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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

Chapter 41 [Reserved]

19-41 California Legal Forms--Transaction Guide Chapter 41

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 42 SECURED TRANSACTIONS

19-42 California Legal Forms--Transaction Guide 42.syn

AUTHOR: by Ann S. Manheimer, J.D.

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Debtor's Demand for Termination Statement From Secured Party

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FOOTNOTES:

(n107)Footnote *. Ms. Manheimer is a graduate of the School of Law of the University of California at Davis, and practices in Alameda and Contra Costa Counties. July 2001 revision by Publisher's editorial staff.



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 42 SECURED TRANSACTIONS

19-42 California Legal Forms--Transaction Guide Scope

AUTHOR: by Ann S. Manheimer, J.D.

Scope

by Ann S. Manheimer, J.D.n* Scope

This chapter discusses the basic procedures used by individual or institutional lenders, small or large, to create security interests in personal property and fixtures and nonpossessory statutory agricultural liens under Division 9 of California's Uniform Commercial Code (UCC). The Legal Background covers the nature of secured transactions and security agreements, classification of collateral, attachment of security interests and agricultural liens, rights and duties of debtors and secured parties, perfection, priorities among competing interests, and default. Secured interests in bankruptcy are also discussed. The Transaction Guide contains detailed checklists concerning the creation and perfection of security interests in various kinds of collateral. The chapter includes four types of forms: agreements dealing with the creation of security interests, the accompanying UCC forms necessary to perfect security interests, subordination agreements, and certain notices and waivers required or permitted under the UCC. UCC forms filed with the Secretary of State are standard and approved by the Secretary of State.

For more detailed coverage of secured transactions, see McDonnell, *Secured Transactions Under the Uniform Commercial Code* (Matthew Bender). For information on tax consequences of secured transactions, see Rabkin & Johnson, *Current Legal Forms with Tax Analysis*, Ch. 6, *Credit and Finance* (Matthew Bender).

Secured transactions involving real property are covered in Ch. 25A, *Security Instruments for Real Estate Financing*. Secured transactions involving sales of accounts receivable are discussed in Ch. 44, *Accounts Receivable Financing and Factoring*. Sales of goods under the UCC are discussed in Ch. 52, *Sales of Goods Under the Uniform Commercial Code*. Instruments normally used to finance automobiles or create interests in agricultural crops are discussed in Ch. 47, *Automotive Financing*, Ch. 48, *Agricultural Financing*, and Ch. 49, *Agricultural Contracts*.

FOOTNOTES:

(n108)Footnote *. Ms. Manheimer is a graduate of the School of Law of the University of California at Davis, and practices in Alameda and Contra Costa Counties. July 2001 revision by Publisher's editorial staff.



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19-42 California Legal Forms--Transaction Guide § 42.01

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.01 California Sources

[1] Statutes

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Rees-Levering Motor Vehicle Sales Act. *Civ. Code §§ 2981-2984.4.*

Uniform Commercial Code (as enacted in California).

General definitions. *Com. Code § 1201.*

Sales (Article 2). *Com. Code § 2101 et seq.*

Secured transactions (Article 9). *Com. Code § 9101 et seq.*

Short title, applicability, definitions, and control. *Com. Code §§ 9101-9110.*

Effectiveness of security agreements; attachment of interests; rights of parties to agreement. *Com. Code §§ 9201-9210.*

Perfection and rules of priority. *Com. Code §§ 9301-9342.*

Rights of third parties. *Com. Code §§ 9401-9409.*

Filing. *Com. Code §§ 9501-9528.*

Rights and procedures after default. *Com. Code §§ 9601-9629.*

Effective date and transitional issues. *Com. Code §§ 9701-9709.*

Leases. *Com. Code § 10101 et seq.*

Industrial Loan Law. *Fin. Code § 18000 et seq.*

Pawnbroker Law. *Fin. Code § 21000 et seq.*

California Finance Lenders Law. *Fin. Code § 22000 et seq.*

Mobilehomes-Manufactured Housing Act of 1980. *Health & Safety Code § 18000 et seq.*

Enforcement of security interests in vehicles is prohibited if lessor-retailer is not licenced as required by law. *Veh. Code § 11711.3.*

[2] Attorney General Opinions

Financing statements--Secretary of State and county recorders may accept for filing any financing statement submitted in proper form regardless of collateral. *43 Ops. Cal. Atty. Gen. 254 (1964)* .



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AUTHOR: by Ann S. Manheimer, J.D.

§ 42.02 Federal Sources

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Liens, avoidance, and preferences. *11 U.S.C. §§ 544-548.*

Federal Trade Commission Act. *15 U.S.C. § 41 et seq.*

Consumer Credit Protection Act (including Truth in Lending Act). *15 U.S.C. § 1601 et seq.*

[2] Regulations

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Federal Trade Commission Act holder in due course regulations. *16 C.F.R. §§ 433.1-433.3.*



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PART I. RESEARCH GUIDE

A. Primary Sources

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PART I. RESEARCH GUIDE

B. Secondary Sources

19-42 California Legal Forms--Transaction Guide § 42.05

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.05 Law Reviews and Periodicals

Facter, *Fashioning a Coherent Demand Rule for Derivative Litigation in California*, 40 Santa Clara L. Rev. 379 (2000).

Sigman & Smith, *Revised U.C.C. Article 9's Transition Rules: Insuring a Soft Landing*, Part II, 55 Bus. Law. 1763 (2000).

Zinnecker, *The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part II*, 54 Bus. Law. 1737 (1999).

Long-Croom, *Unauthorized and Forged Indorsements: A Glitch in Revised Article 3 of the Uniform Commercial Code*, 37 Santa Clara L. Rev. 349 (1997).

Mann, *Explaining the Pattern of Secured Credit*, 110 Harv. L. Rev. 625 (1997).

McCabe, *Fifty Tips for Getting a Commercial Loan*, 43(6) Prac. Law. 27 (1997).

Talley, *Securities Offerings on the Internet*, 43(8) Prac. Law. 19 (1997).

Bertram, *Sales of Offers and Securities on the Internet*, 42(7) Prac. Law. 23 (1996).

Lowenfels & Bromberg, *SEC Rule 10b-5 and its New Statute of Limitations: The Circuits Defy the Supreme Court*, 51 Bus. Law. 309 (1996).

Overby, *Model UCC Drafting*, 29 Loy. L.A.L. Rev. 645 (1996).

Greenfield, *Perfecting a Security Interest in Investment Securities*, 41(7) *Prac. Law.* 77 (1995).

Dobbs, *Enforcement of Article 9 Security Interests--Why so Much Deference to the Junior Secured Party?* 28 *Loy. L.A.L. Rev* 131 (1994).

Furbush & Smith, *Estimating the Number of Damaged Shares in Securities Fraud Litigation: An Introduction to Stock Trading Models*, 49 *Bus. Law.* 527 (1994).

Note, *Knowledge and Notice in Section 10(b) Limitations Law*, 103 *Yale L.J.* 1939 (1993).

Tribar Opinion Committee, *U.C.C. Security Interest Opinions*, 49 *Bus. Law.* 359 (1993).

Hopkins, *Gollust v. Mendell: Toward An Objective Standard of Standing Under Section 16(b)*, 48 *Bus. Law* 373 (1992).

Gittelman, *Financing Statements: How a Perfect Filing Can Achieve Less Than Perfection*, 24 *U.C.C. L.J.* 195 (1992).

Chobot, *Enforcing the Cash Collateral Obligations of Debtors in Possession*, 96 *Com. L.J.* 136 (1991).

Holmes, *Involuntary Strict Foreclosure Under Section 9-505(2) of the Uniform Commercial Code: Tarpit for the Tardy Creditor*, 26 *Wake Forest L. Rev.* 289 (Summer 1991).

Rostocki, *Perfecting Security Interests in Rents: Article 9 Must Be Amended*, 24 *U.C.C. L.J.* 151 (Fall 1991).

Abney, *Conditional Authorization for Sale of Goods Based on Remittance of Proceeds After the Debtor's Sale of Collateral*, 23 *U.C.C. L.J.* 26 (Summer 1990).

Franzese, *Secured Financing's Uneasy Place in Bankruptcy: Claims for Interests in Chapter 11*, 19 *Hofstra L. Rev.* 1 (Fall 1990).

Lacy, *Conflicting Security Interests in Inventory and Proceeds Under the Revised Article 9 of the Uniform Commercial Code*, 41 *So. Carolina L. Rev.* 247 (Winter 1990).

FitzGibbon & Glazer, *Legal Opinions in Corporate Transactions: Opinions Relating to Security Interests in Personal Property*, 44 *Bus. Law.* 655 (May 1989).

Harrell, *Sales-Related Conflicts Between Articles 2 and 9*, 22 *U.C.C. L.J.* 134 (Fall 1989).

Harris, *Interface Between Articles 2A and 9 Under the Official Text and the California Amendments*, 22 *U.C.C. L.J.* 99 (Fall 1989).

Lawrence, *Lender Control Liability: An Analytical Model Illustrated With Applications to the Relational Theory of Secured Financing*, 62 *S. Cal. L. Rev.* 1387 (July 1989).

Weintraub & Resnick, *Security Interests in Keogh Plans*, 22 *U.C.C. L.J.* 177 (Fall 1989).

Di Geronimo, *Clearing Up the Confusion About Mixed Collateral: A Comprehensive Analysis of California Commercial Code § 9501(4)*, 22 *U.S.F. L. Rev.* 425 (Winter/Spring 1988).

Donaldson, *Commercially Reasonable Disposition of Collateral Under Article 9 of the UCC: the Question of the Burden of Proof*, 28 U.C.C. L.J. 307 (Spring 1988).

Duncan & Lyons, *Federal Tax Liens and the Secured Party*, 21 U.C.C. L.J. 3 (Summer 1988).



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CHAPTER 42 SECURED TRANSACTIONS

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B. Secondary Sources

19-42 California Legal Forms--Transaction Guide § 42.06

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§ 42.06 Annotations

Annot., Construction and Effect of "Future Advances" Clauses Under UCC Article 9, 90 A.L.R.4th 859 (1991).

Annot., Secured Transactions: Government Agricultural Program Payments as "Proceeds" of Agricultural Products Under UCC § 9-306, 79 A.L.R.4th 903 (1990) .

Annot., Applicability of Article 9 of Uniform Commercial Code to Assignment of Rights Under Real Estate Sales Contract, Lease Agreement, or Mortgage as Collateral for Separate Transaction, 76 A.L.R.4th 765 (1990) .

Annot., UCC: Value of Trade-In Taken on Sale of Collateral for Purposes of Computing Surplus or Deficiency, 72 A.L.R.4th 1128 (1989) .

Annot., Secured Transactions: What Is "Public" or "Private" Sale Under UCC § 9-504(3), 60 A.L.R.4th 1012 (1988) .

Annot., Sales: What Is "Entrusting" Goods to Merchant Dealer Under UCC § 2-403, 59 A.L.R.4th 567 (1988) .

Annot., Security Interests in Liquor Licenses, 56 A.L.R.4th 1131 (1987) .

Annot., Application, to Security Aspects of Sales Contract, of UCC § 2-725 Limiting Time for Bringing Actions for Breach of Sales Contract, 16 A.L.R.4th 1335 (1982) .

Annot., Nature of Collateral Which Secured Party May Sell or Otherwise Dispose of Without Giving Notice to Defaulting Debtor Under UCC § 9-504(3), 11 A.L.R.4th 1060 (1982) .

Annot., Sufficiency of Secured Party's Notification of Sale or Other Intended Disposition of Collateral Under UCC

9-504(3), 11 A.L.R.4th 241 (1982) .

Annot., Failure of Secured Party to Make "Commercially Reasonable" Disposition of Collateral Under UCC § 9-504(3) as Bar to Deficiency Judgment, 10 A.L.R.4th 413 (1981) .

Annot., Loss or Modification of Right to Notification of Sale of Repossessed Collateral Under Uniform Commercial Code § 9-504, 9 A.L.R.4th 552 (1981) .

Annot., Right of Secured Creditor to Have Set Aside Fraudulent Transfer of Other Property by His Debtor, 8 A.L.R.4th 1123 (1981) .

Annot., What Is "Commercially Reasonable" Disposition of Collateral Required by UCC § 9-504(3), 7 A.L.R.4th 308 (1981) .

Annot., Construction of Term "Debtor" as Used in UCC § 9-504(3), Requiring Secured Party to Give Notice to Debtor of Sale of Collateral Securing Obligation, 5 A.L.R.4th 1291 (1981) .

Annot., Effect of UCC Article 9 Upon Conflict, as to Funds in Debtor's Bank Account, Between Secured Creditor and Bank Claiming Right of Setoff, 3 A.L.R.4th 998 (1981) .

Annot., Sufficiency of Debtor's Signature on Security Agreement or Financing Statement Under UCC §§ 9-203 and 9-402, 3 A.L.R.4th 502 (1981) .

Annot., Construction and Operation of UCC § 9-318(3) Providing That Account Debtor Is Authorized to Pay Assignor Until He Receives Notification to Pay Assignee, 100 A.L.R.3d 1218 (1980) .

Annot., Sufficiency of Description of Collateral in Security Agreement Under UCC §§ 9-110 and 9-203, 100 A.L.R.3d 940 (1980) .

Annot., Sufficiency of Secured Party's Signature on Financing Statement or Security Agreement Under UCC § 9-402, 100 A.L.R.3d 390 (1980) .

Annot., Sufficiency of Description of Collateral in Financing Statement Under UCC §§ 9-110 and 9-402, 100 A.L.R.3d 10 (1980) .

Annot., Effectiveness of Original Financing Statement Under UCC Article 9 After Change in Debtor's Name, Identity, or Business Structure, 99 A.L.R.3d 1194 (1980) .

Annot., Sufficiency of Address of Secured Party in Financing Statement Required Under UCC § 9-402(1), 99 A.L.R.3d 1080 (1980) .

Annot., Sufficiency of Address of Debtor in Financing Statement Required by UCC § 9-402(1), 99 A.L.R.3d 807 (1980) .

Annot., Sufficiency of Designation of Debtor or Secured Party in Security Agreement or Financing Statement Under UCC § 9-402, 99 A.L.R.3d 478 (1980) .

Annot., Secured Transactions: What Constitutes "Inventory" Under UCC § 9-109(4), 77 A.L.R.3d 1266 (1977) .

Annot., Secured Transactions: What Constitutes "Consumer Goods" Under UCC § 9-109(1), 77 A.L.R.3d 1225 (1977)

.

Annot., Uniform Commercial Code: Burden of Proof as to Commercially Reasonable Disposition of Collateral, 59 A.L.R.3d 369 (1974) .



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART I. RESEARCH GUIDE

B. Secondary Sources

19-42 California Legal Forms--Transaction Guide § 42.07

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.07 Text References

[1] Matthew Bender Sources

California Legal Forms(Matthew Bender).

Ch. 25A, *Security Instruments for Real Estate Financing* .

Ch. 39, *Mobilehome Parks* .

Ch. 40, *Mobilehomes* .

Ch. 43, *Commercial Loans* .

Ch. 44, *Accounts Receivable Financing and Factoring* .

Ch. 45, *Consumer Installment Loans and Credit Sales*.

Ch. 47, *Automotive Financing and Vehicle Leasing* .

Ch. 48, *Agricultural Financing* .

Ch. 49, *Agricultural Contracts* .

Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

Ch. 53, *Personal Property Leasing* .

Ch. 55, *Negotiable Instruments* .

California Forms of Pleading and Practice(Matthew Bender).

Ch. 385, *Negotiable Instruments* .

Ch. 500, *Sales: Sales under the Commercial Code* .

Ch. 501, *Sales: Retail Installment Sales* .

Ch. 502, *Sales: Warranties* .

Ch. 503, *Sales: Secured Transactions* .

Ch. 504, *Sales: Consumers Legal Remedies Act* .

Ch. 505, *Sales: Independent Wholesale Sales Representatives Contractual Relations Act*.

California Points and Authorities, Ch. 166, *Negotiable Instruments* (Matthew Bender).

McDonnell, *Secured Transactions Under the Uniform Commercial Code* (Matthew Bender).

McDonnell, *Uniform Commercial Code Analysis of Revised Article 9* (Matthew Bender 1999).

Hart & Willier, *Forms and Procedures Under the Uniform Commercial Code* (Matthew Bender).

Article Rev9, *Secured Transactions* (post-July 1, 2001 law).

Article 9, *Secured Transactions* (pre-July 1, 2001 law).

Rabkin & Johnson, *Current Legal Forms with Tax Analysis*, Ch. 6, *Credit and Finance* (Matthew Bender).

[2] Additional Text References

Witkin, *Summary of California Law*, vol. 4, *Secured Transactions in Personal Property* (10th ed. 2005).



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART I. RESEARCH GUIDE

B. Secondary Sources

19-42 California Legal Forms--Transaction Guide §§ 42.08-42.09

AUTHOR: by Ann S. Manheimer, J.D.

[Reserved]

§§ 42.08[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 42 SECURED TRANSACTIONS
PART II. LEGAL BACKGROUND

19-42 California Legal Forms--Transaction Guide § 42.10

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.10 Secured Transactions Under the California Uniform Commercial Code

[1] Nature of Secured Transactions and Security Agreements

The term "secured transaction" applies to any transaction (regardless of its form) that create a security interest (see discussion below) in personal property or fixtures by contract [see *Com. Code § 9109(a)(1)*; see also § 42.11]. The security interest is designed to protect the secured party in the event that the debtor fails to pay or perform the underlying obligation. In addition, the term applies to each of the following [see *Com. Code § 9109(a)*]:

- An agricultural lien [see *Com. Code § 9102(a)(5)* (definition)].
- A sale of accounts, chattel paper, payment intangibles, or promissory notes [see *Com. Code § 9102(a)(2), (11), (61), (65)* (definitions)].
- A consignment [see *Com. Code § 9102(a)(20)* (definition)].
- A security interest arising under *Com. Code § 2401* (seller's reservation of title to goods), *Com. Code § 2505* (seller's shipment of goods under reservation), *Com. Code § 2711(3)* (buyer's security interest in rejected goods), or *Com. Code § 10508(e)* (lessee's security interest in goods in lessee's possession) [see *Com. Code § 9110* (special rules applicable to security interests arising under Divisions 2 or 10)].
- A security interest arising under *Com. Code § 4201* (agency status of collecting bank) or *Com. Code § 5118* (issuer or nominated person's security interest).

A secured transaction creates two kinds of rights. First, it creates a "security interest" in specified property, termed "collateral" [see *Com. Code § 9102(a)(12)* ("collateral" defined; see also § 42.11)] that secures the payment or performance of an obligation [see *Com. Code § 1201(b)(35)*], and that gives the person in whose favor the security interest or agricultural lien was created the right to repossess and retain or dispose of the collateral if the person who

owes the obligation fails to perform it [see § 42.16].

Security interests can be created in many forms, including interests in proceeds to which a security interest attaches; accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and goods that are the subject of a consignment [Com. Code § 9102(a)(12); see Com. Code § 1201(b)(35) (*security interest* includes any interest of cosigner and buyer of accounts, chattel paper, a payment intangible, or promissory note in transactions subject to Com. Code § 9101 et seq.; see also [4][a], below)]. An agricultural lien can also create a security interest [see Com. Code § 9109(a)(2)].

Second, a secured transaction creates the right to be paid first among creditors to the extent that the collateral has value [see § 42.14[1], [2]]. For a detailed discussion of priority rights, see Secured Transactions Under the Uniform Commercial Code, Part III, *Priority of Security Interests*, Chs. 7A-7E (Matthew Bender).

[2] Definitions

[a] Security Agreement

An agreement that creates or provides for a security interest is referred to as a "security agreement" [Com. Code § 9102(a)(73)]. This term often was used colloquially in former Division 9 to refer to the document or writing that contained the debtor's security agreement. However, the revised Division 9, adopted in 1999 and operative on July 1, 2001 [see Stats. 1999 ch. 991, § 35; see also [3][b], below], eliminates this usage, reserving the term for the more precise meaning specified in the definition [see Com. Code § 9102 (UCC Comment P 3b)]. Whether or not an agreement creates a security interest is discussed in [4][a], below.

[b] Secured Party

The "secured party" includes any of the following [Com. Code § 9102(a)(72)]:

- A person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding.
- A person that holds an agricultural lien [see Com. Code § 9102(a)(5) (definition)].
- A consignor.
- A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold [see Com. Code § 9102(a)(2), (11), (61), (65) (definitions)].
- A trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for [see Com. Code § 9102 (UCC Comment P 2b) (providing examples of status of various types of representatives)].
- A person that holds a security interest arising under Com. Code § 2401 (seller's reservation of title to goods), Com. Code § 2505 (seller's shipment of goods under reservation), Com. Code § 2711(3) (buyer's security interest in rejected goods), or under Com. Code § 10508(e) (lessee's security interest in goods in lessee's possession).

Among other things, the definition of "secured party" controls which person has the duties and liabilities that the provisions governing default impose on a secured party [see Com. Code § 9601 et seq.; § 42.16].

[c] Debtor

The "debtor" is any one of the following [*Com. Code § 9102(a)(28)*]:

- A person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor [*see Com. Code § 9102(a)(59)* ("obligor" defined)].
- A seller of accounts, chattel paper, payment intangibles, or promissory notes [*see Com. Code § 9102* (definitions)].
- A consignee [*see Com. Code § 9102(a)(19)* (definition)].

By including in the definition of "debtor" all persons with a property interest (other than a security interest in or other lien on collateral), the definition includes transferees of collateral, whether or not the secured party knows of the transfer or the transferee's identity [*Com. Code § 9102* (UCC Comment P 2a)]. Exculpatory provisions in Part 6 of Division 9 [*Com. Code § 9101 et seq.* (default and enforcement)] protect the secured party in that circumstance [*see Com. Code §§ 9605, 9629*].

[d] Obligor and Secondary Obligor

Revised Division 9, adopted in 1999 and operative on July 1, 2001 [*see Stats. 1999 ch. 991, § 35; see also [3][b], below*], added "obligor" and "secondary obligor." An "obligor" is a person who, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral [*Com. Code § 9102(a)(59)*]:

- Owes payment or other performance of the obligation;
- Has provided property other than the collateral to secure payment or other performance of the obligation; or
- Is otherwise accountable in whole or in part for payment or other performance of the obligation. The term does not include issuers or nominated persons under a letter of credit.

A "secondary obligor" is an obligor to the extent that either of the following conditions are satisfied [*Com. Code § 9102(a)(71)*]:

- The obligor's obligation is secondary.
- The obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either.

In the context of Part 6 [*Com. Code § 9601 et seq.*], governing default and enforcement, the definitions of "debtor," "obligor," and "secondary obligor" distinguish among three classes of persons [*Com. Code § 9102* (UCC Comment P 2a)]:

- Those who have a stake in the proper enforcement of a security interest by virtue of their non-lien property interest (typically an ownership interest) in all collateral;
- Those who may have a stake in the proper enforcement of the security interest because of their obligation to pay the secured debt; and
- Those who have an obligation to pay the secured debt but have no stake in the proper enforcement of

the security interest.

Persons in the first class are debtors [*Com. Code* § 9102 (UCC Comment P 2a)]. Persons in the second class are secondary obligors if any portion of the obligation is secondary, or if the obligor has a right of recourse against the debtor or another obligor with respect to the obligation secured by collateral [*Com. Code* § 9102 (UCC Comment P 2a); see Ch. 79, *Suretyship, Guaranty, and Indemnity* (Matthew Bender) for discussion of whether an obligation is secondary]; see also Restatement 3d, *Suretyship and Guaranty* § 1 (1996)]. Obligors in the third class are neither debtors nor secondary obligors [*Com. Code* § 9102 (UCC Comment P 2a)]. With one exception [see *Com. Code* § 9616], the rights and duties of *Com. Code* § 9601 *et seq.* affect non-debtor obligors only if they are secondary obligors [*Com. Code* § 9102 (UCC Comment P 2a); see generally § 42.16].

[e] New Debtor and Original Debtor

Definitions of "new debtor" and "original debtor" are used in the special rules found in *Com. Code* § 9326 (priority) and *Com. Code* § 9508 (effectiveness of financing statement) [see §§ 42.15[16], 42.140[1]].

[3] Historical Background

[a] Security Devices Used Before Adoption of California Commercial Code

Most secured transactions in California are governed by Division 9 of the California Commercial Code [see *Com. Code* § 9101 *et seq.*], which is based on model legislation referred to as Article 9 of the Uniform Commercial Code (UCC). California established its Commercial Code, adopting major portions of the UCC, in 1963 to become effective on January 1, 1965 [see Stats. 1963 Stats. ch. 819, § 52]. Revised Division 9 was adopted in 1999 and became operative on July 1, 2001 [see Stats. 1999 ch. 991, § 35; see also [b], below].

Before the initial effective date of Division 9, California law used various types of devices to create security interests in different types of personal property. Division 9, as initially adopted, ignored these devices and their formal distinctions, and instead used the general concept of a security interest [see former *Com. Code* § 9105 (Cal. Code Comment); *Com. Code* § 9102 (UCC Comment 2 P 1)]. Division 9, as revised, continues this practice [see *Com. Code* § 9102 (UCC Comment 2 P 1)]. Nevertheless, because the terminology of the early security devices still appears in discussions of secured transactions, an understanding of those terms is helpful.

The various security devices used before the adoption of the UCC included the following [see former *Com. Code* § 9101 *et seq.* (introductory comment)]:

- **Pledge** [see former *Civ. Code* §§ 2986-3011]. This type of device now generally falls under the rubric of a possessory security interest. It secures an indebtedness by placing possession of the collateral with the secured party, or his or her agent, until the debt is paid.
- **Chattel mortgage** [see former *Civ. Code* §§ 2955-2978]. This device was used when the debtor possessed or was in the process of obtaining the property to be used as collateral, and the secured party held either title to or a lien on the collateral. This device has a direct descendant in the UCC's non-purchase money security interest in equipment and consumer goods.
- **Conditional sale** [see former *Civ. Code* §§ 2980-2980.5]. This device involved a sale of goods by a seller to a buyer in exchange for the buyer's promise to pay the agreed purchase price of the goods in stated installments, similar to a modern installment sales contract. The seller delivered the goods, but retained title to them as security. Its descendant is the UCC's "purchase money security interest" [see *Com. Code* § 9103 (definition); see also § 42.15[9]].

■ **Trust receipt** [see former *Civ. Code* §§ 3012-3016.16]. This device was used when goods, documents, or instruments were shipped by a manufacturer or distributor to a purchaser, but title did not pass to the purchaser until after payment to the financier who took title directly from the shipper. Its descendant can be found in one form of the UCC's purchase money security interest in inventory [see *Com. Code* § 9103(b)(2)].

■ **Inventory lien** [see former *Civ. Code* §§ 3030-3043]. This device was used when a lender held a nonpossessory lien on a borrower's merchandise. A security interest in inventory asserted under an after-acquired property clause (also referred to as non-purchase money security interest in inventory) under the UCC resembles this device [see *Com. Code* § 9324(b), (c); see also former *Com. Code* § 9312(3), (4)].

■ **Assignment of accounts receivable** [see former *Civ. Code* §§ 3017-3029]. Under this device, the financier was deemed to take the debtor's interest as assignee. The UCC covers security interests in accounts [see *Com. Code* § 9102(a)(2) ("account" defined)].

[b] Revised Division 9

A revised version of Division 9 was adopted in 1999, effective July 1, 2001 [see Stats. 1999 ch. 991, § 35]. For the most part, the revised division follows the general approach and retains much of the terminology of the former Division 9 [see *Com. Code* § 9101 (UCC Comment P 1)]. The division was substantially lengthened and reorganized into a format designed to promote clarity, understanding, and predictability in secured financing [see generally *Com. Code* § 9101 (UCC Comment)]. Transition from former Division 9 to the current division is particularly challenging in view of the current division's expanded scope [see [4], below], its modification of choice of law rules [see § 42.121 P 14] for perfection and priority, and its expansion of methods of perfection [see § 42.14]. Transition provisions are contained in *Com. Code* § 9701 *et seq.*

[4] Scope of Coverage of Division 9

[a] Transactions Governed by Division 9

Division 9 of the Commercial Code [*Com. Code* § 9101 *et seq.*] governs all transactions that create a security interest in personal property or fixtures by contract, except transactions expressly excluded by the Code [see *Com. Code* § 9109(a)(1); see also *Com. Code* § 9109(c), (d) (excluded transactions)]. A "security interest" is an interest in personal property or fixtures that secures payment or performance of an obligation [*Com. Code* § 1201(b)(35)].

Division 9 also covers agricultural liens. An "agricultural lien" is an interest in farm products that meets all of the following conditions [*Com. Code* § 9102(a)(5)]:

- It secures payment or performance of an obligation for either (1) goods or services furnished in connection with a debtor's farming operation; or (2) rent on real property leased by a debtor in connection with its farming operation.
- It is created by statute in favor of a person that does either of the following: (1) in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or (2) leased real property to a debtor in connection with the debtor's farming operation.
- Its effectiveness does not depend on the person's possession of the personal property.

In addition, Division 9 covers most sales of accounts [see § 42.11[2][e]], chattel paper [see § 42.11[2][f]], payment intangibles [see § 42.11[2][g]], or promissory notes [Com. Code § 9109(a)(2)-(4); see § 42.11[2][d]; see also Com. Code § 1201(b)(35) ("security interest" includes any interest of consignor or buyer of accounts, chattel paper, payment intangible, or promissory note in transaction subject to Com. Code § 9101 et seq.)].

As provided in Com. Code § 9110, Division 9 applies to security interests arising under Com. Code § 2401 (seller's reservation of title to goods); Com. Code § 2505 (seller's shipment of goods under reservation), Com. Code § 2711(3) (buyer's security interest in rejected goods), or under Com. Code § 10508(e) (lessee's security interest in goods in lessee's possession) [Com. Code § 9109(a)(5); see Com. Code § 1201(b)(35) (discussing acquisition of security interests under these provisions)]. Division 9 also applies to security interests arising under Com. Code § 4201 (agency status of collecting bank) or Com. Code § 5118 (issuer or nominated person's security interest) [Com. Code § 9109(a)(6)].

Whether an agreement creates a security interest depends on whether the transaction falls within the definition of "security interest" in Com. Code § 1201(b)(35), not on whether the parties intend the law to characterize the transaction as a security interest [see Com. Code § 9102 (UCC Comment P 3b); see also Com. Code § 9109(a)(1) (UCC Comment P 1)]. Whether a transaction in the form of a lease creates a security interest is determined by the facts of each case, in accordance with Com. Code § 1203 [Com. Code § 1201(b)(35)]. Thus, when a security interest is created, Division 9 applies regardless of the form of the transaction or the names that the parties have given to it [see Com. Code § 9109 (UCC Comment P 2)]. Division 9 also applies to a security interest in a secured obligation even if the obligation is itself secured by a transaction or interest that is not governed by Division 9 [Com. Code § 9109(b); see [b], below]. Further, the rights and obligations under Division 9 apply whether title to collateral is in the secured party or the debtor, except as otherwise provided with respect to consignments or sales of accounts, chattel paper, payment intangibles, or promissory notes [Com. Code § 9202; see, e.g., Com. Code §§ 9207(a), 9210(b), 9601(g), 9615(e) (special rules governing consignments, sales of accounts, chattel paper, payment intangibles, promissory notes)].

[b] Transactions Not Subject to Division 9

With few exceptions (such as nonconsensual agricultural liens), Division 9 of the California Commercial Code applies only to consensual security interests in personal property [Com. Code § 9109 (UCC Comment P 10); see [a], above].

Division 9 does not apply to the creation or transfer of an interest or lien on real property, including leases or rentals of real property, except to the extent that provision is made in Division 9 for liens on real property [see Com. Code § 9203, 9308], fixtures [see Com. Code § 9334], fixture filings [see Com. Code §§ 9501, 9502, 9512, 9516, 9519], or security agreements covering personal and real property [Com. Code § 9109(d)(11); see Com. Code § 9604 (procedure if security agreement covers real property or fixtures)]. These exclusions generally reiterate the limitations on coverage (that is, "by contract," "in personal property and fixtures") made explicit in Com. Code § 9109(a)(1) [Com. Code § 9109 (UCC Comment P 10); see [a], above]. For coverage of security interests in real property, see Ch. 25A, *Security Instruments for Real Estate Financing*.

In addition, several kinds of transactions and security interests that would otherwise be subject to Division 9 are expressly excluded from its coverage [see Com. Code § 9109(c), (d)(1)-(10), (12)-(17)]. For a detailed checklist of excluded transactions, see § 42.110, PP 1c, d.

Division 9 is limited in its application to security interests that arise solely under the divisions on sales and leases [Com. Code § 9113; see Com. Code § 2101 et seq. (sales), 10101 et seq. (leases); see also Com. Code § 1201(b)(35) (limitations); Com. Code § 10103 (definitions)]. Further, the application of Division 9 to statutory liens other than agricultural liens is limited [see Com. Code § 9109(d)(1), (2); see also Com. Code § 9333 (governing priorities between certain possessory suppliers' liens and security interests covered by Division 9)].

If an excluded transaction or interest is used as collateral to secure an obligation to a third party, Division 9 of the

Commercial Code will apply to the new security interest created in favor of the third party [*Com. Code § 9109(b)*; see, e.g., § 42.203].

[5] Other Applicable Law

Although a secured transaction is subject to the California Commercial Code, some aspects of the transaction may also be governed by other statutes and regulations. A transaction subject to Division 9 is subject to any applicable rule of law that establishes a different rule for consumers, and to any applicable consumer protection statute, regulation, or law [*Com. Code § 9201(b)*].

For example, a secured transaction may be subject to the federal Consumer Credit Protection Act, which includes the Truth in Lending Act [*15 U.S.C. § 1601 et seq.*; see Ch. 45, *Consumer Installment Loans and Credit Sales*]. Under the Truth in Lending Act, a creditor who regularly extends or offers consumer credit that is payable by agreement in four or more installments or subject to a finance charge must make certain disclosures concerning those transactions [see *15 U.S.C. § 1604*; see also *12 C.F.R. §§ 226.2(a)(17), 226.6-226.9, 226.17, 226.18*]. The Truth in Lending Act, however, is inapplicable to extensions of credit for agricultural purposes [*15 U.S.C. § 1603(1)*]. A secured transaction in consumer goods may also be subject to the Federal Trade Commission Act [*15 U.S.C. § 41 et seq.*]. Under this act, it is an unfair or deceptive act or practice for a seller to take a consumer credit contract or to accept the proceeds of any purchase money loan in connection with any sale or lease of goods or services, unless the consumer credit contract includes a notice that the holder of the contract is subject to all the claims and defenses that the debtor could assert against the seller [*16 C.F.R. § 433.2*; see *15 U.S.C. § 45*].

Other California laws may also govern a particular secured transaction in areas not covered by the Commercial Code [see *Com. Code § 9201(b)* (transactions subject to Division 9 are subject to other applicable laws relating to consumers or as specified), *Com. Code § 10104* (personal property leases subject to other statutes); see also *Com. Code § 9201* (UCC Comment P 3)]. For example, if a retail buyer and seller enter into a security agreement requiring the buyer to make four or more installment payments of the purchase price of goods or services used primarily for personal, family, or household purposes, the agreement constitutes a *retail installment contract* [see *Civ. Code §§ 1802.1, 1802.6*] and is subject to the Unruh Act [see *Civ. Code § 1801 et seq.*]. This Act governs retail installment sales, requires certain disclosures, and prohibits certain provisions [see *Civ. Code § 1801 et seq.*; see Ch. 45, *Consumer Installment Loans and Credit Sales*].

Other state provisions that may govern the transaction include the following [*Com. Code § 9201(b)*]:

- *Bus. & Prof. Code § 17200 et seq.* (regulation of unfair competition; enforcement).
- *Bus. & Prof. Code § 17500 et seq.* (advertising).
- The Automobile Sales Finance Act (Rees-Levering Act) [*Civ. Code § 2981 et seq.*; see Ch. 47, *Automotive Financing and Vehicle Leasing*].
- The Civil Code, Division Three, Part Four, Obligations Arising from Particular Transactions [*Civ. Code § 1738 et seq.*], with respect to the applicable provisions relating to, for example, consignment of fine art, credit cards, credit card disclosure and charge card disclosures, layaway practices, consumer credit reports, reporting agencies, computed interest, finance charges, credit sales, contracts for various lessons and services, creditor remedies, deposits, loans, and liens [see *Com. Code § 9201(b)*].
- The Industrial Loan Law [*Fin. Code § 18000 et seq.*].
- The Pawnbroker Law [*Fin. Code § 21000 et seq.*; see Ch. 102B, *Pawnbrokers, Personal Property*].

Brokers, and Secondhand Goods Dealers].

- The California Finance Lenders Law [*Fin. Code § 22000 et seq.*; see Ch. 102B, *Pawnbrokers, Personal Property Brokers, and Secondhand Goods Dealers].*
- The Mobilehomes-Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*; see Ch. 39, *Mobilehome Parks*, Ch. 40, *Mobilehomes].*
- Any applicable consumer protection statute, regulation, or law.

In case of conflict between Division 9 of the Commercial Code and one of the rules of law, statutes or regulations described in *Com. Code § 9201(b)*, that rule of law, statute, or regulation controls [*Com. Code § 9201(c)*]. A failure to comply with any applicable regulatory statute has the effect specified in that statute, but does not automatically constitute a violation of Division 9 [*Com. Code § 9201(c)*; see *Com. Code § 9201* (UCC Comment P 3)]. Further, Division 9 does not validate violations under or extend the application of the other applicable laws [see *Com. Code § 9201(d)*].

The perfection of security interests in property may be governed by authority other than the Commercial Code [see *Com. Code § 9311*]. For discussion of applicable statutes, regulations, and treaties, see § 42.10[5]. For a detailed guide to perfecting security in multiple state transactions, refer to § 42.121, P 14.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsParties to Secured TransactionsCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionScopeCommercial Law (UCC)Secured Transactions (Article 9)Security AgreementsGeneral Overview



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PART II. LEGAL BACKGROUND

19-42 California Legal Forms--Transaction Guide § 42.11

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.11 Classification of Collateral

[1] In General

The kind of collateral used in a secured transaction affects the form of the transaction as well as the procedures necessary to make the security interest enforceable against third parties [see §§ 42.14, 42.120, 42.121]. Therefore, to take advantage of all the protections afforded by the Commercial Code, the interested parties must first classify the collateral used.

The collateral in a secured transaction subject to Division 9 of the Commercial Code is the property subject to a security interest or agricultural lien, including proceeds to which a security interest attaches; accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and goods that are the subject of a consignment[*Com. Code § 9102(a)(12)*]. With few exceptions (such as nonconsensual agricultural liens), Division 9 of the California Commercial Code applies only to consensual security interests in personal property [see *Com. Code § 9109*; *Com. Code § 9109* (UCC Comment P 10); see § 42.10[4][a]].

Former *Com. Code § 9102(1)* enumerated common categories of collateral in personal property, including goods [see [2][a], *below*], documents [see [2][c], *below*], instruments (which, under the expanded scope of revised Division 9, include promissory notes) [see [2][d], *below*], accounts [see [2][e], *below*], chattel paper [see [2][f], *below*], and general intangibles (which, under the expanded scope of revised Division 9, include payment intangibles and software) [see *also* [2][g], *below*]. The term "collateral" now also explicitly includes proceeds subject to a security interest [see *Com. Code § 9102(a)(12)*; § 42.10[1]] and property subject to an agricultural lien [see *Com. Code § 9109(a)(2)*]. Although the revised basic scope provision, *Com. Code § 9109(a)(1)*, no longer includes this list, "no change in meaning is intended" by its omission [see *Com. Code § 9109(a)(1)* (UCC Comment P 2)], and the list provides a useful framework to discuss the types of collateral in personal property that commonly give rise to security interests.

PRACTICE TIP:

Unlike the UCC comments to former Division 9, the comments to revised Division 9, effective July 1, 2001 [see Stats. 1999 ch. 991, § 35] do not dwell on the pre-UCC state of the law. For that reason the

comments to former Division 9 remain of substantial historical value and interest [*Com. Code § 9101* (UCC Comment P 1)]. They also remain useful in understanding the background and general conceptual approach to the current law [*see Com. Code § 9101* (UCC Comment P 1)].

For this reason, comments to the former division may be cited in this chapter, usually when the revised statutory provisions have been combined and shortened, with no change in meaning intended [*see, e.g., Com. Code § 9109* (UCC Comment P 2)].

Whether a transaction actually creates a "security interest" is determined by whether the transaction falls within the definition of "security interest" in *Com. Code § 1201(b)(35)* [*see Com. Code § 9102* (UCC Comment P 3b); *Com. Code § 9109* (UCC Comment P 2); *see also Com. Code § 1201(b)(35)* ("security interest" defined); § 42.10[4][a]].

For a detailed checklist of the kinds of collateral that may be involved in secured transactions, see § 42.110, P 1b.

[2] Specific Types of Collateral

[a] Goods

"Goods" includes all things that are movable at the time that the security interest attaches [*Com. Code § 9102(a)(44)*; *see § 42.12*]. The term includes fixtures; standing timber that is to be cut and removed under a conveyance or contract for sale; the unborn young of animals; crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes; and manufactured homes [*Com. Code § 9102(a)(44)*]. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program, if the program customarily is considered part of the goods, or if by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods [*Com. Code § 9102(a)(44)*].

"Goods" does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded [*Com. Code § 9102(a)(44)*]. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction [*Com. Code § 9102(a)(44)*].

"Fixtures" are goods that have become so related to particular real estate that an interest in them arises under real property law [*Com. Code § 9102(a)(41)*; *see Goldie v. Bauchet Properties* (1975) 15 Cal. 3d 307, 314-316, 124 Cal. Rptr. 161, 540 P.2d 1 (decided under prior law)], other than ordinary building materials used to construct the building or other improvement [*see Com. Code § 9334(a)*; *see also Com. Code § 9334* (UCC Comment P 3)].

Also considered goods are "accessions," which are goods that are physically united with other goods in such a manner that the original identity of the goods is not lost [*Com. Code § 9102(a)(1)*; *see Com. Code § 9335* (UCC Comment P 2); *see also Com. Code § 9335* (special priority and enforcement rules for accessions)], and "manufactured homes" [*see Com. Code § 9102(a)(53)* (definition); *see also Com. Code § 9515* (permitting financing statement in "manufactured-home transaction" to be effective for 30 years)].

[b] Types of Collateral Consisting of Goods

Division 9 identifies the following four mutually exclusive types of collateral that consist of goods: consumer goods, farm products, inventory, and equipment [*see Com. Code § 9102* (UCC Comment P 4a)]. This classification is relevant in many situations, including determining the rights of persons who buy goods from a debtor that are subject to a security interest [*see Com. Code §§ 9320, 9323(d), (e)*; *see also § 42.15[8]*], resolving certain priority issues [*see Com. Code §§ 9322-9324*; *see also § 42.15[1], [5]-[9]*], determining the proper place to file [*see Com. Code § 9501 et seq.*; *see also § 42.14[3][c]*], and determining rights after default [*Com. Code § 9601 et seq.*; *see also § 42.16*].

"Consumer goods" are goods that are used or bought for use primarily for personal, family, or household purposes [Com. Code § 9102(a)(23); see Com. Code § 9102 (UCC Comment P 4a)]. In certain instances, special rules apply to consumer goods, consumer goods transactions, and consumer transactions [see, e.g., Com. Code § 9616 (duty to explain calculation of deficiency or surplus in consumer goods transaction); Com. Code § 9614 (special requirements for contents of notification of disposition and "plain English" form of notification for consumer goods transactions); see also § 42.241].

"Farm products" are goods, other than standing timber, if the debtor is engaged in a farming operation with respect to the goods [Com. Code § 9102(a)(34)]. Farm products include any of the following [Com. Code § 9102(a)(34)]:

- Crops grown, growing, or to be grown, including both crops produced on trees, vines, and bushes, and aquatic goods produced in aquacultural operations [see Com. Code § 9324 (UCC Comment P 11) (courts are free to classify aquatic goods as either crops or livestock on case-by-case basis)].
- Livestock, born or unborn, including aquatic goods produced in aquacultural operations.
- Supplies used or produced in a farming operation.
- Products of crops or livestock in their unmanufactured states.

"Inventory" means goods, other than farm products, that are leased by a person as lessor; held by a person for sale or lease or to be furnished under a contract of service; furnished by a person under a contract of service; or consist of raw materials, work in process, or materials used or consumed in a business (for example, fuel used in operations) [Com. Code § 9102(a)(48); see Com. Code § 9102 (UCC Comment P 4a); see also *U.S. v. Handy and Harman* (9th Cir. 1984) 750 F.2d 777, 781 n.2 (decided under former law)]. Implicit in the definition is the criterion that the sale or lease is or will be in the ordinary course of business. For example, machinery used in manufacturing is equipment (see below), not inventory, even though it is the debtor's policy to sell machinery when it becomes obsolete or worn [see Com. Code § 9102 (UCC Comment P 4a)].

"Equipment" includes goods that are not inventory, farm products, or consumer goods [Com. Code § 9102(a)(33)]. In general, goods used in a business are equipment if they are fixed assets or have, as identifiable units, a relatively long period of use. However, goods are inventory, even though not held for sale or lease, if they are used up or consumed in a short period of time in producing a product or providing a service [Com. Code § 9102 (UCC Comment P 4a)].

The four types of collateral consisting of goods are mutually exclusive; the same property cannot simultaneously belong to more than one category [Com. Code § 9102 (UCC Comment P 4a)]. In general, the classification of goods into one of the four categories depends on who holds the goods and for what reason. Goods can also fall into difference classes at different times. For example, a radio may be inventory in the hands of a dealer, but consumer goods in the hands of a consumer. In borderline cases in which an item may be classified in more than one category, its principal use determines its classification. Goods are "equipment" if they do not fall into another category [Com. Code § 9102 (UCC Comment P 4a)].

[c] Documents

A "document" is either a document of title or a warehouse receipt [Com. Code § 9102(a)(30); see Com. Code § 1201(b)(16) ("document of title" defined); Com. Code §§ 7201(b), 7202(a) (warehouse receipts)]. A "document of title" must purport to be issued by or addressed to a bailee and to cover goods in the bailee's possession that either are identified or are fungible portions of an identified mass [Com. Code § 1201(b)(16)]. "Fungible goods" are goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit, or goods that by agreement are

treated as equivalent [*Com. Code § 1201(b)(18)*]. Documents of title include bills of lading, dock warrants, dock receipts, warehouse receipts, or orders for the delivery of goods, and any other documents that, in the regular course of business or financing, are treated as adequate evidence that the person in possession of one of these documents is entitled to receive, hold, and dispose of the document and the goods it covers [*Com. Code § 1201(b)(16)*; see *Com. Code § 7401* (general obligations imposed on issuer)].

A "warehouse receipt," which is also a document of title [see *Com. Code § 1201(b)(16)*], is a receipt issued by a person engaged in the business of storing goods for hire [*Com. Code § 1201(b)(42)*; see *Com. Code § 7102(a)(13)* ("warehouse" defined); *Com. Code § 7102(a)(8)* ("issuer"); *Com. Code § 7102(a)(9)* ("person entitled under the document"); *Com. Code § 7201* (issuance of receipts); *Com. Code § 7202* (form for receipt)]. If goods, including distilled spirits and agricultural commodities, are stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, a receipt issued for the goods is deemed to be a warehouse receipt, even if issued by a person that is the owner of the goods and is not a warehouse [*Com. Code § 7201(b)*].

[d] Instruments

Under Division 9, an "instrument" includes a negotiable instrument, such as a note, draft, check, certificate of deposit, or demand draft [*Com. Code § 9102(a)(47)*; see *Com. Code § 3104* ("negotiable instrument" defined)]. Under this division, an instrument also includes any other writing that evidences a right to the payment of money that is transferable by delivery with any necessary endorsement or assignment in the ordinary course of business and that is not itself a security agreement or lease [*Com. Code § 9102(a)(47)*]. The term does *not* include investment property [see *Com. Code § 9102(a)(49)* ("investment property" defined)], letters of credit [see *Com. Code § 5102(a)(10)* ("letter of credit" defined); see also Ch. 56, *Letters of Credit and Electronic Fund Transfers*], or writings that evidence a right to payment arising out of the use of a credit card or a charge card or information contained on or for use with the card [*Com. Code § 9102(a)(47)*]. Except in the case of chattel paper [see [f], *below*], the fact that an instrument is itself secured by a security interest or encumbrance on property does not change the character of the instrument as such or convert the combination of instrument and collateral into a separate classification of personal property [*Com. Code § 9102* (UCC Comment P 5c)].

A "promissory note" is an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds [*Com. Code § 9102(a)(65)*]. The definition explicitly excludes obligations arising out of "orders" to pay (checks, for example), as opposed to "promises" to pay [*Com. Code § 9102* (UCC Comment P 5c); see *Com. Code § 3104* (definitions)]. Revised Division 9 includes the sale of promissory notes within its scope [see *Com. Code § 9109(a)(3)*].

[e] Accounts

Under revised Division 9, effective July 1, 2001 [see Stats. 1999 ch. 991, § 35; see also § 42.10[2][b]], the definition of "account" was expanded and reformulated. It is no longer limited to rights to payment relating to goods and services [*Com. Code § 9102* (UCC Comment P 5a); cf. former *Com. Code § 9106* (account is ordinary commercial account receivable)]. "Account" (except as used in the phrase "account for") now means a right to payment of a monetary obligation, whether or not earned by performance [*Com. Code § 9102(a)(2)*]:

- For property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of;
- For services rendered or to be rendered;
- For a policy of insurance issued or to be issued;

- For a secondary obligation incurred or to be incurred;
- For energy provided or to be provided;
- For the use or hire of a vessel under a charter or other contract [*see Richmond Crane Rigging & Drayage Co. v. Liberty Nat. Bank* (1972) 27 Cal. App. 3d 968, 974-977, 104 Cal. Rptr. 277 (decided under prior law)];
- Arising out of the use of a credit or charge card or information contained on or for use with the card;
or
- As winnings in a lottery or other game of chance operated or sponsored by a state or its governmental unit, or person licensed or authorized to operate the game by a state or its governmental unit.

"Account" includes health care insurance receivables [*Com. Code* § 9102(a)(2)]. A "health care insurance receivable" is an interest in, or claim under, an insurance policy that is a right to payment of a monetary obligation for health care goods or services provided or to be provided [*Com. Code* § 9102(a)(46)]. Although health care receivables are accounts, the rules generally applicable to account debtors on accounts do not apply to insurers obligated on health care insurance receivables [*see Com. Code* §§ 9404(c), 9405(d), 9406(i)].

Certain accounts are "as-extracted collateral" [*Com. Code* § 9102 (UCC Comment P 5a)]. That term refers to minerals and related accounts [*see Com. Code* § 9102(a)(6) (definition); *Com. Code* § 9102 (UCC Comment P 4c, Examples 6, 7)]. Division 9 contains special rules for perfecting security interests in minerals that attach on extraction and in accounts resulting from the sale of minerals at the wellhead or minehead [*see, e.g., Com. Code* § 9301(4) (perfection and priority); *Com. Code* § 9501(a)(1)(A) (place of filing); *Com. Code* § 9502 (contents of filing statement); *Com. Code* § 9519(d), (e) (indexing of records)].

"Account" does *not* include [*Com. Code* § 9102(a)(2)]:

- Rights to payment evidenced by chattel paper or an instrument;
- Commercial tort claims;
- Deposit accounts;
- Investment property;
- Letter-of-credit rights or letters of credit; or
- Rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card [*see Com. Code* § 9102 (UCC Comment P 5a) (explaining that "funds," although undefined, is a broader concept than "money," which is essentially limited to currency); *see also Com. Code* § 1201(b)(24) ("money" defined)].

For example, when a lender credits a borrower's deposit account for the amount of a loan, the bank's advance of funds is not a transaction giving rise to an account [*Com. Code* § 9102 (UCC Comment P 5a)].

[f] Chattel Paper

"Chattel paper" consists of a monetary obligation together with a security interest in or a lease of specific goods if the obligation and security interest or lease are evidenced by a "record or records" [see *Com. Code § 9102(a)(11)*]. Chattel paper also includes records that evidence a monetary obligation and security interest in specific goods and software used in the goods or in specific goods and license of software used in the goods, or a monetary obligation together with a lease of specific goods and license of software used in the goods [see *Com. Code § 9102(a)(11)*]. "Monetary obligation" in this context means a monetary obligation secured by the goods or owed under a lease of the goods. It includes a monetary obligation with respect to software used in the goods [see *Com. Code § 9102(a)(11)*].

Charters or other contracts involving the use or hire of a vessel are expressly excluded from the definition of "chattel paper" [see *Com. Code § 9102(a)(11)*; see also *Com. Code § 9102* (UCC Comment P 5b) ("charter" defined)]; they are accounts [see *Com. Code § 9102* (UCC Comment P 5b)]. Also excluded are records that evidence a right to payment arising out of the use of a credit card or charge card, or information contained on or for use with the card [see *Com. Code § 9102(a)(11)*].

Under former Division 9, an obligation could qualify as chattel paper *only* if the evidence of an obligation consisted of "a writing or writings" [see former *Com. Code § 9105(1)(b)*]. However, in the revised division, traditional written chattel paper is included in the definition of "tangible chattel paper" [see *Com. Code § 9102(a)(78)* ("tangible chattel paper" defined); *Com. Code § 9102* (UCC Comment P 5b)].

"Electronic chattel paper" is chattel paper that is stored in an electronic medium instead of in a tangible form [see *Com. Code § 9102(a)(31)*]. The concept of an electronic medium is meant to be construed liberally to include electrical, digital, magnetic, optical, electromagnetic, or any other current or similar emerging technologies [see *Com. Code § 9102* (UCC Comment P 5b)]. Further, the definition of electronic chattel paper does not dictate that it be created in any particular way. For example, a record consisting of a tangible writing may be converted to electronic form, for example, by creating electronic images of a signed writing. Or records may be created and executed in electronic form; for example, when a lessee authenticates an electronic record of a lease that is then stored in electronic form [see *Com. Code § 9102* (UCC Comment P 5b)].

If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper [see *Com. Code § 9102(a)(11)*].

Chattel paper is typically created when a secured party wishes to borrow against or sell the security agreement along with its interest in the collateral received from the debtor [see former *Com. Code § 9105* (UCC Comment PP 3, 4); see also *Com. Code § 9101* (UCC Comment P 1) (noting that Comments to former Division 9 remain useful in understanding the background and general conceptual approach of revised Division 9)].

[g] General Intangibles

"General intangible" is the residual category of personal property that is not included in the other defined types of collateral [see *Com. Code § 9102(a)(42)*; *Com. Code § 9102* (UCC Comment P 5d)]. It specifically includes things in action, payment intangibles, and software [see *Com. Code § 9102(a)(42)*]. It also includes any personal property *other than* accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction [see *Com. Code § 9102(a)(42)*; see also *MLQ Investors LP v. Pacific Quadracasting, Inc.* (9th Cir. 1998) 146 F.3d 746, 749 (creditor may obtain security interest in proceeds of sale of FCC license; such an interest constitutes "general intangible" that may be perfected prior to sale of license, decided under prior law)]. Examples include various categories of intellectual property and the right to payment of a loan of funds that is not evidenced by chattel paper or an instrument [see *Com. Code § 9102* (UCC Comment P 5d)].

Commercial tort claims, deposit accounts, and letter-of-credit rights [see *Com. Code § 9102(a)(13), (29), (51)*]

(definitions)], which are excluded from the definition of general intangibles, are each separate types of collateral [see *Com. Code* § 9102 (UCC Comment P 5d)]. One important consequence of this exclusion is that tortfeasors (commercial tort claims), banks (deposit accounts), and persons obligated on letters of credit (letter-of-credit rights) are not "account debtors," having the rights and obligations set forth in *Com. Code* §§ 9404, 9405, and 9406, governing assignment and discharge of account debtors [see *Com. Code* § 9102 (UCC Comment P 5d); see also *Com. Code* § 9108 (requiring greater specificity of description in security agreement for these types of collateral); § 42.12[2][c]].

A "payment intangible" is a general intangible under which the account debtor's principal obligation is monetary [see *Com. Code* § 9102(a)(61)]. Even though almost any intangible right could give rise to payment of money if the account debtor were in breach of its obligation, the term "payment intangible" embraces only those general intangibles "under which the account debtor's *principal* obligation is a monetary obligation" [*Com. Code* § 9102 (UCC Comment P 5d) (emphasis in original; discussing how to classify intangible collateral)]. The sale of a payment intangible is subject to Division 9 [see *Com. Code* § 9109(a)(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 42 SECURED TRANSACTIONS
PART II. LEGAL BACKGROUND

19-42 California Legal Forms--Transaction Guide § 42.12

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§ 42.12 Attachment of Security Interests and Agricultural Liens

[1] Requirements for Attachment

In order for a security agreement to be enforceable against the debtor or third parties with respect to the collateral, the security interest must "attach" [see *Com. Code § 9102(a)(73)* ("security agreement" defined); *Com. Code § 9203(a)* (security agreement attaches to collateral when it becomes enforceable against debtor with respect to collateral, unless an agreement postpones time of attachment); see also *Bank of Stockton v. Diamond Walnut Growers, Inc. (1988) 199 Cal. App. 3d 144, 152-153, 244 Cal. Rptr. 744* (decided under prior law)]. The term "attach" is used to describe the point at which the property becomes subject to a security interest [*Com. Code § 9308* (UCC Comment P 2)].

With specified exceptions, a security interest attaches and is enforceable against the debtor and third parties with respect to the collateral only if each of following conditions is satisfied [*Com. Code § 9203(b)*; see *Com. Code § 9203(c)-(i)* (exceptions)]:

- Value has been given [*Com. Code § 9203(b)(1)*].
- The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party [*Com. Code § 9203(b)(2)*].
- There is an agreement, plus satisfaction of one of the following evidentiary tests [see *Com. Code § 9203(b)(3)*; *Com. Code § 9203* (UCC Comment PP 2-4); see also *Com. Code § 9203(e)* (enforcement requirements of *Com. Code § 9203(b)(3)* are met when new debtor becomes bound under original debtor's security agreement); *Com. Code § 9203(d)* (explaining when new debtor becomes bound)]:
 - **Authenticated security agreement:** The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned [*Com. Code § 9203(b)(3)(A)*].

■ **Possession pursuant to the agreement:** The collateral is not a certificated security and is in the possession of the secured party under *Com. Code § 9313* (perfection by possession or delivery without filing), in accordance with to the debtor's security agreement [*Com. Code § 9203(b)(3)(B)*].

■ **Delivery pursuant to the agreement:** The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under *Com. Code § 8301* (delivery of security), in accordance with the debtor's security agreement [*Com. Code § 9203(b)(3)(C)*; see *Com. Code § 8102(a)(4)* ("certificated security" defined); *Com. Code § 8102(a)(16)* "security certificate" defined)].

■ **Control pursuant to the agreement:** The collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents, and the secured party has control under *Com. Code §§ 7106 and 9104-9107*, in accordance with the debtor's security agreement [*Com. Code § 9203(b)(3)(D)*; see *Com. Code § 9102* (definitions)].

Com. Code § 9203(b)(3)(A) represents the most basic of the evidentiary alternatives, under which the debtor must authenticate a security agreement that provides a description of the collateral [see *Com. Code § 9203(b)(3)(A)*; *Com. Code § 9203* (UCC Comment P 3); see also *Com. Code § 9102(a)(73)* ("security agreement" is "an agreement that creates or provides for a security interest"); *Com. Code § 9102(a)(7)* ("authenticate" means to sign or execute or otherwise adopt or accept a record)].

The other alternatives in *Com. Code § 9203(b)(3)* dispense with the requirement of an authenticated security agreement and provide alternative evidentiary tests. Under *Com. Code § 9203(b)(3)(B)*, the secured party's possession substitutes for the authentication under *Com. Code § 9203(b)(3)(A)* if the secured party's possession "is pursuant to the debtor's security agreement" [see *Com. Code § 9203(b)(3)(B)*; *Com. Code § 9203* (UCC Comment P 4); see also *Com. Code § 9313* (possession for these purposes)]. That phrase refers to the debtor's agreement to the secured party's possession for the purpose of creating a security interest. The phrase should not be confused with the phrase "debtor has authenticated a security agreement," used in *Com. Code § 9203(b)(3)(A)*, which contemplates the debtor's authentication of a record [*Com. Code § 9203* (UCC Comment P 4)]. In the unlikely event that possession was obtained without the debtor's agreement, possession would not suffice as a substitute for an authenticated security agreement. However, once the security interest has become enforceable and has attached, it is not impaired by the fact that the secured party's possession is maintained without the agreement of a subsequent debtor [*Com. Code § 9203* (UCC Comment P 4)].

Com. Code § 9203(b)(3)(C) provides that delivery of a certificated security to the secured party under *Com. Code § 8301* pursuant to the debtor's security agreement is sufficient as a substitute for an authenticated security agreement [*Com. Code § 9203(b)(3)(C)*; see *Com. Code § 9203* (UCC Comment P 4)]. Similarly, under *Com. Code § 9203(b)(3)(D)*, control of investment property, a deposit account, electronic chattel paper, a letter-of-credit right or an electronic document, satisfies the evidentiary test if control is pursuant to the debtor's agreement [*Com. Code § 9203(b)(3)(D)*; see *Com. Code § 9203* (UCC Comment P 4)].

Attachment occurs automatically as soon each of the required conditions of *Com. Code § 9203(b)* is satisfied, unless an agreement expressly postpones the time of attachment [*Com. Code § 9203(a)*; see, e.g., *Bank of the West v. Commercial Credit Fin. Serv., Inc.* (9th Cir. 1988) 852 F.2d 1162, 1166-1167 (creditor had no interest in inventory and accounts until debtor acquired business, decided under prior law)]. However, the order in which the events establishing the attachment of a security interest occur is immaterial [*Komas v. Future Systems, Inc.* (1977) 71 Cal. App. 3d 809, 813, 139 Cal. Rptr. 669 (decided under prior law)].

Special provisions govern attachment when the collateral is securities [*see Com. Code § 9206*], when a collecting bank holds the security interest [*see Com. Code § 4210*], when an issuer or nominated person has a security interest in a document presented under a letter of credit [*see Com. Code § 5118*], when a security interest arises under *Com. Code § 2101 et seq.*, governing sales, or under *Com. Code § 10101 et seq.*, governing personal property leases [*Com. Code § 9203(c)*; *see Com. Code § 9110* (security interests arising under Commercial Code Divisions 2 and 10)]. These provisions are discussed in [3], *below*. For a guide to attachment procedures, *see § 42.120*.

Additional rules exist for supporting obligations [*see Com. Code § 9203(f)*; [2][e], *below*], transfer of an obligation [*see Com. Code § 9203(g)*; [2][f], *below*], and investment property [*see Com. Code § 9203(h)*, (i); [3][a], *below*].

For discussion of agricultural liens, *see § 42.14[3][a]*.

[2] Validity of Security Agreements

[a] In General

A security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors, unless the Commercial Code provides to the contrary [*Com. Code § 9201(a)*]. Exceptions to the general rule arise when there is an overriding provision in this division or in another division [*Com. Code § 9201* (UCC Comment P 2)]. For example, the Commercial Code operates to invalidate disclaimers of the duty of good faith [*see Com. Code § 1302(b)*; *see also Com. Code § 1203* (every contract or duty within Commercial Code imposes obligation of good faith in its performance and enforcement)], to subordinate a security interest that has not been perfected [*see Com. Code § 9317*; *see also § 42.14[2]*], or to subordinate certain security interests to other security interests and to the interests of purchasers [*see Com. Code § 3101 et seq.*]. This general rule also does not validate any rate, charge, agreement, or practice that violates a rule of law, statute, or regulation described in *Com. Code § 9201(b)* [*see § 42.10[5]*], or extend the application of any such statute, rule of law, or regulation to a transaction not otherwise subject to it [*Com. Code § 9201(d)*].

[b] Sufficiency of Agreement

In order to make a security interest enforceable [*see [1], above*], there must be a binding security agreement [*Komas v. Future Systems, Inc.* (1977) 71 Cal. App. 3d 809, 813, 139 Cal. Rptr. 669 (decided under prior law); *Needle v. Lasco Industries, Inc.* (1970) 10 Cal. App. 3d 1105, 1108, 89 Cal. Rptr. 593 (decided under prior law)] and compliance with an evidentiary requirement in the nature of the Statute of Frauds [*Com. Code § 9203(b)(3)*; *see Com. Code § 9203* (UCC Comment P 3)]. A security agreement is one that creates or provides for a security interest [*Com. Code § 9102(a)(73)*; *see § 42.10[2][a]*].

The Commercial Code does not specify the language or the terms that must be included in a security agreement, and does not require that the terms of the agreement be set forth in a single document; no special form is necessary to create or provide for a security interest [*Komas v. Future Systems, Inc.* (1977) 71 Cal. App. 3d 809, 814-816, 139 Cal. Rptr. 669 (decided under prior law); *In re Amex-Protein Dev. Corp.* (9th Cir. 1974) 504 F.2d 1056, 1058-1060 (decided under prior law); *see New West Fruit Corp. v. Coastal Berry Corp.* (1991) 1 Cal. App. 4th 92, 97-98, 1 Cal. Rptr. 2d 664 (there is no requirement that security agreement be in writing when collateral is in the secured party's possession, and no express requirements for agreement's form or content)]. Rather, the Commercial Code broadly defines the term "agreement" to mean the bargain between the parties in fact, as found in their language, or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in *Com. Code § 1303* [*Com. Code § 1201(b)(3)*].

The test for the sufficiency of a security agreement is whether the transaction falls within the definition of "security interest" in *Com. Code § 1201(b)(35)*, not whether the parties intend to *characterize* the transaction as a security interest

[see *Com. Code* § 9102 (UCC Comment P 3b); *Com. Code* § 9109 (UCC Comment P 2); see also *Com. Code* § 1201(b)(35) ("security interest" includes any interest of consignor or buyer of accounts, chattel paper, payment intangible, or promissory note in transaction subject to *Com. Code* § 9101 et seq.)). Whether a transaction in the form of a lease creates a security interest is determined under *Com. Code* § 1203 [*Com. Code* § 1201(b)(35)].

A security agreement need not be contained in a single document. For example, an effective security agreement can consist of multiple documents, such as an agreement between the creditor and the debtor and a financing statement, or a promissory note together with invoices, provided that the documents together create or provide for a security interest and give adequate notice of the security interest to third parties [see *Biggins v. Southwest Bank* (S.D. Cal. 1971) 322 F. Supp. 62, 67-68, modified, 490 F.2d 1304 (9th Cir. 1973) (decided under prior law); *In re Amex-Protein Dev. Corp.* (9th Cir. 1974) 504 F.2d 1056, 1058-1060 (decided under prior law); see also [c], below].

[c] Sufficiency of Description of Collateral

The description of the personal or real property collateral that must be included in a security agreement does not need to be specific. With specified exceptions, the description is sufficient, whether or not it is specific, if it reasonably identifies the collateral described [*Com. Code* § 9108(a); see *Com. Code* § 9108(c)-(e) (exceptions); see also *Com. Code* § 9108(f) (additional requirements for investment property collateral and consumer goods)]. The test of the sufficiency of the description is whether the description provides information adequate to lead a reasonable inquirer to the identity of the collateral [*In re Amex-Protein Dev. Corp.* (9th Cir. 1974) 504 F.2d 1056, 1060-1061 (decided under prior law); see *Com. Code* § 9108 (UCC Comment P 2) (test is that "the description ... make possible the identification of the collateral described")]. For example, an agreement setting forth a security interest in "new and used automobiles" is sufficient to identify the property covered by a security agreement [*Biggins v. Southwest Bank* (S.D. Cal. 1971) 322 F. Supp. 62, 67-69, modified, 490 F.2d 1304 (9th Cir. 1973) (decided under prior law)]. However, if the security interest covers timber to be cut, the agreement must contain a description of the land concerned [*Com. Code* § 9203(b)(3)(A)]. Moreover, if the description identifies the location of the property, it must do so accurately [see, e.g., *Matter of California Pump & Mfg. Co., Inc.* (9th Cir. 1978) 588 F.2d 717, 719 (description is insufficient when collateral is not located in city identified in description, decided under prior law)].

There are a variety of ways in which a description may reasonably identify collateral. With specific exceptions related to a security entitlement, securities account, or commodity account [see *Com. Code* § 9108(d)], a description reasonably identifies the collateral if it describes it by any of the following [*Com. Code* § 9108(b)]:

- Specific listing.
- Category.
- Except as otherwise provided in *Com. Code* § 9108(e) for a commercial tort claim or a consumer transaction, a type of collateral defined in the Commercial Code.
- Quantity.
- Computational or allocational formula or procedure.
- Except as otherwise provided in *Com. Code* § 9108(c) (see below), any other method, if the identity of the collateral is objectively determinable.

However, a description of collateral as "all the debtor's assets" or "all the debtor's personal property" or similar words does not reasonably identify the collateral and is *not* sufficient for purposes of a security agreement [see *Com. Code* § 9108(c)]. Note, however, that under *Com. Code* § 9504, a financing statement sufficiently indicates collateral if it

"covers all assets or all personal property" [see *Com. Code* § 9504(2)].

With specified exceptions for a commercial tort claim or a consumer transaction [see *Com. Code* § 9108(e)], a description of a security entitlement, securities account, or commodity account is sufficient if it describes either the collateral by those terms or as investment property, or the underlying financial asset or commodity contract [*Com. Code* § 9108(d)]. Thus, the use of the wrong terminology [see *Com. Code* § 8101 *et seq.* (investment securities)] does not render a description invalid. For example, a security agreement intended to cover a debtor's "security entitlements" is sufficient if it refers to the debtor's "securities" [*Com. Code* § 9108 (UCC Comment P 4)]. Note that given the broad definition of "securities account," a security interest in a securities account also includes all other rights of the debtor against the securities intermediary arising out of the securities account [*Com. Code* § 9108 (UCC Comment P 4); see *Com. Code* § 8501) ("securities account" defined)]. Moreover, describing collateral as a securities account is a simple way of describing all of the securities entitlements carried on the account [*Com. Code* § 9108 (UCC Comment P 4)].

Greater specificity of description, however, is required when dealing with either a commercial tort claim, or, in a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account [see *Com. Code* § 9108(e)]. In those cases, a description only by type of collateral defined in the Commercial Code is an insufficient description [*Com. Code* § 9108(e)]. For example, "all existing and after-acquired investment property" or "all existing and after-acquired security entitlements," without more, would be insufficient in a consumer transaction to describe a securities entitlement, securities, account, or commodity account [*Com. Code* § 9108 (UCC Comment P 5); see *Com. Code* § 9203(h), (i) (if collateral consists of securities account or commodity account, description of account is sufficient to cover all existing and future entitlements or commodity contracts carried on account); see also [1], above].

In addition to the requirements governing the sufficiency of the description of collateral set forth in *Com. Code* § 9108, a description of investment property collateral also must meet the applicable requirements of *Civ. Code* § 1799.103 (limitations on security interest in investment property in consumer credit contract or guarantee), and a description of consumer goods also must meet the applicable requirements of *Civ. Code* § 1799.100 (security interests in household goods and personal property in connection with consumer credit contract or other consumer credit obligation) [*Com. Code* § 9108(f)].

The requirements applicable to the description of collateral in financing statements are discussed in § 42.14[3][b].

[d] After-Acquired Property and Future Advances

Although the general rule is that a security interest cannot attach unless the parties agree and an evidentiary requirement is met, value is given, and the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party [see *Com. Code* § 9203(b); [1], above], the Commercial Code expressly permits a security agreement to create or provide for a security interest in after-acquired collateral [see *Com. Code* § 9204(a)]. However, a security interest does not attach under an after-acquired property clause to a commercial tort claim [*Com. Code* § 9204(b)(2); see *Com. Code* § 9102(a)(13) (definition); *Waltrip v. Kimberlin* (2008) 164 Cal. App. 4th 517, 528-529, 79 Cal. Rptr. 3d 460 (security interest in commercial tort claim cannot attach unless claim is in existence when security agreement is authenticated; after-acquired *property clause* in agreement antedating claim cannot create such security interest except by modification of agreement once claim exists)]. A security interest also does not attach under an after-acquired *property clause* to consumer goods, other than an accession [see *Com. Code* § 9102(a)(1) (definition); see also *Com. Code* § 9335 (security interests in accessions)] when given as additional security, unless the debtor acquires rights in the property within 10 days after the secured party gives value [*Com. Code* § 9204(b)(1)].

A security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are sold in connection with, future advances or other value, whether or not the advances or value are given pursuant to commitment [*Com. Code* § 9204(c)]. An advance is made pursuant to commitment when the secured

party is obliged to make it, whether or not a subsequent event within the party's control has relieved or many relieve the secured party from its obligation [*Com. Code § 9102(a)(68)*]. Determining the obligations secured by collateral is solely a matter of construing the parties' agreement under applicable law [*Com. Code § 9204* (UCC Comment P 5)].

[e] Proceeds From Disposition of Collateral; Supporting Obligations

The attachment of a security interest in collateral gives the secured party the rights to proceeds as provided by *Com. Code § 9315* [*Com. Code § 9203(f)*]. Under *Com. Code § 9315(a)*, a security interest or agricultural lien continues in collateral despite the sale, lease, license, exchange, or other disposition of the collateral, unless the secured party authorized the disposition free of the security interest or agricultural lien [*see Com. Code § 9315(a)(1)*; *see also Com. Code § 2403(2)* (exception when buyer entrusts possession of goods to merchant with power to transfer all rights to buyer in ordinary course of business)]. The security interest attaches to any identifiable proceeds of collateral [*Com. Code § 9315(a)(2)*]. "Proceeds" include [*Com. Code § 9102(a)(64)*; *see Com. Code § 9315(b)* (commingled proceeds); *see also In the Matter of Munger* (9th Cir. 1974) 495 F.2d 511, 512-513 (proceeds includes federal farm subsidies, decided under prior law)]:

- Whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral.
- Whatever is collected on, or distributed on account of, collateral.
- Rights arising out of collateral.
- To the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral.
- To the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.

The attachment of a security interest in collateral is also attachment of a security interest in a supporting obligation for the collateral [*Com. Code § 9203(f)*]. "Supporting obligation" means a letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, document, general intangible, instrument, or investment property [*Com. Code § 9102(a)(77)*]. Implicit in *Com. Code § 9203(f)* is the principle that the secured party's interest in a supporting obligation extends to the supporting obligation only to the extent that it supports the collateral in which the secured party has a security interest [*Com. Code § 9203* (UCC Comment P 8)]. Complex issues may arise, however, if a supporting obligation supports many separate obligations of a particular account debtor, and if the supporting obligations are separately assigned as security to several secured parties. Division 9 does not contain provisions dealing with competing claims to a limited supporting obligation. In these circumstances, the law of suretyship and the agreement of the parties will control [*see Com. Code § 9203* (UCC Comment P 8; *see also Ch. 79, Suretyship, Guaranty, and Indemnity* ; Restatement 3d, *Suretyship and Guaranty* (1996))].

[f] Security Interest or Other Lien on Personal or Real Property

The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien [*Com. Code § 9203(g)*]. Thus, the transfer of an obligation secured by such a security interest or other lien also transfers the security interest or lien [*see Com. Code § 9203* (UCC Comment P 9)].

[g] Securities and Commodities Accounts

The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account [*Com. Code* § 9203(h); *see Com. Code* § 8501(a) ("securities account" defined)]. Similarly, the attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account [*Com. Code* § 9203(i); *see Com. Code* § 9102(a)(14) ("commodities account" defined)].

[h] Floating Liens

The Code expressly validates the concept of a "floating lien" on shifting collateral [*Com. Code* § 9205 (UCC Comment P 2)]. A security interest is not invalid or fraudulent against the debtor's creditors by reason of the debtor's right or ability to use, commingle, or dispose of all or part of the collateral, including returned or repossessed goods [*Com. Code* § 9205(a)(1)(A)]. The same is true when the debtor is at liberty to collect, compromise, enforce, or otherwise deal with collateral, to accept the return of goods or make repossessions, or to use, commingle, or dispose of proceeds of the collateral [*Com. Code* § 9205(a)(1)(B)-(D)]. Further, the failure of the secured party to require the debtor to account for the proceeds or replace the collateral neither invalidates the security interest or renders it fraudulent against other creditors of the debtor [*Com. Code* § 9205(2)]. However, the fact that floating liens are valid under the Code does not alter the requirements of possession if attachment, perfection, or enforcement of a security interest depends on possession of the collateral by the secured party [*Com. Code* § 9205(b); *see* §§ 42.14, 42.121].

[3] Special Provisions Governing Attachment of Certain Interests

[a] Investment Property

A security interest in favor of a securities intermediary attaches to a person's security entitlement if the person buys a financial asset through the securities intermediary in a transaction in which the person is obligated to pay the purchase price to the securities intermediary at the time of the purchase, and the securities intermediary credits the financial asset to the buyer's securities account before the buyer pays the securities intermediary [*Com. Code* § 9206(a)]. A "securities intermediary" is either a clearing corporation or a person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity [*Com. Code* § 8102(a)(14)]. This security interest in favor of a securities intermediary secures the person's obligation to pay for the financial asset [*Com. Code* § 9206(b)]. These rules codify the indirect holding system commonly known as the "broker's lien" [*Com. Code* § 9206 (UCC Comment P 2)].

A security interest is also created in favor of persons who deliver certificated securities [*Com. Code* § 8102(a)(4) (definition)] or other financial assets in physical form, such as money market instruments, if the agreed payment is not received [*see Com. Code* § 9206(c); *Com. Code* § 9206 (UCC Comment P 3)]. This security interest secures the seller's right to receive payment for delivery [*see Com. Code* § 9206(d)].

Attachment rules for security interests arising in the purchase or delivery of a financial asset [*see Com. Code* § 9206] override the general attachment rules of *Com. Code* § 9203 [*see Com. Code* § 9203(c); *see also* [1], *above*]. A securities intermediary's security interest is perfected by control without further action [*see Com. Code* § 9206(a); *Com. Code* § 9206 (UCC Comment P 4); *see also Com. Code* § 8106 (control of security); *Com. Code* § 9314 (perfection by control)]. A security interest arising in the delivery of a financial asset under *Com. Code* § 9206(c) is automatically perfected [*see Com. Code* § 9309(9); *see also Com. Code* § 9206 (UCC Comment P 4)].

[b] Security Interests Held by Collecting Banks

When a collecting bank holds the security interest, the interest attaches without a security agreement and has priority over conflicting interests in the instrument [*Com. Code* § 4210(c); *see Com. Code* § 9203(c)]. Collecting banks have security interests in any item and accompanying documents or the proceeds of either in the following circumstances [*Com. Code* § 4210(a)]:

- When the item is deposited in an account, to the extent to which credit given for the item has been withdrawn or applied.
- When credit has been given for an item available for withdrawal as a matter of right, to the extent of the credit given, regardless of whether or not the credit is drawn upon and whether or not there is a right of chargeback.
- If the bank makes an advance on or against the item.

[c] Sales or Leases of Goods

Division 9 governs a security interest that arises under *Com. Code* §§ 2401 or 2505, or under *Com. Code* § 2711(3), or *Com. Code* § 10508(e) is subject to Division 9 [*Com. Code* §§ 9110, 9203(c)].

Com. Code § 2505 explains how a seller of goods may reserve a security interest in them [*see Com. Code* § 2505; *Com. Code* § 9110 (UCC Comment P 3)]. *Com. Code* § 2401 indicates that a reservation of title by the seller of goods, despite delivery to the buyer, is limited to a reservation of security interest [*see Com. Code* § 2401; *Com. Code* § 9110 (UCC Comment P 3)]. Division 9 governs a security interest arising solely under these provisions. However, until the buyer obtains possession of the goods, the security interest is enforceable even in the absence of a security agreement [*see Com. Code* § 9203(b)(3); [1], *above*], filing is not necessary to perfect the security interest, and the seller-secured party's rights on the buyer's default are governed by the Commercial Code Division on sales [*Com. Code* § 9110(1)-(3); *see Com. Code* § 2101 *et seq.*; *see also Com. Code* § 9110(4) (security interest has priority over conflicting security interest created by debtor); § 42.15].

Com. Code § 2711(3) and *Com. Code* § 10508(e) create a security interest in favor of the buyer or lessee in possession of goods that were rightfully rejected or as to which acceptance was justifiably revoked [*see Com. Code* §§ 2711(3), 10508(e); *Com. Code* § 9110 (UCC Comment P 3)]. Division 9 governs a security interest arising solely under these provisions. However, until the seller or lessor obtains possession of the goods, the security interest is enforceable even in the absence of a security agreement [*see Com. Code* § 9203(b)(3); [1], *above*], filing is not necessary to perfect the security interest, and the secured party's (buyer's or lessee's) rights on the debtor's (seller's or lessor's) default are governed by the Commercial Code Division on sales [*see Com. Code* § 2101 *et seq.*] or leases [*Com. Code* § 9110(1)-(3); *see Com. Code* § 10101 *et seq.*; *see also Com. Code* § 9110(4) (security interest has priority over conflicting security interest created by debtor)].

In general, a lease is enforceable according to its terms between the parties, against purchasers of goods, and against creditors of the parties, except as otherwise provided in Division 10 [*Com. Code* § 10301; *see Com. Code* §§ 1201(b)(35), 1203].

Whether a transaction in the form of a lease creates a lease or a security interest is determined by the facts of each case [*Com. Code* § 1203(a); *see Com. Code* § 1203(c) (transactions in lease form that do not, standing alone, create security interest)]. A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay for the right to possess and use the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and if one of the following conditions is [*Com. Code* § 1203(b)]:

- The original term of the lease is equal to or greater than the remaining economic life of the goods.
- The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods.

- The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration on compliance with the lease agreement.
- The lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration on compliance with the lease agreement.

There is no requirement for filing a lease [see Harris, *The Interface Between Articles 2A and 9 Under the Official Text and the California Amendments*, 22 U.C.C. L.J. 99, 103 (1989)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsAfter-Acquired Property & Future AdvancesCommercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsRequirementsCommercial Law (UCC)Secured Transactions (Article 9)Security AgreementsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Security AgreementsEffectiveness



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 42 SECURED TRANSACTIONS
PART II. LEGAL BACKGROUND

19-42 California Legal Forms--Transaction Guide § 42.13

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.13 Rights and Duties of Secured Parties

[1] Duty of Care for Collateral in Secured Party's Possession; Rights of Secured Party Having Possession

A secured party in possession of collateral has a duty to use reasonable care in its custody and preservation [*Com. Code § 9207(a)*; *see Com. Code § 9207(d)* (exception, in certain circumstances, if secured party is seller of accounts, chattel paper, payment intangibles, or promissory notes or consignor)]. The definitions of "collateral," "debtor," and "secured party" [*see Com. Code § 9102(a)(12), (28), (72)*] make this section applicable to collateral subject to an agricultural lien if the collateral is in the lienholder's possession [*Com. Code § 9207* (UCC Comment P 2)]. The duty to exercise reasonable care may not be disclaimed by agreement, although the parties remain free to determine by agreement standards that are not manifestly unreasonable what constitutes reasonable care [*see Com. Code § 1302(b)*; *Com. Code § 9207* (UCC Comment P 2)]. Unless otherwise agreed, for a secured party in possession of chattel paper or an instrument [*see Com. Code § 9102(a)(11), (47)* (definitions)], reasonable care includes taking necessary steps to preserve rights against prior parties [*Com. Code § 9207(a)*].

A buyer of accounts, chattel paper, payment intangibles, or promissory notes, or a consignor, retains no interest in the collateral and thus is not disadvantaged by the secured party's noncompliance with the rights and duties set forth in *Com. Code § 9207* [*Com. Code § 9207* (UCC Comment P 7)]. Accordingly, a secured party's duty to use reasonable care in the custody and preservation of collateral [*see Com. Code § 9207(a)*] applies only to security interests that secure an obligation and to sales of receivables in which the buyer has recourse against the debtor [*see Com. Code § 9207(d)(1)*; *Com. Code § 9207* (UCC Comment P 7)].

Specific rules apply when the secured party is in possession of the collateral, or, in certain circumstances, when a secured party is in either possession or control, unless the parties otherwise agree [*see Com. Code § 9207(b), (c)*]. These rules address typical issues that may arise while a secured party is in possession of the collateral [*Com. Code § 9207(b)(1)-(3)*; *see § 42.121* P 11c]:

- Expenses, insurance, and taxes are chargeable to the debtor and secured by the collateral.

■ The risk of loss or damage is on the debtor, to the extent it is not covered by insurance; identifiable collateral must remain identifiable, but fungible collateral may be commingled. The secured party may use or operate the collateral for the purpose of preserving the collateral or its value, or as permitted by the court, or, except in the case of consumer goods, as agreed by the debtor [*see Com. Code § 9207(b)(4)*]. These rules are inapplicable to buyers of accounts, chattel paper, payment intangibles, or promissory notes or consignors [*Com. Code § 9207(d)(2)*].

In addition, a secured party having possession of the collateral or control of the collateral [*see Com. Code §§ 7106, 9104, 9105, 9106, 9107*] may hold as additional security any proceeds, except money or funds, received from the collateral, may create a security interest in the collateral, and must apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor [*Com. Code § 9207(c)*]. These rules are inapplicable to buyers of accounts, chattel paper, payment intangibles, or promissory notes, or consignors [*Com. Code § 9207(d)(2)*]. For further discussion of the rights of secured parties in possession of collateral, see § 42.121, P 11c.

[2] Duty to Relinquish Control

A secured party having control of collateral has additional duties in cases in which there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value [*see Com. Code § 9208(a)*].

A secured party who has control of a deposit account [*see Com. Code § 9104(a)(2), (3)*], electronic chattel paper [*see Com. Code § 9105*], investment property [*see Com. Code §§ 8106(d)(2), 9106(b)*], or a letter-of-credit right [*see Com. Code § 9107*] has a duty to relinquish control and to file or provide a termination statement for the financing statement within ten days after receiving an authenticated demand by the debtor [*see Com. Code § 9208(b)*; *cf. Com. Code § 9513* (duty to file termination statement)]. If the secured party fails to comply with these requirements, the debtor may recover actual and statutory damages [*see Com. Code § 9625(b), (e)(1)*].

Similarly, a secured party to whom receivables have been assigned [*see Com. Code § 9406(a)*] must free up collateral when there is no longer any outstanding secured obligation or any commitment to give value in the future, within 10 days after receiving an authenticated demand by the debtor [*see Com. Code § 9209*]. The secured party must provide an authenticated record that releases the account debtor from any further obligation to the secured party [*Com. Code § 9209(b)*]. This duty, however, does not apply to an assignment constituting the sale of an account, chattel paper, or payment intangible [*Com. Code § 9209(c)*].

[3] Duty to Provide Debtor with Information Concerning Secured Obligation and Collateral

A debtor may obtain from a secured party information about the secured obligation and the collateral in which the secured party may claim a security interest [*see Com. Code § 9210(b)-(e)* (procedures for complying with requests)]. Information concerning secured indebtedness is available to debtors, both before and after default [*Com. Code § 9210* (UCC Comment P 2)]. The disclosure rules apply to secured parties, including those involved in agricultural lien transactions [*see Com. Code § 9102(a)(12)* ("collateral" defined); *Com. Code § 9102(a)(28)* ("debtor" defined); *Com. Code § 9102(a)(72)* ("secured party" defined)], but not to buyers of accounts, chattel paper, payment intangibles, or promissory notes, or to consignors [*see Com. Code § 9210(a), (c)*]. For further discussion of requests for an accounting, or for a list of collateral, or a statement of account, and appropriate forms, see §§ 42.230 and 42.231.

[4] Duties Relating to Default and Enforcement

Com. Code § 9601 et seq. specify additional duties of secured parties in connection with default and enforcement [*see, e.g., Com. Code § 9616* (duty to explain calculation of deficiency or surplus in consumer goods transaction)]. For further

discussion of these issues, *see* § 42.16.

Legal Topics:

For related research and practice materials, see the following legal topics:

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DIVISION III: COMMERCIAL TRANSACTIONS
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PART II. LEGAL BACKGROUND

19-42 California Legal Forms--Transaction Guide § 42.14

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.14 Perfection of Security Interests and Agricultural Liens

[1] Purpose of Perfecting Security Interest or Agricultural Lien

A secured party must look to the collateral to satisfy a secured obligation if the debtor defaults on the obligation [see § 42.16]. To obtain maximum protection against the claims of third parties with conflicting interests in the collateral, a secured party must perfect the security interest. Attachment of the security interest, that is, the point at which the property becomes subject to a security interest [see *Com. Code § 9203* (requisites for attachment); see also § 42.12], does not by itself provide maximum protection for the secured party, because when the security interest attaches, it may be perfected or unperfected [see *Com. Code § 9308* (UCC Comment P 2); [2], below].

Perfection generally protects the secured party against creditors and transferees of the debtor and, in particular, against any representative of creditors in insolvency proceedings instituted by or against the debtor [*Com. Code § 9308* (UCC Comment P 2); see also *Atascadero Factory Outlets Inc. v. Augustini* (2000) 83 Cal. App. 4th 717, 721-722, 99 Cal. Rptr. 2d 911, decided under version of Division 9 in effect prior to July 1, 2001 (doctrine of unjust enrichment, a recognized exception to UCC lien priority system, did not apply so as to give law firm's lien priority; UCC immunizes secured creditors from unjust enrichment claims in all but rarest of cases)]. However, perfection does not provide protection against all possible conflicting claims. A security interest that has been perfected may still be subordinate to certain third party interests [*Com. Code § 9308* (UCC Comment P 2); see, e.g., *Com. Code § 9320* (buyer of goods in ordinary course of business); *Com. Code § 9322* (priorities among conflicting security interests and agricultural liens in same collateral); see also § 42.15[8]].

[2] Priorities When Security Interest or Agricultural Lien Is Unperfected

A security interest that has attached [see *Com. Code § 9203* (requisites for attachment); see also § 42.12], but as to which a required perfection step has not been taken [see [3], below] is "unperfected" [*Com. Code § 9317* (UCC Comment P 2)].

In general, an unperfected security interest is subordinate to the rights of a person entitled to priority under *Com. Code §*

9322, governing priorities among conflicting security interests in and agricultural liens on the same collateral [*Com. Code* § 9317(a); *see Com. Code* § 9317 (UCC Comment P 3) (noting that security interests given priority under *Com. Code* § 9322 take priority in general over perfected security interests; thus, they would also automatically take priority over unperfected security interests); *see also* § 42.15[7]].

An unperfected security interest generally is also subordinate to the rights of a person who becomes a lien creditor before the earlier of the time the security interest or agricultural lien is perfected, or one of the evidentiary conditions specified in *Com. Code* § 9203(b)(3) is met [*see* § 42.12[2][b]] and a financing statement covering the collateral is filed [*Com. Code* § 9317(a); *see Com. Code* § 9317(e) (exception for person who files financing statement with respect to money purchase interest, if specified conditions are met)]. A "lien creditor" is a creditor that has acquired a lien on the property involved by attachment, levy, or the like, an assignee for benefit of creditors from the time of assignment, a trustee in bankruptcy from the date of the filing of the petition, or a receiver in equity from the time of appointment [*Com. Code* § 9102(a)(52)(A)]. A creditor that by filing a notice with the Secretary of State has acquired only an attachment or judgment lien on personal property, or both, is not considered a lien creditor for the purposes of this statute [*Com. Code* § 9102(a)(52)(B)].

Certain purchasers (other than secured parties) have priority over an unperfected security interest [*see Com. Code* § 9317(b)-(d)]. For example, with one exception, a buyer (other than a secured party) of tangible chattel paper, tangible documents, goods, instruments, or a security certificate takes free of the security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected [*Com. Code* § 9317(b); *see Com. Code* § 9317(e) (exception for person who files financing statement with respect to money purchase interest, if specified conditions are met)].

Similarly, a lessee of goods generally takes free of a security interest or agricultural lien if the lessee gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected [*Com. Code* § 9317(c); *see Com. Code* § 9317(e) (exception for person who files financing statement with respect to money purchase interest, if specified conditions are met)].

A licensee of a general intangible or a buyer, other than a secured party, of accounts, electronic chattel paper, electronic documents, general intangibles, or investment property other than a certificated security also takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected [*Com. Code* § 9317(d)].

For discussion of priorities involving perfected security interests or agricultural liens, *see* § 42.15. As between conflicting unperfected security interests or agricultural liens, the first to attach or become effective has priority [*Com. Code* § 9322(a)(3); *see* § 42.15[1]].

[3] Means of Perfecting Security Interest or Agricultural Lien

[a] In General

With specified exceptions, a security interest is perfected if it has attached [*see* § 42.12] and the secured party has taken all the procedural steps required to perfect the interest [*Com. Code* § 9308(a); *see Com. Code* §§ 9310-9316 (requirements for perfection)]. If the procedural steps are taken before the security interest attaches, as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral, the interest is perfected at the time of attachment [*see Com. Code* § 9308(a)].

An agricultural lien is perfected if it has become effective and all of the applicable requirements for perfection in *Com. Code* § 9310 have been satisfied [*Com. Code* § 9308(b)]. If the applicable requirements are met before the agricultural lien becomes effective, the lien is perfected when it becomes effective [*Com. Code* § 9308(b)].

A security interest or agricultural lien is perfected continuously if it is originally perfected by one method under Division 9 and is later perfected by another method under Division 9, without an intermediate period during which it was unperfected [*Com. Code* § 9308(c); *see, e.g., Com. Code* § 9308 (UCC Comment P 4)].

In general, to perfect a security interest or agricultural lien, the secured party must file a financing statement (Form UCC-1) [*see* § 42.211 (form)] at the appropriate public office [*see Com. Code* § 9310(a); *Com. Code* § 9501 *et seq.* (filing); *see [c], below*]. However, filing is not necessary to perfect a security interest that is perfected by another permissible method [*see Com. Code* § 9310(b)], nor does filing ordinarily perfect a security interest in a deposit account, letter-of-credit right, money, insurance policy, or health care insurance receivable [*see Com. Code* § 9312(b); *see also Com. Code* § 9102(a)(46) ("health care insurance receivable" defined)]. For further discussion of exemptions from filing, *see [e], below*. For a detailed guide to the procedures for perfecting a security interest in the various kinds of collateral, *see* § 42.121.

The perfection of security interests in certain property may be governed by authority other than the Commercial Code [*see Com. Code* § 9311]. If the transaction is subject to any federal statute, regulation, or treaty that establishes a system of filing or registration under federal law, perfection of a relevant security interest generally may be achieved only through compliance with that system; filing under this division is not an alternative [*see Com. Code* § 9311(a)(1); *see, e.g., 49 U.S.C. § 44107* (recordation, conveyances, leases, and security interests in civil aircraft of the United States); *see also Com. Code* § 9311(d) (exception for inventory covered by certificate of title); § 42.121; *but see Moldo v. Matsco, Inc. (In re Cybernetic Servs.) (9th Cir. 2001) 252 F.3d 1039, 1059*, decided under version of Division 9 in effect prior to July 1, 2001 (holder of security interest in patent is not required to record that interest with federal Patent and Trademark Office in order to perfect interest as against subsequent lien creditor)]. Compliance with the requirements of these statutes, regulations, or treaties is equivalent to the filing of a financing statement under Division 9, and a security interest so perfected remains perfected despite a change in the use or transfer of possession of the collateral [*Com. Code* § 9311(b); *see also Com. Code* §§ 9311(d) (exception for inventory covered by certificate of title), *Com. Code* § 9313 (exception for negotiable documents, goods, instruments, money or tangible chattel paper perfected by possession and for security interest in certified securities perfected by delivery), *Com. Code* § 9316(d), (e) (exception for security interest in goods covered by certificate of title perfected under law of another jurisdiction)]. Transactions governed by certain California certificate-of-title statutes are also exempt from the filing requirements of Division 9. Filing under Division 9 is not necessary or effective to perfect a security interest in collateral subject to the Vehicle Code provisions that require registration of a vehicle or vessel [*see Veh. Code* §§ 5600, 6300, 6301; Ch. 102D, *Registration and Transfer of Vehicles, Vessels, and Aircraft*], or the Health and Safety Code provisions that require registration of a mobilehome or commercial coach [*see Com. Code* § 9311(a)(2), (3); *see Health & Safety Code* § 18075 *et seq.*; *see* Ch. 39, *Mobilehome Parks*, Ch. 40, *Mobilehomes*]. However, during any period in which the collateral is inventory, the filing provisions of *Com. Code* § 9501 *et seq.* apply to a security interest in that collateral [*Com. Code* § 9311(a)(2)(B)]. In addition, filing is not necessary to perfect a security interest in property subject to the Health and Safety Code provisions that require registration of all interests in approved air contaminant emission reductions [*Com. Code* § 9311(a)(2)(C); *see Health & Safety Code* §§ 40709-40713].

Similarly, a transaction subject to a certificate-of-title statute of another jurisdiction is exempt from the filing requirements of Division 9 [*see Com. Code* § 9311(a)(3)].

If a transaction has a reasonable relation to California and to another state or nation, the parties' agreement may specify the law that will govern their rights and duties [*Com. Code* § 1301(a)]. However, *Com. Code* §§ 9301-9307 govern perfection, the effect of perfect or nonperfection, and the priority of security interests and agricultural liens; and a contrary agreement is effective only to the extent permitted by those provisions [*Com. Code* § 1301(b)].

For a guide to choice of law rules, including perfecting security in multiple state transactions, *see* § 42.121, P 14.

[b] Contents of Financing Statements; Required Authorization

The UCC's use of filing as a method of perfecting many security interests is based on the concept of notice [*see Com. Code § 9502* (UCC Comment P 2); *Borg-Warner Acceptance Corp. v. Bank of Marin* (1973) 36 Cal. App. 3d 286, 288-289, 111 Cal. Rptr. 361 (decided under prior law)]. The security agreement itself is not filed; instead, the only document that must be filed is a simple record indicating that the secured party who has filed may have a security interest in the collateral indicated [*see Com. Code § 9502* (UCC Comment P 2)].

The simple, formal requirements for an effective financing statement are as follows [*Com. Code § 9502(a)*]:

- The debtor's name.
- The name of the secured party or the secured party's representative.
- An indication of the collateral.

With respect to the last of the above requirements, a financing statement sufficiently indicates collateral if it provides either a "description" of the collateral [*see Com. Code § 9108* (adequacy of description); § 42.12[2][c]] or an indication that the financing statement covers all assets or all personal property [*Com. Code § 9504(2)*].

PRACTICE TIP:

Such a "super-generic" description of collateral, while a sufficient indication of collateral in a financing statement, is inadequate for purposes of a security agreement [*see Com. Code §§ 9108, 9203*; § 42.12[2][c]; *see also Com. Code § 9101* (UCC Comment P 4h)].

Additional requirements apply to real property-related filings [*see Com. Code § 9502(b)*].

A uniform national written form, known as form UCC-1 [*see § 42.211*], has been adopted. Form UCC-1 must be accepted by a filing office that accepts written records [*see Com. Code § 9521* (sample form); *see also Cassel v. Kolb* (1999) 72 Cal. App. 4th 568, 576, 84 Cal. Rptr. 2d 878 (holding that original UCC-1 was adequate to perfect bank's security interest in accounts receivable, decided under prior law)]. The California Secretary of State's Office has stated that use of Form UCC-1 is mandatory for financing statement filings made in California after July 1, 2001. For an illustration of Form UCC-1 and the accompanying official instructions, with commentary, *see § 42.211*; *see also § 42.131*.

There is no requirement that the debtor's signature (or other evidence of authorization) appear on the filing statement [*see Com. Code § 9502* (UCC Comment P 3); *cf. former Com. Code § 9402(1)*], except to the extent that filing offices may chose to employ authentication procedures in connection with electronic communications [*Com. Code § 9101* (UCC Comment P 4h)]. Elimination of the signature requirement facilitates paperless filing [*Com. Code § 9502* (UCC Comment P 3)]. However, the fact that Division 9 does not require that an authenticating symbol be contained in the public record does not mean that all filings are authorized. Rather, a person may file an initial financing statement, an amendment that adds collateral covered by a financing statement, or an amendment that adds a debtor to a financing statement only if the debtor authorizes the filing in an authenticated record, or the person holds an agricultural lien that has become effective at the time of filing and the financing statement covers only collateral in which the person holds an agricultural lien [*Com. Code § 9509(a)*]. However, the debtor's authentication of (or becoming bound by) a security agreement, by itself, constitutes the debtor's authorization of the filing of the financial statement covering the collateral described in the security agreement or any identifiable proceeds of that collateral; the secured party is not required to obtain a separate authorization [*Com. Code § 9509(b)*]. Similarly, by acquiring collateral in which a security interest or agricultural lien continues [*see Com. Code § 9315(a)(1)*; § 42.121[2]-[4]], the debtor authorizes the filing of an initial financing statement, and an amendment, covering the collateral and the property that becomes collateral [*Com. Code §*

9509(c); see *Com. Code* § 9315(a)(1)]. Further, a person other than the debtor is entitled to file a termination statement only if the secured party of record authorizes the filing [see *Com. Code* § 9509(d)]. A person who files an unauthorized record in violation of *Com. Code* § 9509(a) is liable for a statutory penalty and damages [see *Com. Code* § 9625(b), (e)(3); see also *Com. Code* § 9518 (procedure for filing correction statement concerning inaccurate or wrongly filed record)]. Moreover, a filing has legal effect only to the extent it is authorized [see *Com. Code* § 9510(a)].

A financing statement that substantially complies with the requirements discussed above is effective even if it contains minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading [*Com. Code* § 9506(a)]. A financing statement that fails sufficiently to provide the debtor's name in accordance with the statutory rules [see *Com. Code* § 9503(a)] is seriously misleading as a matter of law [*Com. Code* § 9506(b)]. However, if the financing statement would be discovered in a search under the debtor's correct name, using the filing office's standard search logic, if any, then as a matter of law, the incorrect name does not make the financing statement seriously misleading [*Com. Code* § 9506(c)].

In determining the extent to which a financing statement naming an original debtor is effective against a new debtor, the sufficiency of the financing statement should be tested against the name of the new debtor [see *Com. Code* § 9506(d); *Com. Code* § 9506 (UCC Comment P 3); see also *Com. Code* § 9508 (effectiveness of financing statement if new debtor becomes bound by security agreement)].

[c] Filing of Financing Statements

Communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing [*Com. Code* § 9516(a)]. A filing office must refuse to accept a record for filing, and may refuse to accept a filing, only for the reasons set forth in *Com. Code* § 9516(b), for example, if the financing statement is lacking an address for the debtor or the secured party [*Com. Code* § 9520(a), see *Com. Code* § 9516(b) (specifying required information)]. However, if the filing office accepts the record, it is effective nevertheless [*Com. Code* § 9520(c); see also *Com. Code* § 9338 (priority of security interest or agricultural lien perfected by effective, but flawed financing statement)]. For a list of grounds on which the filing office may reject a record, see § 42.131.

A financing statement may be filed before a security agreement is made or before the security interest otherwise attaches [*Com. Code* § 9502(d)]. The reason for filing a financing statement before the security interest attaches is to obtain the earliest possible priority date as against conflicting security interests. Generally, conflicting perfected security interests and agricultural liens rank according to priority in time of filing or time of perfection, whichever is earlier [see *Com. Code* § 9322(a)(1); § 42.15[1]].

For a detailed guide to procedures for filing financing statements in California, see § 42.131. For an illustration of the standard UCC-1 financing statement, and commentary on its use in California, see § 42.211.

[d] Duration and Effectiveness of Financing Statements

With specified exceptions, a financing statement is effective for a period of five years after the date of filing [*Com. Code* § 9515(a)], unless its effectiveness is continued [see *Com. Code* § 9515(d)] or terminated [see *Com. Code* § 9513 (duty of secured party to file or send termination statement)].

There are three exceptions to this five-year period, as follows:

- A financing statement is effective for 30 years if it relates to a public finance transaction or a manufactured home transaction and so indicates [*Com. Code* § 9515(b)].
- A financing statement filed against a transmitting utility remains effective indefinitely, until a

termination statement is filed [*Com. Code § 9515(f)*].

- A mortgage effective as a fixture filing remains effective until the mortgage is released or satisfied or its effectiveness terminates under real property law [*Com. Code § 9515(g)*].

To extend the effective period of a financing statement, the secured party may file a continuation statement within six months before the end of the five-year period or the 30-year period, whichever is applicable [*Com. Code § 9515(c)*; see also § 42.214]. This statement is filed on Form UCC-3, which is illustrated in § 42.214. A continuation statement that is not filed with the prescribed six-month period is ineffective [*Com. Code § 9510(c)*]. On timely filing of a continuation statement, the effectiveness of the initial financing statement continues for a period of five years beginning on the day on which the financing statement would have become ineffective in the absence of the filing. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement [*Com. Code § 9515(e)*].

The effectiveness of a financing statement lapses when the period of effectiveness expires [*Com. Code § 9515(c)*]. On lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise [*Com. Code § 9515(c)*]. A security interest or agricultural lien that becomes unperfected on lapse is deemed never to have been perfected as against a purchaser of the collateral for value [*Com. Code § 9515(c)*].

[e] Perfection by Methods Other than Filing

Certain security interests may be perfected without filing a financing statement because they are perfected [*Com. Code § 9310(b)*; see *Com. Code § 9310* (UCC Comment P 3)]:

- Automatically on attachment [*Com. Code § 9310(b)(2)*, (9); see *Com. Code § 9309* (security interests perfected on attachment); *Com. Code § 9315(c)* (proceeds)].
- On the occurrence of another event [*Com. Code § 9310(b)(1)*, (5); see *Com. Code § 9308(d)* (supporting obligation for collateral); *Com. Code § 9308(e)* (security interest, mortgage, or other lien on personal or real property securing right to payment or performance); *Com. Code § 9308(f)* (security entitlements carried in securities account); *Com. Code § 9308(g)* (commodity contracts carried in commodity account); *Com. Code § 9312(e)*, (f), (g) (security interests in certified securities, documents, goods, or instruments); *Com. Code § 9315(d)*, (e) (proceeds)].
- Under the law of another jurisdiction [*Com. Code § 9310(b)(3)*, (10); see *Com. Code § 9311* (property subject to specified statutes, regulations, or treaties); *Com. Code § 9316* (continued perfection following change in governing law); see also [3][a], above].
- By another method, such as by the secured party taking possession or control [*Com. Code § 9310(b)(3)-(8)*, (11); see *Com. Code § 9311* (property subject to specified statutes, regulations, or treaties); *Com. Code § 9312(d)(1)*, (2) (goods in possession of bailee); *Com. Code § 9312(e)-(g)* (certified securities; negotiable documents in possession of bailee); *Com. Code § 9313* (negotiable documents, certain goods, instruments, money, tangible chattel paper in secured party's possession or security interest in certificated security perfected by delivery); *Com. Code § 9314* (deposit accounts, electronic chattel paper, electronic documents, investment property or letter-of-credit rights); *Com. Code § 9312(b)(4)* (insurance policies)].

For a detailed guide to the procedures for perfecting a security interest in the various kinds of collateral, see § 42.121.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)PerfectionGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PriorityGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 42 SECURED TRANSACTIONS
PART II. LEGAL BACKGROUND

19-42 California Legal Forms--Transaction Guide § 42.15

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§ 42.15 Priorities of Perfected Security Interests and Agricultural Liens

[1] In General

A perfected security interest or agricultural lien may be or may become subordinate to conflicting third-party security interests in or liens against the same collateral [*see Com. Code § 9322*]. Three general rules, subject to specified exceptions, govern priorities among conflicting security interests or agricultural liens [*see Com. Code § 9322(a)*; *see also Com. Code § 9709(b)* (transition provision affecting application of *Com. Code § 9322(a)* to filing occurring before effective date of revised Division 9, which would be ineffective to perfect security interest under former Division 9 but is effective under this Division); *Com. Code § 9317 et seq.* (rules governing priority of security interests and agricultural liens)].

- First, when there is more than one perfected security interest, the security interests rank according to time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected [*Com. Code § 9322(a)(1)*]. The form of the claim to priority, that is, filing or perfection, will be based on the first filing or perfection, as long as there is no intervening period without filing or perfection [*see Com. Code § 9322(a)(1)*; *Com. Code § 9322* (UCC Comment P 4)]. "Filing" refers to filing an effective financing statement [*see § 42.14[3][c]*]. "Perfection" refers to the acquisition of a perfected security interest, that is, one that has attached and to which any required perfection step has been taken [*see Com. Code § 9308*; § 42.14[1]].

- Second, a perfected security interest has priority over an unperfected interest [*Com. Code § 9322(a)(2)*].

- Third, if both security interests are unperfected, the first to attach has priority [*Com. Code § 9322(a)(3)*].

Rules that override these general rules include those applicable to money-purchase interests [*see Com. Code § 9324*;

[9], *below*] and those that govern types of collateral qualifying for special priority, including, for example, deposit accounts [see *Com. Code* § 9327; [10], *below*], investment property [see *Com. Code* § 9328; [11], *below*], letter-of-credit rights [see *Com. Code* § 9329; [12], *below*], chattel paper and instruments [see *Com. Code* § 9330; [13], *below*], and fixtures [see *Com. Code* § 9334; § 42.221]. In addition, the general rules contained in *Com. Code* § 9322 are subject to priority rules governing security interests arising under Division 2 [see *Com. Code* § 2101 *et seq.* (sales)], Division 10 [see *Com. Code* § 10101 *et seq.* (leases)], Division 4 [see *Com. Code* § 4210 (security interest of collecting bank)], and Division 5 [*Com. Code* § 9322(f); see *Com. Code* § 5118 (security interest of issuer or nominated person); see also [14], *below*].

For a more detailed discussion of the complex question of priorities among conflicting security interests under the UCC, see McDonnell, *Secured Transactions Under the UCC*, pt. III, *Priority of Security Interests*, Chs. 7A-7F (Matthew Bender).

[2] Special Rules Applicable to Agricultural Liens

Statutes other than Division 9 may purport to grant priority to an agricultural lien as against a conflicting security interest or agricultural lien. If another statute grants priority to an agricultural lien, the agricultural lien has priority only if the same statute creates the agricultural lien and the agricultural lien is perfected [*Com. Code* § 9322(g)]. Otherwise, the same priority rules under *Com. Code* § 9322(a) apply to an agricultural lien as to a security interest, regardless of whether the agricultural lien conflicts with a security interest or with another agricultural lien [see *Com. Code* § 9322(a); [1], *above*].

[3] Proceeds

For purposes of the rule governing priority of perfected interests, the time of filing or perfection in the security interest in the collateral is also the time of filing or perfection of a security interest in the proceeds, except as otherwise provided [*Com. Code* § 9322(b)(1); see *Com. Code* § 9322(c)-(e) (exceptions)]. However, a perfected security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds unless specified statutory conditions are satisfied [see *Com. Code* § 9315(d), (e); see also *Cassel v. Kolb* (1999) 72 Cal. App. 4th 568, 577, 84 Cal. Rptr. 2d 878 (under former *Com. Code* § 9306(3)(a), now see *Com. Code* § 9315(d)(1) security interest in stock was perfected by operation of law); see also see § 42.121, P 5d].

PRACTICE TIP:

Note that attachment cannot occur [see *Com. Code* § 9203; § 42.12] (and, therefore, perfection cannot occur [see *Com. Code* § 9308; § 42.14]) as to particular collateral until the collateral itself comes into existence and the debtor has rights to it [see *Com. Code* § 9322 (UCC Comment P 6)]. Thus, a security interest in proceeds of original collateral does not attach and is not perfected until the proceeds come into existence and the debtor has acquired rights to them [see *Com. Code* § 9322 (UCC Comment P 6, Example 4); see also *Com. Code* § 9324 (governing extent to which special purchase-money priority in goods or software carries over into proceeds of original collateral)].

Additional priority rules exist for proceeds of collateral in situations in which the temporal (first-in-time) rules of *Com. Code* § 9322(a)(1) [see [1], *above*] are not appropriate. These rules distinguish what the UCC Comments refer to as "nonfiling collateral" from that they call "filing collateral" [see *Com. Code* § 9322 (UCC Comment P 7)]. As used in the UCC Comments, nonfiling collateral is collateral for which perfection may be achieved by a method other than filing (possession or control, mainly) and for which secured parties who so perfect generally do not expect or need to conduct a filing search [see *Com. Code* § 9322 (UCC Comment P 7)]. More specifically, nonfiling collateral is chattel paper, deposit accounts, negotiable documents, instruments, investment property, and letter-of-credit rights [see *Com. Code* § 9322(c); *Com. Code* § 9322 (UCC Comment P 7)]. Under the baseline priority rule for proceeds of non-filing collateral, which applies if the secured party has taken the steps required for non-temporal priority over a conflicting priority in the

original non-filing collateral (for example, control in the case of deposit accounts, letter-of-credit rights and investment property) [see *Com. Code* § 9322(c); *Com. Code* § 9322 (UCC Comment P 7)], the priority in the original collateral continues in proceeds if the security interest in the proceeds is perfected and the proceeds are cash proceeds or proceeds "of the same type" as the original collateral [*Com. Code* § 9322(c)(2); see *Com. Code* § 9322 (UCC Comment P 8, Example 6)] ("type" should be read broadly, *e.g.*, security is "of the same type" as a "security entitlement;" investment property or a promissory security entitlement is "of the same type" as a draft, that is, an instrument)].

However, if a security interest in nonfiling collateral is perfected by a method other than filing (control or possession, for example), it does not retain its priority over a conflicting security interest in proceeds that are filing collateral [see *Com. Code* § 9322(d); *Com. Code* § 9322 (UCC Comment P 9)]. Moreover, it is not entitled to priority in proceeds under the first-to-file-or-perfect rule of *Com. Code* § 9322(a)(1), (b). Instead, priority is determined by another first-to-file rule [see *Com. Code* § 9322(d); see, *e.g.*, *Com. Code* § 9322 (UCC Comment P 9, Example 12); see also *Com. Code* § 9322(e) (limitation on *Com. Code* § 9322(d))].

Because no agricultural lien on proceeds arises under this division, the priority rules governing proceeds [see *Com. Code* § 9322(b)-(e)] do not apply to proceeds of agricultural liens [see *Com. Code* § 9322 (UCC Comment P 12)]. However, if an agricultural lien has priority under *Com. Code* § 9322(g) [see [2], *above*], and the statute creating the agricultural lien gives the secured party a lien on the proceeds of the collateral subject to the lien, a court should apply the principle of *Com. Code* § 9322(g) and award priority in the proceeds to the holder of the perfected agricultural lien [see *Com. Code* § 9322 (UCC Comment P 12)].

[4] Supporting Obligations

Similar to the general rule governing priority of proceeds [see [3], *above*], the time of filing or perfection of a security interest in collateral supported by a supporting obligation is also the time of filing or perfection of a security interest in the supporting obligation [see *Com. Code* § 9322(b)(2); *Com. Code* § 9322(c)(1)]. A "supporting obligation" is a letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, document, general intangible, instrument, or investment property [*Com. Code* § 9102(a)(77)]. However, this general rule is subject to the special rule governing the priority of security interests in letter-of-credit rights [see *Com. Code* § 9322(f)(3)]. Under that rule, a security interest held by a secured party having control of the letter-of-credit right under *Com. Code* § 9107 has priority to the extent of its control over a conflicting security interest held by a secured party that does not have control, while security interests perfected by control under *Com. Code* § 9314 rank according to priority in time of obtaining control [*Com. Code* § 9329].

[5] After-Acquired Property

Priority in after-acquired property [see *Com. Code* § 9204(a) (security interest in after-acquired collateral)] must be considered separately for each item of collateral [*Com. Code* § 9322 (UCC Comment P 5)]. Priority does not depend only on time of perfection but may also be based on priority in filing before perfection [see *Com. Code* § 9322 (UCC Comment P 5)]. When after-acquired property is encumbered by more than one security interest, one of the security interests is often a money-purchase security interest that is entitled to special priority under *Com. Code* § 9324 [*Com. Code* § 9322 (UCC Comment P 5); see *Com. Code* § 9324 (priority of money purchase interests); [9], *below*].

[6] Future Advances

A security agreement may provide that collateral secures future advances [see *Com. Code* § 9204(c); § 42.12[2][d]]. In general, the first-to-file-or-perfect rule of *Com. Code* § 9322(a)(1) does not distinguish among various advances made by the secured party. The priority of each advance dates from the earlier of filing or perfection [see *Com. Code* § 9322 (UCC Comment P 4)]. However, in rare instances, the priority of an advance dates from the time the advance is made, if the advance is made without commitment and while the security interest is perfected only temporarily under *Com. Code*

§ 9312(e), (f), or (g) [see *Com. Code* § 9323(a); *Com. Code* § 9322 (UCC Comment P 4, Example 3); *Com. Code* § 9323 (UCC Comment P 3)]. Specific rules in determining priorities in future advances among competing lien creditors and competing buyers and lessees are discussed in [7] and [8], respectively, *below*.

[7] Conflicting Liens

The priority of the security interest for future advances over a lien creditor [see *Com. Code* § 9102(a)(52) (definition); § 42.14[2]] is absolute for 45 days regardless of the knowledge of the secured party concerning the lien [see *Com. Code* § 9323(b); *Com. Code* § 9323 (UCC Comment P 4)]. If, however, the advance is made after 45 days, the advance will not have priority unless it was made or committed without knowledge of the lien [see *Com. Code* § 9323(b); *Com. Code* § 9323 (UCC Comment P 4)].

A "possessory lien" on goods has priority over a security interest in the goods unless the possessory lien is created by a statute that expressly provides otherwise [*Com. Code* § 9333(b)]. For these purposes, a "possessory lien" is a common-law or statutory lien, other than a security interest or agricultural lien, whose effectiveness depends on the lienor's possession of the goods with respect to which the lienor provided services or furnished materials in the ordinary course of that its business [*Com. Code* § 9333(a)]. If the statute creating the possessory lien is silent as to its priority relative to a security interest, this statute provides a rule of interpretation that the possessory lien takes priority, even if the statute has been construed judicially to make the possessory lien subordinate [see *Com. Code* § 9333 (UCC Comment P 2)].

The priority of attachment or judgment liens acquired by the filing of a notice with the Secretary of State is governed by special provisions outside of the Commercial Code [see *Code Civ. Proc.* § 488.500(c) (attachment lien); *Code Civ. Proc.* § 697.590(b)-(f) (judgment lien)]. In general, the priority between a judgment lien on personal property and a conflicting security interest or agricultural lien in the same property is determined by the time of filing or perfection. For a judgment lien, priority dates from the time filing is first made covering the personal property. For a security interest or agricultural lien, priority dates from the earlier of the time a filing is first made covering the personal property or the time the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection [*Code Civ. Proc.* § 697.590(b)].

[8] Priorities of Competing Buyers and Lessees of Goods

Certain buyers of goods take the goods free of perfected security interests. For example, a person who buys goods in the ordinary course of business takes the goods free of any security interest created by the buyer's seller, even if the buyer has actual knowledge of the security interest [*Com. Code* § 9320(a); see *Com. Code* § 9320(e) (exception for security interest in goods perfected by possession of secured party under *Com. Code* § 9313)]. A "buyer in the ordinary course of business" is a buyer other than a pawnbroker who, in good faith and without actual knowledge that the sale violates the rights of another person in the goods, buys goods from a seller who is in the business of selling goods of that kind (primarily inventory) [*Com. Code* § 1201(b)(9); see *Com. Code* § 9320 (UCC Comment P 3)]. Thus, the buyer can take the goods free of security interests, even though perfected, and even though the buyer knows the security interest exists, provided that the buyer does not know that the sale violated a term of the security agreement with the secured party [see *Com. Code* § 9320 (UCC Comment P 3)]. Similarly, a licensee of general intangibles and a lessee of goods in the ordinary course of business take free of a security interest, even if the security interest is perfected and the licensee or lessee knows of its existence [see *Com. Code* § 9321 (repealed as to licensees in the ordinary course of business eff. January 1, 2013)].

This provision, however, does not enable a buyer of farm products to take free of a security interest created by the seller, even if the buyer is a buyer in the ordinary course of business. However, a buyer of farm products may take free of a security interest under the Food Security Act of 1985 [see *Com. Code* § 9320 (UCC Comment P 4); 7 U.S.C. § 1281 *et seq.*].

A buyer of goods other than a buyer in the ordinary course of business generally takes the goods free of security interests to the extent that they secure future advances made after the secured party acquires knowledge of the purchase or more than 45 days after the purchase [*Com. Code* § 9323(d)]. However, a security interest in future advances will continue to apply if the advances were made in accordance with a commitment entered into before the expiration of the 45-day period and without knowledge of the purchase [*Com. Code* § 9323(e)]. An analogous rule is provided for lessees [*see Com. Code* § 9323(f), (g)].

[9] Purchase Money Security Interests

Purchase money security interests [*see Com. Code* § 9103 (when security interest enjoys purchase-money status); *see also Com. Code* § 9101 (UCC Comment P 4e (discussing meaning of "purchase money security interest"))] are subject to special priority rules in a variety of contexts [*see Com. Code* §§ 9317(e), 9324]. A purchase money interest can be created only in goods, including fixtures, and software [*see Com. Code* § 9103(b), (c)].

Com. Code § 9324 affords a special, non-temporal priority to those purchase money security interests that satisfy the statutory conditions. In most cases, priority will be over a security interest asserted under an after-acquired property clause [*see Com. Code* § 9324; *Com. Code* § 9324 (UCC Comment P 2); *see also Com. Code* § 9204 (governing extent to which security interests asserted under after-acquired clause are validated)].

A perfected purchase money interest in goods other than inventory and livestock, as well as a perfected security interest in its identifiable proceeds, generally takes priority over a conflicting security interest in the same goods if the purchase money security interest is perfected when the debtor receives possession of the collateral or within 20 days after receipt [*Com. Code* § 9324(a); *see Com. Code* § 9324(g) (special rule applicable when more than one security interest qualifies for priority in same collateral); *Com. Code* § 9327 (exception for deposit accounts)]. A purchase money security interest qualifies for priority under this provision, even if the purchase money secured party knows that a conflicting security interest has been created or that the holder of the conflicting interest has filed a financing statement covering the collateral [*see Com. Code* § 9324 (UCC Comment P 3)]. Further, if a purchase money security interest is perfected by filing no later than 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of buyers, lessees, or lien creditors that arise between the time the security interest attaches and the time of filing [*Com. Code* § 9317(e); *see Com. Code* §§ 9320, 9321 (exception for buyers and lessees of goods and licensees of general intangibles)].

A money purchase interest in inventory (and most chattel paper or instruments constituting proceeds of the inventory, as well as identifiable cash proceeds) can achieve priority over an earlier-filed security interest in the same collateral if the purchase money security interest is perfected when the debtor receives possession of the inventory [*see Com. Code* § 9324(b)(1); *see also Com. Code* § 9324(g) (exceptions)], and if the purchase money secured party gives notification to a holder of a conflicting security interest who filed against the same item or type of inventory before the purchase money secured party filed or its security interest became perfected temporarily under *Com. Code* § 9312(f) [*see Com. Code* § 9324(b)(2)-(4), (c)].

The purchase money priority rules for security interests in livestock are patterned on the purchase money priority rules for inventory [*see Com. Code* § 9324(b), (c)] and include a requirement that the purchase money secured party notify earlier-filed parties [*see Com. Code* § 9324(d), (e)].

A purchase money interest in software (and in most of its identifiable proceeds) has the same priority as a purchase money interest in the goods in which the software was acquired for use [*see Com. Code* § 9324(f)]. This priority is determined under *Com. Code* § 9324(b), (c) for inventory, or under *Com. Code* § 9324(a) for goods [*see Com. Code* § 9324(f); *Com. Code* § 9324 (UCC Comment P 12)]. A purchase money security interest in software arises only if the debtor acquires its interest in the software for the principle purpose of using the software in goods subject to a purchase

money security interest [*Com. Code § 9103(c)*].

If more than one security interest qualifies for priority in the same collateral under any of the provisions discussed above [*see Com. Code § 9324(a), (b), (d), (f)*], a security interest securing an obligation incurred as all or part of the price of the collateral has priority over a security interest securing an obligation incurred for value given to enable the debtor to acquire rights in, or the use of, collateral [*Com. Code § 9324(g)(1)*]. In all other cases, the first-to-file-or-perfect rule of *Com. Code § 9322(a)* [*see [1], above*] applies to the qualifying security interests [*Com. Code § 9324(g)(2)*].

[10] Deposit Accounts

The following rules govern priority among conflicting interests in the same deposit accounts [*Com. Code § 9327; see Com. Code § 9102(a)(29)* ("deposit account" is a demand, time, savings, passbook or similar account maintained with a bank; it does not include investment property or accounts evidenced by an instrument)]:

- A security interest held by a secured party having control of the deposit account [*see Com. Code § 9104* (control)] has priority over a conflicting security interest held by a secured party that does not have control (for example, identifiable cash proceeds under *Com. Code § 9315*).
- Except as otherwise provided in the two paragraphs *below*, security interests perfected by control under *Com. Code § 9314* (investment property, deposit accounts, letter-of-credit rights, electronic chattel paper, or electronic documents) rank according to priority in time of obtaining control. This provision covers the rare case in which a bank enters a control agreement as specified in *Com. Code § 9104(a)(2)* with more than one secured party. If the bank is solvent and the control agreements are well-drafted, the bank will be liable to each secured party and this priority rule will have no practical effect [*see Com. Code § 9327* (UCC Comment P 3)].
- Except as otherwise provided in the paragraph *below*, a security interest held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party. A rule of this kind makes it possible for banks to extend credit to their depositors without the need to examine either the public record or their own records to determine whether another party might have an interest in the deposit account [*see Com. Code § 9327* (UCC Comment P 4)].
- A security interest perfected by control under *Com. Code § 9104(a)(3)* (control of deposit account by becoming bank's customer with respect to deposit account) has priority over a security interest held by the bank with which the deposit account is maintained [*cf. Com. Code § 9339* (secured party can achieve same result by obtaining subordination agreement from bank)].

[11] Investment Property

"Investment property" means a security, whether certificated or uncertificated, a security entitlement, securities account, commodity contract, or commodity account [*Com. Code § 9102(a)(49)*]. The general rule governing priority in investment property is that the secured party who obtains control [*see Com. Code §§ 8106, 9106*] has priority over a secured party who does not obtain control [*see Com. Code § 9328(1)*]. Additional rules address the priority of conflicting security interests each of which is perfected by control [*see Com. Code § 9328(2)-(4)*], the priority of a certificated security that is perfected by delivery but not control [*see Com. Code § 9328(5)*], priority in the relatively unusual circumstance in which a broker, securities intermediary, or commodities intermediary has created conflicting security interests none of which is perfected by control [*see Com. Code § 9328(6)*], and priority in cases not covered by the specific provisions governing priority in investment property [*see Com. Code § 9328(7); see also Com. Code §§ 9322, 9323* (rules applicable in these circumstances)]. Generally, security interests perfected by control rank according

to the time that control is obtained or, in the case of a security entitlement or a commodity contract carried in a commodity account, the time when the control arrangement is entered into [see *Com. Code* § 9328(2); see also *Com. Code* § 9101 (UCC Comment P 4e)]. However, a security intermediary's security interest in a securities entitlement that it maintains for the debtor is senior to a security interest held by another secured party [see *Com. Code* § 9328(3)].

[12] Letter-of-Credit Rights

A security interest perfected by control (that is, one that takes an assignment of proceeds and obtains consent of the issuer or any nominated person under *Com. Code* § 5114(c)) [see *Com. Code* § 9107]) has priority over one perfected in another manner (that is, one that is perfected automatically in which the letter-of-credit rights are supporting obligations under *Com. Code* § 9308(d)) [see *Com. Code* § 9329(1)].

Security interests in a letter-of-credit right perfected by control [see *Com. Code* §§ 9107, 9314(a)] rank according to the time that control is obtained [*Com. Code* § 9329(2)]. However, the rights of a transferee beneficiary or a nominated person are independent and superior to the extent provided by *Com. Code* § 5114 [see *Com. Code* § 9109(c)(2)].

[13] Priorities of Purchasers of Chattel Paper and Instruments

Different priority rules apply to purchasers of chattel paper who give new value and take possession (or, in the case of electronic chattel paper, obtain control) of the collateral depending on whether a conflicting security interest in the collateral is "claimed merely as proceeds" or claimed other than merely as proceeds [see *Com. Code* § 9330(a); see also *Com. Code* § 9330 (UCC Comment P 3) (noting that section does not elaborate on meaning of "merely as proceeds")].

A purchaser of chattel paper has priority over a security interest in the chattel paper that is claimed merely as proceeds of inventory subject to a security interest if, in good faith and in the ordinary course of the purchaser's business, the purchaser gives new value and takes possession of the chattel paper or obtains control of the electronic chattel paper [see *Com. Code* § 9105], and the chattel paper does not indicate that it has been assigned to an identified assignee other than the purchaser [*Com. Code* § 9330(a); see *Com. Code* § 9102(a)(43) ("good faith" defined)]. "New value" is money, money's worth in property, services, or new credit, or release by a transferee of an interest in property previously transferred to the transferee. The term does not include an obligation substituted for another obligation [*Com. Code* § 9102(a)(57)].

A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed *other than merely as proceeds* of inventory subject to a security interest if the purchaser gives new value and takes possession of the chattel paper or obtains control of the electronic chattel paper [see *Com. Code* § 9105] in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party [*Com. Code* § 9330(b); see *Com. Code* § 9330(f) (purchaser of chattel paper or instrument has knowledge that purchase violates rights of secured party if chattel paper or instrument indicates that it has been assigned to identified secured party other than purchaser)].

For purposes of either of the rules discussed above, the holder of a purchase money security interest in inventory is deemed to give "new value" for chattel paper constituting proceeds of the inventory [*Com. Code* § 9330(e)]. Accordingly, the purchase-money secured party may qualify for priority under *Com. Code* § 9330(a) or (b), whichever, is applicable, even if it does not make an additional advance against the chattel paper [see *Com. Code* § 9330 (UCC Comment P 3); see also [9], *above* (purchase money security interests); [6], *above* (future advances)].

The priority afforded to a purchaser of chattel paper under *Com. Code* § 9330(a) and (b), discussed *above*, extends to the proceeds of the chattel paper if the purchaser would have priority under the normal priority rules applicable to the proceeds [see *Com. Code* § 9322; [1], *above*], or if the proceeds consist of the specific goods covered by the chattel paper or cash proceeds of the specific goods, even if the purchaser's security interest in the proceeds is unperfected [

Com. Code § 9330(c)].

A purchaser of an instrument has priority over a security interest in the instrument perfected by a method other than possession (for example, by filing, temporarily, under *Com. Code § 9312(e)* or *(g)*, as proceeds under *Com. Code § 9315(d)*, or automatically on attachment under *Com. Code § 9309(4)* if the security instrument arises out of the sale of an instrument) if the purchaser gives value (*not* new value) and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party [*Com. Code § 9330(d)*; see *Com. Code § 9330* (UCC Comment P 7); see also *Com. Code § 9330(f)* (purchaser of chattel paper or instrument has knowledge that purchase violates rights of secured party if chattel paper or instrument indicates that it has been assigned to identified secured party other than purchaser)]. However, this rule does not limit the right of a holder in due course under Article 3, governing negotiable instruments [see *Com. Code § 9330(d)*; *Com. Code § 9331(a)*; see also *Com. Code § 3101 et seq.* (negotiable instruments)]. Thus, in the rare case in which a purchaser of an instrument qualifies for priority under this provision, but another person has the rights of a holder of due course of the instrument, the other person takes free of the purchaser's claim [see *Com. Code § 9330* (UCC Comment P 7); see also *Com. Code § 3306* (holder of due course takes free of other claims of property or possessory rights in instrument)].

[14] Priorities of Collecting Banks, Issuer or Nominated Person under Letter of Credit, and Security Interests Arising under Division 2 and Division 10

Special rules govern the priority of security interests arising under Division 2 [see *Com. Code § 2101 et seq.* (sales)], Division 10 [see *Com. Code § 10101 et seq.* (leases)], Division 4 [see *Com. Code § 4210* (security interest of collecting bank)], and Division 5 [*Com. Code § 9322(f)*; see *Com. Code § 5118* (security interest of issuer or nominated person)].

A security interest arising under *Com. Code § 2401* (seller's reservation of title to goods); *Com. Code § 2505* (seller's shipment of goods under reservation), *Com. Code § 2711(3)* (buyer's security interest in rejected goods), or under *Com. Code § 10508(e)* (lessee's security interest in goods in lessee's possession) is subject to Division 9 [*Com. Code § 9110*]. However, until the debtor obtains possession of the goods, a security interest arising under one of these statutory sections has priority over a conflicting security interest created by the debtor [*Com. Code § 9110(4)*]. Thus, a security interest arising under *Com. Code §§ 2401* or *2505* has priority over a conflicting security interest in the buyer's after-acquired goods, even if the goods in question are inventory [see *Com. Code § 9110* (UCC Comment P 4)]. Similarly, a security interest under *Com. Code § 2711(3)* or *Com. Code § 10508(e)* has priority over security interests claimed by the seller's or lessor's secured lender [see *Com. Code § 9110* (UCC Comment P 4)]. In the event that a security interest referred to in *Com. Code § 9110* conflicts with a security interest that is created by a person other than the debtor, the rule governing priority of security interests in transferred collateral [see *Com. Code § 9325*] applies [see *Com. Code § 9110* (UCC Comment P 4)].

A collecting bank has a perfected security interest, without the requirements of a security agreement or filing, in certain items, documents, and proceeds it holds in deposit [*Com. Code § 4210(a), (c)(1), (2)*]. Therefore, regardless of the time that the conflicting interest is filed or perfected, the collecting bank has priority over conflicting perfected security interests to the extent that the bank does not receive final settlement for the item or does not give up possession of the item or possession or control of the accompanying documents for purposes other than collection [*Com. Code § 4210(c)(3)*].

Com. Code § 5118 governs priority with respect to security interests of an issuer or nominated person in certain documents presented under letters of credit. Under this provision, if the document (1) is presented in a written or tangible medium, (2) is not a certificated security, chattel paper, a document of title, an instrument, or a letter of credit, and (3) is not in the debtor's possession, the secured interest is perfected and has priority over a conflicting security interest [*Com. Code § 5118(3)*]. If the document is the type of tangible collateral that is excluded from this perfection and priority rule, the issuer or nominated person must comply with the normal method of perfection (for example, possession of an instrument) and is subject to the applicable Division 9 priority rules [see *Com. Code § 5118* (UCC

Comment P 2)].

[15] Perfected Security Interests Arising under Federal Loan Programs

In the absence of a federal statute establishing priority in specific cases, perfected security interests arising from federal loan programs do not take precedence over private perfected security interests. When the United States acts as a lender or guarantor, it does so voluntarily and with detailed knowledge of the borrower's financial status and the accompanying risks. In this respect, it is similar to a private lender and is fully capable of establishing terms that will secure repayment. Therefore, state law is ordinarily the appropriate rule for setting priorities of competing federal and private security interests [*United States v. Kimbell Foods, Inc.* (1979) 440 U.S. 715, 729-733, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (decided under prior law)].

[16] Miscellaneous Priority Provisions

Division 9 also includes a number of miscellaneous priority provisions, such as:

- Clarifications of selected good-faith purchase and similar issues [*see Com. Code §§ 9317, 9331*].
- Priority rules to deal with the "double debtor" problem, arising when a debtor creates a security interest in collateral acquired by the debtor subject to a security interest created by another person [*see Com. Code § 9325*].
- Priority rules to deal with the problems created when a change in an entity's structure results in a new entity that has become bound by the original debtor's after-acquired property agreement [*see Com. Code § 9326*].
- A provision enabling most transferees of funds from a deposit account or money to take free of a security interest [*see Com. Code § 9332*].
- Priority rules dealing with accessions and commingled goods [*see Com. Code §§ 9335, 9336*].
- Priority rules for security interests in goods covered by a certificate of title perfected in another jurisdiction [*see Com. Code § 9337*].
- Provisions designed to ensure that priority provisions in deposit accounts will not extend to most transferees of funds on deposit or payees from deposit accounts and will not otherwise "clog" the payment system [*see Com. Code §§ 9341, 9342*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsAfter-Acquired Property & Future AdvancesCommercial Law (UCC)Secured Transactions (Article 9)PriorityGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PriorityCreditor PrioritiesFuture AdvancesCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)PriorityPurchasers & Perfected Secured PartiesGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 42 SECURED TRANSACTIONS
PART II. LEGAL BACKGROUND

19-42 California Legal Forms--Transaction Guide § 42.16

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§ 42.16 Default

[1] Acts Constituting Default

The Commercial Code does not specifically define default in the context of a security agreement [*see Com. Code § 9601*]. Generally, default is the failure of the debtor to perform the requirements imposed by the security agreement in a timely manner. Division 9 also leaves to the agreement of the parties the circumstances giving rise to a default [*see Com. Code § 9601* (UCC Comment P 3); *see also § 42.200*]. Events of default under a security agreement typically include (1) default under the terms of the secured obligation, such as a failure to make payments; (2) failure to maintain or insure the collateral; and (3) unauthorized removal of collateral. The particular events constituting default under a security agreement must be negotiated between the debtor and the secured party [*see Com. Code § 9601* (UCC Comment P 3); McDonnell, Secured Transactions Under the UCC, Ch. 8, *The Secured Party and Default Proceedings Under Article 9* (Matthew Bender)].

The Commercial Code provisions governing default and enforcement provide parallel treatment for security interests and agricultural liens. However, because agricultural liens are statutory rather than consensual, the code draws a few distinctions between these liens and security interests (*see, e.g., Com. Code § 9601(e)(3)*) [*see Com. Code § 9601* (UCC Comment P 6)]. A default occurs in connection with an agricultural loan at the time the secured party becomes entitled to enforce the lien in accordance with the statute under which it was created [*Com. Code § 9606*].

[2] Debtor's or Obligor's Rights and Remedies After Default

[a] Eligible Debtors and Obligors

The Commercial Code grants certain rights and remedies to the defaulting debtor and obligor [*see Com. Code §§ 9601(d)*, *9602*; *see also Com. Code § 1201(b)(34)* (rights includes remedies)]. A debtor, for these purposes, is any person with a non-lien interest in collateral [*see Com. Code § 9102(a)(28)(A)*; *Com. Code § 9601(g)* *see also Com. Code § 9101* (UCC Comment P 4i)]. An obligor is a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (1) owes payment or other performance of the obligation, (2) has

provided property other than the collateral to secure payment or other performance of the obligation, or (3) is otherwise accountable in whole or in part for payment or other performance of the obligation [*Com. Code* § 9102(a)(59)]. The term does not include issuers or nominated persons under a letter of credit [*Com. Code* § 9102(a)(59)].

[b] Secondary Obligors

With one exception, the rights (and duties) in this part of the Commercial Code [*see Com. Code* § 9601 *et seq.* (default and enforcement)] affect non-debtor obligors only if they are "secondary obligors" [*see Com. Code* § 9101 (UCC Comment P 4i); *see also Com. Code* § 9616(b)(2), (d) (exception for consumer obligor)]. A "secondary obligor" is defined to include one who is secondarily obligated on the secured obligation, for example, a guarantor, or one who has a right of recourse against the debtor or another obligor with respect to an obligation secured by collateral [*see Com. Code* § 9102(a)(71)(B)].

[c] Secured Party Relieved of Duty

The secured party is relieved from any duty or liability to a debtor or obligor unless the secured party knows [*see Com. Code* § 1202(b) ("knowledge" means actual knowledge)] that the person is a debtor or obligor [*see Com. Code* §§ 9605(1), 9628(b)(1)]. Similarly, the secured party is relieved from duties to a secured party or lienholder who has filed a financing statement against the debtor, if the secured party does not know about the debtor [*see Com. Code* §§ 9605(2), 9628(b)(2); *see also Com. Code* § 9605 (UCC Comment P 2 (example))].

[d] Available Rights and Remedies; Expansion and Waiver of Statutory Rights

After default, a debtor and an obligor have the rights and remedies provided by *Com. Code* § 9207 (rights and duties of secured party having possession or control of collateral) and *Com. Code* § 9601 *et seq.* (default and enforcement), as well as those provided by the security agreement [*see Com. Code* § 9601(d)]. For a guide to the rights and remedies of the parties on default, see §§ 42.141 and 42.142. For a guide to drafting a security agreement, including permissible provisions varying or waiving the parties' rights and remedies on default, see § 42.130.

A security agreement may expand the rights of the debtor or the obligor on default, but it may not waive or alter the rights provided in the Commercial Code, except as expressly permitted by the Code [*Com. Code* § 9602; *see Com. Code* § 9602 (UCC Comment P 2)]. With limited exceptions, the following rules may not be waived or varied to the extent that they give rights to the debtor or obligor and impose duties on the secured party [*Com. Code* § 9602; *see Com. Code* § 9624 (exceptions relating to some dispositions and redemptions of collateral)]:

- The rule dealing with the use and operation of the collateral by the secured party [*see Com. Code* § 9207(b)(4)(C)].
- The rules dealing with requests for an accounting and requests concerning a list of collateral and statement of account [*see Com. Code* § 9210].
- The rules requiring that a secured party proceed in a commercially reasonable manner in exercising its collection and enforcement rights [*see Com. Code* § 9607(c)].
- The rules dealing with application or payment of noncash proceeds of collection, enforcement, or disposition [*see Com. Code* §§ 9608(a), 9615].
- The rules dealing with the accounting for or payment of surplus proceeds of collateral [*see Com. Code* §§ 9608(a), 9615(d)].

- The rule imposing on a secured party that takes possession of collateral without judicial process the duty to do so without breach of the peace [*see Com. Code § 9609*].
- The rules dealing with the disposition of collateral [*see Com. Code §§ 9610(b), 9611, 9613, 9614; but see Com. Code § 9624(a)* (waiver of right of notification under *Com. Code § 9611*)].
- The rule dealing with the calculation of a deficiency or surplus when a disposition is made to the secured party, a person related to the secured party, or a secondary obligor [*see Com. Code § 9615(f)* ("low-price" dispositions)].
- The rule dealing with the secured party's required explanation of the calculation of a surplus or deficiency [*see Com. Code § 9616*].
- The rules dealing with the acceptance of collateral in satisfaction of an obligation [*see Com. Code §§ 9620-9622; but see Com. Code § 9624(b)* (waiver of right to require disposition under *Com. Code § 9620(e)*)].
- The rule dealing with the redemption of collateral [*see Com. Code § 9623; but see Com. Code § 9624(c)* (waiver of right to redeem non-consumer collateral under *Com. Code § 9623*)].
- The rule dealing with permissible waivers [*see Com. Code § 9624*].
- The rules dealing with the existence of a deficiency and with the secured party's liability for failure to comply with Division 9 [*see Com. Code §§ 9625, 9626*].

Statutory rules not enumerated above [*see Com. Code § 9602*] are subject to *Com. Code § 1302(b)*, which specifies that, with exceptions relating to good faith, diligence, reasonableness, and care, the immediate parties, between themselves, may vary Commercial Code provisions by agreement [*see Com. Code § 1302(b); Com. Code § 9602; see also Com. Code § 1103(b)* (supplementary principles of general law are applicable); *Com. Code § 9603* (parties may determine, by agreement, standards measuring fulfillment of rights and duties under *Com. Code § 9602* if standards are not manifestly unreasonable)].

[e] Credit Disability Insurance

If the debtor has bought credit disability insurance from the creditor, or if the creditor arranged for or received compensation for such a sale, the creditor may not impose late charges, accelerate a due date, collect any credit balance, or enforce any security interest in any manner until three calendar months after the earlier of (1) the date that the first missed payment is due, or (2) the date that the insurer pays or rejects the debtor's claim [*see Civ. Code § 1812.402(a); see also Civ. Code §§ 1812.401(d), 1812.403-1812.407; Ch. 45, Consumer Installment Loans and Credit Sales*].

[3] Secured Party's Rights and Remedies After Default

[a] In General

After default by the debtor, the secured party may exercise the rights and remedies granted under the default provisions of Division 9, and, except as otherwise provided in *Com. Code § 9602* [*see [2], above*], the rights provided by the security agreement [*Com. Code § 9601(a); see [1], above* (discussing what constitutes default)]. These statutory rights include [*see Com. Code § 9601(a), (b)*]:

- The right to reduce a claim to judgment, foreclose, or otherwise to enforce the claim, security

interest, or agricultural lien by any available judicial procedure [see *Com. Code § 9601(e)* (judicial lien relates back to earlier of date of filing or date of perfection, thus, giving secured party who enforces security interest by judicial process the benefit of *Com. Code § 9322(a)(1)*'s first-to-file-or-perfect priority rule); *Com. Code § 9601(f)* (execution sale is appropriate method of foreclosure under *Com. Code § 9601 et seq.*, but is governed by law other than Division 9)].

- If the collateral is documents, the right to proceed either as to the documents or as to the goods they cover.

- If the secured party is in possession of collateral or control of collateral [see *Com. Code §§ 9104-9107* (control)], the rights and duties provided in *Com. Code § 9207* [see § 42.13[1]].

These statutory rights are cumulative and may be exercised simultaneously [*Com. Code § 9601(c)*].

With the exception of the rules requiring that a secured party proceed in a commercially reasonable manner in exercising its collection and enforcement rights [see *Com. Code § 9607(c)*], the statutory provisions governing default [see *Com. Code § 9601 et seq.*] impose no duties on a secured party that is a consignor or is a buyer of accounts, chattel paper, payment intangibles, or promissory notes [*Com. Code § 9601(g)*].

Generally, the secured party must account to and pay a debtor for any surplus [see *Com. Code § 9608(a)(4), (b)*; see also *Com. Code § 9615(d)(1), (e)* (specifying manner in which proceeds of collection and enforcement must be applied); and [j], below; but see *Code Civ. Proc. § 701.040(b)*]. With some limitations, the secured party also may seek a deficiency judgment against the obligor when the underlying transaction secures an indebtedness [see *Com. Code §§ 9608(a)(4), 9615(d)(2)*; [j], below; see also *Com. Code § 9626(b)* (special rules for consumer transactions)].

If an obligation is secured by both personal property or fixtures [see *Com. Code § 9102(a)(41)* (definition)] and an interest or estate in real property, the secured party may proceed, in any sequence [*Com. Code § 9604(a)*]:

- (1) As to the real property security, in accordance with the secured party's rights and remedies in respect of the real property and, as to the personal property or fixtures, in accordance with the default and enforcement provisions of Division 9;
- (2) As to both some or all of the real property and some or all of the personal property or fixtures, in accordance with the secured party's rights and remedies with respect to the real property, by including the selected portion of the personal property or fixtures in the judicial or nonjudicial foreclosure of the real property; or
- (3) In accordance with Paragraph 1, above, as to part of the personal property or fixtures, and, in accordance with Paragraph 2, above, as to another part of the personal property or fixtures.

A secured party that exercises rights under the default and enforcement provisions of Division 9 [see *Com. Code § 9601 et seq.*] with respect to personal property does not prejudice any rights under real property law [see *Com. Code § 9604(a)(1)(B)*].

In general, statutory provisions and limitations governing real property and obligations secured by real property do not apply to personal property or fixtures other than personal property or fixtures as to which the secured party has proceeded (or is proceeding) in accordance with the secured party's rights and remedies under the default provisions of Division 9, or to the obligations secured by the personal property or fixtures [*Com. Code § 9604(a)(2)(A)*; see *Code Civ. Proc. § 726*]. These statutory provisions and limitations include, but are not limited to, *Code Civ. Proc. § 726*, governing foreclosure actions in general, provisions governing acceleration or reinstatement of obligations, prohibitions

against deficiency judgments, limitations on deficiency judgments based on the value of the collateral, limitations on the right to proceed against the collateral, and requirements that the creditor resort either first or not at all to the security [Com. Code § 9604(a)(2)(A)].

PRACTICE TIP:

CAUTION. The three-month time limit for seeking a deficiency judgment after a real property judicial foreclosure sale set forth in *Code of Civ. Proc.* § 726(b) does not apply to a mixed collateral obligation when the real property is sold in a nonunified sale [*Florio v. Lau* (1998) 68 Cal. App. 4th 637, 653, 80 Cal. Rptr. 2d 409 (deciding, in case of first impression, that *Code of Civ. Proc.* § 726(b) may not be applied in its entirety to mixed collateral situation without running afoul of Legislature's stated purpose in enacting mixed collateral statutes)].

These limitations, however, do not deprive the debtor of the statutory protection against a deficiency judgment following a sale of the real property collateral, and do not apply to a loan or credit sale made to an individual primarily for personal, family, or household purposes [see Com. Code § 9604(a)(3); see also *Code Civ. Proc.* §§ 580a, 580d].

For a detailed guide to the rights and remedies of the parties on default, see §§ 42.141 and 42.142. For a guide to drafting a security agreement, including permissible provisions varying or waiving the parties' rights and remedies on default, see § 42.130.

[b] Execution of Judgment

If the secured party reduces the claim to judgment, any resulting judgment lien made on the collateral will relate back to the earliest of any of the following [Com. Code § 9601(e)]:

- The date of perfection of the security interest or agricultural lien in the collateral.
- The date of filing a financing statement covering the collateral.
- Any date specified in a statute under which the agricultural lien was created.

Because the judicial lien relates back to earlier of the date of filing or the date of perfection, the secured party who enforces the security interest by judicial process has the benefit of the first-to-file-or-perfect priority rule of Com. Code § 9322(a)(1) [see Com. Code § 9601 (UCC Comment P 6)]. Because agricultural liens are statutory rather than consensual, the statute creating an agricultural lien would govern whether and the date to which an execution lien relates back [see Com. Code § 9601(e)(3); Com. Code § 9601 (UCC Comment P 6); see also Com. Code § 9606 (explaining when default occurs in agricultural lien context); [1], above].

A judicial sale pursuant to the execution of judgment is considered a foreclosure of the security interest or agricultural lien by judicial procedure [Com. Code § 9601(f); see also [c], below]. The secured party may purchase the collateral at the sale and, after the sale, hold the property without having to comply with the other requirements of Division 9 governing procedures on default, such as notice. Therefore, the restrictions imposed on the right of a secured party to buy collateral at a sale [see Com. Code § 9610] do not apply in this context [see Com. Code § 9601(f); Com. Code § 9601 (UCC Comment P 8); see also *Code Civ. Proc.* §§ 683.010, 683.020, 699.510, 712.010]. For a detailed discussion of execution of judgments, including forms, see California Forms of Pleading and Practice, Ch. 254, *Executions and Enforcement of Judgment* (Matthew Bender).

[c] Foreclosure or Other Judicial Enforcement

If the secured party elects to foreclose or to enforce the claim under any available judicial procedure, the proceedings

are governed by state law outside of Division 9 of the Commercial Code [see *Com. Code* § 9601(f); *Com. Code* § 9601 (UCC Comment P 8)], such as those provisions governing foreclosure of mortgages [see *Code Civ. Proc.* §§ 725a-730] and execution of judgments [see *Com. Code* § 9601(f); see also *Code Civ. Proc.* §§ 683.010-683.050, 699.510 *et seq.*, 712.010 *et seq.*]. For a detailed guide to these procedures, see California Forms of Pleading and Practice, Ch. 254, *Executions and Enforcement of Judgment and Sales*, pt. IV (Matthew Bender). For a detailed guide to procedures governing deficiency judgments, see California Forms of Pleading and Practice, Ch. 503, *Sales: Secured Transactions* (Matthew Bender).

[d] Possession of Collateral

Absent agreement to the contrary, a secured party has the right to take possession of collateral after default, or without removal, render equipment unusable and dispose of collateral on a debtor's premises, or to do both [*Com. Code* § 9609(a); see *Com. Code* § 9610 (disposition after default)]. The secured party may take possession without judicial process, if it is possible to do so without a breach of the peace; otherwise, the secured party may proceed through a court action [*Com. Code* § 9609(b); *Com. Code* § 9609 (UCC Comment P 3) (examples of conduct courts have held to constitute breach of peace); see also *Com. Code* § 9625(b), (c); *Com. Code* § 9625 (UCC Comment P 3) (damages based on secured party's breach of peace in connection with taking possession of collateral)].

If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties [*Com. Code* § 9609(c); see *Com. Code* § 9609 (UCC Comment P 8) (debtor's agreement to assemble and make available collateral and secured party's right to disassemble equipment and dispose of collateral on debtor's premises are likely topics for agreement on standards under *Com. Code* § 9603)]. For further discussion of repossessing collateral without judicial process, see *Secured Transactions Under the UCC*, Ch. 8, *The Secured Party and Default Proceedings* (Matthew Bender).

A secured party in possession of collateral has a duty, even after default, to use reasonable care in its custody and preservation [*Com. Code* § 9207(a); see *Com. Code* § 9601(b); *Com. Code* § 9207 (UCC Comment P 4) (reasonable care following default); see also *Com. Code* § 9207(d) (exception if secured party is seller of accounts, chattel paper, payment intangibles, or promissory notes or consignor)]. For further discussion of the rights and duties of a secured party having possession or control of the collateral, see § 42.13[1].

[e] Acceptance of Collateral in Satisfaction of Obligation

A secured party generally may accept collateral in partial satisfaction, as well as full satisfaction, of the obligations secured, if specified conditions relating to consent by the debtor and any secondary obligor or holder of a junior interest or lien are met [see *Com. Code* § 9620(a)]. This right is sometimes referred to as the right of "strict foreclosure," a procedure by which the secured party acquires the debtor's interest in the collateral without the need of a sale or other disposition [see *Com. Code* § 9620 (UCC Comment P 2); see also *Com. Code* § 9610 (disposition of collateral after default), [h], *below*]. The simplified procedure for strict foreclosures in revised Division 9, effective on July 1, 2001 [see *Stats.* 1999 ch. 991, § 35; see also § 42.10[2][b]] reflects the belief that strict foreclosures should be encouraged and often will produce better results than a disposition for all concerned [see *Com. Code* § 9620 (UCC Comment P 2); cf. former *Com. Code* § 9505].

[f] Conditions for Acceptance of Collateral

Except in consumer transactions [see *Com. Code* § 9620(g) (secured party may not accept collateral in partial satisfaction of obligation it secures)], a secured party may accept collateral in full or partial satisfaction of the obligation it secures if all of the following conditions are satisfied [*Com. Code* § 9620(a)(1)-(3)]:

- The debtor consents to the acceptance [*see Com. Code § 9620(c)* (conditions to effective acceptance)].
- The secured party does not receive, within the prescribed time period [*see Com. Code § 9620(d)*], a notification of objection to the proposal to accept the collateral, authenticated by either a person to which the secured party was required to send the proposal or any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the proposal [*see Com. Code § 9621* (notification requirements)].
- If the collateral is consumer goods, the collateral is not in the possession of the debtor when the debtor consents to the acceptance.
- *Com. Code § 9620(e)*, which imposes an obligation on the secured party to dispose of consumer goods under certain circumstances, does *not* require the secured party to dispose of the collateral or the debtor waives the requirement [*Com. Code § 9620(a)(4)*; *see Com. Code § 9624* (waiver)].

To ensure that the *debtor* cannot unilaterally cause an acceptance of collateral, the statute also provides that compliance with the conditions enumerated above [*see Com. Code § 9620(a)*] is necessary, but not sufficient to cause an acceptance of collateral [*see Com. Code § 9620(b)(2)*; *Com. Code § 9620* (UCC Comment P 5)]. Rather, acceptance does not occur unless, in addition, the secured party consents to the acceptance in an authenticated record or sends the debtor a proposal [*see Com. Code § 9620(b)(1)*].

PRACTICE TIP:

For the above reason, a mere delay in collection or disposition of collateral does not constitute a "constructive" foreclosure. Instead, delay is a factor relating to whether the secured party acted in a commercially reasonable manner under *Com. Code §§ 9607 and 9610* [*see Com. Code § 9620* (UCC Comment P 5); *see also [h], below*].

Once all of these conditions [*see Com. Code § 9620(a), (b)*] have been met, the secured party need take no further action in order to accept collateral. Absent circumstances indicating a contrary intent, the fact that the conditions have been met provides a sufficient indication that the secured party has consented or proposed and that the debtor has consented or failed to object. Following a proposal, acceptance of collateral is automatic on the secured party's becoming bound and the time for objection passing [*see Com. Code § 9620(c)* (conditions to effective acceptance); *Com. Code § 9620(d)* (when objection is timely and thus prevents acceptance of collateral from taking effect)].

PRACTICE TIP:

As a matter of good business practice, an enforcing secured party may wish to memorialize its acceptance following a proposal, for example, by notifying the debtor that the strict foreclosure is effective or by placing a written record to that effect in its files [*see Com. Code § 9620* (UCC Comment P 6)].

Special rules apply in consumer cases. The secured party in consumer transactions is prohibited from accepting collateral in partial satisfaction of the obligation it secures [*Com. Code § 9620(g)*]. Also, unless the debtor agrees to waive the requirements in an authenticated record after default, the secured party must, in certain cases, dispose of consumer goods collateral that has been repossessed [*see Com. Code § 9620(e), (f)*]. For further discussion of the rules on consumer transactions, see § 42.247.

[g] Effect of Acceptance of Collateral

A secured party's acceptance of collateral in full or partial satisfaction of the obligation it secures discharges the

obligation to the extent consented to by the debtor [*Com. Code § 9622(a)(1)*]. In addition, acceptance of collateral effects other property rights and interests as follows [*Com. Code § 9622(a)(2)-(4)*]:

- It transfers to the secured party all of a debtor's rights in the collateral [*cf. Com. Code § 9617(a)* (rights of transferee of collateral)].
- It discharges the security interest or agricultural lien that is the subject of the debtor's consent and any subordinate security interest or other subordinate lien.
- It terminates any other subordinate interest.

A subordinate interest is discharged or terminated by the secured party's acceptance of the collateral, even if the secured party fails to comply with this division [*Com. Code § 9622(b)*].

For a detailed guide to the procedures for retaining collateral after default, see § 42.141, P 8. For related forms, see §§ 42.245-42.247.

[h] Disposition of Collateral

After default, a secured party may sell, lease, license, or otherwise dispose of some or all of the collateral, either in its present condition or following any commercially reasonable preparation or processing [*Com. Code § 9610(a)*]. Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable [*Com. Code § 9610(b)*; *see Com. Code § 9627* (circumstances under which disposition is "commercially reasonable"); *see also Com. Code § 2706* (UCC Comment PP 2-9) (seller's obligation to make resale in good faith and in commercially reasonable manner)]. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by contract, as a unit or in parcels, and at any time and place and on any terms [*Com. Code § 9610(b)*]. The secured party has the duty to obtain the best price possible under the circumstances prevailing at the time of the disposition [*J.T. Jenkins Co. v. Kennedy* (1975) 45 Cal. App. 3d 474, 480 n.15, 119 Cal. Rptr. 578 (decided under prior law)], but is not liable for a decrease in value [*Hutchison v. Southern California First Nat. Bank* (1972) 27 Cal. App. 3d 572, 583, 103 Cal. Rptr. 816 (decided under prior law)].

The provisions governing default maintain two distinctions between "public" and other dispositions [*see Com. Code § 9610* (UCC Comment P 7)]. First, the secured party may purchase collateral at a public disposition without limitation [*see Com. Code § 9610(c)(1)*], but may purchase collateral at a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations [*Com. Code § 9610(c)(2)*]. Second, the debtor is entitled to notification of "the time after which" a private disposition or other intended disposition is to be made [*see Com. Code § 9613(1)(E)*; *see also Com. Code § 9617(b)* (unitary standard applies to transferees acting in good faith in both private and public dispositions)].

The transferee in a disposition enjoys the benefit of any title, possession, quiet enjoyment, and similar warranties that would have accompanied the disposition by operation of non-Division 9 law, had the disposition been conducted under other circumstances [*Com. Code § 9610(d)*; *see Com. Code § 9610* (UCC Comment P 11) (examples); *see also Com. Code § 9619* (transfer of record or legal title)]. These warranties may be disclaimed either under other applicable law or by communicating a record containing an express disclaimer. The record need not be written, but an oral communication would not be sufficient [*see Com. Code § 9610(e)*; *see also Com. Code § 9610(f)* (sample wording sufficient to disclaim warranties under this provision)].

A transfer of record or legal title to a secured party, however, is not of itself a disposition under the provisions governing default. This rule applies regardless of the circumstances under which the transfer occurred [*Com. Code § 9619(c)*].

[i] Notification of Disposition

Unless the collateral is perishable, threatens to decline speedily in value, or is of a type customarily sold on a recognized market, a secured party must send a reasonable, authenticated notification of a disposition of collateral to the debtor, any secondary obligor, and to other secured parties and lienholders who have filed financing statements against the debtor covering the collateral [*Com. Code* § 9611(b)-(d); *see Com. Code* § 9612 (timeliness of notification); *Com. Code* § 9613 (form of notification for non-consumer transactions); *Com. Code* § 9314 (form of notification for consumer goods transactions); *see also Union Safe Deposit Bank v. Floyd* (1999) 76 Cal. App. 4th 25, 32, 90 Cal. Rptr. 2d 36 (bank's notice was defective under former *Com. Code* § 9504(3) when it failed to state, expressly or impliedly, whether sale would be public or private, decided under prior law)]. However, the secured party satisfies its notification duty if the secured party undertakes a search of the records and a report of the results is unreasonably delayed [*see Com. Code* § 9611(e)].

For further discussion of the notification procedure and statutory forms of notification for non-consumer and for consumer goods transactions, see §§ 42.240 and 42.241.

[j] Application of Proceeds; Surplus or Deficiency

The proceeds of the disposition [*see Com. Code* § 9610] must be used in the prescribed order [*see Com. Code* § 9615(a)]: First, to reimburse the secured party for the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorneys' fees and legal expenses incurred by the secured party [*Com. Code* § 9615(a)(1)]. Second, to satisfy the obligations secured by the security interest or agricultural lien under which the disposition is made [*Com. Code* § 9615(a)(2)]. Third, to satisfy the obligations secured by any subordinate security interest in or other subordinate lien on the collateral and to satisfy any subordinate attachment lien or execution lien, if specified conditions are met [*see Com. Code* § 9615(a)(3); *see also Code Civ. Proc.* § 701.040(b) (payment of excess property, payments, or proceeds)].

Further, the enforcing secured party must pay excess proceeds first to subordinate secured parties or lienholders whose interests are senior to that of the consignor, and, finally to the consignor [*see Com. Code* § 9615(a), (d)]. Because the consignor is the owner of the collateral, secured parties and lienholders whose interests are junior to the consignor's interest will not be entitled to any proceeds [*see Com. Code* § 9615 (UCC Comment P 2)]. Similarly, the debtor is not entitled to a surplus when the enforcing secured party is required to pay over proceeds to a consignor [*Com. Code* § 9615(d)(1)].

In addition, the obligor may be liable for any deficiency resulting from the disposition of the collateral [*see Com. Code* § 9615(d)(2)]. In a consumer goods transaction, a secured party must provide the debtor with a notification of how it calculated a deficiency at the time it first undertook to collect the deficiency [*see Com. Code* § 9616]. When the secured party, a person related to the secured party [*see Com. Code* § 9102(a)(72) (definition)], or a secondary obligor acquires the collateral at a foreclosure disposition, the Code provides a special method for calculating a deficiency or surplus to adjust for any lack of incentive on the part of the secured party to maximize the proceeds of the disposition [*see Com. Code* § 9615(f); *Com. Code* § 9615 (UCC Comment P 6)]. This rule applies to dispositions that comply with the procedural requirements of Division 9 (for example, they are conducted in a commercially reasonable manner following reasonable notice), but nevertheless fetch a low price [*see Com. Code* § 9615 (UCC Comment P 6)]. In non-consumer transactions, another special rule applies to calculating the deficiency claim of a secured party who fails to bear the burden of proving that its collection, enforcement, disposition, or acceptance complied with the relevant provisions under *Com. Code* § 9601 *et seq.* [*see Com. Code* § 9626 ("rebuttable presumption" rule); *see also Com. Code* § 9628 (nonliability and limitation on liability of secured party)].

If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, however, the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency [*Com. Code* § 9615(e)(1)]. In these

circumstances, any attachment liens or execution liens [*see Code Civ. Proc. § 701.040*] relating to the payment of proceeds and the liability of the secured party apply only if the security agreement provides that the debtor is entitled to any surplus [*Com. Code § 9615(e)(2)*].

[k] Effect of Disposition

When the collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights in the collateral, discharges the security interest under which the disposition was made, and discharges any other subordinate security interest in or lien against the collateral [*Com. Code § 9617(a)*]. A transferee acting in good faith takes free of all these rights and interests, even if the secured party fails to comply with the statutory requirements for disposition or the requirements of any judicial proceeding [*Com. Code § 9617(b)*]. An aggrieved party (for example, the holder of a subordinate security interest to whom the notification required by *Com. Code § 9611* was not sent) has a right to recover any loss under *Com. Code § 9625(b)* [*see Com. Code § 9617* (UCC Comment P 2); *Com. Code § 9625(b)*]. If a transferee does not take free of these rights and interests (that is, a transferee who does not act in good faith), the transferee takes the collateral subject to the rights of debtor, the security interest or agricultural lien under which the disposition is made, and other security interests or liens [*Com. Code § 9617(c)*].

For a guide to procedures for the disposition of collateral, including notice procedures, see § 42.141, P 7. For related forms, see §§ 42.240-42.249.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)DefaultGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionDisposition of Collateral



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 42 SECURED TRANSACTIONS
PART II. LEGAL BACKGROUND

19-42 California Legal Forms--Transaction Guide § 42.17

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.17 Security Interests in Bankruptcy

[1] Grounds for Invalidating Security Interests After Bankruptcy Filing

A security interest may be challenged on one of several grounds if a bankruptcy action is filed by or against a debtor [see, e.g., 11 U.S.C. §§ 544-548]. Trustees generally rely on three grounds [see McDonnell, Secured Transactions Under the Uniform Commercial Code, Ch. 2, *The Intelligent Lawyer's Guide to Secured Transactions* (Matthew Bender)], discussed individually below.

First, the bankruptcy trustee may avoid a security interest that is unperfected at the time the bankruptcy proceeding is begun. In this case, the bankruptcy trustee is said to have the rights that a state law lien creditor would have if the lien had been established at the time of the bankruptcy. This position, in effect, defeats the priority of unperfected security interests [see 11 U.S.C. § 544(a)].

Second, the bankruptcy trustee may avoid a security interest when there has been a fraudulent conveyance within two years of the date the petition was filed [see 11 U.S.C. § 548]. A fraudulent conveyance occurs when the debtor makes a transfer (including any transfer to or for the benefit of an insider under an employment contract) or incurs an obligation (including any obligation to or for the benefit of an insider under an employment contract) with the actual intent to hinder, delay, or defraud any entity to which the debtor was indebted, or when the debtor receives less than a reasonably equivalent value in exchange for the granting of an interest either to an insider or at a time when the debtor was financially troubled [11 U.S.C. § 548(a)(1)].

Third, a transfer of the debtor's property that is entered into to pay or secure an earlier debt, and that is entered into close in time to the filing of a bankruptcy petition, may be made ineffective as a preferential transfer [see 11 U.S.C. § 547; see also *Cent. Va. Cmty. College v. Katz* (2006) 126 S. Ct. 990, 994, 163 L. Ed. 2d 945 (proceeding initiated by bankruptcy trustee to set aside preferential transfers by debtor to state agencies is not barred by sovereign immunity)]. A preferential transfer contains six distinct elements: (1) it is a transfer of the debtor's property, (2) to or for the benefit of a creditor, (3) for or on account of an antecedent debt, (4) while the debtor is insolvent, (5) during the preference

period, (6) which improves the position of the creditor as to other similarly situated creditors [see 11 U.S.C. § 547(b)]. The acquisition of a security interest under an after-acquired property clause can be a preferential transfer [see 11 U.S.C. § 547(c)(3), (5)].

For the purposes of a preferential transfer, the preference period affecting most creditors is 90 days before the bankruptcy [11 U.S.C. § 547(b)(4)(A); see 11 U.S.C. § 547(f)]; however, the preference period is one year for insiders [11 U.S.C. § 547(b)(4)(B)]. "Insiders" are persons and entities closely related to the debtor. For example, an individual debtor's insiders are his or her general partners; relatives of the debtor or of the debtor's general partners; and partnerships and corporations in which the debtor is a general partner, director, officer, or person in control [11 U.S.C. § 101(31)(A)].

Certain preferential transfers cannot be avoided, regardless of when they are made [11 U.S.C. § 547(c)]. For example, a transfer cannot be avoided if it is part of a substantially contemporaneous exchange for new value [11 U.S.C. § 547(c)(1)]. A transfer creating a security interest is not avoidable to the extent that it is a purchase money security interest acquired with new value and perfected within 10 days after the debtor acquired the collateral [11 U.S.C. § 547(c)(3)]. An otherwise avoidable grant of a security interest in inventory or receivables is not avoidable to the extent that it does not improve the secured party's position [11 U.S.C. § 547(c)(5)].

For a detailed discussion of the grounds for avoiding security interests in bankruptcy, and a discussion of protections against avoidance, see McDonnell, Secured Transactions Under the Uniform Code, Ch. 9, *The Impact of Bankruptcy Law on Secured Financing & Equipment Leasing* (Matthew Bender).

[2] Effect of Bankruptcy Stay

The secured party may not obtain automatic access to the collateral after a bankruptcy filing, even when the secured claim cannot be avoided. The filing of the petition initiates the bankruptcy stay, which bars acts to enforce any claims against the debtor or the debtor's property that were or could have been filed before the commencement of the bankruptcy [11 U.S.C. § 362(a)].

During the course of the stay, the debtor has wide-ranging authority to use, sell, borrow against, or lease the collateral [see 11 U.S.C. §§ 361, 363-365]. Thus, under the stay, the secured party may not correct mistakes in documenting or in filing, because to do so would be an attempt to create or perfect a security interest [see 11 U.S.C. § 362(a)(4), (5)]. Similarly, the secured party may not attempt to shore up its position by seeking additional collateral [see 11 U.S.C. § 362(a)(4), (5)], or attempting collection [see 11 U.S.C. § 362(a)(6)]. However, presentment and requests for payment that do not involve coercion or harassment may be allowed [Morgan Guar. Trust Co. v. American Sav. and Loan (9th Cir. 1986) 804 F.2d 1487, 1491, *cert. denied*, 482 U.S. 929 (1987)].

Although exceptions to a bankruptcy stay are permitted [see 11 U.S.C. § 362(b)], most exceptions are not suitable to secured parties [see, e.g., 11 U.S.C. § 362(b)(1) (criminal proceedings permitted)]. However, secured parties may perfect interests in accordance with certain grace period provisions [see 11 U.S.C. § 362(b)(3)]. In addition, relief from the stay may be permitted for cause, including a lack of adequate protection of an interest in property [see 11 U.S.C. § 362(d)].

For a detailed discussion of the impact of bankruptcy on security interests, see McDonnell, Secured Transactions Under the Uniform Code, Ch. 9, *The Impact of Bankruptcy Law on Secured Financing & Equipment Leasing* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawCase
AdministrationAdministrative PowersStaysCoverageExceptionsPerfection of Property InterestsBankruptcy LawCase
AdministrationExaminers, Officers & TrusteesFraudulent TransfersGeneral OverviewBankruptcy LawCase
AdministrationExaminers, Officers & TrusteesPreferential TransfersExemptionsPurchase-Money Security
InterestsCommercial Law (UCC)Secured Transactions (Article 9)General Overview



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[Reserved]

§§ 42.18[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

19-42 California Legal Forms--Transaction Guide § 42.100

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.100 Facts

1. Identity of debtor, obligor, or secondary obligor.

NOTE:

The definitions of "debtor," "obligor," and "secondary obligor" are important in the context of Part 6 of Division 9 [*Com. Code § 9601 et seq.*], governing default and enforcement. For further discussion, see § 42.10[2].

The "debtor" is any one of the following [*Com. Code § 9102(a)(28)*]:

- A person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor [*see Com. Code § 9102(a)(59)* ("obligor" defined)].
- A seller of accounts, chattel paper, payment intangibles, or promissory notes [*see Com. Code § 9102* (definitions)].
- A consignee [*see Com. Code § 9102(a)(19)* (definition)].

Revised Division 9, effective on July 1, 2001 [*see Stats. 1999 ch. 991, § 35; see also § 42.10[2][b]*], added "obligor" and "secondary obligor." An "obligor" is a person who, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral [*Com. Code § 9102(a)(59)*]:

- Owes payment or other performance of the obligation;
- Has provided property other than the collateral to secure payment or other performance of the obligation; or
- Is otherwise accountable in whole or in part for payment or other performance of the obligation.

The term does not include issuers or nominated persons under a letter of credit.

A "secondary obligor" is an obligor to the extent that either of the following conditions are satisfied [*Com. Code* § 9102(a)(71)]:

- The obligor's obligation is secondary.
- The obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either.

a. Name, address, and telephone number.

b. Legal status, such as:

- (1) Corporation.
- (2) Partnership.
- (3) Trustee or other fiduciary.
- (4) Other entity (*e.g.*, limited liability company or limited liability partnership).
- (5) Individual.

c. If debtor, obligor, or secondary obligor is corporation:

- (1) Date and state of incorporation.
- (2) Name, title, and telephone number of officer or employee who will handle transaction.

d. If debtor, obligor, or secondary obligor is partnership, names of partners.

e. If debtor, obligor, or secondary obligor is another type of entity (*e.g.*, a limited liability company):

- (1) Date and state of registration.
- (2) Name, title, and telephone number of manager or employee who will handle transaction.

f. If debtor is individual whose spouse has ownership interest in collateral, name and address of spouse.

2. Identity of secured party.

NOTE:

The "secured party" includes any of the following [*Com. Code § 9102(a)(72)*]:

- A person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding.
- A person that holds an agricultural lien [*see Com. Code § 9102(a)(5)* (definition)].
- A consignor.
- A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold [*see Com. Code § 9102(a)(2), (11), (61), (65)* (definitions)].
- A trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for [*see Com. Code § 9102* (UCC Comment P 2b) (providing examples of status of various types of representatives)].
- A person that holds a security interest arising under *Com. Code § 2401* (seller's reservation of title to goods), *Com. Code § 2505* (seller's shipment of goods under reservation), *Com. Code § 2711(3)* (buyer's security interest in rejected goods), or under *Com. Code § 10508(e)* (lessee's security interest in goods in lessee's possession).

The definition of "secured party" controls, among other things, which person has the duties and liabilities that the provisions governing default [*see Com. Code § 9601 et seq.*] impose on a secured party [*see § 42.16[2], [3]*].

a. Name, address, and telephone number.

b. Legal status, such as:

- (1) Corporation.
- (2) Partnership.
- (3) Trustee or other fiduciary.
- (4) Other entity (*e.g.*, limited liability company or limited liability partnership).
- (5) Individual.

c. If secured party is legal entity:

- (1) Date and state of incorporation or registration, as applicable.

(2) Name, title, and telephone number of officer or employee who will handle transaction.

d. Business or occupation of secured party, such as:

(1) Commercial lender.

(2) Other business enterprise.

(3) Private individual.

3. Information concerning proposed collateral, including:

a. Description and value of collateral.

b. Location of collateral.

c. Current owner of collateral.

4. Purpose of secured transaction, such as:

a. To finance purchase of collateral from secured party.

b. To finance purchase of collateral from third person.

c. To finance purchase of property other than collateral from secured party.

d. To finance purchase of property other than collateral from third person.

e. To provide working capital for business.

f. To secure existing obligation owing from debtor or obligor to secured party.

g. To consolidate debts.

h. To finance medical or other personal, family, or household expenses or obligations.

i. To finance purchase of inventory.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

19-42 California Legal Forms--Transaction Guide § 42.101

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.101 Documents

1. If debtor, obligor, secondary obligor, or secured party is corporation:
 - a. Certified copy of certificate of incorporation and current bylaws.
 - b. Certified copy of directors' resolution, if any, authorizing transaction [*see, e.g., Corp. Code §§ 315, 1001; see Ch. 5, Directors' Meetings, Actions, and Resolutions*].
 - c. Certified copy of shareholders' resolution, if any, approving transaction [*see, e.g., Corp. Code §§ 315, 1001; see also Ch. 8A, Shareholders' Meetings, Voting, and Agreements*].
2. If debtor, obligor, secondary obligor, or secured party is partnership, copy of partnership agreement.
3. If debtor, obligor, secondary obligor, or secured party is trustee or other fiduciary, copy of trust instrument, will, or other document specifying terms of trust or other fiduciary relationship.
4. If debtor, obligor, secondary obligor, or secured party is another type of entity, articles of incorporation, operating agreement, or other documentation, as appropriate.
5. If collateral is to be goods already owned by debtor:
 - a. Copy of bill of sale or other evidence of ownership.

- b. Copy of any existing conditional sales contract, security agreement, or other instrument encumbering goods.
- 6. If collateral is to be goods to be purchased by or for debtor, copy of contract for purchase of goods.
- 7. Copy of any chattel paper, document, or instrument that will serve as collateral.
- 8. If accounts will serve as collateral, copies of accounts or of relevant contracts.
- 9. If collateral is to be cause of action to collect debt:
 - a. Copy of complaint in action and all other pleadings filed in action.
 - b. Copy of any judgment or other orders rendered in action.
- 10. If collateral is subject to any current security interest held by third person, copy of security agreement and UCC financing statement, if any.
- 11. Any other documentation of current ownership of collateral.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

19-42 California Legal Forms--Transaction Guide §§ 42.102-42.109

AUTHOR: by Ann S. Manheimer, J.D.

[Reserved]

§§ 42.102[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

19-42 California Legal Forms--Transaction Guide § 42.110

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.110 Applicable Law

1. Determine whether Division 9 of California Commercial Code applies to contemplated transaction [*see Com. Code § 9101 et seq.*].

NOTE:

Security interests can be created in many forms, including interests in proceeds to which a security interest attaches; accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and goods that are the subject of a consignment [*Com. Code § 9102(a)(12)* ("collateral defined"); *see Com. Code § 1201(b)(35)* ("security interest" includes any interest of cosigner and buyer of accounts, chattel paper, a payment intangible, or promissory note in transactions subject to *Com. Code § 9101 et seq.*]. An agricultural lien can also create a security interest [*see Com. Code § 9109(a)(2)*; *see generally § 42.10[1]*].

Whether an agreement creates a security interest depends on whether the transaction falls within the definition of "security interest" in *Com. Code § 1201(b)(35)*, not on whether the parties intend the law to characterize the transaction as a security interest [*see Com. Code § 9102* (UCC Comment P 3b); *see also Com. Code § 9109* (UCC Comment P 2)]. Whether a transaction in the form of a lease creates a security interest is determined by the facts of the case [*Com. Code §§ 1201(b)(35), 1203(a)*; *see Com. Code § 1203(b)* (factors that determine when lease creates security interest); § 42.12[3][c]]. Thus, when a security interest is created, Division 9 applies regardless of the form of the transaction or the names that the parties have given to it [*Com. Code § 9109* (UCC Comment P 2)]. Division 9 also applies to a security interest in a secured obligation even if the obligation is itself secured by a transaction or interest that is not governed by Division 9 [*Com. Code §*

9109(b)].

a. Determine whether transaction will involve:

(1) Security interest created by contract, in [*Com. Code § 9109(a)(1)*; *see § 42.10[4]*]:

(a) Personal property.

(b) Fixtures.

(2) Security interest arising under [*Com. Code § 9109(a)(1)*; *see Com. Code § 9110*] (special rules applicable to security interests arising under Divisions 2 or 10); *see also § 42.10[4]*:

(a) *Com. Code § 2401* (seller's reservation of title to goods).

(b) *Com. Code § 2505* (seller's shipment of goods under reservation).

(c) *Com. Code § 2711(3)* (buyer's security interest in rejected goods).

(d) *Com. Code § 10508(e)* (lessee's security interest in goods in lessee's possession).

(e) *Com. Code § 4201* (agency status of collecting bank) or *Com. Code § 5118* (issuer or nominated person's security interest).

(3) Agricultural lien [*see Com. Code § 9102(a)(5)* (definition)].

(4) Sale of accounts, chattel paper, payment intangibles, or promissory notes [*see Com. Code § 9102(a)(2), (11), (61), (65)* (definitions)].

(5) Consignment.

NOTE:

Many, but not all, "true" consignments (that is, bailments for the purpose of sale by the bailee) are security interests covered by Division 9 [*see Com. Code § 9109(a)(4)*; *Com. Code § 9101* (UCC Comment P 4a); *see also Com. Code § 9102(a)(20)* ("consignment" defined)]. If a transaction is a "sale or return" as defined in *Com. Code § 2326(1)(b)*, it is not a consignment [*see Com. Code § 9109* (UCC Comment P 6)].

b. Determine proper classification of collateral [*see § 42.11*].

NOTE:

The collateral in a secured transaction subject to Division 9 of the Commercial Code is the property subject to a security interest or agricultural lien [*Com. Code § 9102(a)(12)*]. The term includes proceeds to which a security interest attaches; accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and goods that are the subject of a consignment [*Com. Code § 9102(a)(12)*]. With few exceptions (such as nonconsensual agricultural liens), Division 9 of the California Commercial Code applies only to consensual security interests in personal property [*see Com. Code § 9109*; *Com. Code § 9109* (UCC Comment P 10); *see § 42.10[4][a]*].

Former *Com. Code § 9102(1)* (repealed eff. July 1, 2001) enumerated common categories of collateral in personal property, including goods [*see P 1, below*], documents [*see P 2, below*], instruments (which,

under the expanded scope of revised Division 9, include promissory notes) [*see* P 3, **below**], accounts [*see* P 4, **below**], chattel paper [*see* P 5, **below**], and general intangibles (which, under the expanded scope of revised Division 9, include payment intangibles and software) [*see* P 6, **below**]. The term "collateral" now also explicitly includes proceeds subject to a security interest [*see* *Com. Code* § 9102(a)(12); § 42.10[1]] and property subject to an agricultural lien [*see* *Com. Code* § 9109(a)(2)]. Although the revised basic scope provision, *Com. Code* § 9109(a)(1), no longer includes the above list of common categories, "no change in meaning is intended" by its omission [*see* *Com. Code* § 9109(a)(1) (UCC Comment P 2)], and the list provides a useful framework to discuss the types of collateral in personal property that commonly give rise to security interests. For further discussion and definitions, see §§ 42.10, 42.11.

(1) Determine whether collateral is goods, such as [*see* *Com. Code* § 9102(a)(44); *see also* § 42.11[2][a]]:

NOTE:

"Goods" includes all things that are movable at the time that the security interest attaches [*Com. Code* § 9102(a)(44); *see* § 42.12 (attachment)]. The term includes fixtures; standing timber that is to be cut and removed under a conveyance or contract for sale; the unborn young of animals; crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes; and manufactured homes [*Com. Code* § 9102(a)(44)]. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program, if the program customarily is considered part of the goods, or if by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods [*Com. Code* § 9102(a)(44)]. For further discussion of goods, including classes of goods, refer to § 42.11[2][a].

"Goods" does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded [*Com. Code* § 9102(a)(44)]. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction [*Com. Code* § 9102(a)(44)].

(a) Fixtures [*see* *Com. Code* § 9334(a)].

(b) Standing timber that is to be cut and removed under a conveyance or contract for sale.

(c) "Farm products," including [*see* *Com. Code* § 9102(a)(34), (44)]:

NOTE:

Goods, other than standing timber, are "farm products" if the debtor is engaged in a farming operation with respect to the goods [*Com. Code* § 9102(a)(34)]. Goods that are farm products cannot be classified as inventory or equipment [*Com. Code* § 9102 (UCC Comment P 4a); *see* (P g), (P h), **below**].

- (i) Livestock, including unborn young of animals.
 - (ii) Crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes.
 - (iii) Aquatic goods produced in agricultural or farming operations.
 - (iv) Supplies used or produced in farming operation.
 - (v) Products of crops or livestock in their unmanufactured state.
- (d) Manufactured homes [*see Com. Code § 9102(a)(53)* (definition)].
- (e) Computer program embedded in goods and any supporting information provided in connection with transaction relating to the program.

NOTE:

A computer program embedded in goods and any supporting information are "goods" if the program customarily is considered part of the goods, or if by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods [*Com. Code § 9102(a)(44)*].

- (f) Consumer goods.

NOTE:

"Consumer goods" are goods that are used or bought for use primarily for personal, family, or household purposes [*Com. Code § 9102(a)(23)*; *see Com. Code § 9102* (UCC Comment P 4a)].

- (g) Inventory.

NOTE:

"Inventory" means goods, other than farm products, that are leased by a person as lessor; held by a person for sale or lease or to be furnished under a contract of service; furnished by a person under a contract of service; or consist of raw materials, work in process, or materials used or consumed in a business (for example, fuel used in operations) [*Com. Code § 9102(a)(48)*; *see Com. Code § 9102* (UCC Comment P 4a); *see also United States v. Handy and Harman* (9th Cir. 1984) 750 F.2d 777, 781 n.2 (decided under former law)]. Implicit in the definition is the criterion that the sales or lease are or will be in the ordinary course of business. For example, machinery used in manufacturing is equipment, not inventory, even though it is the debtor's policy to sell machinery when it becomes obsolete or worn [*Com. Code § 9102* (UCC Comment P 4a)].

- (h) Equipment.

NOTE:

"Equipment" includes goods that are not inventory, farm products, or consumer goods [*Com. Code § 9102(a)(33)*]. In general, goods used in a business are equipment if they are fixed assets or have, as identifiable units, a relatively long period of use. However, goods are inventory, even though not held for sale or lease, if they are used up or consumed in a short period of time in producing a product or providing a service [*Com. Code § 9102*].

(UCC Comment P 4a); *see* P g, **above**].

(i) Accessions [*see Com. Code § 9102(a)(1)* (definition)].

(2) Determine whether collateral is document, including [*see Com. Code § 9102(a)(30)* (definition); *see also* § 42.11[2][c]]:

(a) Document of title, such as [*Com. Code § 1201(b)(16)*]:

NOTE:

In order to be a document of title, the document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession that either are identified or are fungible portions of an identified mass [*Com. Code § 1201(b)(16)*; *see Com. Code § 7102(a)(9)* ("person entitled under the document" defined)].

(i) Bill of lading.

(ii) Dock warrant.

(iii) Dock receipt.

(iv) Warehouse receipt.

(v) Order for delivery of goods.

(vi) Any other document that in course of business or financing is treated as adequately evidencing that person in possession of it is entitled to receive, hold, and dispose of document and goods it covers.

(b) Warehouse receipt issued by owner of goods [*see Com. Code § 7201(b)*].

(3) Determine whether collateral is instrument, including [*see Com. Code § 9102(a)(47)* (definition); *see* § 42.11[2][d]]:

NOTE:

Under Division 9, an "instrument" includes a negotiable instrument, such as a note, draft, check, certificate of deposit, or demand draft [*Com. Code § 9102(a)(47)*; *see Com. Code § 3104* ("negotiable instrument" defined)]. Under this division, an instrument also includes any other writing that evidences a right to the payment of money that is transferable by delivery with any necessary endorsement or assignment in the ordinary course of business and that is not itself a security agreement or lease [*Com. Code § 9102(a)(47)*]. The term does **not** include investment property [*see Com. Code § 9102(a)(49)* (definition)], letters of credit [*see Com. Code § 5102(a)(10)* (definition)], or writings that evidence a right to payment arising out of the use of a credit card or a charge card or information contained on or for use with the card [*Com. Code § 9102(a)(47)*].

Except in the case of chattel paper [*see* [5], **below**], the fact that an instrument is itself secured by a security interest or an encumbrance on property does not change the character of the instrument as such or convert the combination of instrument and collateral into a separate classification of personal property [*Com. Code § 9102* (UCC Comment P 5c)].

(a) Negotiable instrument, such as [*see Com. Code § 3104*]:

- (i) Draft.
- (ii) Check.
- (iii) Certificate of deposit.
- (iv) Note.
- (v) Demand draft.

(b) Other writing evidencing right to payment of money that is, in ordinary course of business, transferred by delivery with any necessary indorsement and assignment and that is not itself security agreement or lease.

(c) Promissory note.

NOTE:

A "promissory note" is an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds [*Com. Code § 9102(a)(65)*]. The definition explicitly excludes obligations arising out of "orders" to pay (checks, for example), as opposed to "promises" to pay [*Com. Code § 9102* (UCC Comment P 5c); *see Com. Code § 3104* (definitions)]. Revised Division 9 includes the sale of promissory notes within its scope [*see Com. Code § 9109(a)(3)*; *see also § 42.11[2][c]*].

(4) Determine whether collateral is account or accounts, that is, a right to payment of a monetary obligation, whether or not earned by performance [*see Com. Code § 9102(a)(2)*; *see also § 42.11[2][e]*]:

- (a) For property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of.
- (b) For services rendered or to be rendered.
- (c) For a policy of insurance issued or to be issued, *e.g.*, health care receivables.

NOTE:

A health care insurance receivable is an interest in, or claim under, an insurance policy that is a right to payment of a monetary obligation for health care goods or services provided or to be provided [*Com. Code § 9102(a)(46)*]. Although health care receivables are accounts, the rules generally applicable to account debtors on accounts do not apply to insurers obligated on health care insurance receivables [*see Com. Code §§ 9404(c), 9405(d), 9406(i)*].

- (d) For a secondary obligation incurred or to be incurred.
- (e) For energy provided or to be provided.
- (f) For the use or hire of vessel under charter or other contract.

(g) Arising out of use of credit or charge card or information contained on or for use with that card.

(h) As winnings in lottery or other game of chance operated, sponsored, or authorized by state, or state governmental unit.

(i) As-extracted collateral.

NOTE:

"As-extracted collateral" refers to minerals and related accounts [*see Com. Code § 9102(a)(6)* (definition); *Com. Code § 9102* (UCC Comment P 4c, Examples 6, 7)]. Division 9 contains special rules for perfecting security interests in minerals that attach on extraction and in accounts resulting from the sale of minerals at the wellhead or minehead [*see, e.g., Com. Code § 9301(4)* (perfection and priority); *Com. Code § 9501(a)(1)(A)* (place of filing); *Com. Code § 9502* (contents of filing statement); *Com. Code § 9519(d), (e)* (indexing of records)].

(5) Determine whether collateral is chattel paper [*see Com. Code § 9102(a)(11)* (definition); *see § 42.11[2][ff]*], including:

NOTE:

"Chattel paper" consists of a monetary obligation together with a security interest in or a lease of specific goods if the obligation and security interest or lease are evidenced by a "record or records" [*see Com. Code § 9102(a)(11)*]. Chattel paper also includes records that evidence a monetary obligation and security interest in specific goods and software used in the goods or in specific goods and license of software used in the goods, or a monetary obligation together with a lease of specific goods and license of software used in the goods [*see Com. Code § 9102(a)(11)*]. "Monetary obligation" in this context means a monetary obligation secured by the goods or owed under a lease of the goods; it includes a monetary obligation with respect to software used in the goods [*Com. Code § 9102(a)(11)*].

Chattel paper typically is created when a secured party wishes to borrow against or sell the security agreement along with his or her interest in the collateral received from the debtor [*see former Com. Code § 9105* (UCC Comment PP 3, 4); *see also Com. Code § 9101* (UCC Comment P 1) (noting utility of former Division 9 Comments to explain background and general conceptual approach of revised Division 9)].

(a) "Tangible chattel paper" [*see Com. Code § 9102(a)(78)* (definition)].

(b) "Electronic chattel paper" [*see Com. Code § 9102(a)(31)* (definition)].

NOTE:

The concept of an electronic medium is meant to be construed liberally to include electrical, digital, magnetic, optical, electromagnetic, or any other current or similar emerging technologies [*see Com. Code § 9102* (UCC Comment P 5b)]. Further, the definition of electronic chattel paper does not dictate that it be created in any particular way. For example, a record consisting of a tangible writing may be converted to electronic form by creating electronic images of a signed writing. Or records may be created and executed in electronic form, for example, when a lessee authenticates an electronic record of a lease that is then stored in electronic form [*Com. Code § 9102* (UCC Comment P

5b)].

(6) Determine whether collateral is general intangible [see *Com. Code* § 9102(a)(42) (definition); see also § 42.11[2][g]], including:

NOTE:

"General intangible" is the residual category of personal property that is not included in the other defined types of collateral [see *Com. Code* § 9102(a)(42); *Com. Code* § 9102 (UCC Comment P 5d)].

(a) Things in action.

(b) Payment intangibles.

NOTE:

A "payment intangible" is a general intangible under which the account debtor's principal obligation is monetary [see *Com. Code* § 9102(a)(61)]. Even though almost any intangible right could give rise to payment of money if the account debtor were in breach of its obligation, the term payment intangible embraces only those general intangibles "under which the account debtor's *principal* obligation is a monetary obligation" [*Com. Code* § 9102 (UCC Comment P 5d) (emphasis in original; discussing how to classify intangible collateral)]. The sale of a payment intangible is subject to Division 9 [see *Com. Code* § 9109(a)(3)].

(c) Software.

(d) Any personal property, including things in action, *other than* accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction.

NOTE:

Examples are various categories of intellectual property and the right to payment of a loan of funds that is not evidenced by chattel paper or an instrument [*Com. Code* § 9102 (UCC Comment P 5d)].

(7) Determine whether collateral is of type not listed in PP b(1)-(6), *above*, such as:

(a) Commercial tort claims [see *Com. Code* § 9102(a)(13) (definition)].

(b) Deposit accounts [see *Com. Code* § 9102(a)(29) (definition)].

(c) Letter-of-credit rights [see *Com. Code* § 9102(a)(51) (definition)].

NOTE:

Commercial tort claims, deposit accounts, and letter-of-credit rights [see *Com. Code* § 9102(a)(13), (29), (51) (definitions)], which are excluded from the definition of general intangibles, are each separate types of collateral [see *Com. Code* § 9102 (UCC Comment P 5d)]. One important consequence of this exclusion is that tortfeasors (commercial tort claims), banks (deposit accounts), and persons obligated on letters of credit (letter-of-credit rights) are not "account debtors," having the rights and obligations set forth in *Com. Code* §§ 9404, 9405, and 9406, governing assignment and discharge of

account debtors [**see** *Com. Code* § 9102 (UCC Comment P 5d); **see also** *Com. Code* § 9108 (requiring greater specificity of description in security agreement for these types of collateral)].

(d) Proceeds subject to a security interest [*see Com. Code* § 9102(a)(12); § 42.10[1]].

(e) Property subject to an agricultural lien [*see Com. Code* § 9109(a)(2)].

c. Determine whether contemplated transaction is subject to any of following conditions that exclude it from coverage of Division 9 of Commercial Code [*Com. Code* § 9109(c); *see* § 42.10[4][b]]:

NOTE:

An excluded transaction or interest can serve as collateral in a subsequent secured transaction that is subject to Division 9 [**see** *Com. Code* § 9109(b); **see also** § 42.10[4][b]].

(1) Statute, regulation, or treaty of the United States that preempts Division 9.

(2) Rights of a transferee beneficiary or nominated person under letter of credit that are independent and superior under *Com. Code* § 5114.

d. Determine whether contemplated transaction or interest is any one of following, to which Division 9 does not apply [*see Com. Code* § 9109(d)]:

NOTE:

An excluded transaction or interest can serve as collateral in a subsequent secured transaction that is subject to Division 9 [**see** *Com. Code* § 9109(b); **see also** § 42.10[4][b]].

(1) Landlord's lien, other than an agricultural lien.

(2) Lien, other than agricultural lien, given by statute or other rule of law for services or materials.

NOTE:

However, *Com. Code* § 9333 applies with respect to priority of the lien [**see** *Com. Code* § 9109(d)(2)].

(3) Assignment of claim for wages, salary, or other compensation of an employee.

(4) Sale of accounts, chattel paper, payment intangibles, or promissory notes as part of sale of business out of which they arose.

(5) Assignment of accounts, chattel paper, payment intangibles, or promissory notes which is for purpose of collection only.

(6) Assignment of right to payment under contract to assignee that is also obligated to perform under the contract.

(7) Assignment of single account, payment intangible, or promissory note to assignee in full or partial satisfaction of preexisting indebtedness.

(8) Any loan made by insurance company pursuant to provisions of policy or contract issued by it and on sole security of that policy or contract.

(9) Assignment of right represented by judgment, other than judgment taken on right to payment that was collateral.

(10) Right of recoupment or setoff, provided that both of following apply:

(a) *Com. Code § 9340* applies with respect to effectiveness of rights of recoupment or setoff against deposit accounts; and

(b) *Com. Code § 9404* applies with respect to account debtor's defenses or claims.

(11) Creation or transfer of interest in or lien on real property, including lease or rents thereunder, except to extent that provision is made for each of following:

(a) Liens on real property in *Com. Code §§ 9203 and 9308*.

(b) Fixtures in *Com. Code § 9334*.

(c) Fixture filings in *Com. Code §§ 9501, 9502, 9512, 9516, and 9519*.

(d) Security agreements covering personal and real property in *Com. Code § 9604*.

(12) Assignment of claim arising in tort, other than commercial tort claim.

NOTE:

However, in this circumstance, *Com. Code §§ 9315 and 9322* apply with respect to proceeds and priorities in proceeds [*Com. Code § 9109(d)(12)*; **see** § 42.15[3]].

(13) Assignment of deposit account in consumer transaction.

NOTE:

However, in this circumstance, *Com. Code §§ 9315 and 9322* apply with respect to proceeds and priorities in proceeds [*Com. Code § 9109(d)(13)*; **see** § 42.15[3]].

(14) Any security interest created by assignment of benefits of any public construction contract under *Sts. & Hy. Code § 5000 et seq.* (Improvement Act, Division 7).

(15) Transition property, as defined in *Pub. Util. Code § 840(g)(1)*, except to extent that Division 9 provisions are referred to in *Pub. Util. Code § 840 et seq.* (Article 5.5).

(16) Recovery property, as defined in *Pub. Util. Code § 848*, except to extent that Division 9 provisions are referred to in *Pub. Util. Code § 848 et seq.* (Article 5.6).

(17) Claim or right of employee or employee's dependents to receive workers' compensation under *Lab. Code § 50 et seq.* or *Lab. Code § 3200 et seq.*

(18) Transfer by government or governmental unit.

2. Determine whether contemplated transaction is subject to other laws in addition to Division 9 of California Commercial Code [see § 42.10[5]].

a. Determine whether any aspect of contemplated transaction is governed by federal statute, such as:

(1) Any applicable rule of law that establishes rule for consumers that is different Division 9 rules [Com. Code § 9201(b)].

NOTE:

For example, a secured transaction may be subject to the federal Consumer Credit Protection Act, which includes the Truth in Lending Act [15 U.S.C. § 1601 *et seq.*; see Ch. 45, **Consumer Installment Loans and Credit Sales**]. Under the Truth in Lending Act, a creditor who regularly extends or offers consumer credit that is payable by agreement in four or more installments or subject to a finance charge must make certain disclosures concerning those transactions [see 15 U.S.C. § 1604; see also 12 C.F.R. §§ 226.2(a)(17), 226.6-226.9, 226.17, 226.18]. The Truth in Lending Act, however, is inapplicable to extensions of credit for agricultural purposes [15 U.S.C. § 1603(1)].

A secured transaction in consumer goods may also be subject to, for example, the Federal Trade Commission Act [15 U.S.C. § 41 *et seq.*]. Under this act, it is an unfair or deceptive act or practice for a seller to take a consumer credit contract or to accept the proceeds of any purchase money loan in connection with any sale or lease of goods or services, unless the consumer credit contract includes a notice that the holder of the contract is subject to all the claims and defenses that the debtor could assert against the seller [16 C.F.R. § 433.2; see 15 U.S.C. § 45].

(2) Securities laws [see 15 U.S.C. § 77b(a)(3); see also Ch. 6, *Securities Regulation Issues*; Ch. 6K, *Nonissuer Transactions in Investment Securities*].

(3) Any federal statute, regulation, or treaty that provides for adequate system of filing or registration in lieu of perfection under Division 9 [see Com. Code § 9311(a)(1); see, e.g., 49 U.S.C. § 44107 (recordation, conveyances, leases, and security interests in civil aircraft of the United States); see also Com. Code § 9311(d) (exception for inventory covered by certificate of title); § 42.121, P 14].

NOTE:

Com. Code § 9311(a)(1) explicitly provides that the filing requirement of Division 9 defers only to federal statutes, regulations, or treaties whose requirements for a security interest's obtaining priority over rights of a lien creditor with respect to the property preempt the requirements of Com. Code § 9310(a) that a financing statement be filed to perfect all security interests and agricultural liens [Com. Code § 9311(a)(1)]. Compliance with the requirements of any such statute, regulation, or treaty for obtaining priority over the rights of lien creditor is equivalent to the filing of a financing statement under Division 9 [Com. Code § 9311(b)]. With few exceptions, a security interest in property subject to any such statute, regulation, or treaty may be perfected only by compliance with those requirements; filing under this division is not an alternative. A security interest so perfected remains perfected despite a change in the use or transfer of possession of the collateral [Com. Code § 9311(b); see also Com. Code §§ 9311(d), 9313, 9316(d), (e) (exceptions)].

The Assignment of Claims Act of 1940 [see 31 U.S.C. § 3727; 41 U.S.C. § 15] does not preempt the Division 9 provisions concerning perfection. An assignee of a claim against the United States may

benefit from compliance with the Assignment of Claims Act. However, regardless of whether the assignee complies with that act, the assignee must file under Division 9 to perfect its security interest against creditors and transferees of an assignor [*Com. Code § 9311* (UCC Comment P 2)].

b. Determine whether contemplated transaction is subject to other applicable California laws relating to consumers or as specified in *Com. Code § 9201*, such as [*Com. Code § 9201(b)*; see *Com. Code § 10104* (personal property leases subject to other statutes)]:

NOTE:

The following statutes generally apply along with Division 9 of the California Commercial Code. To the extent of any conflict, however, these statutes take precedence over Division 9 [*Com. Code § 9201(b)*, (c)].

(1) Unruh Act, governing retail installment sales [*Civ. Code § 1801 et seq.*; see Ch. 45, *Consumer and Installment Loans and Credit Sales*; Ch. 46, *Credit Card and Other Open-End Transactions*].

(2) *Bus. & Prof. Code § 17200 et seq.* (regulation of unfair competition; enforcement).

(3) *Bus. & Prof. Code § 17500 et seq.* (advertising).

(4) Automobile Sales Finance Act (Rees-Levering Act) [*Civ. Code § 2981 et seq.*; see Ch. 47, *Automotive Financing*].

(5) Civil Code, Division Three, Part Four, Obligations Arising from Particular Transactions [*Civ. Code § 1738 et seq.*], with respect to the applicable provisions relating to, for example, consignment of fine art, credit cards, credit card disclosure and charge card disclosures, layaway practices, consumer credit reports, reporting agencies, computed interest, finance charges, credit sales, contracts for various lessons and services, creditor remedies, deposits, loans, and liens [see *Com. Code § 9201(b)*].

(6) Industrial Loan Law [*Fin. Code § 18000 et seq.*].

(7) Pawnbroker Law [*Fin. Code § 21000 et seq.*; see Ch. 102B, *Pawnbrokers, Personal Property Brokers, and Secondhand Goods Dealers*].

(8) California Finance Lenders Law [*Fin. Code § 22000 et seq.*; see Ch. 102B, *Pawnbrokers, Personal Property Brokers, and Secondhand Goods Dealers*].

(9) Mobilehomes-Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*; see Ch. 39, *Mobilehome Parks*, Ch. 40, *Mobilehomes*].

(10) Any applicable consumer protection statute, regulation, or law.

c. Determine whether transaction is governed by another division of Commercial Code, such as [see *Com. Code § 9110*; see § 42.12[3][c]]:

(1) Division on sales [see *Com. Code § 2101 et seq.*].

(2) Division on leases [see *Com. Code § 10101 et seq.*; see also *Com. Code §§ 1201(b)(35), 1203*].

d. Determine whether perfection of security interests in this transaction is governed by authority other than Commercial Code, such as [see *Com. Code* § 9311]:

(1) California certificate of title statutes [see *Com. Code* § 9311(a)(2); see also *Com. Code* § 9311(d) (exception for inventory covered by certificate of title)]:

(a) Vehicle Code provisions that require registration of vehicle or vessel [see *Veh. Code* §§ 5600, 6300, 6301; Ch. 102D, *Registration and Transfer of Vehicles, Vessels, and Aircraft*].

(b) Health and Safety Code provision that require registration of mobilehome or commercial coach [see *Com. Code* § 9311(a)(2), (3); see *Health & Safety Code* § 18075 *et seq.*; see Ch. 39, *Mobilehome Parks*, Ch. 40, *Mobilehomes*].

NOTE:

However, during any period in which collateral (*i.e.*, the mobilehome or commercial coach) is inventory, the filing provisions of *Com. Code* § 9501 *et seq.* apply to a security interest in that collateral [*Com. Code* § 9311(a)(2)(B)].

(c) Health and Safety Code provisions that require registration of all interests in approved air contaminant emission reductions [see *Health & Safety Code* §§ 40709-40713].

(2) Another jurisdiction's certificate of title statute that provides for security interest to be indicated on certificate as condition or result of security interest's obtaining priority over rights of lien creditor with respect to property at issue [see *Com. Code* § 9311(a)(3); see also *Com. Code* § 9311(d) (exception for inventory covered by certificate of title)].

3. Determine whether secured transaction is multiple state transaction [see *Com. Code* §§ 9307 (location of debtor), 9316 (continuing perfection of security interest following change in governing law)].

NOTE:

If the transaction has a reasonable relation to California and also to another state or nation, the parties' agreement may specify the law that will govern their rights and duties [*Com. Code* § 1301(a)]. However, *Com. Code* §§ 9301-9307 govern perfection, the effect of perfect or nonperfection, and the priority of security interests and agricultural liens; and a contrary agreement is effective only to the extent permitted by those provisions [*Com. Code* § 1301(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

19-42 California Legal Forms--Transaction Guide § 42.111

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.111 Rights of Third Persons in Collateral

1. Determine whether any third person has current security interest in proposed collateral.

a. Review copies of current security agreements and UCC financing statements supplied by client [*see* § 42.101, P 10].

b. Obtain official information concerning current UCC financing statements covering collateral.

(1) Determine which filing officers should have received any previous financing statements covering collateral [*see Com. Code* § 9501(a) (filing office); *see also* § 42.121, P 13].

(2) Search records for current UCC financing statements covering collateral.

(a) Search each filing officer's index for financing statements naming debtor [*see Com. Code* § 9519(c), (d) (indexing records); *see also Com. Code* § 9514 (assignment of record of security interest)].

(b) Request filing officer's certificate showing current financing statements naming debtor [*see Com. Code* § 9523(c)].

NOTE:

If the search is being requested at the time a financing statement (Form UCC-1) is being filed, the search request may be made directly on the UCC-1 form by including the appropriate information [for discussion, *see* § 42.211[c]]. If the search is not being requested at the time a financing statement covering the debtor in question is being filed,

the request is made on standard Form UCC-11. For detailed information on filing Form UCC-11, and an illustration of the Secretary of State's official form and instructions, see § 42.216.

The filing office may communicate information in any medium. However, if requested, the filing office must communicate the information by issuing its written certificate [*Com. Code* § 9523(d)]. The filing office must communicate the information required by statute [*see Com. Code* § 9523(a)-(d)] no later than two business days after receiving the request [*Com. Code* § 9523(e)].

c. If proposed collateral is deposit account, ascertain from bank or other organization with whom deposit account is maintained if notice of other security interest has been received [*see Com. Code* § 9310(b)(8); *see also Com. Code* § 9104 (control of deposit account)].

d. If proposed collateral is interest in, or claim under, insurance policy, ascertain from insurer who issued policy whether notice of other security interest has been received [*see Com. Code* § 9310(b)(11); *see also Com. Code* § 9312(b)(4) (perfection by written notice to insurer)].

e. If proposed collateral is investment property [*see Com. Code* § 9102(a)(49) ("investment property" defined)], ascertain whether security interest has been perfected without filing [*see under Com. Code* § 9309(10), (11) (perfection on attachment)].

f. If proposed collateral is automobile or boat not held in inventory, obtain and inspect registration from Department of Motor Vehicles or certificate of documentation from Coast Guard [*see Ch. 102D, Registration and Transfer of Vehicles, Vessels, and Aircraft*].

g. If proposed collateral is aircraft, obtain and inspect conveyance or instrument affecting title from Federal Aviation Administration Aircraft Registry [*see Ch. 102D, Registration and Transfer of Vehicles, Vessels, and Aircraft*].

h. Ascertain who has possession of proposed collateral.

(1) Ascertain whether collateral is in possession of any third person holding security interest [*see Com. Code* §§ 9312(c), (d), 9313(c)].

(2) If proposed collateral is proceeds in possession of debtor, ascertain whether debtor has had possession for fewer than 21 days [*see Com. Code* § 9315(d)].

(3) If proposed collateral is certificated security, negotiable document or instrument, or certain goods in possession of bailee, ascertain whether bailee has had possession for less than 20 days [*see Com. Code* § 9312(e), (f)].

NOTE:

A security interest in tangible negotiable documents, goods, instruments, money, tangible chattel paper, or certificated securities may be perfected [*see* § 42.14] by delivering possession of the collateral to the secured party [*see Com. Code* § 9313(a), (b)]. Perfection of a security interest in goods in the possession of a bailee who has issued a negotiable document of title covering the goods may be perfected by perfecting a security interest in the document [*Com. Code* § 9312(c)(1)]. Perfection of a security interest in goods in the possession of a third party who has issued a nonnegotiable document

covering the goods may be perfected by issuance of a document in the name of the secured party, or the bailee's receipt of notification of the secured party's interest, or filing [*see Com. Code § 9312(d)*]. Therefore, when a third party has possession, a conflicting security interest ordinarily will be readily apparent. However, in certain circumstances, collateral may be in the temporary possession of a third party who is not the secured party's agent [*see Com. Code § 9313(c)*]. For further coverage of perfection by possession, see §§ 42.14[3][e], 42.121 P 8.

i. If third party holds current security interest in proposed collateral, determine whether, and on what terms, he or she is willing to subordinate interest to that of prospective secured party [*see Com. Code § 9339*].

2. Determine whether any third person is likely to claim any interest in collateral in future.

a. Ascertain whether any person is in position to claim lien on collateral, such as:

(1) Persons providing materials or services in connection with collateral [*see Civ. Code § 2872 et seq. (liens)*].

(2) Warehouseman's lien [*see Com. Code §§ 7209, 7210*].

(3) Creditor who effects levy of writ of execution after judgment [*see Code Civ. Proc. §§ 699.010-701.830*].

(4) Creditor who obtains lien by attachment other than filing [*see Code Civ. Proc. § 488.500(a)*].

b. Ascertain whether debtor plans or has agreed to transfer collateral to any third person.

3. Determine whether:

a. Debtor is insolvent or has begun or plans to begin bankruptcy proceedings [*see 11 U.S.C. § 301*].

NOTE:

Under some conditions, the debtor's trustee in bankruptcy can avoid a transfer of a security interest that favors the secured party over other creditors of the debtor [*see, e.g., 11 U.S.C. §§ 544-548*]. For further discussion, see § 42.17[1].

b. Any creditor has begun or is likely to begin bankruptcy proceedings against debtor [*see 11 U.S.C. § 303*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Third Party RightsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

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B. Preliminary Determinations

19-42 California Legal Forms--Transaction Guide §§ 42.112-42.119

AUTHOR: by Ann S. Manheimer, J.D.

[Reserved]

§§ 42.112[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 42 SECURED TRANSACTIONS
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C. Procedural Guide

19-42 California Legal Forms--Transaction Guide § 42.120

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.120 Attachment of Security Interest

NOTE:

A security interest attaches and is enforceable against the debtor and third parties with respect to the collateral only if specified conditions are satisfied [*Com. Code § 9203(b)*; **see** *Com. Code § 9203(c)-(i)* (exceptions)]. For a list of these conditions, see § 42.12[1]. Attachment occurs automatically as soon as these events have taken place, unless an agreement expressly postpones the time of attachment [*Com. Code § 9203(a)*; **see, e.g.,** *Bank of the West v. Commercial Credit Fin. Serv., Inc.*, 852 F.2d 1162 (9th Cir. [Cal.] 1988) 852 F.2d 1162, 1166-1167 (creditor had no interest in inventory and accounts until debtor acquired business, decided under prior law)]. However, the order in which the events establishing the attachment of a security interest occur is immaterial [*Komas v. Future Systems, Inc.* (1977) 71 Cal. App. 3d 809, 813, 139 Cal. Rptr. 669 (decided under prior law)].

Special provisions govern attachment when the collateral is securities [**see** *Com. Code § 9206*], when a collecting bank holds the security interest [**see** *Com. Code § 4210*], when an issuer or nominated person has a security interest in a document presented under a letter of credit [**see** *Com. Code § 5118*], when a security interest arises under *Com. Code § 2101 et seq.*, governing sales, or under *Com. Code § 10101 et seq.*, governing personal property leases [*Com. Code § 9203(c)*; **see** *Com. Code § 9110* (security interests arising under Commercial Code Divisions 2 and 10)]. These provisions are discussed in § 42.12[3]. Additional rules exist for "supporting obligations" [**see** *Com. Code § 9203(f)*; § 42.12[2][e]], transfer of an obligation [**see** *Com. Code § 9203(g)*; § 42.12[2][f]], and investment property [**see** *Com. Code § 9203(h), (i)*; § 42.12[3]].

For discussion of agricultural liens, see § 42.121 NOTE.

1. Draft security agreement, and have debtor and secured party sign agreement [*Com. Code §*

9203(b)(3)(A); see §§ 42.12[2], 42.130, 42.200-42.203].

2. Have secured party give value or performance required under security agreement [see *Com. Code* § 9203(b)(1)].

3. Have debtor take necessary steps to obtain rights in collateral or power to transfer those rights to secured party [see *Com. Code* § 9203(b)(2); see also *Bakersfield Westar Ambulance, Inc. v. Parker* (9th Cir. 1997) 123 F.3d 1243, 1246-1247 (bank may obtain valid security interest in one of its own deposit accounts under former *Com. Code* § 9203(1)(c) (repealed July 1, 2001), now see *Com. Code* § 9203(b)(2) (security interest is not enforceable and does not attach unless, among other things, debtor have rights in collateral); bank's interest attaches to intangible personal property right or "general intangible" of depositor, not bank's own property, decided under former law)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsGeneral Overview



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C. Procedural Guide

19-42 California Legal Forms--Transaction Guide § 42.121

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.121 Perfection of Security Interest or Agricultural Lien

NOTE:

With specified exceptions, a security interest is perfected if it has attached [*see* § 42.12] and the secured party has taken all the procedural steps required to perfect the interest [*Com. Code* § 9308(a); *see Com. Code* §§ 9310-9316 (requirements for perfection)]. If the procedural steps are taken before the security interest attaches, as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral, the interest is perfected at the time of attachment [*see Com. Code* § 9308(a)].

An agricultural lien is perfected if it has become effective and all of the applicable requirements for perfection in *Com. Code* § 9310 have been satisfied [*Com. Code* § 9308(b)]. If the applicable requirements are met before the agricultural lien becomes effective, the lien is perfected when it becomes effective [*Com. Code* § 9308(b)].

1. Advise party that security interest may be perfected:

- a. By filing [*see* PP 10, 13 *below*].
- b. Automatically on attachment [*see* P 2, *below*].
- c. On occurrence of event other than filing or attachment [*see* PP 3-5, *below*].
- d. Under law of another jurisdiction [*see* P14, *below*].
- e. By another method, such as by secured party taking possession or control [*see* PP 8, 9,

below].

2. Advise party that security interest is perfected automatically on attachment [*see Com. Code § 9310(b)(2), (9); see also Com. Code § 9315(a)(2)*]:

a. If security interest is purchase money security interest in consumer goods [*see Com. Code § 9309(1); see also Com. Code § 9311(b)* (exception for consumer goods subject to certain statutes or treaties)].

b. If security interest is assignment of accounts or payment intangibles that does not by itself or in conjunction with other assignments to same assignee transfer significant part of assignor's outstanding accounts or payment intangibles [*see Com. Code § 9309(2); see also Com. Code § 9102(a)(2)* ("account" defined); *Com. Code § 9102(a)(61)* ("payment intangible" defined); Ch. 44, *Accounts Receivable Financing and Factoring*].

c. If security interest is sale of payment intangible [*see Com. Code § 9309(3); see also Com. Code § 9102(a)(61)* ("payment intangible" defined)].

d. If security interest is sale of promissory note [*see Com. Code § 9309(4); see also Com. Code § 9102(a)(65)* ("promissory note" defined)].

e. If security interest is created by assignment of health care insurance receivable to provider of health care goods or services [*see Com. Code § 9309(5); see also Com. Code § 9102(a)(46)* ("health care insurance receivable" defined)].

f. If security interest arises under *Com. Code § 2401* (seller's reservation of title to goods), *Com. Code § 2505* (seller's shipment of goods under reservation), *Com. Code § 2711(3)* (buyer's security interest in rejected goods), or under *Com. Code § 10508(e)* (lessee's security interest in goods in lessee's possession), until debtor obtains possession of collateral [*see Com. Code § 9309(6)*].

g. If security interest is that of collecting bank [*see Com. Code § 9309(7); see also Com. Code § 4210* (security interest of collecting bank)].

h. If security interest is that of issuer or nominated person [*see Com. Code § 9309(8); see also Com. Code § 5118* (security interest of issuer or nominated person)].

i. If security interest arises in delivery of financial asset [*see Com. Code § 9309(9); see also Com. Code § 9206(c)* (delivery of financial asset)].

j. If security interest is in investment property created by broker or securities intermediary [*see Com. Code § 9309(10); see also Com. Code § 9102(a)(49)* ("investment property" defined)].

NOTE:

Perfection of a security interest in a securities account also perfects the security interest in the security entitlements carried in the securities account [*see Com. Code § 9308(f)*].

k. If security interest is in commodity contract or commodity account created by commodity intermediary [*see Com. Code § 9309(11); see also Com. Code § 9102(a)(14)* ("commodity account"

defined); *Com. Code § 9102(a)(15)* ("commodity contract" defined)].

NOTE:

Perfection of a security interest in a commodity account also perfects a security interest in the commodity contracts carried in the commodity account [*Com. Code § 9308(g)*].

l. If security interest is assignment for benefit of all creditors of transferor and subsequent transfers by assignee thereunder [*see Com. Code § 9309(12)*].

m. If security interest is created by an assignment of beneficial interest in decedent's estate [*see Com. Code § 9309(13)*].

n. If security interest is sale by individual of account that is a right to payment of lottery winnings or winnings in another game of chance [*Com. Code § 9309(14)*].

o. If security interest is interest in proceeds [*see Com. Code § 9315(c)* *see also Com. Code § 9102(a)(64)* ("proceeds" defined)].

3. Advise party that perfection of security interest in collateral also perfects security interest in collateral's supporting obligation [*see Com. Code § 9308(d)*].

4. Advise party that perfection of security interest in right to payment or performance also perfects security interest in security interest, mortgage, or other lien on personal or real property securing that right [*see Com. Code § 9308(e)*].

5. Advise party that security interest is temporarily perfected:

a. If security interest is in certificated securities, negotiable documents, or instruments, for 20 days from date of attachment, without filing, control, or possession, to extent that interest arises for new value given under authenticated security agreement [*see Com. Code § 9310(b)(5)*; *Com. Code § 9312(e)*; *see also Com. Code § 9102(a)(57)* ("new value" defined)].

b. If perfected security interest is in negotiable documents or goods in possession of bailee, other than one that has issued negotiable document for the goods, for 20 days, without filing, if secured party makes available to debtor goods, or documents representing goods, for either [*see Com. Code § 9310(b)(4)*; *Com. Code § 9312(f)*]:

(1) Ultimate sale or exchange; or

(2) Loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them preliminary to their sale or exchange.

c. If perfected security interest is in certificated security or instrument, for 20 days, without filing, if secured party delivers security certificate or instrument to debtor for either [*see Com. Code § 9310(b)(5)*; *Com. Code § 9312(g)*]:

(1) Ultimate sale or exchange; or

(2) Presentation, collection, enforcement, renewal, or registration of transfer.

NOTE:

After the 20-day period specified in *Com. Code* § 9312(e), (f), or (g) [**see** PP a, b, c, **above**] expires, perfection depends upon compliance with this division [*Com. Code* § 9312(h)]. For a guide to perfecting beyond the 20-day grace period, see P 13, **below**.

d. If perfected security interest is in proceeds, for 20 days after security interest attaches to proceeds, unless any one of specified conditions is satisfied [*see Com. Code* § 9315(d)].

NOTE:

A perfected security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds unless any of the following conditions is satisfied [*Com. Code* § 9315(d)]:

- A filed financing statement covers the original collateral, the proceeds are collateral in which a security interest may be perfected by filing in the office in which the financing statement has been filed, and the proceeds are not acquired with cash proceeds [*Com. Code* § 9315(d)(1)];
- The proceeds are identifiable cash proceeds [*Com. Code* § 9315(d)(2)]; or
- The security interest in the proceeds is perfected other than under *Com. Code* § 9315(c) when the security interest attaches to the proceeds or within 20 days thereafter [*Com. Code* § 9315(d)(3); **see** *Com. Code* § 9315(c) (security interest in proceeds is perfected if security interest in original collateral was perfected)].

If a filed financing statement covers the original collateral, a security interest in proceeds that remains perfected under *Com. Code* § 9315(d)(1) [**see** list, **above**] becomes unperfected at the later of (1) the date when the effectiveness of the filed financing statement lapses or is terminated [**see** *Com. Code* § 9515 (lapse); *Com. Code* § 9513 (termination)]; or (2) the 21st day after the security interest attaches to the proceeds [*Com. Code* § 9315(e)].

6. Have secured party perfect security interest in accordance with any non-UCC provisions applicable to security interest, such as interests in [*see Com. Code* § 9311; *see also* § 42.110, P 2]:

a. Collateral governed by federal statute or treaty that provides for filing or registration [*see Com. Code* § 9311(a)(1), (b); § 42.110, P 2a; *see also* Ch. 102D, *Registration and Transfer of Vehicles, Vessels, and Aircraft*; but *see Moldo v. Matso, Inc. (In re Cybernetic Servs.) (9th Cir. 2001) 252 F.3d 1039, 1059*, decided under version of Division 9 in effect prior to July 1, 2001 (holder of security interest in patent is not required to record that interest with federal Patent and Trademark Office in order to perfect interest as against subsequent lien creditor)].

b. Vehicles or boats not held as inventory that must be registered under Vehicle Code [*see Veh. Code* §§ 4000 *et seq.*, 9840 *et seq.*; *see also* 46 U.S.C. § 12101 *et seq.*].

NOTE:

For a detailed discussion of sales of motor vehicles, see Ch. 47, **Automotive Financing and Vehicle Leasing**. The transfer and registration of vehicles, aircraft, and boats are discussed in Ch. 102D, **Registration and Transfer of Vehicles, Vessels, and Aircraft**.

c. Mobilehomes or commercial coaches not held as inventory that must be registered under Health and Safety Code [*see Health & Safety Code* § 18000 *et seq.*].

NOTE:

The procedure for perfecting a security interest in a mobilehome is discussed in Ch. 39, *Mobilehome Parks*, and Ch. 40, *Mobilehomes*.

If the collateral is motor vehicles, boats, mobilehomes, or commercial coaches held as inventory, perfection of the security interest must be accomplished by filing a financing statement [*Com. Code* § 9311(a)(2)(B); *Com. Code* § 9311(d); *see Com. Code* § 9501 *et seq.* (filing) *see* P 13, *below*].

d. Certificate of title governed by statute of jurisdiction other than California that requires indication of security interest on certificate as condition of perfection [*Com. Code* § 9311(a)(3)].

e. Approved air contaminant emission reduction that must be registered under Health and Safety Code [*Com. Code* § 9311(a)(2)(C); *see Health & Safety Code* §§ 40709-40713].

7. Advise party that security interest will be perfected when notice of security interest is given in:

NOTE:

Purchase money security interests in inventory will achieve priority over earlier conflicting interests if all of the following conditions are satisfied: the security interest is perfected before the debtor obtains the inventory; the secured party gives authenticated notification to the holder of a conflicting security interests in the inventory; the holder receives the notification within five years before the debtor receives possession of the inventory; and the notification states that the person sending the notification has or expects to acquire a purchase money security interest from the debtor and describes the inventory [*Com. Code* § 9324(b); *see* § 42.211]. For a guide to procedures, see P 13b, *below*.

a. Goods in possession of bailee, excluding goods covered by a negotiable document [*see Com. Code* § 9312(d)(2)].

NOTE:

While goods are in the possession of a bailee that has issued a nonnegotiable document covering the goods, a security interest in the goods may be perfected by the issuance of a document in the name of the secured party, or by the bailee's receipt of notification of the secured party's interest [*Com. Code* § 9312(d)(1), (2)]. Perfection may also be achieved by filing as to the goods [*Com. Code* § 9312(d)(3)].

b. Any policy of insurance including unearned premiums [*see Com. Code* § 9310(b)(11); *Com. Code* § 9312(b)(4); *see also* Ch. 43, *Commercial Loans*].

NOTE:

Such a security interest may be perfect only by giving written notice of the security interest or claim to the insurer [*Com. Code* § 9312(b)(4)]. However, this rule providing for perfection by written notice does not apply to a health insurance receivable [*Com. Code* § 9312(b)(4); *see also Com. Code* § 9102(a)(46) ("health care insurance receivable" defined)]. A health insurance receivable may be perfected only as otherwise provided in Division 9 [*Com. Code* § 9312(b)(4); *see* P 2e, *above*].

8. Advise party that security interest will be perfected by secured party taking possession, without filing, if collateral is [*see Com. Code* § 9313(a)]:

- a. Tangible negotiable documents.

NOTE:

Tangible negotiable documents may be, and usually are, delivered to the secured party. The secured party's act of taking possession will suffice as a perfection step [*see Com. Code § 9313(a)*]. However, as is the case with tangible chattel paper [*see P d, below*], a security interest in a negotiable document may be perfected by filing [*see Com. Code § 9312 (UCC Comment P 3)*].

- b. Goods [*see Com. Code §§ 9313(b), 9316(d)*] (special rules relating to goods covered by certificate of title issued by state of California).

- c. Money.

- d. Tangible chattel paper.

9. Advise party that security interest will be perfected by secured party taking control, without filing, if collateral is [*see Com. Code § 9314(a)*]:

- a. Investment property [*see Com. Code § 9106 (control)*].
- b. Deposit accounts [*see Com. Code § 9104 (control)*].
- c. Letter-of-credit rights [*see Com. Code § 9107 (control)*].
- d. Electronic chattel paper [*see Com. Code § 9105 (control)*].
- e. Electronic documents of title [*see Com. Code § 7106 (control)*].

10. Advise party that security interest or agricultural lien may be perfected by filing [*see P 13, below*], if collateral is [*see Com. Code § 9312(a)*]:

NOTE:

Perfection by filing does not protect the secured party against levies on accounts under *Code Civ. Proc. § 488.470*, which are effected by notice to the account debtor [*see Code Civ. Proc. § 488.470; see also Code Civ. Proc. § 488.500* (creation, duration, scope, and priority of attachment lien)]. The secured party should, therefore, consider requiring the debtor to warrant that there are no levies.

- a. Chattel paper.

- b. Negotiable Document.

NOTE:

Perfection by filing does not limit the rights of a holder in due course of a negotiable instrument, a holder to which a negotiable document of title has been negotiated, or a protected purchaser of a security [*see Com. Code § 9331(a)*].

- c. Instrument.

d. Investment property.

e. Farm products subject to agricultural lien [*see Com. Code §§ 9308(b), 9310(a); see Com. Code § 9102(a)(5)* ("agricultural lien" defined)].

11. If secured party will perfect security interest by taking possession of collateral:

a. Have secured party take possession of collateral [*see Com. Code § 9313; see also P 8, above*].

b. Advise secured party of duty to use reasonable care in custody and preservation of collateral [*Com. Code § 9207(a); see Com. Code § 9207(d)* (exception, in certain circumstances, if secured party is seller of accounts, chattel paper, payment intangibles, or promissory notes or consignor)].

NOTE:

Unless otherwise agreed, for a secured party in possession of chattel paper or an instrument [*see Com. Code § 9102(a)(11), (47)* (definitions)], reasonable care includes taking necessary steps to preserve rights against prior parties [*Com. Code § 9207(a)*].

c. Advise parties that:

NOTE:

Paragraphs (1)-(7), **below**, do not apply if the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor [*Com. Code § 9207(d)(2)*].

(1) Debtor will be liable for all reasonable expenses (including taxes and insurance premiums) incurred by secured party in custody, preservation, use, and operation of collateral [*see Com. Code § 9207(b)(1)*].

(2) Debtor bears any risk of loss or damage not covered by insurance, unless loss is caused by secured party's failure to meet certain obligations [*see Com. Code § 9207(b)(2)*].

(3) Secured party may use or operate collateral to [*see Com. Code § 9207(b)(4)*]:

(a) Preserve collateral or its value.

(b) As permitted by court order.

(c) Except in case of consumer goods, in manner and to extent agreed by debtor.

(4) Secured party must keep collateral identifiable, except that fungible collateral may be commingled with secured party's property [*see Com. Code § 9207(b)(3)*].

NOTE:

"Fungible" collateral would be goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit, or goods that by agreement are treated as equivalent [*Com. Code § 1201(b)(18)*].

(5) Secured party may hold as additional security any proceeds, except money or funds, received from

collateral [*see Com. Code § 9207(c)(1)*].

(6) Secured party must apply money or funds received from collateral to reduce secured obligation, unless remitted to debtor [*see Com. Code § 9207(c)(2)*].

(7) Secured party may create a security interest in the collateral [*see Com. Code § 9207(c)(3)*].

12. If secured party will perfect security interest by taking control of collateral:

a. Have secured party take control of collateral [*see Com. Code § 9314; see also P 9, above*].

b. Advise parties that:

NOTE:

Paragraphs (1)-(3), **below**, do not apply if the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor [*Com. Code § 9207(d)(2)*].

(1) Secured party may hold as additional security any proceeds, except money or funds, received from collateral [*see Com. Code § 9207(c)(1)*].

(2) Secured party must apply money or funds received from collateral to reduce secured obligation, unless remitted to debtor [*see Com. Code § 9207(c)(2)*].

(3) Secured party may create a security interest in the collateral [*see Com. Code § 9207(c)(3)*].

13. If secured party will perfect security interest by filing financing statement:

NOTE:

The filing of a financing statement serves as notice to others of the security interest [*see Borg-Warner Acceptance Corp. v. Bank of Marin (1973) 36 Cal. App. 3d 286, 288-289, 111 Cal. Rptr. 361 (decided under prior law); see also § 42.14[3][b]*].

If a security interest is created in goods that are, or are to become, fixtures, a financing statement that is filed as a fixture filing must satisfy conditions in addition to those required of a standard financing statement [*see Com. Code § 9502(b); see also Com. Code § 9334 (priority of security interests in fixtures)*].

a. Advise secured party to file financing statement [*see Com. Code §§ 9501 et seq.; see also §§ 42.131, 42.211 (form)*] as early as possible, without waiting for security interest to attach [*see Com. Code § 9502(d)*].

NOTE:

Generally, when there is more than one perfected security interest, the security interests rank according to time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected. [*Com. Code § 9322(a)(1)*]. The form of the claim to priority, that is, filing or perfection, will be based on the first filing or perfection, as long as there is no intervening

period without filing or perfection [*see Com. Code § 9322(a)(1); Com. Code § 9322 (UCC Comment P 4)*]. "Filing" refers to filing an effective financial financing statement [*see § 42.14[3][b][ii]*]. "Perfection" refers to the acquisition of a perfected security interest, that is, one that has attached and to which any required perfection step has been taken [*see Com. Code § 9308; 42.14*]. For further discussion of priorities of perfected security interests and agricultural liens, see § 42.15.

b. If security transaction involves purchase money security interest in inventory:

NOTE:

If the purchase money secured party complies with the following procedure in addition to filing the financing statement, the purchase money security interest will have priority over a conflicting security interest in the same inventory, over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper [*see Com. Code § 9330*], and, except as otherwise provided [*see Com. Code § 9327*], in identifiable cash proceeds received on or before the delivery of the inventory to a buyer [*Com. Code § 9324(b); see Com. Code § 9324(c)* (limitations)]. To achieve priority, the purchase money security interest must be perfected when the debtor receives possession of the inventory [*Com. Code § 9324(b)(1)*].

(1) Prepare authenticated notice that [*see Com. Code § 9324(b)(4); see § 42.210 (form)*]:

(a) States that person sending notice has or expects to acquire purchase money security interest in debtor's inventory.

(b) Describes inventory by item or type.

(2) Send authenticated notification to all persons who have filed financing statements covering debtor's inventory [*see Com. Code § 9324(c); see § 42.111*]:

NOTE:

The holder of the conflicting security interest must receive the notification within five years before the debtor receives possession of the inventory [*see Com. Code § 9324(b)(3)*].

(a) Before date of filing made by purchase money secured party; or

(b) Before beginning of 20-day grace period in which purchase money security interest is temporarily perfected without filing or possession [*see Com. Code § 9312(f)*].

c. Prepare financing statement [*see Com. Code § 9502 (contents); see also §§ 42.131, 42.211*].

NOTE:

The requisites for a financing statement are discussed in §§ 42.131 and 42.211. As discussed in those sections, financing statements are filed on Form UCC-1. A financing statement covering as-extracted collateral (including oil, gas, and other minerals, and certain accounts arising out of sale at the minehead or wellhead) [*see Com. Code § 9102(a)(6)*], timber to be cut, or that is filed as a fixture filing must meet additional requirements [*see Com. Code § 9502(b); see also §§ 42.131 P 6, 42.211[1][d]*].

There is no requirement that the debtor's signature (or other evidence of authorization) appear on the filing statement [*see Com. Code § 9502* (UCC Comment P 3); *cf.* former *Com. Code § 9402(1)*], except to the extent that filing offices may choose to employ authentication procedures in connection with electronic communications [*Com. Code § 9101* (UCC Comment P 4h)]. Elimination of the signature requirement facilitates paperless filing [*Com. Code § 9502* (UCC Comment P 3)]. For further discussion of authentication issues, see § 42.14[3][b].

d. File financing statement and pay required fees [*see Com. Code § 9501* (filing office); *Com. Code § 9525* (fees); *see also § 42.211[1][j]*] as follows:

NOTE:

A financing statement that substantially satisfies the requirements of Division 9 is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading [*Com. Code § 9506(a)*]. For further discussion of these issues, *see § 42.14[3][b][i]*.

The fee for filing and indexing a record is set forth in *Gov. Code § 12194(a)-(d)*. The amount of the fee is based on the number of pages of the document being filed. There is no fee with respect to a record of a mortgage which is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut [*Com. Code § 9525(d)*; *see Com. Code § 9502(c)*]. However, the recording and satisfaction fees that otherwise would be applicable to the record of the mortgage apply [*Com. Code § 9525(d)*].

(1) At office designated for filing or recording of record of mortgage on related real property, if [*see Com. Code § 9501(a)(1)*]:

(a) Collateral is as-extracted collateral or timber to be cut; or

(b) Financing statement is filed as fixture filing and collateral is goods that are (or are to become) fixtures [*see § 42.131 P 6*].

NOTE:

However, a financing statement in which the collateral is goods that are or are to become fixtures that is **not** filed as a fixture filing must be filed at the Office of the California Secretary of State [*Com. Code § 9501(a)(2)*].

(2) At Office of California Secretary of State in all other cases [*see Com. Code § 9501(a)(2)*].

NOTE:

The Office of the Secretary of State is the designated filing location for a financing statement to perfect a security interest in collateral, including fixtures, of a transmitting utility [*see Com. Code § 9501(b)*; *see also Com. Code § 9102(a)(80)* (definition)].

e. Advise secured party of duration of effectiveness of financing statement [*see § 42.14[3][d]*].

(1) With three exceptions [*see PP 2-4, below*], financing statement lapses after five years, unless [*see Com. Code § 9515(a)*; *see also § 42.140[2]*]:

(a) Its effectiveness is continued [*see Com. Code § 9515(d)*]; or

(b) Terminated [*see Com. Code § 9513* (duty of secured party to file or send termination statement)].

(2) If real estate mortgage is filed as fixture filing [*see Com. Code § 9501(a)(1)(B)*; § 42.131 P 6], financing statement remains effective as fixture filing until mortgage is released, satisfied, or otherwise terminated [*see Com. Code § 9515(g)*].

(3) If debtor is transmitting utility [*see Com. Code § 9102(a)(80)* (definition)] and is identified as such by financing statement, filing is effective until termination statement is filed [*see Com. Code § 9515(f)*; *see § 42.215*].

(4) If initial financing statement relates to public finance transaction or manufactured home transaction and so indicates, filing is effective for 30 years after date of filing [*see Com. Code § 9515(b)*].

14. If security interest involves multiple state transaction, advise secured party that choice of law rule governing:

a. Perfection (*i.e.*, where to file) for most collateral is law of jurisdiction in which debtor is located [*see Com. Code § 9301*].

b. Location of debtor is debtor's place of business (or chief executive office if debtor has more than one place of business) [*see Com. Code § 9307(b)(2), (3)*], except that:

(1) "Registered organization" (*e.g.*, corporation or limited liability company) is located in state under whose law debtor is organized (*e.g.*, corporate debtor's state of incorporation) [*see Com. Code § 9307(e)*].

(2) Individual debtor is located at his or her principal residence [*see Com. Code § 9307(b)(1)*].

NOTE:

In addition, there are special rules for determining the location of the United States and registered organizations organized under the law of the United States [*see Com. Code § 9307(f), (g)*].

c. Location of non-U.S. debtors is deemed to be District of Columbia [*see Com. Code § 9307(c)*].

NOTE:

If a debtor is located in a jurisdiction whose law does not require public notice as a condition of perfection of a nonpossessory security interest, the debtor is deemed located in the District of Columbia [*see Com. Code § 9307(c)*]. Thus, to the extent that this division applies to non-U.S. debtors, perfection could be accomplished in many cases by a domestic filing [*see Com. Code § 9101* (UCC Comment P 4c)].

This discussion presumes that each transaction bears an appropriate relation to the forum state. In the absence of such a relation, the forum state's entire UCC, including the forum provisions of Article 9 [*Com. Code §§ 9301-9307* (California Division 9)], will not apply [*see Com. Code § 9109* (UCC Comment P 9); *Com. Code § 9307(c)* (UCC Comment P 3)].

d. Priority and effect of perfection and nonperfection is determined:

(1) In general, by local law of jurisdiction in which debtor is located [*see Com. Code § 9307* (determining debtor's location)], for tangible and intangible collateral, whether perfected by filing or automatically [*see Com. Code § 9301(1)*].

NOTE:

This general rule is subject to several exceptions. It does not apply to choice-of-law matters for goods covered by certificates of title [*see Com. Code § 9303*]. Further, other choice-of-law rules, similar to those for investment property under Division 8 [*see Com. Code § 8110* (governing security interests in uncertificated securities and in securities entitlements or securities accounts)], govern choice-of-law matters for deposit accounts [*see Com. Code § 9304*], investment property [*see Com. Code § 9305*], and letter-of-credit rights [*see Com. Code § 9306*]. The general rule also does not apply to possessory security interests, *i.e.*, security interests that the secured party has perfected by taking possession of the collateral [*see Com. Code § 9301(2)*; P 2, **below**; *see also Com. Code § 9301(3)(C)*; P 7, **below**], security interests perfected by filing a fixture filing [*see Com. Code § 9301(3)(A)*; P 4, **below**], security interests in timber to be cut [*see Com. Code § 9301(3)(B)*; P 5, **below**], or security interests in as-extracted collateral [*see Com. Code § 9301(4)*; P 6, **below**].

"Local" law, for these purposes, refers to the substantive law of a particular jurisdiction and not to its choice of law rules [*see Com. Code § 9301* (UCC Comment 2)].

(2) For possessory security interests, by local law of jurisdiction in which collateral is located [*see Com. Code § 9301(2)*].

(3) For collateral subject to agricultural lien, by local law of jurisdiction in which farm products subject to agricultural lien are located [*see Com. Code § 9302*].

(4) For security interest perfected by fixture filing, by local law of jurisdiction in which fixtures are located [*see Com. Code § 9301(3)(A)*].

(5) For timber to be cut, by local law of jurisdiction in which timber is located [*see Com. Code § 9301(3)(B)*].

NOTE:

This rule applies only to "timber to be cut," not to timber that has been cut. Consequently, once timber has been cut, the general choice of law rule in *Com. Code § 9301(1)* [*see P 1, above*] becomes applicable [*see Com. Code § 9301* (UCC Comment P 5c)].

(6) For security interest in minerals that are as-extracted collateral, by local law of jurisdiction in which wellhead or minehead is located [*see Com. Code § 9301(4)*].

(7) For nonpossessory security interest in goods (including fixtures), documents, instruments, money, negotiable documents, and tangible chattel paper, by local law of jurisdiction in which collateral is located [*see Com. Code § 9301(3)(C)*; *Com. Code § 9301* (UCC Comment P 7)].

15. If collateral is or may be subject to third party's security interest and if third party is agreeable [*see § 42.111*], have debtor and third party either:

a. File amended financing statement to clarify that third party's security interest does not cover present collateral [see § 42.140[1]]; or

b. Execute agreement subordinating third party's security interest to that of secured party in present transaction [see § 42.220].

NOTE:

Division 9 of the Commercial Code does not preclude subordination by agreement by a person entitled to priority [*Com. Code* § 9339].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART III. TRANSACTION GUIDE

C. Procedural Guide

19-42 California Legal Forms--Transaction Guide §§ 42.122-42.129

AUTHOR: by Ann S. Manheimer, J.D.

[Reserved]

§§ 42.122[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART III. TRANSACTION GUIDE

D. Drafting Guide

19-42 California Legal Forms--Transaction Guide § 42.130

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.130 Security Agreement

NOTE:

In order to make a security interest enforceable [*see* § 42.12[1], there must be a binding security agreement [*Komas v. Future Systems, Inc.* (1977) 71 Cal. App. 3d 809, 813, 139 Cal. Rptr. 669 (decided under prior law); *Needle v. Lasco Industries, Inc.* (1970) 10 Cal. App. 3d 1105, 1108, 89 Cal. Rptr. 593 (decided under prior law)] and compliance with an evidentiary requirement in the nature of the Statute of Frauds [*Com. Code* § 9203(b)(3); *see* *Com. Code* § 9203 (UCC Comment P 3)]. A "security agreement" is one that creates or provides for a security interest [*Com. Code* § 9102(a)(73); *see* § 42.10[2]].

The Commercial Code does not specify the language or the terms that must be included in a security agreement, and does not require that the terms of the agreement be set forth in a single document; no special form is necessary to create or provide for a security interest [*Komas v. Future Systems, Inc.* (1977) 71 Cal. App. 3d 809, 814-816, 139 Cal. Rptr. 669 (decided under prior law); *In re Amex-Protein Dev. Corp.* (9th Cir. 1974) 504 F.2d 1056, 1058-1060 (decided under prior law); *see* *New West Fruit Corp. v. Coastal Berry Corp.* (1991) 1 Cal. App. 4th 92, 97-98, 1 Cal. Rptr. 2d 664 (no requirement that security agreement be in writing when collateral is in the secured party's possession, and no express requirements for agreement's form or content)]. Rather, the Commercial Code broadly defines the term "agreement" (as distinguished from contract [*see* *Com. Code* § 1201(b)(12) (definition)]) to mean the bargain between the parties in fact, as found in their language, or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in *Com. Code* § 1303 [*Com. Code* § 1201(b)(3)]. However, to avoid misunderstanding between the parties, and difficulties of proof in the event of a conflict over the agreement's terms, counsel should advise clients to enter into a written agreement. The degree of specificity suggested in some of the paragraphs below is based on the more detailed requirements applicable to financing statements, which are covered in § 42.131. These requirements, although not strictly applicable to security agreements, suggest an appropriate level of

detail and may be instructive as a guide. In addition, use of these requirements as guidelines in drafting the security agreement may make completion of the financing statement itself easier.

Note that a financing statement alone is not sufficient as a security agreement [*see Komas v. Future Systems, Inc.* (1977) 71 Cal. App. 3d 809, 813, 139 Cal. Rptr. 669 (decided under former law)]. For example, a financing statement sufficiently indicates collateral if it provides either a "description" of the collateral [*see Com. Code § 9108* (adequacy of description)] or an indication that the financing statement covers all assets or all personal property [*Com. Code § 9504(2)*]. Such a "super-generic" description of collateral, however, is inadequate for purposes of a security agreement [*see Com. Code §§ 9108, 9203; see also Com. Code § 9101* (UCC Comment P 4h)].

For a detailed discussion of security agreements constituting a sale or assignment of accounts or chattel papers, including forms, see Ch. 43, **Commercial Loans**, Ch. 44, **Accounts Receivable Financing and Factoring**, and Ch. 45, **Consumer and Installment Loans and Credit Sales**. For information and forms concerning vehicle financing, see Ch. 47, **Automotive Financing and Vehicle Leasing**.

1. Identify debtor or debtors, stating [*see Com. Code § 9502(a)(1)*; *see also Com. Code § 9516(b)(3)(A), (C)*; *Com. Code § 9520(a)*]:

NOTE:

For purposes of a financing statement [*see § 42.131*], the name of a debtor entity (its "organizational name") must be provided as specified by statute. For example, if the debtor is a "registered organization" (defined to include corporations, partnerships, limited partnerships, and limited liability companies [*see Com. Code § 9102(a)(70)*]), the debtor's name is the name shown on the public records of the debtor's "jurisdiction of organization" [*Com. Code § 9503(a)(1)*; *see Com. Code § 9503(a)(2)* (rules for decedent's estates); *see Com. Code § 9503(a)(3)* (rules for common-law trusts); *see also Com. Code § 9102(a)(50)* ("jurisdiction of organization" defined)]. A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor [*Com. Code § 9503(c)*].

If a person other than the debtor is accountable in whole or in part for payment or other performance of the obligation, the debtor and the obligor, or secondary obligor [*see Com. Code § 9102(a)(28), (59), (71)* (definitions); *see also § 42.10[2]*] should be identified. A financing statement may provide the name of more than one debtor [*Com. Code § 9503(e)*].

a. Name.

NOTE:

The filing office is required to reject an initial filing statement or amendment adding an individual debtor if the office cannot index the record because it cannot identify the debtor's last name (*e.g.*, it is unclear whether the debtor's name is Samuel John or John Samuel) [*see Com. Code § 9516(b)(3)(C)*].

b. Mailing address.

NOTE:

If the debtor lists a post office as the mailing address, obtain a street address as well.

2. Identify secured party (or parties) or secured party's representative, stating [*see Com. Code § 9502(a)(2); see also Com. Code § 9516(b)(4)*]:

a. Name.

NOTE:

A financing statement may provide the name of more than one secured party [*Com. Code § 9503(e)*]. Failure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement [*Com. Code § 9503(d)*].

b. Address at which secured party will make available information concerning security interest.

NOTE:

The lack of a mailing address for the secured party of record requires the filing office to reject an initial financing statement [*Com. Code §§ 9516(b)(4); 9520(a)*]. However, the failure to include an address for the secured party of record does not render a financing statement ineffective [*see Com. Code § 9502(a)*]. The function of the address is not to identify the secured party of record, but rather to provide an address to which others can send required notifications, *e.g.*, of a purchase-money security interest in inventory or of the disposition of collateral [*see Com. Code § 9516* (UCC Comment 5)].

3. Identify collateral [*see Com. Code § 9502(a)(3)*].

a. Describe collateral [*see Com. Code § 9504(1)*], including specific information, if possible, such as serial numbers, make and model names or numbers, number of items involved, and value of collateral, in one or more of following ways [*see Com. Code § 9108(b)*]:

NOTE:

With specified exceptions, the description is sufficient, whether or not it is specific, if it reasonably identifies the collateral described [*Com. Code § 9108(a); see Com. Code § 9108(c)-(e)* (exceptions); *see also Com. Code § 9108(f)* (additional requirements for investment property collateral and consumer goods)]. The test of the sufficiency of the description is whether the description provides information adequate to lead a reasonable inquirer to the identity of the collateral [*In re Amex-Protein Dev. Corp.* (9th Cir. 1974) 504 F.2d 1056, 1060-1061 (decided under prior law); *see Com. Code § 9108* (UCC Comment P 2) (test is that "the description ... make possible the identification of the collateral described")].

(1) Specific listing.

(2) Category.

(3) Except as otherwise provided in *Com. Code § 9108(e)* for a commercial tort claim or a consumer transaction, a type of collateral defined in the Commercial Code.

(4) Quantity.

(5) Computational or allocational formula or procedure.

(6) Except as otherwise provided in *Com. Code § 9108(c)* (*see below*), any other method, if the identity of the collateral is objectively determinable.

NOTE:

A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or similar words does not reasonably identify the collateral and is **not** sufficient for purposes of a security agreement [*see Com. Code § 9108(c)*]. Note, however that in contrast, under *Com. Code § 9504*, a financing statement sufficiently indicates collateral if it "covers all assets or all personal property" [*see Com. Code § 9504(2)*].

b. If collateral is timber to be cut, describe land concerned [*see Com. Code § 9203(b)(3)(A)*; *see also § 42.131*, PP 4-6].

NOTE:

If the security interest covers timber to be cut, the financing statement must contain a description of the land concerned [*Com. Code § 9203(b)(3)(A)*]. Moreover, if the description identifies the location of the property, it must do so accurately [*see, e.g., Matter of California Pump & Mfg. Co., Inc. (9th Cir. 1978) 588 F.2d 717, 719* (description is insufficient when collateral is not located in city identified in description, decided under prior law)].

c. If collateral is as-extracted collateral [*see Com. Code § 9102(a)(6)* (definition)], timber to be cut, or filed as a fixture filing [*see Com. Code § 9501(a)(1)(B)*; § 42.131 P 6] and covers goods that are or are to become fixtures [*see Com. Code § 9502(b)*; *see also Com. Code § 9516(b)(3)(D)*; § 42.131, PP 4-6]:

NOTE:

A record of a mortgage is effective, from the date of recording, as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut only if all of the following conditions are satisfied [*Com. Code § 9502(c)*]:

- The record indicates the goods or accounts that it covers.
- The goods are or are to become fixtures related to the real property described in the record or the collateral is related to the real property described in the record and is as-extracted collateral or timber to be cut.
- The record satisfies the requirements for a financing statement in this section other than an indication that it is to be filed in the real property records.
- The record is duly recorded.

(1) Indicate that agreement or statement covers this type of collateral.

(2) Indicate that statement is to be recorded in real property records.

(3) Provide description of real property to which collateral is related sufficient to give constructive notice of mortgage under California law if description were contained in record of the mortgage of real

property.

(4) If the debtor does not have interest of record in the real property, provide name of record owner.

d. State whether collateral will include:

(1) Proceeds [*see Com. Code § 9102(a)(64)* (definition); *Com. Code § 9315(a)(2), (b)*].

NOTE:

A security interest attaches to any identifiable proceeds of collateral [*Com. Code § 9315(a)(2)*; *see Com. Code § 9315(b)* (proceeds commingled with other property)]. To avoid misunderstandings, the security agreement should state whether any proceeds will be subject to the security interest created by the agreement, and should describe the type of property constituting those proceeds.

For discussion of the time of filing or perfection of the security interest in the proceeds of collateral, *see § 42.15[3]*.

(2) After-acquired property [*see Com. Code § 9204(a)*].

NOTE:

A security agreement may create or provide for a security interest in after-acquired collateral [*Com. Code § 9204(a)*]. However, a security interest under an after-acquired *property clause* does not attach to consumer goods, other than an accession if given as additional security, unless the debtor acquires rights in them within 10 days after the secured party gives value [*Com. Code § 9204(b)(1)*]. A security interest under an after-acquired *property clause* also does not attach to a commercial tort claim [*Com. Code § 9204(b)(2)*; *see Com. Code § 9102(a)(13)* (definition); *Waltrip v. Kimberlin* (2008) 164 Cal. App. 4th 517, 528-529, 79 Cal. Rptr. 3d 460 (security interest in commercial tort claim cannot attach unless claim is in existence when security agreement is authenticated; after-acquired *property clause* in agreement antedating claim cannot create such security interest except by modification of agreement once claim exists)].

Priority in after-acquired property is covered in *§ 42.15[5]*.

(3) Future advances [*see Com. Code § 9204(c)*].

NOTE:

A security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are sold in connection with, future advances or other value, whether or not the advances or value are given pursuant to commitment [*Com. Code § 9204(c)*; *see § 42.12[2][d]*].

For discussion of perfection and priorities of advances made by the secured party, *see § 42.15[6]*.

4. Include grant of security interest.

NOTE:

The security agreement must include a grant of a security interest [*see Komas v. Future Systems, Inc.*

(1977) 71 Cal. App. 3d 809, 813-816, 139 Cal. Rptr. 669 (decided under prior law)]. However, no specific language is required to create the grant of the security interest [*see In re Amex-Protein Development Corporation* (9th Cir. 1974) 504 F.2d 1056, 1058-1060 (decided under prior law)].

a. If security interest is being given to secure obligation of debtor, clearly show parties' intent not to make absolute transfer of title to secured party.

b. If transaction is outright sale (*e.g.*, of accounts or chattel paper), state that debtor (seller) transfers legal title to collateral to secured party (buyer) [*see Com. Code* §§ 1201(b)(35), 9109(a)(3)].

5. Identify value given or to be given by secured party to debtor [*see Com. Code* § 9203(b)(1)].

6. If desired, include provision delaying attachment of security interest to specified date [*see Com. Code* § 9203(a)].

NOTE:

Unless otherwise agreed, the security interest will attach when the debtor has rights in the collateral, value has been given, and one of the following conditions is met:

- The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned [*Com. Code* § 9203(b)(3)(A)].

- The collateral is not a certificated security and is in the possession of the secured party under *Com. Code* § 9313 (perfection by possession or delivery without filing), in accordance with to the debtor's security agreement [*Com. Code* § 9203(b)(3)(B)].

- The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under *Com. Code* § 8301 (delivery of security), in accordance with the debtor's security agreement [*Com. Code* § 9203(b)(3)(C); *see Com. Code* § 8102(a)(4) ("certificated security" defined); *Com. Code* § 8102(a)(16) "security certificate" defined)].

- The collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents, and the secured party has control under *Com. Code* §§ 7106 and 9104-9107, in accordance with the debtor's security agreement [*Com. Code* § 9203(b)(3)(D); *see Com. Code* § 9102 (definitions)].

For further discussion of attachment, see § 42.12[1].

7. If transaction is other than outright sale, identify debtor's obligations secured by collateral, including if applicable:

NOTE:

The security agreement need not describe the terms of the debt or obligation. It is sufficient if the agreement simply shows an intention to grant a security interest to the secured party [*see New West Fruit Corp. v. Coastal Berry Corp.* (1991) 1 Cal. App. 4th 92, 97-98, 1 Cal. Rptr. 2d 664 (decided under prior law)]. However, to avoid misunderstanding, the agreement should refer to the promissory note, contract, or other document that sets forth the terms of the obligation.

- a. Pre-existing obligations.
- b. Obligations to repay future advances to be made by secured party [*see* P 3d(3), *above*].
- c. Whether other persons are liable for obligations [*see* P 1, *above*].

8. Set forth desired provisions regarding preservation of collateral, such as:

- a. Secured party's right to inspect collateral.
- b. Debtor's obligation to assemble collateral and make it available for inspection by secured party.
- c. Limitations, if any, on location of collateral or on debtor's use of collateral.
- d. Debtor's or secured party's duty to insure against loss of or damage to collateral.
- e. Debtor's duty to protect, maintain, and repair collateral.
- f. Debtor's duty to maintain collateral free of taxes, liens, and other obligations.
- g. Debtor's right to sell, exchange, or dispose of collateral.
- h. Debtor's duty to reimburse secured party for expenses incurred in protecting collateral.
- i. If secured party is in possession of collateral, modification of statutory duties of secured party with respect to collateral [*see Com. Code* § 9207(a)-(c)].

NOTE:

The Commercial Code sets forth the rights and duties of the parties when the collateral is in the possession of the secured party [*see Com. Code* § 9207]. However, some of these responsibilities may be altered by agreement [*see Com. Code* § 9207(a), (c); *see also Com. Code* §§ 9601(a), 9602]. For further discussion of the rights and duties of secured parties, *see* § 42.13.

9. State any desired limitations on secured party's right to assign security interest, including:

- a. Effect of attempted assignment.
- b. Debtor's right to receive notice of assignment.

10. If desired, make collection and enforcement rights available to secured party, even if default has not occurred [*see Com. Code* § 9607 (collection and enforcement rights)].

NOTE:

Secured parties are entitled to collect and enforce rights against account debtors before default, as long as the debtor has so agreed [*see Com. Code* § 9607(a); *Com. Code* § 9607 (UCC Comment P 4)].

11. Include default provisions, such as:

- a. Provision defining events of default.

- b. Provision indicating whether or under what circumstances acceleration of obligation will take place.
- c. Provision defining curable defaults.
- d. Provision that waiver of event of default does not act as waiver of future events of default.
- e. If desired, provisions modifying secured party's statutory remedies [*see Com. Code § 9601(a)*; *see also Com. Code § 9602* (waiver and variance of rights and duties); *Com. Code § 9603* (agreement on standards concerning rights and duties)], such as:

NOTE:

For a detailed discussion of statutory remedies, see § 42.16[2], [3]. Generally, the statutory remedies cannot be varied by agreement [*see Com. Code § 9602*; *see also Com. Code § 9601 et seq.*].

(1) Right to take possession of collateral on default [*see Com. Code § 9609(a)(1)*].

(2) Right to demand that defaulting debtor assemble collateral and make it available to secured party at reasonably convenient place designated by secured party [*see Com. Code § 9609(c)*].

(3) Right to render equipment unusable and to dispose of collateral on debtor's premises [*Com. Code § 9609(a)(2)*; *see Com. Code § 9610* (disposition of collateral after default)].

(4) Right to apply proceeds of disposition of collateral to reimbursement of secured party's reasonable attorneys' fees and expenses incurred in repossessing and disposing of collateral [*Com. Code § 9607(d)*].

- f. If desired, provisions expanding or limiting debtor's statutory rights on default, such as [*see Com. Code § 9624*]:

NOTE:

Except as permitted by statute, the debtor's rights cannot be varied or waived [*see Com. Code §§ 9601(d), 9602, 9624*; § 42.16[2]]. However, the parties may agree on reasonable standards by which they can measure the fulfillment of the debtor's statutory rights [*Com. Code § 9603*].

(1) Waiver of right to notification of disposition of collateral [*see Com. Code § 9611*].

NOTE:

This right may be waived only by an agreement to that effect entered into and authenticated after default [*Com. Code § 9624(a)*].

- (2) Waiver of right to require disposition of collateral [*see Com. Code § 9620(e)*].

NOTE:

This right may be waived only by an agreement to that effect entered into and authenticated after default [*Com. Code § 9624(b)*].

(3) Except in consumer-goods transaction, waiver of right to redeem collateral [*see Com. Code § 9623*].

NOTE:

This right may be waived only by an agreement to that effect entered into and authenticated after default [*Com. Code § 9624(c)*].

12. Provide for expiration of agreement on debtor's satisfaction of debts or other obligations [*see P 7, above*] and state that expiration terminates security interest [*see also Com. Code § 9513(a), (c)* (termination statement for financing statement)].

13. If desired, include choice of law provision [*see Com. Code § 1301(a)*].

NOTE:

In a multistate transaction, the parties' agreement cannot modify the statutory rules governing perfection of security interests [*Com. Code §§ 1301(c), 9301-9307; see § 42.121, P 14*].

14. If agreement finances purchase of consumer goods, add provisions needed to comply with consumer protection laws [*see, e.g., 15 U.S.C. §§ 45, 1604; 12 C.F.R. §§ 226.2(a), 226.6-226.9, 226.17, 226.18; 16 C.F.R. §§ 433.1-433.3; Com. Code § 1801 et seq.; see also § 42.10[5]; Ch. 45, Consumer Installment Loans and Credit Sales, and Ch. 47, Automotive Financing and Vehicle Leasing*].

15. If security agreement includes interest in real estate, include provisions in accordance with requirements for documents relating to real property [*see Ch. 25A, Security Instruments for Real Estate Financing; see also § 42.203*].

16. Obtain signatures of debtor, obligor, and secondary obligor, as applicable, and, if desired, secured party.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Security AgreementsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Security AgreementsEffectivenessCommercial Law (UCC)Secured Transactions (Article 9)Security AgreementsRequirements



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART III. TRANSACTION GUIDE

D. Drafting Guide

19-42 California Legal Forms--Transaction Guide § 42.131

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.131 Financing Statement (Form UCC-1)

NOTE:

After July 1, 2001, all financing statements filed in California must be filed on the official financing statement form [*see Com. Code § 9521(b)*], known as Form UCC-1, provided by the office of the Secretary of State. The Secretary of State's Office has advised that nonstandard filings, which previously were accepted for an additional fee, are no longer accepted. For an illustration of Form UCC-1 and the Secretary of State's official instructions, see § 42.211. Copies are also available online at the Secretary of State's website, which is listed in § 42.211[1][a].

Com. Code § 9502(c) creates one exception to the preceding rule by providing that a record of a mortgage is effective, from the date of recording, as a financing statement filed as a fixture filing or covering as-extracted collateral, provided specified requirements are satisfied. For a list of these requirements, see § 42.130, P 3a and NOTE to P 3a.

A financing statement that substantially complies with the statutory requirements is effective, even if it contains minor errors, unless the errors or omissions make the filing statement seriously misleading [*Com. Code § 9506(a)*; *see Com. Code § 9506(b)* (failure to sufficiently provide debtor's name in accordance with *Com. Code § 9503(a)* is seriously misleading); *see also In re Pacific Trencher & Equipment, Inc.* (9th Cir. 1984) 735 F.2d 362, 364 (decided under former law)].

Revised Division 9 contains no signature requirement for a financing statement. For discussion of authorization issues, see § 42.14[3][b].

1. Identify debtor or debtors, stating [*see Com. Code § 9502(a)(1)*; *see also Com. Code §§ 9516(b)(3)(A)*, (C), 9520(a)]:

NOTE:

The name of a debtor entity (its "organizational name") must be provided as specified by statute. For example, if the debtor is a "registered organization" (defined to include corporations, partnerships, limited partnerships, and limited liability companies [*see Com. Code § 9102(a)(70)*]), the debtor's name is the name shown on the public records of the debtor's "jurisdiction of organization" [*Com. Code § 9503(a)(1)*; *see Com. Code § 9503(a)(2)* (rules for decedent's estates); *see Com. Code § 9503(a)(3)* (rules for common-law trusts); *see also Com. Code § 9102(a)(50)* ("jurisdiction of organization" defined)]. A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor [*Com. Code § 9503(c)*].

A financing statement may provide the name of more than one debtor [*Com. Code § 9503(e)*].

a. Debtor's exact legal name (do not abbreviate) [*see Form UCC-1, Official Instructions, Items 1-1b; reproduced in § 42.211[2]*], either:

(1) For organization debtor:

(a) Sole proprietorship is not an organization and must be listed as individual debtor, even if it does business under a trade name.

(b) If debtor is partnership, enter exact full legal name of partnership and do *not* enter names of individual partners as additional debtors.

(c) If debtor is registered organization (corporation, limited partnership, limited liability company), enter name as it appears in debtor's current filed charter documents.

(2) For individual debtor:

NOTE:

The filing office is required to reject an initial filing statement or amendment adding an individual debtor if the office cannot index the record because it cannot identify the debtor's last name (*e.g.*, it is unclear whether the debtor's name is Samuel John or John Samuel) [*see Com. Code § 9516(b)(3)(C)*].

(a) Enter sole proprietorship as an individual debtor under name of proprietor, even if proprietorship is operating under a trade name.

(b) Do not use prefixes, (*e.g.*, "Mr.," "Mrs.," "Ms").

(c) Use suffix title only for lineage (*e.g.*, "Jr.," "Sr.," "III") and not for other suffixes or titles (*e.g.*, "M.D.").

(d) Use married woman's personal name (*e.g.*, "Mary Smith," not "Mrs. John Smith").

b. Mailing address [*see Form UCC-1, Official Instructions, Items 1c; reproduced in § 42.211[2]*].

c. Debtor's taxpayer ID number (social security number or employer's identification number) [*see Form UCC-1, Official Instructions, Items 1d; reproduced in § 42.211[2]*].

d. For organizations [see Form UCC-1, Official Instructions, Items 1e, f, g; reproduced in § 42.211[2]]:

(1) Type of organization.

(2) Jurisdiction of organization.

e. If debtor is trust or a trustee acting with respect to property held in trust, enter debtor's name, attach Addendum (Form UCC-1AD, reproduced in § 42.211[2]) and check appropriate box in Item 17 [see Form UCC-1, Official Instructions, Note; reproduced in § 42.211[2]].

f. If debtor is a decedent's estate, enter name of deceased individual, enter decedent's enter debtor's name, attach Addendum (Form UCC-1AD, reproduced in § 42.211[2]) and check appropriate box in Item 17 [see Form UCC-1, Official Instructions, Note; reproduced in § 42.211[2]].

g. If debtor is a transmitting utility or financing statement is filed in connection with a manufactured home transaction or a public finance transaction, attach Addendum (Form UCC-1AD, reproduced in § 42.211[2]) and check appropriate box in Item 18 [see Form UCC-1, Official Instructions, Note; reproduced in § 42.211[2]].

h. If additional debtor is included, enter information on additional debtor in Item 2 of UCC-1 form, as specified in (a) through (g), *above* [see Form UCC-1, Official Instructions, Item 2; reproduced in § 42.211[2]].

i. If more than one additional debtor is included, enter information on first additional debtor in Item 2 of UCC-1 form [see (h), *above*], and attach addendum listing additional debtors, using format indicated in (a) through (g), *above* [see Form UCC-1, Official Instructions, Item 2; reproduced in § 42.211[2]].

NOTE:

The instructions to Form UCC-1 suggest the use of Form UCC-1AD, reproduced in § 42.211[2], or other additional pages, using format indicated in (a) through (g), *above* [see Form UCC-1, Official Instructions, Item 2; reproduced in § 42.211[2]]. However, the Secretary of State's office has promulgated a California-specific addendum to use when adding additional debtors or secured parties. The California addendum is illustrated in § 42.213.

2. Identify secured party (or parties) or secured party's representative, stating [see *Com. Code* § 9502(a)(2); see also *Com. Code* § 9516(b)(4)]:

a. Name, using rules specified in P 1(a), *above* [see Form UCC-1, Official Instructions, Item 3; reproduced in § 42.211[2]].

NOTE:

A financing statement may provide the name of more than one secured party [*Com. Code* § 9503(e)].

Failure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement [*Com. Code* § 9503(d)].

b. Address at which secured party will make available information concerning security interest, as specified in P 1(b), *above* [see Form UCC-1, Official Instructions, Item 3; reproduced in § 42.211[2]].

NOTE:

The lack of a mailing address for the secured party of record requires the filing office to reject an initial financing statement [*Com. Code* §§ 9516(b)(4), 9520(a)]. However, the failure to include an address for the secured party of record does not render a financing statement ineffective [*see Com. Code* § 9502(a)]. The function of the address is not to identify the secured party of record, but rather to provide an address to which others can send required notifications, *e.g.*, of a purchase-money security interest in inventory or of the disposition of collateral [*see Com. Code* § 9516 (UCC Comment 5); *see also* § 42.211].

c. Other information as specified in P 1(c) through (g), *above* [*see* Form UCC-1, Official Instructions, Item 3; reproduced in § 42.211[2]].

d. If there is more than one secured party, enter information on additional secured parties as stated in P 1(i), *above* [*see* Form UCC-1, Official Instructions, Item 3; reproduced in § 42.211[2]].

NOTE:

The instructions to Form UCC-1 suggest the use of Form UCC-1AD, reproduced in § 42.211[2], or other additional pages, using format indicated in (a) through (g), *above* [*see* Form UCC-1, Official Instructions, Item 2; reproduced in § 42.211[2]]. However, the Secretary of State's office has promulgated a California-specific addendum to use when adding additional debtors or secured parties. The California addendum is illustrated in § 42.213.

e. If there has been a total assignment of secured party's interest prior to filing UCC-1 form, do one of following; either [*see* Form UCC-1, Official Instructions, Item 3; reproduced in § 42.211[2]]:

(1) Enter assignor secured party's name and address in Item 3 of UCC-1 form, and then file an amendment form (Form UCC-3) [*see* §§ 42.140, 42.214]; or

(2) Enter total assignee's name and address in Item 3 of UCC-1 form and, if desired, attach addendum (Form UCC-1AD, reproduced in § 42.211[2]) giving name and address of assignor secured party in Item 12.

3. Identify collateral [*see Com. Code* § 9502(a)(3); *see also* § 42.130, P 3; *see also* Form UCC-1, Official Instructions, Item 4; reproduced in § 42.211[2]].].

NOTE:

A financing statement sufficiently indicates the collateral that it covers if the financing statement provides either a description of the collateral pursuant to *Com. Code* § 9108 [*see* § 42.130, P 3a (NOTE)], or an indication that the financing statement covers all assets or all personal property [*Com. Code* § 9504].

Although "all assets or all personal property" is an adequate description of collateral for purposes of a financing statement, it is insufficient for purposes of a security agreement [*see Com. Code* §§ 9108, 9203; *see also Com. Code* § 9101 (UCC Comment P 4h)].

If the space provided on the UCC-1 form is insufficient to include a full description of the collateral, the person preparing the financing statement should put the entire collateral description or continuation of the collateral description on either an addendum (Form UCC-1AD, reproduced in § 42.211[2]) or other

attached additional pages [*see* Form UCC-1, Official Instructions, Item 4; reproduced in § 42.211[2]].

4. If collateral is as-extracted collateral [*see Com. Code § 9502(b)*; *Com. Code § 9516(b)(3)(D)*; *see also Com. Code § 9102(a)(6)* (definition)]:

NOTE:

A record of a mortgage is effective, from the date of recording, as a financing statement covering as-extracted collateral only if specified conditions are satisfied [*see Com. Code § 9502(c)*; P 7, *below*].

- a. Indicate that financing statement covers this type of collateral.
- b. Indicate that statement is to be recorded in real property records.
- c. Provide description of real property to which collateral is related.

NOTE:

The description of the real estate must be specific enough to satisfy the requirements for giving constructive notice if it were contained in a record of the mortgage of the real estate [*Com. Code § 9502(b)(3)*].

- d. If the debtor does not have interest of record in the real property, provide name of record owner.

5. If collateral is timber to be cut [*see Com. Code § 9502(b)*; *see also Com. Code § 9516(b)(3)(D)*]:

NOTE:

A record of a mortgage is effective, from the date of recording, as a financing statement covering timber to be cut only if specified conditions are satisfied [*see Com. Code § 9502(c)*; P 7, *below*]:

- a. Indicate that financing statement covers this type of collateral.
- b. Indicate that statement is to be recorded in real property records.
- c. Provide description of real property to which collateral is related.

NOTE:

The description of the real estate must be specific enough to satisfy the requirements for giving constructive notice if it were contained in a record of the mortgage of the real estate [*Com. Code § 9502(b)(3)*].

- d. If debtor does not have interest of record in the real property, provide name of record owner.

6. If financing statement is filed as fixture filing and covers collateral in goods that are or are to become fixtures [*see Com. Code § 9502(b)*; *see also Com. Code § 9516(b)(3)(D)*; Form UCC-1, Official Instructions, Item 6; reproduced in § 42.211[2]].]:

NOTE:

A "fixture filing" is the filing of a financing statement covering goods that are or are to become fixtures and satisfying *Com. Code § 9502(a), (b)* [*see* PP 1-3, *above*, and PP a-d, *below*]. The term includes the filing of a financing statement that covering goods of a transmitting utility that are, or are to become

fixtures [*Com. Code § 9102(a)(40)*]. Filing is in the office in which the record of a mortgage on the related real estate would be filed [*see Com. Code § 9501(a)(1)(B)*].

A record of a mortgage is effective, from the date of recording, as a financing statement filed as a fixture filing only if all of the specified conditions are satisfied [*Com. Code § 9502(c)*; *see* P 7, *below*].

- a. Indicate that financing statement covers this type of collateral.
- b. Indicate that statement is to be recorded in real property records.
- c. Provide description of the real property to which collateral is related.

NOTE:

The description of the real estate must be specific enough to satisfy the requirements for giving constructive notice if it were contained in a record of the mortgage of the real estate [*Com. Code § 9502(b)(3)*].

- d. If debtor does not have interest of record in the real property, provide name of record owner.

7. If filer desires (at filer's option) to use titles of "lessee and lessor," or "consignee and consignor," or "bailee and bailor" instead of usual titles of "debtor and secured party," check appropriate box in Item 5 of UCC-1 form [*see* Form UCC-1, Official Instructions, Item 5; reproduced in § 42.211[2]].

8. If search reports are desired on one or more debtors listed in financing statement, check box in Item 7 of UCC-1 form, and file search report copy of Form UCC-1 (in addition to other filed copies) for each debtor for whom a search is being requested [*see* Form UCC-1, Official Instructions, Item 7; reproduced in § 42.211[2]].

NOTE:

For discussion of debtor search reports, see §§ 42.111 P 1b, 42.216.

9. If record of mortgage is to be filed in lieu of financing statement as fixture filing or as financing statement covering as extracted collateral or timber to be cut, make certain that [*Com. Code § 9502(c)*]:

- a. Record indicates goods or accounts that it covers; and
- b. Goods are or are to become fixtures related to real property described in record; or collateral is related to real property described in record and is as-extracted collateral or timber to be cut; and
- c. Record satisfies requirements for financing statement in *Com. Code § 9502*, other than indication that it is to be filed in the real property records; and
- d. Record is recorded.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Secured Transactions (Article 9) Perfection Methods Filings Financing Statements General Overview



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D. Drafting Guide

19-42 California Legal Forms--Transaction Guide §§ 42.132-42.138

AUTHOR: by Ann S. Manheimer, J.D.

[Reserved]

§§ 42.132[Reserved]



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E. Related and Subsequent Procedures

19-42 California Legal Forms--Transaction Guide § 42.139

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.139 Inaccurate or Wrongfully Filed Financing Statement or Other Record (Certificate of Correction)

1. If debtor believes that financing statement or other record indexed under debtor's name is inaccurate or has been wrongfully filed, advise debtor that debtor may file "correction statement" with respect to that record [*see Com. Code § 9518*].

NOTE:

The filing of a correction statment does not affect the effectiveness of an initial financing statement or other filed record [*Com. Code § 9518(c)*]. It does, however, afford an aggrieved person the opportunity to state its position in the public record [*see UCC § 9-518, Official Comment 2*]. The correction statement becomes part of the financing statement as defined in *Com. Code § 9102(a)(39)* [*see UCC § 9-518, Official Comment 2*].

The filing of a correction statement does not displace other provisions of Article 9 that impose liability for making unauthorized filings, or failing to file or send a termination statement, nor displace any available judicial remedies [*see UCC § 9-518, Official Comment 2*].

2. Complete official correction statement form, Form UCC-5 [*see § 42.215* for official Form UCC-5 and instructions], making certain that following statutory requirements for correction statements are satisfied [*see Com. Code § 9518(b)*]:

NOTE:

For additional requirements imposed by the Secretary of State's office with respect to the format and content of UCC-5 forms, see the discussion in *§ 42.215[1]* and the official

instructions reproduced in § 42.215[2].

a. Identify record to which correction statement relates by both of following:

(1) File number assigned to initial financing statement to which record relates; and

(2) Date and time on which initial financing statement was filed or recorded, if all of following conditions exist:

(a) Correction statement relates to a record filed or recorded in office designated for filing or recording of a record of a mortgage on the related real property;

(b) Filing is either [*see Com. Code § 9501(a)(1)*]:

(i) As-extracted collateral or timber to be cut; or

(ii) A fixture filing and collateral is goods that are or are to become fixtures; and

(c) Correction statement is also filed in same filing office in (a), *above*.

b. Indicate that statement is a correction statement.

c. Either:

(1) Provide basis for debtor's (or other filer's) belief that record is inaccurate, and indicate manner in which debtor believes record should be amended to cure inaccuracy; or

(2) Provide basis for debtor's (or other filer's) belief that record was wrongfully filed.

3. File completed correction statement (Form UCC-5) in office where original record was filed [*see Com. Code § 9518*].

NOTE:

In California, this will normally be the Secretary of State's office [*Com. Code § 9501(a)(2)*], unless the collateral is as-extracted timber to be cut or the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures, in which case the filing office will be the county recorder's office in which a mortgage on the related real property would be recorded *Com. Code § 9501(a)(1)*].

4. Include appropriate filing fee.

NOTE:

The UCC-5 form must be accompanied by a fee of \$10 (\$20 if it is more than 2 pages long) [*Com. Code § 9525; Gov. Code § 12194(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsAmendments, Errors & Omissions



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART III. TRANSACTION GUIDE

E. Related and Subsequent Procedures

19-42 California Legal Forms--Transaction Guide § 42.140

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.140 Changes in Filed Financing Statements

[1] Amendment of Financing Statement

1. Determine whether financing statement should be amended because it contains erroneous information.

NOTE:

As a general matter, post-filing changes that render a financing statement inaccurate and seriously misleading have no effect on a financing statement [*see Com. Code § 9507(b)*]. This rule is subject to two exceptions: (1) when a new debtor becomes bound by a security agreement entered into by another person (the "original" debtor)) [*see Com. Code § 9508*]; and (2) when the name change of the debtor (not a new debtor) renders the financing statement seriously misleading [*see Com. Code § 9507(c)*].

- a. Determine whether name change of debtor renders the financing statement seriously misleading [*see Com. Code § 9507(c)*].

NOTE:

A financing statement that fails sufficiently to provide the name of the debtor in accordance with subdivision *Com. Code § 9503(a)* is seriously misleading [*see Com. Code § 9506*; *see also Com. Code § 9503(a)*; § 42.131 P 1 (NOTE)].

- b. If new debtor becomes bound by security agreement entered into by another person, determine whether differences in their names causes filed financial statement to be seriously misleading [*see Com. Code § 9508(b)*].

NOTE:

If the differences between the names of the new debtor and the original debtor cause the financing statement be seriously misleading [*see* P a (NOTE), *above*], the financing statement is effective to perfect a security interest in collateral acquired by the new debtor before, and within four months after, the new debtor becomes bound [*Com. Code* § 9508(b); *see Com. Code* § 9203(d) (when debtor becomes bound)]. The financing statement is not effective to perfect a security interest in collateral acquired by the new debtor more than four months after the new debtor becomes bound unless an initial financing statement providing the name of the new debtor is filed before the expiration of that time [*Com. Code* § 9508(b)]. These rules do not apply to collateral that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a security interest or agricultural lien continues [*see Com. Code* §§ 9507(a), 9508(c)].

A financing statement that is amended to add a debtor is effective as to the added debtor only from the date of filing of the amendment [*Com. Code* § 9512(d)].

- c. Determine whether parties wish to add new collateral.

NOTE:

A security interest may attach to new collateral either under a new security agreement or under an after-acquired property clause in the original security agreement. An amendment to the financing statement is necessary to perfect the security interest only if a new kind of collateral is added. No amendment is needed to add new collateral of a kind already described in the original financing statement [*see former Com. Code* § 9402 (UCC Comment P 4); *Com. Code* § 9512 (UCC Comment P 3)]. An amendment that adds new kinds of collateral is effective as to the added collateral only from its date of filing [*Com. Code* § 9512(c)].

- d. Determine whether parties wish to make other corrections to financing statement.

2. If amendment of financing statement is necessary, complete official amendment form (Form UCC-3) as follows:

NOTE:

After July 1, 2001, all financing statement amendments filed in California must be filed on the official financing statement amendment form [*see Com. Code* § 9521(b)], known as Form UCC-3, provided by the office of the Secretary of State. The Secretary of State's Office has advised that nonstandard filings, which previously were accepted for an additional fee, are no longer accepted. For an illustration of Form UCC-3 and the Secretary of State's official instructions, see § 42.214. Copies are also available online at the Secretary of State's website, which is listed in § 42.214[1][a].

- a. Enter file number of initial financing statement to which amendment relates [*see* Form UCC-3, Official Instructions, Item 1a; reproduced in § 42.214[2]].
- b. If amendment is to be filed or recorded in real estate records [*see* Form UCC-3, Official Instructions, Item 1b; reproduced in § 42.214[2]]:
 - (1) Check box in Item 1b of UCC-3 form; and
 - (2) Attach addendum (Form UCC-3Ad, reproduced in § 42.214[2]) and enter debtor's

name using the same format used in the original financing statement [see § 42.131 P1].

c. To change name or address of a party [see Form UCC-3, Official Instructions, Items 5-7; reproduced in § 42.214[2]]:

- (1) Check box in Item 5 of UCC-3 form;
- (2) Enter name of affected party in Items 6a or 6b, as appropriate; and
- (3) Give new name or address in Item 7 as appropriate.

d. To delete a party [see Form UCC-3, Official Instructions, Items 5,6; reproduced in § 42.214[2]]:

- (1) Check box in Item 5 of UCC-3 form;
- (2) Enter name of deleted party in Items 6a or 6b, as appropriate.

e. To add a party [see Form UCC-3, Official Instructions, Items 5,7; reproduced in § 42.214[2]]:

NOTE:

If multiple debtors or secured parties are being added, the California UCC addendum, reproduced in § 42.213, should be used for this purpose.

(1) Check box in Item 5 of UCC-3 form to indicate whether a debtor or secured party is being added; and

(2) Give name of address of new party in Item 7 as appropriate [for proper format for description of parties in a financing statement, see § 42.131 P1].

f. To changes the collateral covered by the financing statement, describe change in Item 8 of Form UCC-3 [see Form UCC-3, Official Instructions, Item 8; reproduced in § 42.214[2]], by one of following means, clearly indicating which of following means is chosen:

- (1) Describing collateral to be added or deleted; or
- (2) Setting forth description in full as it is to be effective after amendment is filed.

NOTE:

If the space on the UCC-3 form is insufficient for the above purpose, attach an addendum (Form UCC-3Ad, reproduced in § 42.214[2]).

g. Enter name of party of record authorizing amendment (usually secured party of record) in Item 9 of UCC-3 form [see Form UCC-3, Official Instructions, Item 9, reproduced in § 42.214[2]].

(1) If there is more than one authorizing secured party, give additional name(s) in Item 13 of addendum (Form UCC-3Ad, reproduced in § 42.214[2]) [see § 42.131, P1, for rules governing use of names in financing statements].

(2) If amendment is authorized by debtor and adds a debtor or collateral, check box in Item 9 of UCC-3

form and enter name of debtor authorizing amendment.

(3) If amendment is to be filed or recorded in real estate records, enter name of secured part of record in Item 13 of addendum (Form UCC-3Ad, reproduced in § 42.214[2]).

3. File amendment and pay filing fee [*see Com. Code § 9525* (fees); *see also § 42.215[1][c]*].

[2] Continuation Statement

1. Determine whether filing of continuation statement is appropriate.

NOTE:

In most circumstances, a filed financing statement is effective for a period of five years from the date of filing [*see Com. Code § 9515(a)*; *see also Com. Code § 9515(b)* (30 year period for initial financing statements filed in connection with public finance or manufactured home transaction)]. A continuation statement may be filed only within six months before the expiration of the applicable period [*Com. Code § 9515(d)*]. For further discussion, including exceptions to the general rule, *see § 42.14[3][d]*.

Timely filing of a continuation statement extends the effectiveness of the financing statement for five years, beginning on the day on which the financing statement would have become ineffective in the absence of filing [*Com. Code § 9515(e)*]. Successive continuation statements may be filed in the same manner to continue the effectiveness of the original statement [*see Com. Code § 9515(e)*].

a. Determine whether security interest still attaches [*see § 42.12*].

b. Verify that original financing statement was filed:

NOTE:

The following time periods should be measured from the filing date of the original financing statement, regardless of any intervening amendments. An amendment [*see P [1], above*] does not extend the effectiveness of the original financing statement [*see Com. Code §§ 9512(b), 9515(c)*].

(1) Not more than five years before contemplated filing date for continuation statement [*see Com. Code § 9515(d)*].

NOTE:

When the financing statement lapses, the security interest or agricultural lien becomes unperfected, unless the security interest is perfected otherwise. A new financing statement is then necessary to perfect a security interest, unless it is perfected without filing [*see Com. Code § 9515(c)*].

A security interest that becomes unperfected on the lapse of a financing statement is deemed to have been unperfected as against a purchaser of the collateral for value [*Com.*

Code § 9515(c); see Growth Properties v. Lempert (1983) 144 Cal. App. 3d 983, 987, 193 Cal. Rptr. 102 (decided under prior law)].

(2) At least four years and six months before contemplated filing date for continuation statement [*see Com. Code § 9515(d)*].

2. If continuation statement is appropriate, complete official amendment form (Form UCC-3) as follows:

NOTE:

After July 1, 2001, all financing statement continuations filed in California must be filed on the official financing statement amendment form [*see Com. Code § 9521(b)*], known as Form UCC-3, provided by the office of the Secretary of State. The Secretary of State's Office has advised that nonstandard filings, which previously were accepted for an additional fee, are no longer accepted. For an illustration of Form UCC-3 and the Secretary of State's official instructions, see § 42.214. Copies are also available online at the Secretary of State's website, which is listed in § 42.214[1][a].

a. For general information on completing UCC-3 form, see § 42.140[1], P 2, *above*.

b. For continuation statement, check box 3 on UCC-3 form [*see Form UCC-3, Official Instructions, Item 3, reproduced in § 42.214[2]*].

c. Enter name of party of record in Item 9 of UCC-3 form [*see Form UCC-3, Official Instructions, Items 3, 9, reproduced in § 42.214[2]; see also § 42.140[1] P 2(g), above*].

3. File continuation statement and pay filing fee [*see Com. Code § 9525 (fees); see also § 42.215[1][c]*].

[3] Statement of Assignment

1. If secured party has assigned all or part of security interest covered by filed financing statement [*see Com. Code § 9514(b)*], prepare statement of assignment using Form UCC-3, as follows [*see § 42.214*]:

NOTE:

After July 1, 2001, all financing statement continuations filed in California must be filed on the official financing statement amendment form [*see Com. Code § 9521(b)*], known as Form UCC-3, provided by the office of the Secretary of State. The Secretary of State's Office has advised that nonstandard filings, which previously were accepted for an additional fee, are no longer accepted. For an illustration of Form UCC-3 and the Secretary of State's official instructions, see § 42.214. Copies are also available online at the Secretary of State's website, which is listed in § 42.214[1][a].

When record of a mortgage is effective as a financing statement filed as a fixture filing [*see Com. Code § 9502(c)*], then an assignment of record of the security interest may be made only in the manner in which an assignment of record of the mortgage may be made under local real property law [*Com. Code § 9514(c)*].

It appears uncertain under the Commercial Code as adopted in California whether the assignment of a promissory note also acts as an assignment of the chattel mortgage or

security interest securing payment of the note [*see Civ. Code* §§ 2936, 2944].

a. For general information on completing UCC-3 form, see § 42.140[1], P 2, *above*.

b. To assign all or part of assignors interest [*see* Form UCC-3, Official Instructions, Item 4, reproduced in § 42.214[2]]:

(1) Check box in item 4 of UCC-3 form.

(2) Enter name of assignee in Item 7a of UCC-3 form if assignee is an organization, or Item 7b if assignee is an individual.

(3) Enter assignee's address in Item 7c.

(4) Enter name of assignor in Item 9.

(5) If partial assignment affects only some but not all collateral covered by financing statement, check appropriate box in Item 8 of UCC-3 form and indicate affected collateral in Item 8.

2. File statement of assignment and pay filing fee [*see Com. Code* § 9525 (fees); *see also* § 42.215[1][c]].

[4] Termination Statement

1. Determine whether termination statement is required.

NOTE:

Except in the case of a financing statement covering accounts or chattel paper that has been sold, or goods that are the subject of a consignment, the security interest is terminated if there is no remaining outstanding secured obligation and the secured party is under no commitment to make advances, incur obligations, or otherwise give value [*see Com. Code* § 9513(a)(1), (c)(1); *see also* *Com. Code* § 9513(c)(2) (accounts or chattel paper); *Com. Code* § 9513(c)(3) (goods that are subject of consignment)].

The secured party of record must file a termination statement if the financing statement covers consumer goods and either the security interest is terminated [*see Com. Code* § 9513(a)(1)] or the debtor did not authorize the filing of the initial financing statement [*see Com. Code* § 9513(a)(2)]. Otherwise, the secured party of record must send a termination statement to the debtor or file a termination statement only on receipt of an authenticated demand from the debtor [*see Com. Code* § 9513(c)]. The liability imposed on a secured party for failing to file or send a termination statement, as required, is identical to that imposed for the filing of an unauthorized financing statement or amendment [*see Com. Code* § 9625(e)].

2. If client is debtor:

a. Make authenticated demand on secured party for termination statement [*see Com. Code* § 9513(c); *see also* P 1 (NOTE), *above*; § 42.260].

b. If secured party of record does not file or send termination statement, as required [see P 1] (NOTE), *above*], file, or have debtor prepare and file termination statement [see P 3, *below*] and pay filing fee [see *Com. Code* § 9525 (fees); see also § 42.215[1][c]].

NOTE:

If a termination statement is not forthcoming from the secured party of record, the person named as debtor may authorize the filing [see *Com. Code* § 9509(d)(2); *Com. Code* § 9513 (UCC Comment P 3)].

3. If client is secured party and termination statement is required or desired:

a. Prepare termination statement on Form UCC-3 [see *Com. Code* § 9521(b); § 42.215[2]].

NOTE:

After July 1, 2001, all termination statements filed in California must be filed on the official financing statement amendment form [see *Com. Code* § 9521(b)], known as Form UCC-3, provided by the office of the Secretary of State. The Secretary of State's Office has advised that nonstandard filings, which previously were accepted for an additional fee, are no longer accepted. For an illustration of Form UCC-3 and the Secretary of State's official instructions, see § 42.214. Copies are also available online at the Secretary of State's website, which is listed in § 42.214[1][a].

(1) For general information on completing UCC-3 form, see § 42.140[1], P 2, *above*.

(2) To terminate effectiveness of financing statement with respect to security interest of authorized third party, check box 3 on UCC-3 form [see Form UCC-3, Official Instructions, Item 3, reproduced in § 42.214[2]].

(3) Enter name of party of record in Item 9 of Form UCC-3 [see Form UCC-3, Official Instructions, Item 9, reproduced in § 42.214[2]]:

(a) If party of record is secured party, enter secured party's name [see § 42.131, P 1, for rules governing use of names in financing statements].

(b) If termination statement is being authorized by debtor [see P 2, *above*], check appropriate box in Item 9 of UCC-3 form and enter name of debtor authorizing amendment.

(c) If termination statement is to be filed or recorded in real estate records, enter name of secured part of record in in Item 13 of addendum (Form UCC-3Ad, reproduced in § 42.214[2]).

b. File and pay filing fee [see *Com. Code* § 9525 (fees)] or send statement to debtor, as required [see *Com. Code* § 9513(a), (c)].

NOTE:

A termination statement for a financing statement covering consumer goods must be filed either within one month after there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value, or, if earlier, within 20

days after the secured party receives an authenticated demand from a debtor [*Com. Code § 9513(b)*].

In all other cases, a termination statement must be filed or sent to the debtor within 20 days after a secured party receives an authenticated demand from a debtor [*Com. Code § 9513(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral
OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing
StatementsAmendments, Errors & OmissionsCommercial Law (UCC)Secured Transactions (Article
9)PerfectionMethodsFilingsTermination Statements



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART III. TRANSACTION GUIDE

E. Related and Subsequent Procedures

19-42 California Legal Forms--Transaction Guide § 42.141

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§ 42.141 Secured Party's Remedies on Default by Debtor

1. If debtor is in default under security agreement [*see* § 42.16[1]], ascertain remedies available to secured party, including [*see* *Com. Code* § 9601(a), (b); *see also* § 42.16[3]]:

NOTE:

After default by the debtor, the secured party may exercise the rights and remedies granted under the default provisions of Division 9, and, except as otherwise provided in *Com. Code* § 9602 [*see* § 42.16[2]], the rights provided by the security agreement [*Com. Code* § 9601(a)]. These statutory rights are cumulative and may be exercised simultaneously [*Com. Code* § 9601(c)].

a. Right to reduce claim to judgment, foreclose, or otherwise to enforce claim by any available judicial procedure.

NOTE:

A judicial lien relates back to the earlier of date of filing or the date of perfection, thus, giving the secured party who enforces security interest by judicial process the benefit of *Com. Code* § 9322(a)(1)'s first-to-file-or-perfect priority rule [*see* *Com. Code* § 9601(e); *see also* *Com. Code* § 9601(f) (execution sale is appropriate method of foreclosure under *Com. Code* § 9601 *et seq.*, but is governed by law other than this Division)].

b. If collateral is documents, right to proceed either as to documents or as to goods they cover.

c. If secured party is in possession or control of collateral [*see* *Com. Code* §§ 9104-9107 (control)], the

rights and duties provided in *Com. Code* § 9207 [see § 42.13[1]].

NOTE:

With the exception of the rules requiring that a secured party proceed in a commercially reasonable manner in exercising its collection and enforcement rights [see *Com. Code* § 9607(c)], the statutory provisions governing default [see *Com. Code* § 9601 *et seq.*] impose no duties on a secured party that is a consignor or is a buyer of accounts, chattel paper, payment intangibles, or promissory notes [*Com. Code* § 9601(g)].

d. If collateral consists of personal property and interest in real property, remedies available regarding real property [see *Com. Code* § 9604(a); see also Ch. 25A, *Security Instruments for Real Estate Financing* ; Ch. 25D, *Foreclosure*].

NOTE:

If the collateral includes personal property and an interest in real property, the secured party may proceed, in any sequence, in accordance with the secured party's rights and remedies in respect of real property as to the real property security, and in accordance with this the provisions of *Com. Code* § 9601 *et seq.* as to the personal property or fixtures [*Com. Code* § 9604(a)(1)(A) see *Com. Code* § 9604(a)(1)(B), (C); see also Ch. 25D, *Foreclosure*]. However, there are limitations on the applicability of statutory provisions governing real property to personal property or the obligations secured by personal property [see *Com. Code* § 9604(a)(2), (3)]. The three-month time limit for seeking a deficiency judgment after a real property judicial foreclosure sale set forth in *Code of Civ. Proc.* § 726(b) does not apply to a mixed collateral obligation, when the real property is sold in a nonunified sale [*Florio v. Lau* (1998) 68 Cal. App. 4th 637, 653, 80 Cal. Rptr. 2d 409 (decided under prior law; *Code of Civ. Proc.* § 726(b) may not be applied in its entirety to mixed collateral situation without running afoul of Legislature's stated purpose in enacting mixed collateral statutes)].

2. If debtor is in default under security agreement [see § 42.16[1]], ascertain which of secured party's rights to collect or enforce collateral, including accounts, chattel paper, and payment intangibles, are applicable to situation at hand [see *Com. Code* § 9607(a)]:

NOTE:

The following rights are only the baseline rights of the secured party vis-a-vis the debtor. The secured party is entitled to enforce after default, or earlier if so agreed [see *Com. Code* § 9607(a); *Com. Code* § 9607 (UCC Comment P 6)]. *Com. Code* § 9607 should not be understood to regulate the duties of an account debtor or other person obliged on the collateral [see *Com. Code* § 9607(e); *Com. Code* § 9607 (UCC Comment P 6)]. For example, the secured party may be unable to exercise the debtor's rights under an instrument if the debtor is in possession of the instrument, or under a non-transferable letter of credit if the debtor is the beneficiary [see *Com. Code* § 9607 (UCC Comment P 6)].

a. Right to notify account debtor or other person obligated on collateral to make payment to or otherwise render performance for benefit of secured party [see § 42.245].

b. Right to take any proceeds to which secured party is entitled [see *Com. Code* § 9315 (secured party's rights on disposition of collateral and in proceeds)].

c. Right to enforce obligations of account debtor and exercise debtor's rights with respect to account

debtor's obligation to make payment or otherwise render performance to debtor, and with respect to any property that secures account debtor's obligations, for example:

(1) Right to take possession and accept or dispose of collateral [*see Com. Code § 9609-9610, 9620; see also PP 6, 9, below*].

(2) If collateral consists of personal property and interest in real property, make use of remedies available regarding real property [*see Com. Code § 9604(a)*; P 1d, *above*; *see also Com. Code § 9607(b)* (right to enforce mortgage nonjudicially); Ch. 25A, *Security Instruments for Real Estate Financing*; Ch. 25D, *Foreclosure*].

d. If secured party holds security interest in deposit account perfected by control under *Com. Code § 9104(a)(1)*, right to apply balance of deposit account to obligation secured by deposit account.

e. If secured party holds security interest in deposit account perfected by control under *Com. Code § 9104(a)(2), (3)*, right to instruct bank to pay balance of deposit account to or for secured party's benefit.

3. If secured party undertakes to collect or enforce debtor's obligation on collateral [*see Com. Code § 9607(a)*; P 2c, *above*]:

a. Advise secured party that collections must be made in commercially reasonable manner [*see Com. Code § 9607(c)(1)*; *see also Com. Code § 9627* (determination of whether conduct was commercially reasonable)].

b. Advise secured party that it is entitled to charge back uncollected collateral or otherwise to full or limited recourse against debtor or secondary obligor [*see Com. Code § 9607(c)(2)*].

c. Have secured party deduct reasonable expenses of collection and enforcement from amounts collected and credited toward debtor's defaulted obligation [*see Com. Code § 9607(d)*].

NOTE:

These expenses may include reasonable attorneys' fees and legal expenses incurred by the secured party [*Com. Code § 9607(d)*].

4. If enforcing party recovers proceeds of collateral, advise party that:

NOTE:

Recovered proceeds must be applied in substantially the same manner as the dispositions of collateral [*see Com. Code § 9615(a), (e)*; P 9, *below*].

a. Enforcing party must apply or pay over for application cash proceeds of collection or enforcement under *Com. Code § 9607* [*see P 3, above*] in following order to [*see Com. Code § 9608(a)(1)*]:

NOTE:

A secured party need not apply or pay over for application noncash proceeds of collection and enforcement [*see Com. Code 9607*; P 2, *above*] unless the failure to do so would be commercially unreasonable [*Com. Code § 9608(a)(3)*]. A secured party that applies or pays over for application noncash proceeds must do so in a commercially reasonable manner [*Com. Code § 9608(a)(3)*].

(1) Reasonable expenses of collection and enforcement and, to extent provided for by agreement and not prohibited by law, secured party's reasonable attorneys' fees and legal expenses.

(2) Satisfaction of obligations secured by security interest or agricultural lien under which collection or enforcement is made.

(3) If secured party receives authenticated demand for proceeds before distribution of proceeds is completed, satisfaction of obligations secured by any subordinate security interest in or other lien on collateral subject to security interest or agricultural lien under which collection or enforcement is made.

NOTE:

If requested by a secured party, a holder of a subordinate security interest or other lien must furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder complies, the secured party is not required to comply with the holder's demand [*Com. Code § 9608(a)(2)*].

b. Enforcing party must account to and pay debtor for any surplus.

NOTE:

A secured party must account to and pay a debtor for any surplus; and, except as provided for a consumer transaction [*see Com. Code § 9626(b)*], the obligor generally is liable for any deficiency [*see Com. Code § 9608(a)(4)*]. However, if the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency [*Com. Code § 9608(b)*]. *Code Civ. Proc. § 701.040(b)* relating to the payment of proceeds applies only if the security agreement provides that the debtor is entitled to any surplus [*Com. Code § 9608(b)*].

5. If secured party is not already in possession of collateral, have secured party to proceed as follows:

a. Take possession of collateral [*see Com. Code § 9609(a)(1)*].

b. If collateral consists of equipment, render collateral unusable or dispose of it on debtor's premises [*see Com. Code § 9609(a)(2)*].

NOTE:

This provision is of particular assistance when the physical removal of collateral is impractical or the storage of the equipment pending resale would be impractically expensive, for example, when the collateral is heavy equipment. In proceeding under this statutory provision, the secured party must act in good faith and in a commercially reasonable manner [*see Com. Code § 9610* (all aspects of disposition must be commercially reasonable)].

c. Take possession pursuant to judicial process [*see Com. Code § 9609(b)(1)*].

d. Take possession without judicial process, without breach of peace [*see Com. Code § 9609(b)(2)*].

- e. Have secured party demand that debtor assemble collateral and make it available at reasonably convenient place designated by secured party [*see Com. Code § 9609(c)*].
- 6. Advise secured party who has obtained possession of collateral [*see P 5, above*] of duty to use reasonable care in custody and preservation of collateral and other rights and duties arising from secured party's possession [*see Com. Code § 9207(a)*].
- 7. Advise secured party who has obtained possession of collateral [*see P 5, above*] that debtor or any other secured party may redeem collateral unless otherwise agreed in writing after default [*see Com. Code § 9623; see § 42.142, P 1*].
- 8. After secured party obtains possession of collateral [*see P 5, above*], if secured party wishes to retain collateral in full or partial satisfaction of debt [*see Com. Code § 9620; § 42.16[3][e]; see also §§ 42.247, 42.248*]:

NOTE:

In a consumer transaction, a secured party may not accept collateral in partial satisfaction of the obligation it secures [*Com. Code § 9620(g)*].

- a. Advise secured party that it may accept collateral in full or partial satisfaction of debt only if all of following conditions are met:

NOTE:

If the collateral is consumer goods, the collateral is not in the possession of the debtor when the debtor consents to the acceptance [*Com. Code § 9620(a)(3)*].

(1) Debtor consents to acceptance [*see Com. Code § 9620(a)(1); see Com. Code § 9620(c)* (acceptance procedure)].

(2) Secured party does not receive, within specified time [*see Com. Code § 9620(d)*], authenticated notification of objection to proposal [*see Com. Code § 9620(a)(2)*].

NOTE:

The notification of objection to proposal must be authenticated by either a person to which the secured party was required to send a proposal [*see Com. Code § 9621*], or any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the proposal [*Com. Code § 9620(a)(2)*].

(3) Secured party consents to debtor's acceptance in authenticated record or sends proposal to debtor [*see Com. Code § 9620(b)(1); see also Com. Code § 9621* (required notification of others who have or claim to have interest in collateral)].

- b. Advise secured party that if it takes possession of collateral, it must dispose of collateral [*see Com. Code § 9610; P 9, below*] within 90 days after taking possession, or as otherwise agreed in authenticated agreement entered into after default, if either of following conditions has been satisfied [*see Com. Code § 9620(e), (f)*]:

(1) For purchase money security interest in consumer goods, 60 percent of cash price has been paid.

(2) For nonpurchase money security interest in consumer goods, 60 percent of obligation's principal amount has been paid.

9. Advise secured party that after default, it may sell, lease, license, or otherwise dispose of any or all of collateral in its present condition or following any commercially reasonable preparation or processing [*see Com. Code § 9610(a)*; *see also Com. Code § 9610(d)-(f)* (contract for sale, lease, license, or other disposition includes warranties relating to title, possession, and quiet enjoyment, unless disclaimed or modified)].

NOTE:

Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable [*Com. Code § 9610(b)*; *see Com. Code § 9627* (determining whether conduct is commercially reasonable)]. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms [*Com. Code § 9610(b)*]. A secured party may purchase any type of collateral at a public disposition, but may purchase collateral at a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations [*Com. Code § 9610(b)*].

A secured party who wishes to dispose of collateral must send "a reasonable authenticated notification" to specified persons, subject to specified exceptions [*see Com. Code § 9611*]. The notification must be reasonable in the manner in which it is sent [*see Com. Code § 9611(b)*], its timeliness [*see Com. Code § 9612* (timeliness of notification)], and its content [*see Com. Code § 9613* (contents of notification generally); *Com. Code § 9614* (contents of notification in consumer goods transaction)]. For further discussion and forms of notification, see §§ 42.240, 42.241.

10. Advise secured party that proceeds of disposition must be paid in following order [*see § 42.16[3]*]:

- a. First, to expenses of disposition [*see Com. Code § 9615(a)(1)*].
- b. Second, to the obligation secured by the security interest that is being enforced [*see Com. Code § 9615(a)(2)*].
- c. Third, in specified circumstances, to interests that are subordinate to that security interest [*see Com. Code § 9615(a)(3)*].

11. If proceeds of disposition exceed balance due on obligation, advise secured party to pay surplus to debtor or to consignor, as required [*see Com. Code § 9615(d)(1)*; *see also Com. Code § 9615(a)(4)*; § 42.16[3][j]].

NOTE:

Payments of surplus proceeds under these circumstances are subject to the provisions of *Code Civ. Proc. § 701.040* concerning judgment lien creditors [*Com. Code § 9615(d)(1)*; *see Com. Code § 9615(e)(2)*].

If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus [*Com. Code § 9615(e)(1)(A)*].

In addition, a secured party is not required to apply or pay over for application noncash proceeds of collection and enforcement [*see Com. Code 9607*; P 2, **above**] unless the failure to do so would be commercially unreasonable [*Com. Code § 9608(a)(3)*]. A secured party that applies or pays over for application noncash proceeds must do so in a commercially reasonable manner [*Com. Code § 9608(a)(3)*].

12. If balance due on obligation exceeds proceeds from disposition, advise secured party that obligor is liable for any

deficiency.

NOTE:

However, in a consumer transaction, the debtor or any secondary obligor is liable for any deficiency only in specified circumstances [*see Com. Code* § 9626(b)(2)].

In addition, if the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not liable for any deficiency [*Com. Code* § 9615(e)(1)(B)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)DefaultGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART III. TRANSACTION GUIDE

E. Related and Subsequent Procedures

19-42 California Legal Forms--Transaction Guide § 42.142

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.142 Debtor's Rights After Default and Remedies After Disposition

1. If debtor wishes to redeem collateral after secured party has obtained possession after default:

NOTE:

Except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral [*see Com. Code § 9623*] only by an agreement to that effect entered into and authenticated after default [*Com. Code § 9624(c)*].

a. Advise debtor that it may redeem collateral at any time before secured party has [*see Com. Code § 9623(c)*]:

NOTE:

In addition to the debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral [*Com. Code § 9623(a)*].

(1) Collected collateral [*see Com. Code § 9607*; § 42.141 P 3].

(2) Disposed of collateral or entered into contract for its disposition [*see Com. Code § 9610*; § 42.141 P 9].

(3) Accepted collateral in full or partial satisfaction of obligation it secures [*see Com. Code § 9622*; § 42.16[3][e]].

b. Advise debtor that to redeem collateral, debtor must [*see Com. Code § 9623(b)*]:

- (1) Fulfill all obligations secured by collateral.
- (2) Tender reasonable expenses and attorneys' fees.

NOTE:

Expenses include those incurred by the secured party relating to retaking, holding, preparing for disposition, processing, and disposing of collateral. Reasonable expenses also include the secured party's reasonable attorneys' fees and legal expenses, to the extent provided for in the agreement and legal expenses incurred by the secured party [*Com. Code § 9623(b)*; *see Com. Code § 9615(a)*].

2. If it is established that secured party did not comply with Division 9 [*see Com. Code § 9101 et seq.*], advise debtor that:

- a. Court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions [*see Com. Code § 9625(a)*].
- b. Debtor may recover from secured party any loss caused by failure to comply with this division [*see Com. Code § 9625(b)*; *see also Com. Code § 9625(e), (f)* (supplemental damages)].

NOTE:

In addition to the debtor, a person who, at the time of the failure, was an obligor, or held a security interest in or other lien on the collateral may recover damages for its loss [*Com. Code § 9625(c)*; *see Com. Code § 9628* (nonliability or limitation on secured party's liability)].

A debtor whose deficiency is eliminated in an action in which deficiency or surplus is in issue [*see Com. Code § 9626*] may recover damages for the loss of any surplus [*Com. Code § 9625(d)*]. However, in a transaction other than a consumer transaction, a debtor or secondary obligor whose deficiency is eliminated or reduced in such an action may not otherwise recover under *Com. Code § 9625(b)* for noncompliance with the provisions of the statutes relating to collection, enforcement, disposition, or acceptance [*Com. Code § 9625(d)*].

3. If amount collected by secured party after collections [*see Com. Code § 9607*] or disposition [*see Com. Code § 9609*] exceeds amount owed on obligation, advise debtor that debtor is:

- a. Entitled to accounting of surplus [*see Com. Code §§ 9608(a)(4), 9615(d)(1)*].
- b. Entitled to payment or surplus proceeds of collateral [*see Com. Code §§ 9608(a)(4), 9615(d)(1)*].

NOTE:

If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus [*Com. Code § 9615(e)(1)(A)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionDisposition of
CollateralCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionRedemption



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART III. TRANSACTION GUIDE

E. Related and Subsequent Procedures

19-42 California Legal Forms--Transaction Guide §§ 42.143-42.199

AUTHOR: by Ann S. Manheimer, J.D.

[Reserved]

§§ 42.143[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART IV. FORMS

A. Creating Security Interests

19-42 California Legal Forms--Transaction Guide § 42.200

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.200 General Nonpossessory Security Agreement and Note

[1] Comment

[a] Use of Form

This form is a security agreement for use in granting a nonpossessory security interest in collateral owned or to be owned by the debtor. The form can be adapted for use with virtually any kind of collateral. For security agreements granting possessory security interests, see §§ 42.202 and 42.203. For security agreement granting security interests in specific types of collateral, see §§ 42.201 (business equipment), 42.202 (certificated stock), and 42.203 (notes secured by deeds of trust or land sale). The security agreements illustrated in this chapter are agreements securing indebtedness. For agreements constituting sales of accounts or chattel papers, see Ch. 43, *Commercial Loans*, 44, *Accounts Receivable Financing and Factoring*, and 45, *Consumer Installment Loans and Credit Sales*, and Ch. 47, *Automotive Financing and Vehicle Leasing*.

[b] Purpose

In order to make a security interest enforceable [see § 42.12[1], there must be a binding security agreement [*Komas v. Future Systems, Inc.* (1977) 71 Cal. App. 3d 809, 813, 139 Cal. Rptr. 669 (decided under prior law); *Needle v. Lasco Industries, Inc.* (1970) 10 Cal. App. 3d 1105, 1108, 89 Cal. Rptr. 593 (decided under prior law)] and compliance with an evidentiary requirement in the nature of the Statute of Frauds [Com. Code § 9203(b)(3); see Com. Code § 9203 (UCC Comment P 3)]. A "security agreement" is one that creates or provides for a security interest [Com. Code § 9102(a)(73); see § 42.10[2]].

Special rules apply when the collateral is securities [see Com. Code § 9206], when a collecting bank holds the security interest [see Com. Code § 4210], when an issuer or nominated person has a security interest in a document presented under a letter of credit [see Com. Code § 5118], and when a security interest arises under Com. Code § 2101 et seq., governing sales [see also Ch. 52, *Sales of Goods Under the Uniform Commercial Code*], or under Com. Code § 10101

et seq., governing personal property leases [*Com. Code* § 9203(c); *see Com. Code* § 9110 (security interests arising under Commercial Code Divisions 2 and 10)]. These provisions are discussed in § 42.12[3].

[c] Validity of Security Agreements Generally

A security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors, unless the Commercial Code provides to the contrary [*Com. Code* § 9201(a)]. Exceptions to the general rule arise when there is an overriding provision in this division or in another division [*Com. Code* § 9201 (UCC Comment P 2)]. For example, the Code operates to invalidate disclaimers of the duty of good faith [*see Com. Code* § 1302(b); *see also Com. Code* § 1203 (every contract or duty within Commercial Code imposes obligation of good faith in its performance and enforcement)], to subordinate a security interest that has not been perfected [*see Com. Code* § 9317; *see also* § 42.14[2]], or to subordinate certain security interests to other security interests and to the interests of purchasers [*see Com. Code* § 3101 *et seq.*]. This general rule also does not validate any rate, charge, agreement, or practice that violates a rule of law, statute, or regulation described in *Com. Code* § 9201(b) [*see* § 42.10[5]], or extend the application of any such statute, rule of law, or regulation to a transaction not otherwise subject to it [*Com. Code* § 9201(d)].

[d] Form of Security Agreement

The Commercial Code does not specify the language or the terms that must be included in a security agreement, and does not require that the terms of the agreement be set forth in a single document; no special form is necessary to create or provide for a security interest [*Komas v. Future Systems, Inc.* (1977) 71 Cal. App. 3d 809, 814-816, 139 Cal. Rptr. 669 (decided under prior law); *In re Amex-Protein Dev. Corp.* (9th Cir. 1974) 504 F.2d 1056, 1058-1060 (decided under prior law); *see New West Fruit Corp. v. Coastal Berry Corp.* (1991) 1 Cal. App. 4th 92, 97-98, 1 Cal. Rptr. 2d 664 (there is no requirement that security agreement be in writing when collateral is in the secured party's possession, and no express requirements for agreement's form or content)]. Rather, the Commercial Code broadly defines the term "agreement" to mean simply the bargain between the parties in fact, as found in their language, or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in *Com. Code* § 1303 [*Com. Code* § 1201(b)(3)].

When the secured party does not have possession of the collateral (as in the illustrative agreement in [2], *below*), a financing statement normally is drafted and executed with the security agreement so that the security interest created may be properly perfected, except in the circumstances set forth in the code [*see Com. Code* § 9301; *see also* §§ 42.14, 42.121]. The standard financing statement form approved by the California Secretary of State is Form UCC-1 [*see* § 42.211]. This form includes the information that must appear on the financing statement, and, once gathered, may be used to complete that form. The financing statement requirements, although not strictly applicable to security agreements, suggest an appropriate level of detail and may be instructive as a guide. In addition, use of these requirements as guidelines in drafting the security agreement may make completion of the financing statement itself easier.

The promissory note illustrated as part of this form can be used either in a purchase money transaction or in connection with a loan made on the security of property already owned by the borrower. For additional promissory notes for use with secured transactions, see Ch. 55, *Negotiable Instruments* .

[e] Essential Elements; Sufficiency of Agreement

The security agreement must include a description of the collateral [*see Com. Code* § 9203(b)(3)(A)] and a grant of a security interest [*Komas v. Future Systems, Inc.* (1977) 71 Cal. App. 3d 809, 813, 139 Cal. Rptr. 669 (decided under former law)]. The description of the personal or real property collateral does not need to be specific. With specified exceptions, the description is sufficient, whether or not it is specific, if it reasonably identifies the collateral described [

Com. Code § 9108(a); see *Com. Code § 9108(c)-(e)* (exceptions)]. However, a description of collateral as "all the debtor's assets" or "all the debtor's personal property" or similar words does not reasonably identify the collateral and is not sufficient for purposes of a security agreement [see *Com. Code § 9108(c)*]. Note, however that under *Com. Code § 9504*, a financing statement sufficiently indicates collateral if it "covers all assets or all personal property" [see *Com. Code § 9504(2)*; see also § 42.211].

In addition to the requirements governing the sufficiency of the description of collateral set forth in *Com. Code § 9108*, a description of investment property collateral also must meet the applicable requirements of *Civ. Code § 1799.103* (limitations on security interest in investment property in consumer credit contract or guarantee), and a description of consumer goods also must meet the applicable requirements of *Civ. Code § 1799.100* (security interests in household goods and personal property in connection with consumer credit contract or other consumer credit obligation) [*Com. Code § 9108(f)*; see [c], below]. For further discussion of the description of collateral in a security agreement, see § 42.12[2][c].

In general, the agreement may include terms typical of any loan agreement. The test for the sufficiency of a security agreement is whether the transaction falls within the definition of "security interest" in *Com. Code § 1201(b)(35)*, not whether the parties intend the law to characterize the transaction as a security interest [see *Com. Code § 9102* (UCC Comment P 3b); *Com. Code § 9109* (UCC Comment P 2); see also *Com. Code § 1201(b)(35)* (security interest includes any interest of consignor or buyer of accounts, chattel paper, payment intangible, or promissory note in transaction subject to *Com. Code § 9101 et seq.*)]. Thus, an agreement that the parties characterize as a "lease" of goods may be a "security agreement," despite the parties' stated intention that the law treat the transaction as a lease and not as a secured transaction [see *Com. Code § 9102* (UCC Comment P 3b)].

For a detailed guide to drafting security agreements, see § 42.130.

[f] Consumer Credit Contracts

If the security agreement finances the retail purchase of consumer goods or services, counsel should adapt this form to meet the requirements of applicable consumer protection laws [see § 42.10[5]]. For example, the contract will be subject to the Federal Trade Commission Act's "holder in due course" rule [15 U.S.C. § 45; 16 C.F.R. §§ 433.1-433.3]. Under this rule, it is unfair or deceptive for a seller of consumer goods or services to take a consumer credit contract, such as a security agreement, or accept the proceeds of any purchase money loan in connection with any sale or lease of goods or services, unless the contract includes a notice that the holder of the contract is subject to all claims and defenses the debtor could assert against the original seller [16 C.F.R. § 433.2].

If a retail buyer and seller enter into a security agreement requiring the buyer to make four or more installment payments [see *Civ. Code § 1802.6*] to purchase consumer goods or services [see *Civ. Code §§ 1802.1, 1802.2*], the agreement is subject to the Unruh Retail Installment Sales Act [see *Civ. Code § 1801 et seq.*]. The Act imposes numerous requirements on the terms and form of the agreement. For a security agreement that complies with the Unruh Retail Installment Sales Act, see Ch. 45, *Consumer Installment Loans and Credit Sales*.

[g] Sale of Credit Disability Insurance by Lender

A lender may want to protect its position through the use of credit disability insurance covering the debtor. However, the credit disability insurance will have an adverse effect on the creditor's right to enforce the debt in the event of default if the insurance were sold or arranged for by the creditor or if the creditor received compensation for its sale [see *Civ. Code §§ 1812.400, 1812.402*]. In addition, specified disclosures must be made at the time of sale [see *Civ. Code §§ 1812.401(d), 1812.402-1812.407*; see § 42.14[2][a]]. For a discussion and form, see Ch. 45, *Consumer Installment Loans and Credit Sales*.

[2] FORM**General Nonpossessory Security Agreement and Note****GENERAL SECURITY AGREEMENT**

This Security Agreement is entered into on _____ [date], between _____ [name of debtor], ("Debtor"), _____ [street address], _____ [city], _____ County, State of _____, and _____ [name of secured party], ("Secured Party"), _____ [street address], _____ [city], _____ County, State of _____, as follows:

For value received, the Debtor grants to the Secured Party a security interest in the following described property, referred to in this Security Agreement as the Collateral: _____ [list and describe personal property serving as collateral as accurately and precisely as possible, e.g., inventory of refrigerators, stoves, and other electrical appliances owned by the Debtor on the date of this Security Agreement; if collateral is crops growing or to be grown, timber to be cut, minerals, accounts from sale of minerals at wellhead or minehead, or fixtures, describe the land concerned] to secure:

- (1) The Debtor's note of \$_____ to the Secured Party of _____ [date], payable as to principal and interest as provided in the note;
- (2) Future advances by the Secured Party to the Debtor, to be evidenced by similar notes;
- (3) All expenditures by the Secured Party for taxes, insurance, and repairs to and maintenance of the Collateral incurred by the Secured Party in the collection and enforcement of the note and other indebtedness of the Debtor; and
- (4) All liabilities of the Debtor to the Secured Party now existing or incurred in the future, matured or unmatured, direct or contingent, and any renewals, extensions, and substitutions of those liabilities.

The Debtor warrants:

[Have debtor initial the blank preceding any statement applicable to this agreement:]

_____ The Collateral is to be used for personal, family, or household purposes.

_____ The Collateral is to be used in business other than farming operations.

_____ The Collateral is equipment used in farming operations, or farm products, or accounts, contract rights, or general intangibles arising from or relating to the sale of farm products by a farmer.

_____ The Collateral is accounts, and the records concerning the accounts are kept at _____ [address].

_____ The Collateral is a fixture attached to or to become attached to the above-described land.

_____ The Collateral is being acquired by the Debtor from the Secured Party or is being acquired

with the proceeds of the advance evidenced by this Security Agreement.

[Continue with the following:]

The Debtor's residence is located at _____ [residence address].

The Collateral will be kept at _____ [address].

The Debtor's chief place of business is located at _____ [address] .

The Debtor agrees as follows:

Title

1. Except for the security interest granted by this agreement, the Debtor has, or on acquisition will have, full title to the Collateral free from any lien, security interest, encumbrance, or claim, and the Debtor, at the Debtor's cost and expense, will defend any action that may affect the Secured Party's security interest in, or the Debtor's title to, the Collateral.

Financing Statement

2. No financing statement covering the Collateral or any part of it or any proceeds of it [add, if applicable: other than the financing statement executed in conjunction with this Security Agreement] is on file in any public office. [If financing statement has not yet been executed and filed, include: At the Secured Party's request, the Debtor will join in executing and pay the filing fees required for all necessary financing statements in forms satisfactory to the Secured Party and will further execute all other instruments deemed necessary by the Secured Party.] [If collateral is timber to be cut, minerals such as oil or gas, or accounts from sale of minerals at wellhead or minehead, or fixtures, add: The _____ (Debtor or Secured Party) will file the financing statement in the real estate records in the office where the mortgage on the real property described in this Security Agreement is filed or recorded.]

Sale, Lease, or Disposition of Collateral

3. The Debtor will not sell, contract to sell, lease, encumber, or dispose of the Collateral or any interest in it without the written consent of the Secured Party until this Security Agreement and all debts secured by it have been fully satisfied.

Insurance

4. Until final termination of this Security Agreement, the Debtor, at the Debtor's own cost and expense, will insure the Collateral with companies acceptable to the Secured Party against the casualties and in the amounts that the Secured Party will reasonably require, with a loss payable clause in favor of the Debtor and Secured Party as their interests may appear. The Secured Party is authorized to collect sums that may become due under any of the insurance policies and apply them to the obligations secured by this Security Agreement. Debtor must deliver a duplicate copy of each such policy must to the Secured Party.

Protection of Collateral

5. The Debtor will keep the Collateral in good order and repair and will not waste or destroy the Collateral or any part of it. The Debtor will not use the Collateral in violation of any statute or ordinance, and the Secured Party will have the right to examine and inspect the Collateral at any reasonable time.

Taxes and Assessments

6. The Debtor will pay promptly when due all taxes and assessments on the Collateral, or any part of the Collateral, or for its use and operation.

Location and Identification

7. The Debtor will keep the Collateral separate and identifiable and at the address shown above, and will not remove the Collateral from that address without the Secured Party's written consent, for as long as this Security Agreement remains in effect.

Security Interest in Proceeds and Accessions

8. The Debtor grants to the Secured Party a security interest in and to all proceeds, increases, substitutions, replacements, additions, and accessions to the Collateral and to any part of the Collateral. This provision shall not be construed to mean that the Debtor is authorized to sell, lease, or dispose of the Collateral without the prior written consent of the Secured Party.

Decrease in Value of Collateral

9. If, in the Secured Party's judgment, the Collateral has materially decreased in value or if the Secured Party at any time determines that the Secured Party is financially unstable, the Debtor will either provide enough additional Collateral to satisfy the Secured Party or reduce the total indebtedness by an amount sufficient to satisfy the Secured Party.

Reimbursement of Expenses

10. At the option of the Secured Party, the Secured Party may discharge taxes, liens, interest, or perform or cause to be performed for and on behalf of the Debtor any actions and conditions, obligations, or covenants that the Debtor has failed or refused to perform. In addition, the Secured Party may pay for the repair, maintenance, and preservation of the Collateral. The Secured Party also may enter the premises where the Collateral or any part of it is located and cause to be performed as agent and on the account of the Debtor any acts that the Secured Party deems necessary for the proper repair or maintenance of the Collateral or any part of it. All sums expended by the Secured Party under this paragraph, including but not limited to, attorneys' fees, court costs, agent's fees, or commissions, or any other costs or expenses, will bear interest from the date of payment at the annual rate of _____ percent, will be payable at the place designated in the Debtor's note, and will be secured by this Security Agreement.

Payment

11. The Debtor will pay the note secured by this Security Agreement and any renewal or extension of it and any other

indebtedness secured by this agreement in accordance with the terms and provisions of the indebtedness. The Debtor also will repay immediately all sums expended by the Secured Party in accordance with the terms and provisions of this Security Agreement. On full payment by the Debtor of all indebtedness secured by this agreement in accordance with this Security Agreement, this Security Agreement will expire, and the Secured Party's security interest in the Collateral, as set forth in this Security Agreement, will terminate.

Change of Residence or Place of Business

12. The Debtor will promptly notify the Secured Party of any change of the Debtor's residence, chief place of business, or place where records concerning the collateral are kept.

[If secured party will be allowed to make collections regardless of whether debtor defaults on security agreement (see generally Com. Code § 9607); see also 42.130 P 10), add:]

Attorney-in-Fact

13. The Debtor appoints the Secured Party as the Debtor's attorney-in-fact to do any act that the Debtor is obligated by this Security Agreement to do, to exercise all rights of the Debtor in the Collateral, to make collections, to execute all papers and instruments, and to do all other things necessary to preserve and protect the Collateral, to make collections, and to protect the Secured Party's security interest in the Collateral.

[Continue with the following:]

Time of Performance and Waiver

14. In performing any act under this Security Agreement and the note secured by it, time is of the essence. The Secured Party's acceptance of partial or delinquent payments, or the failure of the Secured Party to exercise any right or remedy, will not constitute a waiver of any obligation of the Debtor or right of the Secured Party and will not constitute a waiver of any other similar default that occurs later.

Default

15. The Debtor will be in default under this Security Agreement on the occurrence of any of the following events or conditions:

- (a) Default in the payment or performance of any note, obligation, covenant, or liability secured by this Security Agreement;
- (b) Any warranty, representation, or statement made or furnished to the Secured Party by or on behalf of the Debtor proves to have been false in any material respect when made or furnished;
- (c) Any event that results in the acceleration of the maturity of the indebtedness of the Debtor to others under any indenture, agreement, or undertaking;

(d) Loss, theft, substantial damage, destruction, sale, or encumbrance to or of any of the Collateral, or the making of any levy, seizure, or attachment of or on the Collateral;

(e) Any time the Secured Party reasonably believes that the prospect of payment or any indebtedness secured by this Security Agreement or the performance of this Security Agreement is impaired; or

(f) Death, dissolution, termination of existence, insolvency, business failure, appointment of a receiver for any part of the Collateral, assignment for the benefit of creditors, or the commencement of any proceeding under any bankruptcy or insolvency law by or against the Debtor or any guarantor or surety for the Debtor.

Remedies

16. On the occurrence of any event of default, and at any later time, the Secured Party may declare all obligations secured due and payable immediately and may proceed to enforce payment and exercise any and all of the rights and remedies provided by the California Commercial Code as well as other rights and remedies either at law or in equity possessed by the Secured Party.

The Secured Party may require the Debtor to assemble the Collateral and make it available to the Secured Party at any place to be designated by the Secured Party that is reasonably convenient to both parties. Unless the Collateral is perishable, threatens to decline speedily in value, or is of a type customarily sold on a recognized market, the Secured Party will give the Debtor reasonable notice of the time and place of any public sale or of the time after which any private sale or any other intended disposition of the Collateral is to be made. The requirements of reasonable notice will be met if the notice is mailed, postage prepaid, to the address of the Debtor shown at the beginning of this Security Agreement at least 10 days before the time of the sale or disposition. Expenses of retaking, holding, preparing for sale, selling, or the like will include the Secured Party's reasonable attorneys' fees and legal expenses.

Governing Law

17. This Security Agreement will be construed in accordance with the California Commercial Code and other applicable laws of the State of California. All obligations of the parties created under this Security Agreement are performable in _____ County, California.

Parties Bound

18. This Security Agreement will be binding on and inure to the benefit of the parties and their respective heirs, executors, administrators, legal representatives, successors, and assigns as permitted by this Security Agreement.

Attorneys' Fees

19. If _____ [any litigation or *specify more limited provision, e.g., any legal action based in contract law*] is begun between the parties to this Security Agreement concerning the Collateral, this Security Agreement, or the rights and duties of either party, the prevailing party will be entitled to a reasonable sum as reimbursement for that party's attorneys' fees and legal expenses.

Validity and Construction

20. If any one or more of the provisions contained in this Security Agreement is for any reason held to be invalid, illegal, or unenforceable, the invalidity, illegality, or unenforceability of that provision will not affect any other provision of this Security Agreement, and this Security Agreement will be construed as if the invalid, illegal, or unenforceable provision had never been contained in it.

Sole Agreement

21. This Security Agreement constitutes the only agreement of the parties, and supersedes any prior understandings or written or oral agreements between the parties, respecting the subject matter of this Security Agreement.

Commercial Code Definitions Applicable

22. All terms used in this Security Agreement that are defined in the California Commercial Code will have the same meaning in this Security Agreement as in the Code.

Dated: _____

DEBTOR

_____ [signature of debtor]

_____ [typed name]

SECURED PARTY

_____ [signature of secured party]

_____ [typed name]

NOTE

_____ [city]

_____ [county], California

FOR VALUE RECEIVED, the undersigned promises to pay to the order of _____ [name of secured party] at _____ [city], _____ County, California, or at any other place in the State of California that any holder of this note may designate in writing, the sum of \$_____ with interest, from the date written above until paid, at the rate of _____ percent per year.

This note, together with all interest due on it, is due and payable as follows: _____ [specify method of payment].

The payment of this note is secured by a Security Agreement of this date from _____ [name of debtor] to _____ [name of secured party], granting a security interest in the following described property: _____ [describe collateral], together with all other property described in or referred to in the Security Agreement.

[If right to prepayment of principal is desired, include:]

The maker will have the right to prepay the principal of this note in whole or in part before its due date without

premium or penalty.

[Continue with the following:]

If this note is placed for collection, or collected by a lawsuit or through a bankruptcy, probate, or any other court, either before or after maturity, reasonable attorneys' fees, costs, and other expenses incurred by the holder in enforcing the terms of this note will be paid to the holder of this note.

Failure to pay any part of the principal or interest of this note when due, or failure to carry out any of the terms of the Security Agreement, will authorize the holder of this note to declare as immediately due and payable the then-unpaid principal and to exercise all of the rights and remedies provided by the California Commercial Code, as well as all other rights and remedies either at law or in equity possessed by the holder of this note.

The endorsers of this note, jointly and severally, waive presentment, notice of dishonor, and protest.

_____ [signature of debtor-maker]

_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Security AgreementsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Security AgreementsEffectivenessCommercial Law (UCC)Secured Transactions (Article 9)Security AgreementsRequirements



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART IV. FORMS

A. Creating Security Interests

19-42 California Legal Forms--Transaction Guide § 42.201

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.201 Nonpossessory Security Interest in Business Equipment

[1] Comment--Use of Form

This security agreement, which is similar to an installment sales contract, is for use by any seller for the sale of business equipment. It may be used for the sale of farm equipment unless the farm equipment is bought for personal, family, or household purposes [*see 15 U.S.C. §§ 1602(h), 1603; Civ. Code §§ 1802.1, 1802.5, 1802.6; Com. Code § 9102(a)(23)* ("consumer goods" defined); *Com. Code § 9102(a)(33)* ("equipment" defined)]. Because the form illustrated here does not comply with the Unruh Installment Sales Act [*see Civ. Code § 1801 et seq.*] or the federal Truth in Lending Act [*see 15 U.S.C. § 1601 et seq.*], it cannot be used for the sale of consumer goods by a person in the business of making retail sales of consumer goods or extending credit [*see §§ 42.10[4], 42.200[1][f]*]. For a retail installment sales contract complying with the Unruh Installment Sales Act and the Truth in Lending Act, see Ch. 45, *Consumer Installment Loans and Credit Sales*. For a contract complying with the Rees-Levering Act [*Civ. Code §§ 2981-2984.4*], covering the retail sale of automobiles under installment sales contracts, refer to Ch. 47, *Automotive Financing and Vehicle Leasing*.

This form meets the requirements of a financing statement [*see Com. Code § 9502*], unless the financing statement covers as-extracted collateral, or timber to be cut, or is filed as a fixture filing and covers goods that are, or are to become fixtures [*see Com. Code § 9502(b); § 42.130 P 3; see also § 42.131 PP 4-6*].

For a discussion of the requirements for a security agreement, see §§ 42.12[2] and 42.200[1]. For a detailed guide to drafting security agreements, see § 42.130.

[2] FORM

Nonpossessory Security Interest in Business Equipment

SECURITY AGREEMENT

This Security Agreement is entered into on _____ [date], between _____ [name of seller], _____ [legal status, e.g., a California corporation] ("Seller"), _____ [street address], _____ [city], _____ County, State of _____, and _____ [name of buyer], _____ [legal status, e.g., a California corporation] ("Buyer"), _____ [street address], _____ [city], _____ County, State of _____, as follows:

Sale and Purchase

1. The Seller will sell to the Buyer and the Buyer will purchase from the Seller the goods described as follows: _____ [describe goods], referred to in this Agreement as the "Goods," on the terms and conditions set forth in this Agreement.

Purchase Price

2. The total purchase price to be paid by the Buyer to the Seller for the Goods is the sum of \$ _____, payable as follows:

The sum of \$ _____ on execution of this Agreement, receipt of which is acknowledged by the Seller, and the balance in equal monthly installments of \$ _____ each on the _____ day of each month beginning on _____ [date] and continuing until the entire unpaid balance of the purchase price, together with interest at the rate of _____ percent per year from the date of this Agreement, has been paid. Each payment is to be credited first to the payment of interest then accrued, and then to the reduction of the principal balance of the purchase price.

Title and Security Interest

3. The Seller retains title to the Goods until the Buyer has performed all of the obligations owing to the Seller under this Agreement, and until the purchase price of the Goods has been fully paid. The Seller retains a security interest in the Goods, and in all accessions to, replacements of, and proceeds from the Goods, as security for the performance by the Buyer of all of the Buyer's obligations arising under this Agreement.

Receipt in Good Condition

4. The Buyer acknowledges that it has received possession of the Goods and that, at the time of receipt, the Goods were, and each part of them was, in good repair and in a safe, workable, and clean condition.

Use of Goods

5. The Buyer acknowledges that the Goods are not being purchased primarily for personal, family, or household use, but for lawful use in the Buyer's business. The goods will be located at the Buyer's place of business at _____ [street address], City of _____, State of California, unless and until written consent to a change of their location is obtained from the Seller.

Risk of Loss

6. The Buyer assumes all risks of loss of the Goods and will not be released from any obligation or obligations under this Agreement because of any loss, damage, or disrepair suffered by the Goods or any part of the Goods.

Maintenance

7. The Buyer will maintain the Goods and each part of the Goods in good repair at the Buyer's cost and expense. The Buyer will not use the Goods or any part of the Goods in a manner that would subject them to waste or undue deterioration.

Insurance

8. During the continuance of this Agreement, the Buyer, at its own cost and expense, will keep the Goods and all parts of them insured for their full insurable value against loss or damage caused by fire, theft, the elements, or any other risk to which the Goods, or any part of them, might foreseeably be exposed. Insurance must be by insurance policies that are acceptable to the Seller. The Seller will be named as a loss payee under each policy obtained by the Buyer in fulfillment of its obligations under this paragraph.

Taxes and Assessments

9. The Buyer, at its own cost and expense, will pay as they become due, all taxes, assessments, or other charges levied or assessed on the Goods, or any part of them, during the continuance of this Agreement.

Sale of Goods

10. The Buyer will keep the Goods, and all parts of them, separate and identifiable from other property owned by the Buyer or located on the same premises as the Goods. The Buyer will not sell, lease, encumber, or otherwise dispose of any part of the Goods or of any of the Seller's rights under this Agreement without the prior written consent of the Seller, until all of the Buyer's obligations under this Agreement have been fully performed.

Inspection Rights

11. The Seller, either in person or by agent, may enter the premises where the Goods, or any part of them, are located, at any reasonable hour, and may inspect the Goods.

Financing Statement

12. The parties will execute any Financing Statements that may be required by the Uniform Commercial Code as enacted in California to perfect the security interest in the Goods retained by the Seller under this Agreement. The Financing Statements will be on forms approved by the California Secretary of State, will be executed with this Agreement, and will be filed as required by the Uniform Commercial Code as enacted in California.

Default

13. The Buyer will be in default under this Security Agreement on the occurrence of any of the following events or conditions:

- (a) Default in the payment or performance of any obligation, covenant, or liability secured by this Agreement;
- (b) Any warranty, representation, or statement made or furnished to the Seller by or on behalf of the Buyer proves to have been false in any material respect when made or furnished;
- (c) Any time the Seller reasonably believes that the prospect of payment of any indebtedness secured by this Agreement or the performance of this Agreement is impaired; or
- (d) Death, dissolution, termination of existence, insolvency, business failure, or the commencement of any proceeding under any bankruptcy or insolvency law by or against the Buyer or any guarantor or surety for the Buyer.

Remedies

14. On the occurrence of any event of default, and at any later time, the Seller may, at the Seller's option and without demand or notice to the Buyer, declare all amounts remaining unpaid under this Agreement to be immediately due and payable, and the Seller may proceed to enforce payment and exercise any and all of the rights and remedies provided by the California Commercial Code as well as other rights and remedies either at law or in equity possessed by the Seller. Specifically, the Seller may exercise the following rights:

- (a) Enter the Buyer's premises, render the Goods unusable, and dispose of the Goods on the Buyer's premises in the manner provided by the California Commercial Code.
- (b) Apply the proceeds received from the sale or other disposition of the Goods to, in addition to the items specified in Division 9 of the California Commercial Code, payment of reasonable attorneys' fees and legal expenses incurred by the Seller as a result of the Buyer's default.

Waiver

15. The Seller's acceptance of partial or delinquent payment, or the failure of the Seller to exercise any right or remedy will not be a waiver of any obligation of the Buyer or right of the Seller, will not be a modification of this Agreement or of any of buyer's obligations under this Agreement, and will not constitute a waiver of any other similar default that occurs later.

Attorneys' Fees

16. If _____ [any litigation or *specify more limited provision, e.g., any legal action based in contract law*] is begun between the parties to this Agreement concerning the Goods, this Agreement, or the rights and duties of either party in relation to them, the prevailing party will be entitled to a reasonable sum as reimbursement for its attorneys' fees and legal expenses.

Notices

17. Except as otherwise expressly provided in this Agreement or by law, any notice or other communication required or permitted by this Agreement or by law to be served on, given to, or delivered to either party to this Agreement by the other party will be in writing and will be considered served, given, delivered, and received when personally delivered to the party to whom it is directed or, in lieu of personal delivery, when it is deposited in the United States mail, first-class postage prepaid, addressed to the Buyer at _____[street address], City of _____, State of California, or to the Seller at _____[street address], City of _____, State of California. Either party, Buyer or Seller, may change its address for the purpose of this paragraph by giving written notice of the change to the other party in the manner provided in this paragraph.

Time of Essence

18. Time is expressly declared to be of the essence of this Agreement.

Governing Law

19. This Agreement will be construed in accordance with the Uniform Commercial Code as enacted in California and other applicable laws of the State of California.

Validity and Construction

20. If one or more of the provisions contained in this Agreement for any reason is held invalid, illegal, or unenforceable, the invalidity, illegality, or unenforceability of that provision will not affect any other provision of this Agreement; and this Agreement will be construed as if the invalid, illegal, or unenforceable provision had never been contained in it.

Definitions

21. All terms used in this Agreement that are defined in the California Commercial Code will have the same meaning in this Security Agreement as in the Code.

Effect on Heirs and Assigns

22. This Agreement and each of its provisions will be binding on the heirs, executors, administrators, legal representatives, successors, and assigns of each of the parties to this Agreement. Nothing contained in this paragraph, however, will be deemed a consent to the sale, assignment, or transfer of the Goods or obligations under this Agreement by the Buyer.

Sole Agreement

23. This instrument constitutes the only agreement between the Buyer and Seller respecting the Goods. It correctly sets forth the rights, and duties of each to the other with respect to the Goods as of its date. Any prior agreements, promises, negotiations, or representations concerning the Goods or payment for the Goods not expressly set forth in this Agreement are no longer in effect.

Date: _____

At _____ [city], County of _____, State of California.

SELLER

_____ [signature of debtor]

_____ [typed name]

BUYER

_____ [signature of secured party]

_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Security AgreementsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART IV. FORMS

A. Creating Security Interests

19-42 California Legal Forms--Transaction Guide § 42.202

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.202 Pledge Agreement--Possessory Security Interest in Stock Certificates

[1] Comment

[a] Use of Form

This form is for use in pledging stock certificates as collateral [*see Com. Code § 8102(a)(4)* ("certificated security" is security represented by certificate)].

This form is, in essence, a common law pledge agreement [*see § 42.10[3][a]*]. It uses the common law terminology, which may be preferred by counsel or parties; however, the terminology of the Commercial Code, referring to the lender as the "secured party" and the borrower as the "debtor" may be substituted. The pledgee then would be referred to as the secured party, and the pledgor as the debtor. This pledge agreement is structured as a "hard pledge" [*see [b], below*].

A financing statement is not used in conjunction with this form [*see [c], below*], and the form does not contain all the information required of a financing statement.

[b] Secured Financing Arrangements

Secured financing arrangements can be implemented in various ways. In some circumstances, lenders may require that the transactions be structured as "hard pledges," in which securities are transferred on the books of a clearing corporation from the debtor's account to the lender's account or to a special pledge account for the lender in which they cannot be disposed of without the lender's consent. In other circumstances, lenders are content with so-called "agreement to pledge" or "agreement to deliver" arrangements, in which the debtor retains the positions in its own account, but reflects on its books that the positions have been hypothecated and promises that the securities will be transferred to the secured party's account on demand [*see Com. Code § 9309* (UCC Comment P 6)]. Hard pledge arrangements are covered by the concept of control [*see Com. Code §§ 9314, 9106, 8106; see also [c], below*].

Non-control secured financing arrangements for securities firms are covered by the automatic perfection rule of *Com. Code § 9309(10)* [see *Com. Code § 9309* (UCC Comment P 6); see also [c], below].

[c] Perfection of Security Interest in Investment Property

A security interest in investment property, including certificated securities, uncertificated securities, security entitlements, and securities accounts [see *Com. Code § 9102* (definitions)] may be perfected by filing [see *Com. Code § 9312(a)*]. However, security interests created by brokers, security intermediaries [see *Com. Code § 8102(a)(14)* ("securities intermediary" defined)], or commodity intermediaries [see *Com. Code § 9102(a)(17)* ("commodity intermediary" defined)] are automatically perfected; filing is of no effect [see *Com. Code § 9309(10), (11)*]. A security interest in all kinds of investment property may also be perfected by control [see *Com. Code §§ 9106, 9314(a)*]; and a security interest in a certificated security may also be perfected by secured party's taking delivery under *Com. Code § 8301* [see *Com. Code § 9313(a)*; see also *Com. Code § 8301*].

A security interest perfected only by filing is subordinate to a security interest perfected by control or delivery [see *Com. Code § 9328(1), (5)*]. Thus, although filing is a permissible method of perfection, a secured party who perfects by filing takes the risk that the debtor has granted or will grant a security interest in the same collateral to another party who obtains control [see *Com. Code § 9312* (UCC Comment P 4)]. Perfection by filing would not give the secured party protection against other types of adverse claims, because the Division 8 [see *Com. Code § 8101 et seq.*] adverse claim cutoff rules require control [see *Com. Code § 8510*].

For a detailed guide to perfecting security interests, see § 42.121. For discussion of the transfer of investment securities, see Ch. 6K, *Nonissuer Transactions in Investment Securities*. For other pledge agreement forms, see Ch. 6K, *Nonissuer Transactions in Investment Securities*, §§ 6K.205-6K.207.

[2] FORM

Pledge Agreement--Possessory Security Interest in Stock Certificates

PLEDGE AGREEMENT

This AGREEMENT is entered into on _____ [date], between _____ [name of pledgor] ("Pledgor"), _____ [address of pledgor], and _____ [name of pledgee] ("Pledgee"), _____ [address of pledgee].

Recitals

At the time of the execution of this Agreement, the Pledgee lent the Debtor \$ _____, evidenced by the promissory note of the Pledgor dated _____ [date].

To induce the Pledgee to make the loan, the Pledgor has agreed to pledge certain stock to the Pledgee as security for the repayment of the loan.

It is therefore agreed:

Pledge

1. In consideration of the sum of \$ _____ lent to the Pledgor by the Pledgee, receipt of which is acknowledged, the Pledgor grants a security interest to the Pledgee in instruments of the following description:

_____[describe by name, number and type of shares and certificate numbers], endorsed in blank and delivered to the Pledgee with this Agreement. The Pledgor appoints the Pledgee _____ its attorney-in-fact to arrange for the transfer of the pledged shares on the books of the issuer to the name of the Pledgee. The Pledgee will hold the pledged shares as security for the repayment of the loan, and will not encumber or dispose of the shares except in accordance with the provisions of Paragraph 8 of this Agreement.

Dividends

2. During the term of this pledge, all dividends and other amounts received by the Pledgee as a result of the Pledgee's record ownership of the pledged shares will be applied to the payment of the principal and interest on the loan.

Voting Rights

3. During the term of this pledge, and as long as the Pledgor is not in default in the performance of any of the terms of this Agreement or in the payment of the principal or interest of the loan, the Pledgor will have the right to vote the pledged shares on all corporate questions. The Pledgee will execute timely proxies in favor of the Pledgor to this end.

Representations

4. The Pledgor warrants that there are no restrictions on the transfer of any of the pledged shares, other than those that may appear on the face of the certificates, and that the Pledgor has the right to transfer the shares free of any encumbrances and without obtaining the consents of the other shareholders.

Adjustments

5. In the event that, during the term of this pledge, any share dividend, reclassification, readjustment, or other change is declared or made in the capital structure of the company that has issued the pledged shares, all new, substituted, and additional shares or other securities issued by reason of any change will be held by the Pledgee in the same manner as the shares originally pledged under this Agreement.

Warrants and Rights

6. In the event that during the term of this pledge, subscription warrants or any other rights or options will be issued in connection with the pledged shares, the warrants, rights, and options will be immediately assigned by the Pledgee to the Pledgor, and if exercised by the Pledgor, all new shares or other securities so acquired by the Pledgor will be immediately assigned to the Pledgee to be held in the same manner as the shares originally pledged under this Agreement.

Payment of Loan

7. On payment at maturity of the principal and interest of the loan, less amounts received and applied by the Pledgee in reduction of the loan, the Pledgee will transfer to the Pledgor all the pledged shares and all rights received by the Pledgee as a result of the Pledgee's record ownership of the pledged shares.

Default

8. In the event that the Pledgor defaults in the performance of any of the terms of this Agreement, or in the payment at maturity of the principal or interest of the loan, the Pledgee will have the rights and remedies provided in the California Commercial Code. In this connection, the Pledgee may, on 10 days written notice to the Pledgor, and without liability for any diminution in price that may have occurred, sell all the pledged shares in the manner and for the price that the Pledgee may determine. At any bona fide public sale the Pledgee will be free to purchase all or any part of the pledged shares. Out of the proceeds of any sale the Pledgee may retain an amount equal to the principal and interest then due on the loan, plus the amount of the expenses of the sale, and will pay any balance of the proceeds of any sale to the Pledgor. If the proceeds of the sale are insufficient to cover the principal and interest of the loan plus expenses of the sale, the Pledgor will remain liable to the Pledgee for any deficiency, in accordance with the provisions set forth in *Commercial Code Section 9615*.

Dated: _____

PLEDGOR

_____ [signature of pledgor]

_____ [typed name]

PLEDGEE

_____ [signature of pledgee]

_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART IV. FORMS

A. Creating Security Interests

19-42 California Legal Forms--Transaction Guide § 42.203

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.203 Pledge Agreement--Possessory Security Interest in Notes Secured by Deeds of Trust or Land Sale Contracts

[1] Comment

[a] Use of Form

This form is a security agreement creating a possessory interest in promissory notes secured by real estate deeds of trust or land sales contracts. The agreement is, in essence, a form of pledge agreement [see § 42.10[3][a]]. For a discussion of the terminology used in pledge agreements, see § 42.202[1][a].

[b] Security Interest in Obligation Secured by Non-Division 9 Transaction

Division 9 applies to a security interest in a secured obligation even if the obligation is itself secured by a transaction or interest that is not governed by Division 9 [Com. Code § 9109(b)]. The following example provides an illustration of the circumstances that might arise in connection with the type of agreement set forth in [2], *below* [see Com. Code § 9109 (UCC Comment 7, Example 1)]:

EXAMPLE:

O borrows \$10,000 from M and secures its repayment obligation, evidenced by a promissory note, granting to M a mortgage on O's land. Division 9 does not apply to the creation of the real property mortgage [see Com. Code § 9109(d)(11)]. However, if M sells the promissory note to X or gives a security interest in the note to secure M's own obligation to X, Division 9 *does* apply to the security interest created in favor of X [see Com. Code § 9109(a)(3)]. The security interest in the promissory note is covered by Division 9, even though the note is secured by a real property mortgage [see Com. Code § 9109(b)]. Also, X's security interest in the note gives X an attached security interest in the mortgage lien that secures the note and, if the security interest in the note is perfected, the security interest in the mortgage lien is likewise perfected [see Com. Code §§ 9203, 9308].

It is implicit from *Com. Code § 9109(b)* that one cannot obtain a mortgage interest or a lien, such as a mortgage on real property, that is not also coupled with an equally effective security interest in the secured obligation [see *Com. Code § 9109* (UCC Comment 7)].

Neither Division 9 nor the definition of "security interest" in *Com. Code § 1201(b)(35)* provide rules for distinguishing sales transactions from those that create a security interest securing an obligation. Division 9 applies to both transactions. The principal effect of this coverage is to apply Division 9's perfection and priority rules [see *Com. Code § 9309(4)* (perfection on attachment)] to the sales transactions [see *Com. Code § 9109* (UCC Comment 5); *Com. Code § 9318* (UCC Comment 2)].

[c] Perfection of Instruments

A security interest created by an instrument, including promissory notes [see *Com. Code § 9102(a)(65)* ("promissory note" defined)] may be perfected by secured party taking possession of the collateral [see *Com. Code § 9313(a)*]. In addition, a security interest in instruments may be perfected by filing [see *Com. Code § 9312(a)*]. This rule represents an important change from former Division 9, under which the secured party's possession of an instrument was the only method of achieving long-term perfection [see former *Com. Code §§ 9304(1), 9305*; see also former *Com. Code § 9304(4), (5)* (temporary perfection without possession)]. This rule is likely to be particularly useful in transactions involving large number of notes that a debtor uses as collateral but continues to collect from the makers [see *Com. Code § 9312* (UCC Comment 2)].

A security interest perfected by filing, however, is subject to defeat by certain subsequent purchasers (including secured parties). For example, purchasers who take possession of an instrument without knowledge that the purchase violates the right of the secured party generally would achieve priority over a security interest in the instrument perfected by filing [see *Com. Code § 9330(d)*]. In addition, filing a financial statement does not constitute notice that would preclude a subsequent purchaser from becoming a holder in due course and taking free of the claims of *Com. Code § 3306*, governing claims to instruments [see *Com. Code § 9331(c)*].

Even though a financing statement need not be prepared and filed to perfect the security interest created by this form, a promissory note ordinarily will be drafted and executed by the debtor contemporaneously with the agreement in this form, to evidence the obligation secured by it. For promissory notes for use with secured transactions, see § 42.200[2] and Ch. 55, *Negotiable Instruments*.

For a discussion of the requirements for a security agreement, see §§ 42.12 and 42.200[1]. For a detailed guide to drafting security agreements, see § 42.130.

[d] Reasonable Care Requirement

Once in possession of the collateral, the secured party must use reasonable care in the custody and preservation of the collateral. In the case of an instrument, reasonable care includes taking the necessary steps to preserve rights against third parties unless otherwise agreed [*Com. Code § 9207(a)*; see § 42.121]. However, the secured party is not liable for a decline in the value of the instrument even if timely action could have prevented the decline [*Hutchison v. Southern Cal. First Nat. Bank* (1972) 27 Cal. App. 3d 572, 581, 103 Cal. Rptr. 816 (decided under prior law)].

[e] Personal and Real Property as Collateral

Because this security agreement is a pledge of promissory notes (classified in the Commercial Code as instruments [see *Com. Code § 9102(a)(65)*]), secured by interests in real property, the security interest involves the law of both real and personal property. Division 9 applies when an excluded interest, such as real estate, is used as collateral to secure an

obligation to a third party [see *Com. Code* § 9109(b); [b], *above*].

If an obligation is secured by both personal property or fixtures [see *Com. Code* § 9102(a)(41) (definition)] and an interest or estate in real property, the secured party *may* proceed, in any sequence [*Com. Code* § 9604(a)]:

(1) As to the real property security, in accordance with the secured party's rights and remedies in respect of the real property and, as to the personal property or fixtures, in accordance with the default and enforcement provisions of Division 9;

(2) As to both some or all of the real property and some or all of the personal property or fixtures, in accordance with the secured party's rights and remedies with respect to the real property, by including the selected portion of the personal property or fixtures in the judicial or nonjudicial foreclosure of the real property; or

(3) In accordance with Paragraph 1, *above*, as to part of the personal property or fixtures, and, in accordance with Paragraph 2, *above*, as to another part of the personal property or fixtures.

A secured party that exercises rights under the default and enforcement provisions of Division 9 [see *Com. Code* § 9601 *et seq.*] with respect to personal property does not prejudice any rights under real property law [see *Com. Code* § 9604(a)(1)(B)].

For further discussion of the procedure if the security agreement covers real property or fixtures, see §§ 42.16[3][a] and 42.141. For detailed discussions of real property procedures and security instruments, see Ch. 23, *Real Property Sales Agreements*, and Ch. 25A, *Security Instruments for Real Estate Financing*, and Ch. 25D, *Foreclosure*.

[2] FORM

Pledge Agreement--Possessory Security Interest in Notes Secured by Deeds of Trust or Land Sale Contracts

PLEDGE AGREEMENT

This PLEDGE AGREEMENT is entered into on _____ [date], between _____ [name of pledgee] ("Pledgee"), _____ [address of pledgee], and _____ [name of pledgor] ("Pledgor"), _____ [address of pledgor].

Recitals

The Pledgor desires to borrow from the Pledgee, and the Pledgee desires to lend to the Pledgor, the sum of \$_____, to be secured by the land sale contracts and promissory notes secured by deeds of trust described in this Pledge Agreement, which are to be pledged as collateral for the obligation described in this paragraph.

It is therefore agreed:

Pledge

1. In consideration of any financial accommodations given or to be given or continued to the Pledgor by the Pledgee, and as collateral security for the payment of any indebtedness, obligation, or liability of the Pledgor to the Pledgee, including but not limited to the obligation of the Pledgor to the Pledgee under the promissory notes executed

concurrently with this Pledge Agreement, the Pledgor assigns, transfers to, and deposits with the Pledgee the promissory note(s), deed(s) of trust, and land sale contract(s) described in this Paragraph, delivered by the Pledgor to the Pledgee, or currently held by the Pledgee, and any additional property as may later be delivered by the Pledgor to the Pledgee during the existence of this Pledge Agreement. The note(s), deed(s) of trust, and land sale contract(s) referred to in this paragraph (the "Collateral") are described as follows: _____[describe each item of collateral].

Warranties

2. The Pledgor warrants and represents the following with respect to the Collateral:

- (1) The Pledgor is the absolute owner of the Collateral and the obligations described in the documents that compose the Collateral are due and payable as stated in those documents, and the obligor(s) under the Collateral _____ [is or are] not now in default in any respect as to any obligations under the Collateral.
- (2) The Collateral is not subject to any prior assignment, claim, lien, or security interest, and the Pledgor will not make any further assignment of the Collateral or create any further security interest in the Collateral, and will not permit its rights in the Collateral to be reached by attachment, levy, garnishment, or other judicial process.
- (3) The obligations of the obligors under the Collateral are not subject to any claim for credits, allowances, or adjustments.
- (4) No notice of the bankruptcy or insolvency of any obligor(s) under the Collateral has been received by the Pledgor. On the Pledgor's receipt of any such notice, the Pledgor will immediately give the Pledgee written notice.
- (5) The Pledgor has maintained and will continue to maintain accurate and complete records and accounts of all obligations given as the Collateral, and agrees to permit the Pledgee to inspect these records and accounts. The Pledgor further agrees to submit statements of these account to the Pledgee in any reasonable form prescribed by the Pledgee.

Power of Sale

3. The power of sale and all other powers granted by the Pledgor in this Pledge Agreement will apply to all collateral of any kind, including all moneys, negotiable instruments, bonds, stocks, and commercial paper, credits, choses in action, claims or demands of every kind at any time during the existence of this Pledge Agreement deposited with or in the possession or control of the Pledgee or any of its agents.

Substitution of Collateral

4. If, with the consent of the Pledgee, the Pledgor substitutes or exchanges other collateral, including but not limited to securities or instruments, in the place of the Collateral described in Paragraph 1, then all of the rights of the Pledgee and all of the obligations of the Pledgor under this Pledge Agreement will be applicable to the substituted or exchanged collateral, and will be the same in all respects as the rights and obligations concerning the Collateral originally pledged.

Collection of Collateral

5. The Pledgee will have the right to notify the obligor(s) under the Collateral to make payment directly to it and to take control of all the proceeds of the Collateral, or any part of it, and to enforce any of the obligations of the obligor(s) under the Collateral. The Pledgee may exercise the rights described in this Paragraph at any time, whether or not the Pledgor is then in default under this Pledge Agreement and whether or not the Pledgor had been making collections on the Collateral. Until such time as the Pledgee elects to exercise these rights by mailing written notice to the Pledgor, the Pledgor is authorized to collect payments and to enforce all rights under the Collateral concerning current and past-due payments, but is not authorized to collect any prepayments, fire insurance proceeds, or condemnation awards without the prior written consent of the Pledgee. The costs of collection and enforcement, including attorneys' fees and legal expenses, will be at the expense of the Pledgor. The Pledgor will reimburse any costs or expenses, including attorneys' fees and legal expenses, that are incurred by the Pledgee.

Fire Insurance

6. All fire insurance required to be maintained by the obligor(s) under the terms of the Collateral will be written with loss payable to the Pledgee. The policies, or certificates evidencing the policies, will be furnished to the Pledgee in a form satisfactory to it. If the obligor(s) and Pledgor fail to pay any premium on any such insurance, the Pledgee may, but will not be required to, pay the premium and may add the amount of the premium to the debt secured by this Pledge Agreement. The Pledgor appoints the Pledgee to be its attorney-in-fact to endorse any draft or check that may be payable to the Pledgor in order to collect the proceeds of any such insurance or any condemnation award, and any balance of proceeds remaining after payment in full of all amounts secured by this Pledge Agreement will be paid to the Pledgor. The amount collected under any fire or any other insurance policy and any condemnation award may be applied by the Pledgee to any indebtedness secured by this Pledge Agreement, in any order that the Pledgee may determine, or, at the option of the Pledgee, any or all of the entire amount collected may be released to the Pledgor.

Default

7. The Pledgor will be in default under this Pledge Agreement on the occurrence of any of the following events or conditions:

(a) Default in the payment or performance of any of the obligations, covenants, or liabilities secured by this Pledge Agreement.

(b) Any warranty, representation, or statement made or furnished to the Pledgee by or on behalf of the Pledgor proves to have been false in any material respect when made or furnished.

(c) Death, dissolution, termination of existence, insolvency, business failure, appointment of a receiver for any part of the Collateral, assignment for the benefit of creditors, or the commencement of any proceeding under any bankruptcy or insolvency law by or against the Pledgor.

(d) Any default by any obligor(s) under the terms of the Collateral.

Remedies

8. On the occurrence of any event of default, and at any later time, the Pledgee may declare all the obligations and

liabilities of the Pledgor under this Pledge Agreement to become immediately due and payable, notwithstanding any credit or extension of time allowed to the Pledgor by any instrument evidencing any of these liabilities. In addition, the Pledgee may proceed to enforce payment and may exercise any rights and remedies provided by the California Commercial Code, as well as other rights and remedies either at law or in equity possessed by the Pledgee, including but not limited to the following rights:

(a) On notice to the Pledgor as required by the California Commercial Code, the Pledgee may sell or otherwise dispose of the Collateral. The sale may be as a unit or in parts, at any time and place and on any terms, provided the Pledgee acts in good faith and in a commercially reasonable manner. Out of the proceeds of any sale, the Pledgee may retain an amount equal to the principal and interest then due on the loan, plus the amount of the expenses of the sale, and will pay any balance of the proceeds of any sale to the Pledgor. The Pledgor agrees to pay to the Pledgee, on demand, whatever balance may be owing on the indebtedness secured by this Pledge Agreement after the sale of the Collateral and the application of the proceeds as provided by this Paragraph and as required by law.

(b) On notice as required by the California Commercial Code, the Pledgee may accept the Collateral in satisfaction of all obligations of the Pledgor secured by this Pledge Agreement. If the Pledgor or other person entitled to receive notice objects in writing within 20 days after notice was sent, the Pledgee must dispose of the Collateral under the terms and conditions provided in paragraph (1), above, or as otherwise authorized by law. In the absence of any written objection, the Pledgee may accept the collateral, without any right of redemption, in full satisfaction of the Pledgor's obligations and indebtedness to the Pledgee.

Attorneys' Fees

9. In the event of _____ [any litigation or *specify more limited provision, e.g.,* any legal action based in contract law] between the parties to this Pledge Agreement, or involving any of them, regarding the rights and obligations of the parties under this Pledge Agreement or any obligation secured by this Pledge Agreement, the prevailing party will be entitled to recover its reasonable attorneys' fees and legal expenses as determined by the court.

Waiver of Rights by Pledgor

10. Each Pledgor, if there is more than one, waives any right to require the Pledgee to (1) proceed against any person, (2) proceed or exhaust any collateral, or (3) pursue any other remedy in the Pledgee's power. Each Pledgor also waives any defense arising from any disability or other defense of any other Pledgor or any other person. Each Pledgor authorizes the Pledgee to (1) take and hold security, other than the Collateral, for the payment of the indebtedness or any part of the indebtedness, and exchange, enforce, waive, and release the Collateral or any part of it or any other security, and (2) release or substitute any other Pledgor.

Prior Agreements Superseded

11. This Pledge Agreement constitutes the only agreement of the parties and supersedes any prior understandings or written or oral agreements between the parties respecting the subject matter of this Pledge Agreement.

Parties Bound

12. This Pledge Agreement is binding on and inures to the benefit of the parties and their respective heirs, executors, administrators, legal representatives, successors, and assigns as permitted by this Pledge Agreement.

Assignment

13. This Assignment of a security interest in the Collateral will be for the benefit of the Pledgee and its successors or assigns. In the event that the Pledgee assigns, endorses, sells, or transfers to any other person or entity the Collateral, or any other notes, evidences of indebtedness, bonds, stocks, or other securities deposited under this Pledge Agreement or secured or intended to be secured by this Pledge Agreement, or any part of it, the assignment or transfer will automatically constitute an assignment and transfer of this Pledge Agreement and all of the rights granted by this Pledge Agreement. The assignee, endorsee, transferee, or successor of the Pledgee will have all of the rights given to the Pledgee in accordance with the terms of this Pledge Agreement.

Time of the Essence

14. Time is of the essence in this Pledge Agreement.

Payments and Notices

15. All payments and notices under this Pledge Agreement or otherwise required by law will be made to the Pledgee at _____[address], and to the Pledgor at _____[address], or to any other address as the party entitled to the payment or notice may designate to the other party in writing.

Satisfaction of Obligation

16. On the satisfaction of all obligations of the Pledgor to the Pledgee, the Pledgee will return to the Pledgor the Collateral and all other documents and securities given as collateral under this Pledge Agreement, and will endorse all instruments to the Pledgor and give an assignment of all of the Collateral, in recordable form.

Applicable law

17. This Pledge Agreement will be construed in accordance with the Uniform Commercial Code as enacted in California and other applicable laws of the State of California.

Validity and Construction

18. In case one or more of the provisions contained in this Agreement will for any reason be held invalid, illegal, or unenforceable in any respect, the invalidity, illegality, or unenforceability of that provision will not affect any other provision of this Pledge Agreement, and this Pledge Agreement will be construed as if the invalid, illegal, or unenforceable provision had never been contained in it.

Commercial Code Definitions Apply

19. All terms used in this Pledge Agreement that are defined in the California Commercial Code will have the same meaning in this Pledge Agreement as in the Code.

Date: _____,
at _____ [city],
County of _____, California.
PLEDGOR

_____ [signature of pledgor]
_____ [typed name]

PLEDGEE

_____ [signature of pledgee]
_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGeneral
OverviewCommercial Law (UCC)Secured Transactions (Article 9)Security AgreementsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART IV. FORMS

A. Creating Security Interests

19-42 California Legal Forms--Transaction Guide §§ 42.204-42.209

AUTHOR: by Ann S. Manheimer, J.D.

[Reserved]

§§ 42.204[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART IV. FORMS

B. Perfecting Security Interests

19-42 California Legal Forms--Transaction Guide § 42.210

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.210 Notice of Intention to Finance Purchase of Inventory

[1] Comment

[a] Use of Form

This form is for use by a secured party holding a perfected purchase money security interest in inventory. It is a notice of intention to finance the purchase of the inventory.

[b] Priority of Money Purchase Interests in Inventory

A money purchase interest in inventory (and most chattel paper or instruments constituting proceeds of the inventory, as well as identifiable cash proceeds) can achieve priority over an earlier-filed security interest in the same collateral if the purchase money security interest is perfected when the debtor receives possession of the inventory [*see Com. Code § 9324(b)(1)*; *see also Com. Code § 9324(g)* (exceptions)], and if the purchase money secured party gives notification to a holder of a conflicting security interest who filed against the same item or type of inventory before the purchase money secured party filed or its security interest became perfected temporarily under *Com. Code § 9312(f)* [*see Com. Code § 9324(b)(2)-(4), (c)*; *see also [c], below*]. For further discussion of priorities in purchase money security interests, see § 42.15[9].

[c] Timing of Notification to Conflicting Inventory Secured Party

The perfected purchase money security interest achieves priority over a conflicting interest only if the holder of the conflicting security interest receives a notification within five years before the debtor receives possession of the purchase money collateral [*Com. Code § 9324(b)(3)*]. If the debtor never receives possession, the five year period never begins, and the purchase money security interest has priority, even if notification were not given [*see Com. Code § 9324(b)(3)*; *Com. Code § 9324* (UCC Comment P 5)]. However, if the purchase money inventory financing began by the purchase money secured party's possession of a document of title, to retain priority, the secured party must give the

required notification at or before the usual time, that is, when the debtor gets possession of the inventory, even though the security interest remains perfected for 20 days under *Com. Code* § 9312(e) or (f) [see *Com. Code* § 9324(c); *Com. Code* § 9324 (UCC Comment P 5)].

[d] Address for Notification

The holder of a purchase money security interest may satisfy the requirement to "send" [see *Com. Code* § 9102(a)(74) (definition)] notification to the holder of a conflicting security interest in inventory by sending notification to the address provided as that of the secured party on a filed financing statement, even if the address is, or becomes, incorrect [see *Com. Code* § 9324 (UCC Comment P 5); see also *Com. Code* §§ 9516(b)(4), 9520(a) (lack of mailing address requires filing office to reject an initial financing statement); *Com. Code* § 9516 (UCC Comment 5) (function of address); § 42.131 P 2b (NOTE)]. Similarly, because the address is "held out [by the holder of the conflicting security interest] as the place of receipt of these communications [i.e., communications relating to security interests]," the holder is deemed to have "received" a notification sent to that address [*Com. Code* § 9324 (UCC Comment P 5)].

[2] FORM

Notice of Intention to Finance Purchase of Inventory

NOTICE OF INTENTION TO FINANCE THE PURCHASE OF INVENTORY

TO: _____ [name of other secured party]
 _____ [address]
 _____ [city], California

In accordance with *California Commercial Code Section 9324(b)* and (c), this will notify you that the undersigned
 _____ [has or expects to acquire] a purchase money security interest in the following inventory:
 _____ [describe by item or type].

Dated: _____

_____ [signature of secured party]
 _____ [typed name]
 _____ [address]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionPurchase-Money Security
 InterestsCommercial Law (UCC)Secured Transactions (Article 9)PriorityCreditor PrioritiesPurchase-Money Security
 Interests



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART IV. FORMS

B. Perfecting Security Interests

19-42 California Legal Forms--Transaction Guide § 42.211

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.211 National Financing Statement--Form UCC-1

[1] Comment

[a] Use of Form

This form is a reproduction of the national financing statement form (Form UCC-1) approved by the California Secretary of State. The general instructions prepared for use of the form, as well as the filing statement addendum (Form UCC-1Ad) and addendum instructions, are also reproduced below. A California UCC addendum form has also been prepared by the Secretary of State's office for use in connection with the UCC-1 and UCC-3 forms when the names of additional debtors or secured parties. For a reproduction of the California addendum form, *see* § 42.213.

The Secretary of State's Office advises that use of Form UCC-1 is mandatory for all financing statement filings after July 1, 2001. Non-standard filings will no longer be accepted [*see Com. Code §§ 9516(b)(1), 9521(a); see also* [d], *below*].

PRACTICE TIP

ELECTRONIC FORMS NOTE: Electronic copies of this form that may be filled in and printed out for filing can be obtained at the official website of the California Secretary of State, Business Programs Division, which is located at <http://www.sos.ca.gov/business/ucc/ucc.htm>. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or emailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 42.211. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will require Adobe Acrobat Reader version 3.0 or higher.

The form illustrated here is a reproduction of the Secretary of State's online form referred to above. For important information regarding use of copies of this online form, *see* [e], *below*.

For a detailed guide to drafting financing statements, see § 42.131.

[b] Purpose of Financing Statement

The financing statement is the basic tool in the notice-filing scheme of Division 9 of the California Commercial Code for perfecting security interests in collateral [see *Com. Code* § 9502; *Com. Code* § 9502 (UCC Comment P 2)]. By filing a financing statement, the secured party puts on record mention of a security interest in generally described collateral and places a duty on third parties to inquire into that security interest [see *Borg-Warner Acceptance Corp. v. Bank of Marin* (1973) 36 Cal. App. 3d 286, 288-289, 111 Cal. Rptr. 361 (decided under prior law)]. With specified exceptions, a financing statement must be filed to perfect all security interests and agricultural liens [see *Com. Code* § 9310(a); see also *Com. Code* § 9310(b) (exceptions); § 42.14[3]]. For a procedural guide to perfecting security interests, see § 42.121. For a detailed guide to preparing and filing financing statements, see § 42.131.

[c] Debtor Search Reports

Form UCC-1 may also be used to request debtor search reports on some or all debtors named in the financing statement [see *Com. Code* § 9523(c); Item 7 in [2], *below*]. A search report will list all financing statements on file against the designated debtor on the date of the report, including the financing statement being filed statement [see *Com. Code* § 9523(c)]. An additional fee is charged for each report. The Secretary of State's office advises that not all states perform such searches, and not all states will honor a search request using this form (some require a separate request form) [see Item 7 in Instructions in [2], *below*]. For additional filing information, see [i], *below*.

Requests for debtor search reports that are *not* made in conjunction with the filing of a UCC-1 financing statement should be made by filing form UCC-11 [see § 42.216]. Prior to July 1, 2001, debtor search requests were made using the then-current version of Form UCC-3. After July 1, 2001, form UCC-3 is no longer used for this purpose [see § 42.214].

[d] Use of Official Form Required

All financing statements filed after July 1, 2001, must be filed using the official version of Form UCC-1 reproduced here, except that the filing office may not refuse to file a written initial financing statement in the form and format of the Form UCC-1 reproduced here but lacking a space identified for the disclosure of the social security number [*Com. Code* § 9521(a)]. Prior to July 1, 2001, the Secretary of State's office accepted nonstandard UCC forms for filing, for an additional fee [see former *Gov. Code* § 12194(b) (repealed eff. July 1, 2001)]. However, the Secretary of State's Office advises that after July 1, 2001, nonstandard filings will no longer be accepted [see *Com. Code* §§ 9516(b)(1), 9521(a)]. All forms other than the one reproduced here, including national transitional UCC forms, are obsolete and will be rejected by the filing office.

[e] Format of UCC-1 Form

This form contains a special barcode patch in the upper left hand corner. The Secretary of State's office advises that for microfilming purposes, this barcode patch should be clearly printed and kept free of damage. If the barcode patch is altered, including by stapling or photocopying, it causes delays in the Secretary of State's microfilm processing time. The Secretary of State's office recommends that to preserve the effectiveness of the barcode patch, users frequently check their printer's ink quality. Use of dot matrix printers for this purpose is not recommended.

In addition to the barcode patch, the UCC-1 form must be produced in the format prescribed by the Secretary of State's office. It must be 8 1/2 " by 11" and printed on white paper. Submittals that do not conform to these specifications will be rejected.

The Secretary of State's office recommends that all documents filed with that office be filled in by typing or printing on a laser printer, in order to provide sufficient contrast and legibility for microfilming purposes.

If attachments are necessary, use of the Addendum (Form UCC-1Ad, reproduced *below*) is encouraged. To add additional debtors or secured parties, the California UCC Addendum, reproduced as Form 43.213, should be used.

See the official instructions (reproduced in [2], *below*) for important additional information on completing Form UCC-1.

[f] Required Information in General

All financing statements must provide the debtor's name [see *Com. Code* §§ 9502(a)(1), 9516(b)(3)(A); see also Item 1 in [2], *below*] and mailing address [see *Com. Code* § 9516(b)(5)(A); see also Item 1c in [2], *below*]; the name of the secured party and an address from which information about the security interest may be obtained [see *Com. Code* §§ 9502(a)(2), 9516(b)(4), 9520(a) (lack of mailing address requires filing office to reject an initial financing statement); see also Item 3 in [2], *below*]; and a statement indicating the types or describing the items of the collateral [see *Com. Code* § 9502(a)(3); see also Item 4 in [2], *below*].

A financing statement sufficiently indicates collateral if it provides either a "description" of the collateral [see *Com. Code* § 9108 (adequacy of description); see also § 42.14[3][b][ii]] or an indication that the financing statement covers all assets or all personal property [*Com. Code* § 9504(2)]. Such a "super-generic" description of collateral, however, while a sufficient indication of collateral in a financing statement, is inadequate for purposes of a security agreement [see *Com. Code* §§ 9108, 9203; see also § 42.12[2][c]; *Com. Code* § 9101 (UCC Comment P 4h))].

A financing statement that substantially satisfies the requirements of Division 9 is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading [*Com. Code* § 9506(a)]. For further discussion of these issues, see § 42.14[3][b][i].

[g] Additional Requirements for Real Property-Related Filings

Additional requirements apply to real property-related filings [see *Com. Code* § 9502(b)]. If the security interest covers timber to be cut, the financing statement must contain a description of the land concerned [*Com. Code* § 9203(b)(3)(A)]. Moreover, if the description identifies the location of the property, it must do so accurately [see, e.g., *Matter of California Pump & Mfg. Co., Inc.* (9th Cir. 1978) 588 F.2d 717, 719 (description is insufficient when collateral is not located in city identified in description, decided under prior law)].

If financing statement is filed as fixture filing [see *Com. Code* § 9102(a)(40) (definition)] and covers collateral in goods that are or are to become fixtures, the financing statement must [see *Com. Code* § 9502(b); see also *Com. Code* § 9516(b)(3)(D)]:

- Indicate that the financing statement covers this type of collateral.
- Indicate that the statement is to be recorded in real property records.
- Provide a description of the real property to which the collateral is related.

The description of the real estate must be specific enough to satisfy the requirements for giving constructive notice if it were contained in a record of the mortgage of the real estate [*Com. Code* § 9502(b)(3)].

[h] Signature Not Required

There is no statutory requirement that the debtor's signature (or other evidence of authorization) appear on the financing statement [*see Com. Code § 9502* (UCC Comment P 3); *cf.* former *Com. Code § 9402(1)*], except to the extent that filing offices may choose to employ authentication procedures in connection with electronic communications [*Com. Code § 9101* (UCC Comment P 4h)]. Elimination of the signature requirement facilitates paperless filing [*Com. Code § 9502* (UCC Comment P 3)]. Accordingly, the form reproduced here does not require a signature.

[i] Copies

If an acknowledgment copy is desired [*see Com. Code § 9523(a)*], the Secretary of State's office advises that the person filing the statement should send one copy with the original and mark it "acknowledgment copy." If a search is being requested using form UCC-1 [*see [c], above*], an additional copy for each debtor name to be searched should be included. These additional copies should be marked "search copy."

Separate copies should be made for the debtor and secured party if desired. The version of form UCC-1 in effect prior to July 1, 2001, included separate, appropriately labeled copies for these parties, but the current official form does not.

[j] Fees

The fee for filing and indexing a record is set forth in *Gov. Code § 12194(a)-(d)* and current fees are listed on the Secretary of State's website which is given in [a], *above*. Note that current fee amounts are based on the number of pages being filed.

There is no fee with respect to a record of a mortgage which is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut [*Com. Code § 9525(d)*; *see Com. Code § 9502(c)*]. However, the recording and satisfaction fees that otherwise would be applicable to the record of the mortgage apply [*Com. Code § 9525(d)*].

[k] Who May File Statement

A person may file an initial financing statement only if one of the following conditions is satisfied [*Com. Code § 9509(a)*]:

- The debtor authorizes the filing in an authenticated record in accordance with *Com. Code § 9509(b)* or (c) (discussed *below*); or
- The person holds an agricultural lien that has become effective at the time of filing and the financing statement covers only collateral in which the person holds an agricultural lien.

By authenticating or becoming bound as debtor by a security agreement, the debtor is deemed by statute to have authorized the filing of an initial financing statement (and an amendment) covering the collateral described in the security agreement or any identifiable proceeds of that collateral; the secured party is not required to obtain a separate authorization [*Com. Code § 9509(b)*]. Similarly, by acquiring collateral in which a security interest or agricultural lien continues [*see Com. Code § 9315(a)(1)*; § 42.121], the debtor authorizes the filing of an initial financing statement [*Com. Code § 9509(c)*; *see Com. Code § 9315(a)(1)*].

A person who files an unauthorized record in violation of *Com. Code § 9509(a)* is liable for a statutory penalty and damages [*see Com. Code § 9625(b), (e)(3)*; *see also Com. Code § 9518* (procedure for filing correction statement concerning inaccurate or wrongly filed record)]. Moreover, a filing has legal effect only to the extent it is authorized [*see Com. Code § 9510(a)*].

[1] Filing Procedure

Financing statements are filed centrally in the Secretary of State's office, or locally, for real estate related collateral, in the office where real estate mortgages are recorded [*see Com. Code § 9501(a)*; *see also Com. Code § 9501(d)* (special filing provisions for transmitting utilities); § 42.121, P 13d]. The original and acknowledgment copy of the form [*see [i], above*] are to be sent to the filing officer with the correct filing fee [*see [j], above*]. The copy will be returned, stamped with the filing date and time. For a detailed guide to the filing procedures, see § 42.121, P 13.

Com. Code § 9519 imposes various filing and indexing requirements on the Secretary of State's office, including a requirement for a two-day turnaround after the Secretary's office initially receives a financing statement [*Com. Code § 9519(h)*]. The Secretary of State's office has stated that the latter requirement will not be met until an extensive automation project in that office is completed.

[2] FORM**National Financing Statement--Form UCC-1**

[Click here to view image.](#)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsRequirements



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART IV. FORMS

B. Perfecting Security Interests

19-42 California Legal Forms--Transaction Guide § 42.212

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.212 Cover Letter to Accompany Financing Statement

[1] Comment--Use of Form

This form is a cover letter designed to accompany a financing statement, Form UCC-1 when that form is mailed. Although the letter in [2], *below*, is addressed to the Secretary of State's Uniform Commercial Code Division, it may be adapted for use when mailing these forms to a local filing office. For information on preparing and filing financing statements, see § 42.211.

[2] FORM

Cover Letter to Accompany Financing Statement and Request for Information

[Letterhead of attorney]

Secretary of State
Uniform Commercial Code Division
P.O. Box 942835
Sacramento, CA 94235-0001

Re: Financing Statement

_____[name], Debtor
_____[name], Creditor

To whom it may concern:

Enclosed please find:

1. The original and acknowledgment copy of a Financing Statement on the standard UCC-1 form. I request that you file the original in your office and return the acknowledgment copy to me at my above address with the filing date, time, and number endorsed on it. *[If debtor search report is requested, add: Please note that this filing includes a request for search reports as indicated in Item 7 of the form].*

2. My check payable to your order in the amount of your statutory fee in this matter, \$

_____ .

Thank you for your attention and for your prompt response to this request.

Sincerely,

_____ *[signature]*

_____ *[typed name]*

Attorney for Secured Party

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral Overview



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B. Perfecting Security Interests

19-42 California Legal Forms--Transaction Guide § 42.213

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.213 California UCC Addendum

[1] Comment--Use of Form

This form is the Secretary of State's official California UCC Addendum form, for use with the UCC financing statement form (UCC-1) [see § 42.211] and the UCC financing statement amendment form (UCC-3) [see § 42.214]. This form is used to add the names of additional debtors to the UCC-1 or UCC-3 form. The instructions accompanying the form are also included.

PRACTICE TIP

ELECTRONIC FORMS NOTE: Electronic copies of this form that may be printed out and filled in for filing can be obtained at the official website of the California Secretary of State, Business Programs Division, which is located at <http://www.sos.ca.gov/business/ucc/ucc.htm>. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or emailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 42.213. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will require Adobe Acrobat Reader version 3.0 or higher.

[2] FORM

California UCC Addendum

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral
Overview



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B. Perfecting Security Interests

19-42 California Legal Forms--Transaction Guide § 42.214

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.214 UCC Financing Statement Amendment--Form UCC-3

[1] Comment

[a] Use of Form

This form is a reproduction of the national financing statement amendment form (Form UCC-3) approved by the California Secretary of State. The general instructions prepared for use of the form, as well as the filing statement addendum (Form UCC-3Ad) and addendum instructions, are also reproduced below. A California UCC addendum form has also been prepared by the Secretary of State's office for use in connection with the UCC-1 and UCC-3 forms when the names of additional debtors or secured parties. For a reproduction of the California addendum form, *see* § 42.213.

Form UCC-3 is used to change information that previously was filed on a financing statement (UCC-1) form [*see* § 42.211]. It may be used to amend a financing statement [*see Com. Code* § 9512], to continue a financing statement [*see Com. Code* § 9515], to terminate [*see Com. Code* § 9513], or to assign [*see Com. Code* § 9514] a security interest. The Secretary of State's office will accept only one type of change per form; if more than one change needs to be made, separate forms must be filed.

If a debtor or other person believes that a previous UCC filing indexed under that person's name is inaccurate or was wrongfully filed, that person should file a correction statement [*Com. Code* § 9518] on Form UCC-5, which is reproduced in § 42.215[2].

The Secretary of State's office has stated that use of Form UCC-3 is mandatory after July 1, 2001.

PRACTICE TIP

ELECTRONIC FORMS NOTE: Electronic copies of this form that may be filled in and printed out for filing can be obtained at the official website of the California Secretary of State, Business Programs Division, which is located at <http://www.sos.ca.gov/business/ucc/ucc.htm>. You may also obtain a copy of

this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or emailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 42.214. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will require Adobe Acrobat Reader version 3.0 or higher.

The form illustrated here is a reproduction of the Secretary of State's online form referred to above. For important information regarding use of copies of this online form, see [b], *below*.

This version of Form UCC-3 is the successor to old Form UCC-2. Prior to July 1, 2001, Form UCC-2 was used to record changes in UCC-1 filings, and a different Form UCC-3, Request for Information (Debtor Search Certificate), was in use. After July 1, 2001, Form UCC-2 was superseded by the new Form UCC-3 that is reproduced here, and the former Form UCC-3 was superseded by Form UCC-11, which is now used to request debtor searches [see § 42.216].

[b] Format of UCC-3 Form

This form contains a special barcode patch in the upper left hand corner. The Secretary of State's office advises that for microfilming purposes, this barcode patch should be clearly printed and kept free of damage. If the barcode patch is altered, including by stapling or photocopying, it causes delays in the Secretary of State's microfilm processing time. The Secretary of State's office recommends that to preserve the effectiveness of the barcode patch, users frequently check their printer's ink quality. Use of dot matrix printers for this purpose is not recommended.

In addition to the barcode patch, the UCC-3 form must be produced in the format prescribed by the Secretary of State's office. It must be 8 1/2 " by 11" and printed on white paper. Submittals that do not conform to these specifications will be rejected.

The Secretary of State's office recommends that all documents filed with that office be filled in by typing or printing on a laser printer, in order to provide sufficient contrast and legibility for microfilming purposes.

If attachments are necessary, use of the Addendum (Form UCC-3Ad, reproduced *below*) is encouraged.

See the official instructions (reproduced in [2], *below*) for important additional information on completing Form UCC-3.

[c] Copies

If an acknowledgment copy is desired, the Secretary of State's office advises that the person filing the statement should send one copy with the original and mark it "acknowledgment copy."

[d] Fees

The fee for filing and indexing a record is set forth in *Gov. Code § 12194(a)-(d)* and current fees are listed on the Secretary of State's website which is given in [a], *above*. Note that current fee amounts are based on the number of pages being filed.

[e] Who May File Statement

For discussion of who may file an initial financing statement [*Com. Code § 9509*], see § 42.211[1][j]. The same rules apply to amendments adding collateral or a debtor to a financing statement [*Com. Code § 9509(a)*].

A person may file an amendment *other than* an amendment that adds collateral covered by a financing statement or an

amendment that adds a debtor to a financing statement only if either of the following conditions is satisfied [*Com. Code* § 9509(d)]:

- The secured party of record [*see Com. Code* § 9511] authorizes the filing. The secured party of record is *required* to file a termination statement when the underlying obligation terminates or other specified conditions have been met [*see Com. Code* § 9513(a), (c)].
- The amendment is a termination statement for a financing statement as to which the secured party of record has failed to file or send a termination statement as required by *Com. Code* § 9513(a) or (c), the debtor authorizes the filing, and the termination statement indicates that the debtor authorized it to be filed [*Com. Code* § 9509(d)]. If there is more than one secured party of record for a financing statement, each secured party of record may authorize such a filing [*Com. Code* § 9509(e)].

[f] Filing Procedure

For discussion of filing procedures for UCC forms filed with the Secretary of State's office, see § 42.211[1][k].

[2] FORM

UCC Financing Statement Amendment--Form UCC-3

[Click here to view image.](#)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsAmendments, Errors & Omissions



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B. Perfecting Security Interests

19-42 California Legal Forms--Transaction Guide § 42.215

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.215 Financing Statement Correction Statement--Form UCC-5

[1] Comment

[a] Use of Form

This form is the Secretary of State's official Financing Statement Correction Statement, Form UCC-5. A correction statement may be filed by a debtor when the debtor believes that a previous UCC filing is inaccurate or was wrongfully filed [*Com. Code § 9518*]. For amendments to a previously filed financing statement when information changes [*Com. Code §§ 9509, 9512*], continuation statements [*Com. Code § 9515*], and termination statements [*Com. Code § 9513*], Form UCC-3 (reproduced in § 42.214) should be used.

PRACTICE TIP

ELECTRONIC FORMS NOTE: Electronic copies of this form that may be printed out and filled in for filing can be obtained at the official website of the California Secretary of State, Business Programs Division, which is located at <http://www.sos.ca.gov/business/ucc/ucc.htm>. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or emailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 42.215. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will require Adobe Acrobat Reader version 3.0 or higher.

The form illustrated here is a reproduction of the Secretary of State's online form referred to above. For important information regarding use of copies of the online form, see [d], [e], *below*. Use of the official form is mandatory in California after July 1, 2001. Submissions that do not conform to the form specifications stated below will be rejected.

[b] Statutory Requirements

Com. Code § 9518(a) provides that a person may file in the filing office a correction statement with respect to a record indexed there under the person's name if the person believes that the record is inaccurate or was wrongfully filed. A correction statement, in order to be valid, must do all of the following [*Com. Code § 9518(b)*]:

- Identify the record to which it relates by both (1) the file number assigned to the initial financing statement to which the record relates; and (2) if the correction statement relates to a record filed or recorded in a filing office described in *Com. Code § 9501(a)(1)* (relating to as-extracted goods, timber to cut, and fixture filings), the date that the initial financing statement was filed or recorded, and the information specified in *Com. Code § 9502(b)* [see [e], below, and Item 3 in the form].
- Indicate that it is a correction statement.
- Provide the basis for the person's belief that the record is inaccurate, and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed.

[c] Effect of Correction on Initial Financing Statement or Other Record

The filing of a correction statement does not affect the effectiveness of an initial financing statement or other filed record [*Corp. Code § 9518(c)*]. It does, however, afford an aggrieved person the opportunity to state its position in the public record [see *UCC § 9-518*, Official Comment 2]. The correction statement becomes part of the financing statement as defined in *Com. Code § 9102(a)(39)* [see *UCC § 9-518*, Official Comment 2].

The filing of a correction statement does not displace other provisions of Article 9 that impose liability for making unauthorized filings, or failing to file or send a termination statement, nor displace any available judicial remedies [see *UCC § 9-518*, Official Comment 2].

[d] Printing Requirements

The Secretary of State's office requires that UCC-5 forms must be printed on 8 1/2 " x 11" white paper. The Secretary of State's office also strongly recommends that the form be printed out on a quality laser printer and kept free of damage, so that the special barcode patch located in the upper left hand corner of the form will be clear for microfilming purposes. Use of dot matrix printers is discouraged, and the office recommends that printer ink quality be checked frequently to assure that the barcode patch will be effective. Altering the barcode patch, including by being stapled or photocopied, can cause delays in the Secretary of State's microfilm processing times.

[e] Completing the Form

The official form must be completed as described below to assure that the requirements of *Com. Code § 2518* [see [b], above] are met. For additional information, see the official instructions to the form, which are reproduced in [2], below.

- Completion of Items 1 and 4 is mandatory. Either item 2a or 2b must also be completed. Item 3 is required under specified circumstances.
- The type of record involved (financing statement or amendment) must be entered in Item 1a. Additional information, such as the filing date and number, may also be entered. The filing number of the initial financing statement must be entered in Item 1b. Only one filing number may be entered.
- If the correction statement is being filed in the belief that the original statement is inaccurate, Box 2a should be checked. The filer should state the basis for that belief and indicate the manner in which the

record should be amended to cure the inaccuracy.

- If the correction statement is being filed in the belief that the original statement was wrongfully filed, the filer should check Box 2b and provide the basis for that belief.

- If the correction statement relates to a record filed or recorded in the office designated for the filing or recording of a record of a mortgage on the related real property, the filing is either (1) as-extracted collateral or timber to be cut, or (2) a fixture filing and the collateral is goods that are or are to become fixtures [*see Com. Code § 9501(a)(1)*], and the correction statement is also filed in such a filing office, Item 3 must be completed to specify the date and time on which the initial financing statement was filed or recorded.

- The name of the person who authorized the filing of the correction statement must be entered in Item 4. This name must be the same as the name under which the record is indexed.

[f] Fees

The UCC-5 form must be accompanied by a fee of \$10 (\$20 if it is more than 2 pages long) [*Com. Code § 9525; Gov. Code § 12194(b)*].

[2] FORM

Financing Statement Correction Statement--Form UCC-5

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsAmendments, Errors & Omissions



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B. Perfecting Security Interests

19-42 California Legal Forms--Transaction Guide § 42.216

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.216 Information Request--Form UCC-11

[1] Comment

[a] Use of Form

This form is the Secretary of State's official Information Request, Form UCC-11. This form is used for two purposes:

- To request a search report on a particular debtor [*see Com. Code § 9523(c)*]; and/or
- To obtain copies of UCC records on file with the Secretary of State's office.

PRACTICE TIP

ELECTRONIC FORMS NOTE: Electronic copies of this form that may be printed out and filled in for filing can be obtained at the official website of the California Secretary of State, Business Programs Division, which is located at <http://www.sos.ca.gov/business/ucc/ucc.htm>. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or emailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 42.216. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will require Adobe Acrobat Reader version 3.0 or higher.

The form illustrated here is a reproduction of the Secretary of State's online form referred to above. For important information regarding use of copies of the online form, see [d]-[f], *below*. This version of the national UCC-11 form has been customized by the Secretary of State's office for use in California; filing offices in other states may offer variations in filing options. Use of the official form is mandatory in California after July 1, 2001.

Prior to July 1, 2001, debtor search requests were made using the then-current version of Form UCC-3. These requests

should how be made using Form UCC-11 (this form), or, if the search is being requested in conjunction with the filing of a UCC-1 financing statement, by indicating on the UCC-1 form that a search request also is being made [see [b], *below*]. The current Form UCC-3 [see § 42.214] is completely different from its predecessor of the same number and is no longer used for this purpose.

[b] Debtor Search Made in Conjunction With Filing of Financing Statement

If a debtor search request is being made in conjunction with the filing of a financing statement, the request may be made on the UCC-1 form itself; it is not necessary to file a separate UCC-11 form. For information on requesting search reports on a debtor named in a UCC-1 financing statement at the time the UCC-1 statement is filed, see § 42.211[1][c].

[c] Information Contained in Debtor Search Report

Form UCC-11 may be used to request a search report on a particular debtor (except when the debtor search is made in conjunction with the filing of a UCC-1 financing statement, as discussed in [b], *above*). *Com. Code § 9523(c)* provides that the filing office must communicate or otherwise make available in a record all of the following information to any person that requests it:

- Whether there is on file on a date and time specified by the filing office, but not a date earlier than three business days before the filing office receives the request, any financing statement that satisfies all of the following conditions:
 - It designates a particular debtor or, if the request so states, designates a particular debtor at the address specified in the request.
 - It has not lapsed under *Com. Code § 9515* with respect to all secured parties of record.
 - If the request so states, it has lapsed under *Com. Code § 9515* and a record of which is maintained by the filing office under *Com. Code § 9522(a)*.
- The date and time of filing of each financing statement.
- The information provided in each financing statement.

The filing office may communicate information in any medium. If requested, however, the filing office must communicate information by issuing a written certificate [*Com. Code § 9523(d)*].

[d] Submitting Request

The Secretary of State requests that the form be typed in or printed on a laser printer.

Each request must relate to one specific debtor. Separate requests must be submitted for each debtor name or variation of a debtor name.

As indicated in the attached instructions [see Item 1 in attached instructions], the exact legal debtor name should be used. The Secretary of State's office notes that there may be records on file in which the exact legal name is not used. It may be possible to address this problem by filing a separate UCC-11 form for each possible name variation.

[e] Requirements for Debtor Search Request

When a search request is being requested, the requesting party must choose one of the following options [see Item 2 and 3 in attached instructions]:

- The box in Item 2a should be checked for a complete search at any address. Searches include unexpired and expired records.
- If the box in Item 3a is checked, the search report will not be produced until the accompanying document and all other documents received on that day have been filed and can be certified.
- If the box in Item 3b is checked, the debtor search is limited to a specific street address. The complete address must be indicated on the UCC-11 form. The Secretary of State will not search by city alone.
- If the box in Item 3c is checked, the debtor search will be limited to a specific date range. The starting and ending dates of that range should be indicated.
- If the box in Item 3d is checked, the debtor search will be limited to a debtor with a specific social security number or federal tax ID number.

All searches by the Secretary of State's office will be certified; hence that box is already checked on the official California version of the UCC-11 form.

[f] Requirements for Copy Request

When copies are being requested, one of the following options in the form must be checked [see Item 2 and 3 in attached instructions]:

- To request copies of records appearing in the search report, check box 2B on the form; or
- To request copies of other records, complete Item 2B for each specific record to be copied. The Secretary of State's office requires that the UCC-1 file number be referenced. There is a limit of 10 file numbers for each UCC-11 form.

[g] Fees

Fees are required for each request, and must accompany the request. The search fee for each request is \$10 [*Com. Code* § 9525; *Gov. Code* § 12194(a)], and the copy fee for each request is \$1 for the first page of record and 50 cents for each additional page [*Gov. Code* § 12178.1(a)]. Copy fees are based on the number of fees in a record, and exact fees cannot be determined until after reproduction. The Secretary of State advises enclosing a check with the notation "not to exceed \$ _____" and states that \$35 usually is sufficient. Once the fees have been determined, the check will be completed and a detailed billing sheet returned with the information. The Secretary of State's office requires pre-approval for all requests estimated to exceed \$50.

[2] FORM

Information Request--Form UCC-11

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral Overview



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B. Perfecting Security Interests

19-42 California Legal Forms--Transaction Guide §§ 42.217-42.219

AUTHOR: by Ann S. Manheimer, J.D.

[Reserved]

§§ 42.217[Reserved]



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C. Subordination

*19-42 California Legal Forms--Transaction Guide § 42.220***AUTHOR:** by Ann S. Manheimer, J.D.**§ 42.220 General Subordination Agreement****[1] Comment--Use of Form**

This form is an agreement of a secured party to subordinate a senior security interest to a junior security interest of another creditor in the same collateral. Any person entitled to priority under the UCC may agree to subordinate his or her security interest to that of another secured party [*Com. Code § 9339*]. For further discussion of perfection and priorities, see §§ 42.14 and 42.15.

[2] FORM**General Subordination Agreement**

SUBORDINATION AGREEMENT

_____[city], _____ County, California

For _____[valuable consideration or state consideration], the undersigned subordinates the security interest represented by the security agreement dated _____, between the undersigned and _____[name of debtor], to the security interest arising out of the security agreement dated _____[date], between _____[name of secured party obtaining priority] and _____[name of debtor].

Date: _____

_____ [signature of subordinating party]

_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)PerfectionGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PriorityGeneral Overview



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 C. Subordination

19-42 California Legal Forms--Transaction Guide § 42.221

AUTHOR: by Ann S. Manheimer, J.D.**§ 42.221 Consent by Owner or Mortgagee of Real Estate to Security Interest in Fixtures****[1] Comment--Use of Form**

A security interest in fixtures, even if unperfected, has priority over the conflicting interest of a mortgagee or owner of the real estate if either (1) the debtor has a right to remove the goods or (2) the owner or mortgagee has consented in an authenticated record [see *Com. Code* § 9102(a)(7) ("authenticate" defined); *Com. Code* § 9102(a)(69) ("record" defined)] to the security interest or has disclaimed an interest in the goods as fixtures [*Com. Code* § 9334(f)]. This form contains the consent of the owner or mortgagee to the secured party's security interest.

[2] FORM**Consent by Owner or Mortgagee of Real Estate to Security Interest in Fixtures**

CONSENT BY _____ [OWNER or MORTGAGEE] OF REAL ESTATE TO SECURITY
 INTEREST IN FIXTURES

The undersigned _____ [owner or mortgagee] of the real estate located at
 _____ [street address], _____ [city], California, consents to the granting of a security
 interest by _____ [name of debtor] to _____ [name of secured party] in the fixtures
 described below and _____ [located or to be located] on or at the real estate described above:
 _____ [describe fixtures].

Date: _____
 _____ [signature of owner or mortgagee]
 _____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGoodsFixtures



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C. Subordination

19-42 California Legal Forms--Transaction Guide §§ 42.222-42.229

AUTHOR: by Ann S. Manheimer, J.D.

[Reserved]

§§ 42.222[Reserved]



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D. Statement of Account or List of Collateral

19-42 California Legal Forms--Transaction Guide § 42.230

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.230 Request for Statement of Account or List of Collateral

[1] Comment

[a] Use of Form

This form includes a request for an accounting of unpaid obligations, a request for a statement of the amount due on the debtor's obligations secured by collateral, and a request regarding a list of collateral securing an obligation [see *Com. Code § 9210(a)*]. The debtor may choose among the requests, as appropriate.

For discussion of the secured party's reply to the request, see § 42.231.

[b] Requests by Debtors Only

Because the creditors of and prospective purchasers from a debtor may need more information than that disclosed by a financing statement filed under *Com. Code § 9501 et seq.* [see § 42.131 (detailing limited information disclosed in financing statement)], the debtor may submit a request for an accounting of unpaid obligations, a request for a statement of the amount due on the debtor's obligations secured by collateral, or a request regarding a list of collateral securing an obligation [see *Com. Code § 9210(a)*]. However, because the secured party should not be under a duty to disclose details of the debtor's financial affairs to any casual inquirer or competitor, the debtor, alone, has the right to request this information [see *Com. Code § 9210* (UCC Comment 3)].

[c] Permitted Types of Requests

The debtor may request three types of information by submitting three types of "requests" [see *Com. Code § 9210(a)(1)* ("request" defined)] to the secured party. First, the debtor may request the secured party to prepare and send an "accounting" [*Com. Code § 9210(a)(2)*; see *Com. Code § 9102(a)(4)* ("accounting" defined)]. A "request for an accounting" is a record authenticated by a debtor requesting that the recipient provide an accounting of the unpaid

obligations secured by collateral and reasonably identifying the transaction or relationship that is the subject of the request [*Com. Code* § 9210(a)(2)]. An "accounting" in this context must indicate the aggregate unpaid secured obligations as of a date not more than 35 days earlier or 35 days later than the date of the record [*Com. Code* § 9102(a)(4)].

Second, the debtor may submit to the secured party a list of collateral for the secured party's approval or correction [*Com. Code* § 9210(a)(3)]. A "request regarding a list of collateral" is a record authenticated by a debtor requesting that the recipient approve or correct a list of what the debtor believes to be the collateral securing an obligation and reasonably identifying the transaction or relationship that is the subject of the request [*Com. Code* § 9210(a)(3)].

Third, the debtor may submit to the secured party for its approval or correction a statement of the aggregate amount of unpaid secured obligations [*Com. Code* § 9210(a)(4)]. A "request regarding a statement of account" is a record authenticated by a debtor requesting that the recipient approve or correct a statement indicating what the debtor believes to be the aggregate amount of unpaid obligations secured by collateral as of a specified date and reasonably identifying the transaction or relationship that is the subject of the request [*Com. Code* § 9210(a)(4)].

Because a secured party may have numerous transactions and relationships with a debtor, each request must identify the relevant transaction or relationships [*see Com. Code* § 9210(a)(2)-(4)].

The secured party must respond to a request within 14 days following receipt of the request [*see Com. Code* § 9210(b), (c); *see also* § 42.231]. Similarly, a party that receives a request, claims no interest in the collateral or the obligations when it receives the request, but claimed an interest in the collateral or obligations at an earlier time, must respond within 14 days after receipt [*see Com. Code* § 9210(d), (e); § 42.231[1][c]].

[d] No Waiver of Request Rights Permitted

The debtor's rights under this statutory provision may not be waived or varied [*see Com. Code* § 9602(2); *see also Com. Code* § 9625(f) (remedies for noncompliance)].

[e] Limitation on Free Responses to Requests

A debtor is entitled to receive from the secured party one free response to *each* type of request (that is, three free responses) during a six-month period [*see Com. Code* § 9210(f)].

[2] FORM

Request for Statement of Account or List of Collateral

REQUEST _____ [FOR ACCOUNTING *or* REGARDING STATEMENT OF ACCOUNT *or* REGARDING LIST OF COLLATERAL]

TO: _____ [name of secured party]
 _____ [address]
 _____ [city], California

[If accounting of unpaid obligations is desired, use:]

The undersigned debtor requests that you provide an accounting of the unpaid _____ [security agreement *or* note *or* conditional sale *or* specify other form of obligation], executed by the debtor on _____ [date], to you, [add, as required to reasonably identify transaction: secured by

_____ (describe collateral)].

[Or, if statement of account of unpaid obligation is desired, use:]

The undersigned debtor requests that you approve or correct, and return to the debtor, this statement of account. The debtor believes that the aggregate balance due you on the _____ [security agreement or note or conditional sale or specify other form of obligation] executed by the debtor on _____ [date], [add, as required to reasonably identify transaction: secured by _____ (describe collateral)], is \$ _____ [amount] as of _____ [date].

[Or, if list of collateral is desired, use:]

The undersigned debtor requests that you approve or correct the following list of collateral in which you have a security interest by virtue of the security agreement dated _____ and executed by the debtor: _____ [list collateral].

[Continue with the following:]

In accordance with *Commercial Code Section 9210*, your response is required within 14 days following receipt of this request.

Thank you for your prompt attention.

Date: _____

_____ [signature of debtor]

_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 42 SECURED TRANSACTIONS

PART IV. FORMS

D. Statement of Account or List of Collateral

19-42 California Legal Forms--Transaction Guide § 42.231

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.231 Secured Party's Reply to Debtor's Request for Statement and Request for Payment of Charge

[1] Comment

[a] Use of Form

This form is for use by a secured party in reply to the debtor's request for an accounting of unpaid obligations, a request for a statement of the amount due on the debtor's obligations secured by collateral, or a request regarding a list of collateral securing an obligation [*see Com. Code § 9210(a)*; *see also § 42.230*].

For a debtor's forms for request, see § 42.230.

[b] Contents of Reply

In the case of a request for an accounting, the secured party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, must comply with the request by authenticating and sending to the debtor an accounting [*Com. Code § 9210(b)(1)*]. In the case of a request regarding a list of collateral or a request regarding a statement of account, the secured party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, must comply by authenticating and sending to the debtor an approval or correction [*Com. Code § 9210(b)(2)*]. A secured party that claims a security interest in all of a particular type of collateral owned by the debtor may comply with a request regarding a list of collateral by sending to the debtor an authenticated record including a statement to that effect [*Com. Code § 9210(c)*].

An "accounting" in this context must indicate the aggregate unpaid secured obligations as of a date not more than 35 days earlier or 35 days later than the date of the record [*Com. Code § 9102(a)(4)*].

[c] Recipients Claiming No Interest in Transaction

A debtor may be unaware that a creditor with whom it has dealt has assigned its interest or the secured obligation. Recipients of requests for an accounting or regarding a list of collateral or a statement of account have a duty to inform the debtor that they claim no interest in the collateral or secured obligation, respectively, and to inform the debtor of the name and mailing address of any known assignee or successor to the recipient's interest in the collateral [see *Com. Code* § 9210(d), (e)].

[d] Timeliness of Reply

The secured party must respond to a request within 14 days following receipt of the request [see *Com. Code* § 9210(b), (c); see also *Com. Code* § 9625(f) (remedies for noncompliance)].

[e] Limitation on Free Responses to Requests

A debtor is entitled to receive from the secured party one free response to *each* type of request (that is, three free responses) during a six-month period [see *Com. Code* § 9210(f)].

[2] FORM

Secured Party's Reply to Debtor's Request for Statement and Request for Payment of Charge

REPLY TO REQUEST _____ [FOR ACCOUNTING or REGARDING STATEMENT OF ACCOUNT or REGARDING LIST OF COLLATERAL] [if appropriate, add: AND DEMAND FOR PAYMENT OF CHARGE]

TO: _____ [name of secured party]
 _____ [address]
 _____ [city], California

[If reply is to request for accounting of unpaid obligations, use:]

Following is an accounting of the unpaid _____ [security agreement or note or conditional sale or specify other form of obligation], executed by you on _____ [date], [add, if desired:] secured by _____ [describe collateral], as of _____ [date not more than 35 days earlier or 35 days later than date of record]: _____

[Or, if reply is to request for statement of account of unpaid obligation, use:]

The undersigned secured party returns to you the statement of account you sent. The statement has been reviewed and _____ [approved or corrected as noted].

[Or, if party claims no interest in obligation, use:]

The undersigned claims no interest in the obligation referred to in your request dated _____. [If party know the name and mailing address of any assignee or successor, add:]

The name and mailing address of the [assignee or successor] are as follows: _____.

[Or, if reply is to request for list of collateral and secured party claims interest in collateral, use:]

The undersigned secured party returns to you the list of collateral you sent. The statement has been reviewed and _____ [approved or corrected as noted]. [Add, if desired: Please be advised that, with respect to the list of collateral you have sent, the undersigned claims a security interest in all _____ (describe type of collateral) owned by you.]

[Or, if party claims no interest in collateral, use:]

The undersigned claims no interest in the collateral referred to in your request dated _____. [If party knows the name and mailing address of any known assignee or successor, add: The name and mailing address of the _____ (assignee or successor) are as follows: _____.]

[If debtor has submitted more than one request in six months, add:]

Since you have submitted _____ [number greater than one] requests within six months, in accordance with *California Commercial Code Section 9210*, the undersigned demands payment of \$ _____ [not exceeding \$25.00] for furnishing this reply statement.

[Continue with the following:]

Date: _____
 _____ [signature of secured party]
 _____ [typed name]

[Add, as required:]

Attachments:
 Accounting
 Statement of Account
 List of Collateral

Legal Topics:

For related research and practice materials, see the following legal topics:
 Commercial Law (UCC) Secured Transactions (Article 9) General Overview Commercial Law (UCC) Secured Transactions (Article 9) Application & Construction Definitions Collateral General Overview



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D. Statement of Account or List of Collateral

19-42 California Legal Forms--Transaction Guide §§ 42.232-42.239

AUTHOR: by Ann S. Manheimer, J.D.

[Reserved]

§§ 42.232[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

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PART IV. FORMS

E. Remedies After Default by Debtor

19-42 California Legal Forms--Transaction Guide § 42.240

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.240 Notice Before Disposition of Collateral--General

[1] Comment

[a] Use of Form

This form is for use by a secured party to notify specified persons of the disposition of collateral after default [*see Com. Code § 9610*; *see also § 42.16[3][h]*]. This form is for use when the disposition does not involve a consumer goods transaction [*see Com. Code § 9613*]. For a notification relating to disposition of collateral in a consumer goods transaction, *see § 42.241*.

For discussion of default generally, *see § 42.16*. For a detailed guide to procedures on default, *see § 42.141*.

[b] Secured Party's Right to Dispose of Collateral After Default

A secured party after default may sell, lease, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing [*Com. Code § 9610(a)*].

Unless the collateral is perishable, threatens to decline speedily in value, or is of a type customarily sold on a recognized market [*Com. Code § 9611(d)*], the secured party must send a reasonable authenticated notification of disposition [*Com. Code § 9611(b)*; *see Com. Code § 9610(b)* (every aspect of disposition, including method, manner, place, and other terms, must be commercially reasonable)]. The notification must be reasonable in the manner in which it is sent, that is, a reasonable time before the disposition is to take place [*see Com. Code § 9612* (timeliness of notification); *see also [c], below*] and in its content [*see Com. Code § 9613* (contents of notification generally); *see also [d], below; Com. Code § 9614* (contents of notification in consumer goods transactions); *§ 42.241*].

If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms [*Com. Code § 9610(b)*].

[c] Timeliness of Notification

Whether a notification is sent within a reasonable time is generally a question of fact [*Com. Code § 9612(a)*]. However, in a transaction other than a consumer transaction, a notification of disposition sent after default and 10 days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition [*Com. Code § 9612(b)*].

[d] Contents of Notification

Except in a consumer-goods transaction, the contents of a notification of disposition are sufficient if the notification does all of the following [*Com. Code § 9613(1)*]:

- Describes the debtor and the secured party.
- Describes the collateral that is the subject of the intended disposition.
- States the method of intended disposition.
- States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting.
- States the time and place of a public sale or the time after which any other disposition is to be made.

Whether the contents of a notification that lacks any of the required information are nevertheless sufficient is a question of fact [*Com. Code § 9613(2)*]. However, the contents of a notification providing substantially the required information is sufficient, even if the notification includes either information not specified by *Com. Code § 9613(1)* or minor errors that are not seriously misleading [*Com. Code § 9613(3)*].

No particular phrasing of the notification is required [*Com. Code § 9613(4)*]. However, except in a consumer goods transaction, the contents of a notification that includes the information contained in [2], *below*, is sufficient as a matter of law, unless the parties agree otherwise [*see Com. Code § 9613(5); Com. Code § 9613* (UCC Comment P 2)]. The required contents of a form of notification before disposition of collateral in a consumer goods transaction is contained in § 42.241[2].

[e] Parties Entitled to Notification

The secured party must send notification of disposition to all of the following persons:

- The debtor [*Com. Code § 9611(c)(1)*].
- Any secondary obligor [*Com. Code § 9611(c)(2)*].
- If the collateral is other than consumer goods to both of the following persons:
 - Any other person from which the secured party has received, before the notification date [*see Com. Code § 9611(a)* (definition)], an authenticated notification of a claim of an interest in the collateral [*Com. Code § 9611(c)(3)(A)*].
 - Any other secured party or lienholder that, ten days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing

statement that (1) identified the collateral; (2) was indexed under the debtor's name as of that date, and (3) was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date [*Com. Code § 9611(c)(3)(B)*; see *Com. Code § 9611(e)* (safe harbor provision)].

- Any other secured party that, 10 days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in *Com. Code § 9311(a)*, such as a certificate-of-title statute [*Com. Code § 9611(c)(3)(C)*; see § 42.14[3]].

A secured party, however, is relieved of the duty to send notification to a debtor or secondary obligor unknown to the secured party [*Com. Code § 9605*].

In addition, there is a "safe harbor" provision that takes into account the delays that may be attendant to receiving information from a public filing office. A secured party generally will be deemed to have satisfied its notification duty under *Com. Code § 9611(c)(3)(B)* (see discussion, *above*) if it requests a search from the proper office at least 20, but not more than 30 days before sending notification to the debtor and it also sends a notification to all secured parties (and other lienholders) reflected in the search report [*Com. Code § 9611(e)(1)*]. The secured party's duty under this provision will also be satisfied if the secured party requests, but does not receive, a search report before the notification is sent to the debtor [*Com. Code § 9611(e)(2)*]. However, this safe harbor provision has no effect on the requirements of other paragraphs of *Com. Code § 9611(c)* [see *Com. Code § 9611(e)*; *Com. Code § 9611* (UCC Comment P 4)].

[f] Remedies for Noncompliance

The holder of a conflicting security interest may have the right to recover any loss caused by the secured party's failure to comply with these notification provisions [see *Com. Code § 9625(b)*].

[g] Waiver

A debtor or secondary obligor may waive the right to notification only by a post-default authenticated agreement [see *Com. Code § 9624(a)*; § 42.242].

[2] FORM

Notice Before Disposition of Collateral--General

NOTICE OF DISPOSITION OF COLLATERAL ON DEFAULT

To: _____ [*Name of debtor, obligor, or other person to which the notification is sent*]

From: _____ [*Name, address, and telephone number of secured party*]

Name of Debtor(s): _____ [*include only if debtor(s) are not an addressee*]

[*If disposition is public, use:*]

We will _____ [*sell or lease or license*] _____ [*describe collateral*] to the highest qualified bidder in public as follows:

Day and Date: _____

Time: _____

Place: _____

[Or, if disposition is private, use:]

We will _____ [sell or license] the _____ [describe collateral] privately sometime after _____ [day and date].

[Continue with the following:]

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to [sell or lease or license] [for a charge of \$_____]. You may request an accounting by calling us at _____ [telephone number].

Date: _____

_____ [signature of secured party]

_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)DefaultGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionDisposition of Collateral



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E. Remedies After Default by Debtor

19-42 California Legal Forms--Transaction Guide § 42.241

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.241 Notice Before Disposition of Collateral--Consumer Goods Transaction

[1] Comment

[a] Use of Form

This form is for use by a secured party to notify specified persons of the disposition of collateral after default [*see Com. Code § 9610; see also § 42.16[3][h]*]. This form is for use when the disposition involves a consumer goods transaction [*see Com. Code § 9614*]. For a form for notification relating to disposition of collateral in transaction that is not a consumer goods transaction, see § 42.240[2].

For discussion of the secured party's right of disposition after default, see § 42.240[1][b]. For further discussion of notification before disposition of collateral, including timeliness of notification, parties entitled to notification, remedies for noncompliance, and waiver, see § 42.240[1][c]-[g]. For coverage of default generally, see § 42.16. For a detailed guide to procedures on default, see § 42.141.

[b] Contents of Notification in Consumer Goods Transaction

In a consumer goods transaction, a notification of disposition must provide all of the following information [*Com. Code § 9614(1)*]:

- Description of the debtor and the secured party.
- Description of the collateral that is the subject of the intended disposition.
- Statement of the method of intended disposition.
- Statement that the debtor is entitled to an accounting of the unpaid indebtedness and states the

charge, if any, for an accounting.

- Statement of the time and place of a public sale or the time after which any other disposition is to be made.
- Description of any liability for a deficiency of the person to which the notification is sent.
- Telephone number from which the amount that must be paid to the secured party to redeem the collateral is available [*see Com. Code § 9623* (right to redeem collateral)].
- Telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

A particular phrasing of the notification is not required [*Com. Code § 9614(2)*]. However, a notification that lacks any of the information set forth above is insufficient as a matter of law [*see Com. Code § 9614(1)*; *Com. Code § 9614* (UCC Comment P 2); *cf. Com. Code § 9613(2)* (trier of fact may find notification to be sufficient even if it lacks some information listed in *Com. Code § 9613(1)*; § 42.240[1][d]]].

The notification form in [2], *below* [*see Com. Code § 9614(3)* (statutory form)], when completed, provides sufficient information [*Com. Code § 9614(3)*]. It is sufficient even if additional information appears at the end of the form [*Com. Code § 9614(4)*]. In addition, this form of notification is sufficient even if it includes errors in information not required by *Com. Code § 9614(1)* (*see above*), unless the error is misleading with respect to rights arising under Division 9 [*Com. Code § 9614(5)*]. However, if a notification before disposition of collateral in a consumer goods transaction is not in the form in [2], *below*, law other than Division 9 determines the effect of including information not required by *Com. Code § 9614(1)* [*Com. Code § 9614(6)*].

[c] Strict Compliance Required

Strict compliance with these notice requirements has been deemed necessary by the courts under the version of Division 9 in effect prior to July 1, 2001 [*see C.I.T. Corp. v. Anwright Corp. (1987) 191 Cal. App. 3d 1420, 1422-1424, 237 Cal. Rptr. 108* (decided under prior law)]. In one case, a California appellate court held that a bank's notice failed to comply with the specific notice requirements of former *Com. Code § 9504(3)* (*now see Com. Code §§ 9611-9614*) because it failed to state, expressly or impliedly, whether the sale would be public or private. The bank's notice stated in part: "Notice Is Hereby Given of the undersigned's intent to sell the repossessed motor vehicle at the expiration of 5 days from the date this notice was mailed ... and 'by private or public sale whichever deems [sic] necessary at redemption address at close of business day.' " The court found that the content of the notice was defective because it did not contain sufficient information to ascertain with specificity the type of sale the bank intended to undertake. The language of the notice arguably suggested either a public or a private sale. It specified the time and place of a possible public sale, but also might be read to indicate the date after which a private sale would take place. The court noted that California law mandates strict compliance with the (former) *Com. Code § 9504(3)* (*now see Com. Code § 9611-9614*) notice requirement; it does not permit the creditor to leave the debtor guessing regarding the type of sale contemplated [*Union Safe Deposit Bank v. Floyd (1999) 76 Cal. App. 4th 25, 29-31, 90 Cal. Rptr. 2d 36* (decided under prior law)].

Although there is as yet no authority expressly applying a strict compliance standard to the revised Division 9 that became effective on July 1, 2001, it would appear that this approach is still applicable, at the very least, to consumer transactions [*see [b], above*].

[d] Disposition of Motor Vehicle at Public Sale Generally

If the collateral is a motor vehicle, a public disposition includes, but is not limited to, the following defined categories [

Com. Code § 9614(7)]:

- Retail disposition by a retail seller of motor vehicles who offers the collateral for sale or lease to the general public in the same manner as goods that the seller disposes of on the seller's own behalf.
- Retail disposition made subsequent to advertising in a publication with a recognized ability to attract retail motor vehicle buyers and lessees and in a manner designed to reach the retail buying and leasing public for vehicles of that type and condition.

For these dispositions, the secured creditor must ensure that the consumer has reasonable access to the motor vehicle in question in order to be able to exercise the right to inspect the motor vehicle [*Com. Code § 9614(8)*].

Nothing in these provisions is to be construed to alter or disturb any right to inspect a consumer good prior to sale under existing law [*Com. Code § 9614(9)*]. In addition, nothing in this statute is to be construed to alter or disturb the holding in *Bank of America v. Lallana* (1998) 19 Cal. 4th 203, 77 Cal. Rptr. 2d 910, 960 P.2d 1133 (discussed in [e], below) [see Stats. 2000 ch. 188, § 2]. This statute does not define "public" and "private" sales and dispositions in general, but describes a limited subset of "public" sales and dispositions when the consumer goods collateral is a motor vehicle [see Stats. 2000 ch. 188, § 2]. In addition, nothing in this statute is to be construed to alter or disturb any applicable requirements contained in the Rees-Levering Automobile Sales Finance Act [see Stats. 2000 ch. 188, § 2; see also *Civ. Code § 2981 et seq.*; [e], below].

[e] Disposition Pursuant to Rees-Levering Act

To obtain a deficiency judgment, a secured creditor who sells a defaulting debtor's repossessed car must comply with both the provisions of the Rees-Levering Motor Vehicle Sales and Finance Act [see *Civ. Code § 2981 et seq.*; Ch. 47, *Automotive Financing and Vehicle Leasing*] and with any relevant provisions in Division 9 of the Commercial Code [*Bank of America v. Lallana* (1998) 19 Cal. 4th 203, 206, 77 Cal. Rptr. 2d 910, 960 P.2d 1133] . *Civ. Code § 2983.2(a)* requires a creditor to give the debtor written notice of its intent to dispose of a repossessed car. *Civ. Code § 2983.2(a)* specifies that except as otherwise provided in *Civ. Code § 2983.8*, the debtor will be liable for any deficiency after disposition of the repossessed motor vehicle if the creditor gives the debtor requisite timely notice and provides statutorily specified information. *Civ. Code § 2983.8* provides that no deficiency judgment will lie after any sale or other disposition of a motor vehicle unless the court has determined that the sale or other disposition was in conformity with the provisions of both the Rees-Levering Act and the relevant provisions of Division 9, including *Com. Code § 9504*.

In *Bank of America v. Lallana* [*Bank of America v. Lallana* (1998) 19 Cal. 4th 203, 206, 77 Cal. Rptr. 2d 910, 960 P.2d 1133] , the debtor's car was sold at a public auction. The California Supreme Court determined that the secured creditor gave proper notice pursuant to the Rees-Levering Act, but because it failed to give the debtor proper notice of a public sale pursuant to former *Com. Code § 9504(3)* (notice of both the time and place of sale; now see *Com. Code § 9611, 9614*), it was precluded from obtaining a deficiency judgment [*Bank of America v. Lallana* (1998) 19 Cal. 4th 203, 206, 77 Cal. Rptr. 2d 910, 960 P.2d 1133] . For further discussion, see Ch. 47, *Automotive Financing and Vehicle Leasing*, § 47.203.

[2] FORM

Notice Before Disposition of Collateral--Consumer Goods Transaction

NOTICE OF DISPOSITION OF COLLATERAL ON DEFAULT--CONSUMER GOODS

_____ [name of secured party]

_____ [address of secured party]

_____ [date]

NOTICE OF OUR PLAN TO SELL PROPERTY

_____ [name and address of any obligor who is also a debtor]

Subject: _____ [identification of transaction]

We have your _____ [describe collateral], because you broke promises in our agreement.

[For a public disposition, use:]

We will sell _____ [describe collateral], at public sale. A sale could include a lease or license. The sale will be held as follows:

Date: _____

Time: _____

Place: _____

You may attend the sale and bring bidders if you want.

[Or, for a private disposition, use:]

We will sell _____ [describe collateral] at private sale sometime after _____ [date].

[Continue with the following:]

A sale could include a lease or license.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will or will not] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at _____ [telephone number].

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at _____ [telephone number] or write us at _____ [secured party's address] and request a written explanation. [Add, if applicable: We will charge you \$ _____ [amount not to exceed \$25.00] for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]

If you need more information about the sale call us at _____ [telephone number] or write us at _____ [secured party's address].

We are sending this notice to the following other people who have an interest in _____ [describe collateral] or who owe money under your agreement:

_____ [Names of all other debtors and obligors, if any.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Secured Transactions (Article 9) Default General Overview Commercial Law (UCC) Secured Transactions (Article 9) Default Foreclosure & Repossession General Overview Commercial Law (UCC) Secured Transactions (Article 9) Default Foreclosure & Repossession Disposition of Collateral



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E. Remedies After Default by Debtor

19-42 California Legal Forms--Transaction Guide § 42.242

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.242 Debtor's Waiver of Right to Notice of Sale of Collateral After Default

[1] Comment--Use of Form

This form is for use by a debtor or any secondary obligor to waive its right to notification of an intended disposition of collateral by the secured party after the debtor has defaulted on the obligation [*see Com. Code § 9624(a)*].

The debtor may waive this right of notification only by an agreement to that effect, entered into and authenticated after default [*Com. Code § 9624(b)*].

For discussion of the secured party's right to dispose of the collateral after default, see § 42.240[1][b]. For a notice when the disposition does not involve a consumer goods transaction, see § 42.240[2]. For a form for notification relating to disposition of collateral in a consumer goods transaction, see § 42.241[2]. For discussion of default generally, see § 42.16. For a detailed guide to procedures on default, see § 42.141.

[2] FORM

Debtor's Waiver of Right to Notice of Sale of Collateral After Default

DEBTOR'S RENUNCIATION OF RIGHT TO NOTICE OF DEFAULT SALE

Re: Financing Statement No. _____

Filed _____ [date] with the _____ [California Secretary of State or County Recorder
of _____ County, California]

I, the undersigned debtor, being in default of the security agreement dated _____[*date*], creating the security interest in favor of _____[*name of secured party*], evidenced by the above-described financing statement, waive any right I may have to notice, written or otherwise, of the time and place of any public sale or of the time on or after which any private sale or other intended disposition of the collateral subject to such security interest is to be made.

Date: _____

_____ [signature of debtor]

_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)DefaultGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionAgreements, Variance & WaiversCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionNotice of Sale



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PART IV. FORMS

E. Remedies After Default by Debtor

19-42 California Legal Forms--Transaction Guide § 42.243

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.243 Demand by Subordinate Secured Party for Satisfaction of Subordinate Debt

[1] Comment

[a] Use of Form

This form is for use by the holder of a subordinate security interest in or other subordinated lien on collateral to demand that the senior secured party satisfy the subordinate obligation from the proceeds of the disposition of the collateral securing both debts, after the debtor has defaulted [*see Com. Code § 9615(a)(3)*].

For a discussion of default procedures generally, see §§ 42.16, 42.141, and 42.142.

[b] Application of Proceeds

The proceeds of the disposition by the senior secured party of collateral after default must be applied as follows:

- First, to repay the reasonable expenses of the senior secured party in retaking, holding, preparing for disposition, and disposing of the collateral, including reasonable attorneys' fees and legal expenses if provided for in the agreement and not prohibited by law [*Com. Code § 9615(a)(1)*].
- Second, to satisfy the obligations secured by the security interest or agricultural lien under which the disposition is made [*Com. Code § 9615(a)(2)*].
- Third, to satisfy any subordinate security interest in or other lien on the collateral and to the satisfaction of any subordinate attachment lien or execution lien in accordance with *Code Civ. Proc. § 701.040*, if both of the following conditions are met [*Com. Code § 9615(a)(3)*]:
 - The secured party receives from the holder of the subordinate security interest or

other lien an authenticated demand for proceeds or notice of the levy of attachment or execution before distribution of the proceeds is completed.

■ In a case in which a consignor [see *Com. Code § 9102(a)(21)* (definition)] has an interest in the collateral, the subordinate security interest or other lien is senior to the interest of the consignor.

Thus, this authenticated demand should be served on the senior secured party as soon as the holder of the subordinate security interest receives notice of the proposed disposition [see §§ 42.240, 42.241].

The secured party who conducts the distribution of proceeds may request that any person claiming a subordinate security interest furnish reasonable proof of the interest within a reasonable time [*Com. Code § 9615(b)*; see § 42.244]. If the subordinate secured party fails to furnish the proof requested, the secured party is not required to comply with the demand for satisfaction of the obligations secured by the subordinate security interest or subordinate lien [*Com. Code § 9615(b)*]. Accordingly, this form includes data concerning the financing statement involved and states that a copy of the financing statement is enclosed.

[2] FORM

Demand by Subordinate Secured Party for Satisfaction of Subordinate Debt

DEMAND FOR SATISFACTION OF SUBORDINATE DEBT

TO: _____ [name of senior secured party]
 _____ [address]
 _____ [city], California

[If subordinate security interest was perfected by filing of financing statement, add:]

RE: Financing Statement No. _____
 Filed on: _____ [date]
 Filed at: _____ [place]

[Continue with the following:]

The undersigned demands that the indebtedness owed by _____ [name of debtor] to the undersigned in the amount of \$_____ and secured by a security interest in the collateral that you propose to _____ [sell or dispose of] _____ [on or on or after] _____ [date] be satisfied from the proceeds of that _____ [sale or disposition].

The undersigned perfected a security interest in the collateral by _____ [filing the Financing Statement referenced above or describe method of perfection].

Date: _____
 _____ [signature of subordinate secured party]
 _____ [typed name]
 _____ [address]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)DefaultGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionDisposition of Collateral



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E. Remedies After Default by Debtor

19-42 California Legal Forms--Transaction Guide § 42.244

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.244 Request by Secured Party for Proof of Demand for Satisfaction of Subordinate Debt

[1] Comment

[a] Use of Form

If a subordinate secured party demands to share in the proceeds of a sale of collateral after default by the debtor [*see* § 42.243], the senior secured party conducting the sale may request reasonable proof of the subordinate party's interest in the collateral [*see Com. Code* § 9615(b)]. This form may be used to make such a request.

[b] Consequences of Noncompliance with Senior Secured Party's Request

If the subordinate secured party fails to furnish reasonable proof of the interest within a reasonable time, the secured party need not comply with the demand for satisfaction of the obligations secured by the subordinate security interest or subordinate lien [*Com. Code* § 9615(b)].

[2] FORM

Request by Secured Party for Proof of Demand for Satisfaction of Subordinate Debt

REQUEST FOR PROOF OF DEMAND

TO: _____[*name of subordinate secured party*]
_____[*street address*]
_____[*city*], California

I RESPECTFULLY REQUEST that you furnish me with reasonable proof of your interest, as claimed in your Demand for Satisfaction of Subordinate Debt dated _____[*date*], in the property I propose to sell _____[on or on or after] _____[*date*], because of the default of my debtor _____[*name of debtor*].

I further request that proof of your interest in the property be furnished me on or before _____[*date*], or I am not required to, and will not, comply with your demand.

Dated: _____

_____ [*signature of secured party*]

_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)DefaultGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionDisposition of Collateral



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E. Remedies After Default by Debtor

19-42 California Legal Forms--Transaction Guide § 42.245

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.245 Notice to Account Debtor or Obligor to Make Payment to Secured Party

[1] Comment

[a] Use of Form

This form is for use by the secured party to notify the account debtor or the obligor to make future payments directly to the secured party.

[b] Collection and Enforcement by Secured Party

On default by the debtor, and otherwise if so agreed, the secured party has the right to payment or performance of the obligation of an account debtor or other person obligated on collateral [see *Com. Code* § 9607(a)(1)]. For further discussion of rights of the secured party relative to the debtor, see §§ 42.16[3] and 42.141.

[2] FORM

Notice to Account Debtor or Obligor to Make Payment to Secured Party

NOTICE TO MAKE PAYMENT TO SECURED PARTY

TO: _____[*name of account debtor*]
_____[*address*]
_____[*city*], California

The undersigned secured party, having a security interest in _____[*describe secured obligation*] by

virtue of a security agreement dated _____ and executed by _____ [*name of debtor*], demands, in accordance with *California Commercial Code Section 9607*, that beginning immediately you make payment on the obligation to the undersigned at the address indicated below.

Dated: _____

_____ [*name of secured party*]

_____ [*typed name*]

_____ [*address*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)DefaultGeneral Overview



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E. Remedies After Default by Debtor

19-42 California Legal Forms--Transaction Guide § 42.246

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.246 Notice of Intention to Accept Collateral in Satisfaction of Obligation

[1] Comment

[a] Use of Form

This form is for use by a secured party who, after default, elects to accept collateral in full or partial satisfaction of the obligation it secures [*see Com. Code § 9620(a)*; *see [b], below*]. This form is a notice of the secured party's proposal to accept the collateral, as required by the Commercial Code [*see Com. Code §§ 9620, 9621*].

Counsel should modify this form to fit the circumstances of the particular case. For example, if the security interest has been perfected by means other than the filing of a financing statement [*see § 42.121*], the reference to a financing statement should be deleted.

[b] Conditions for Acceptance

Except in consumer transactions [*see Com. Code § 9620(g)* (secured party may not accept collateral in partial satisfaction of obligation it secures); *see also [c], below*], a secured party may accept collateral in full or partial satisfaction of the obligation it secures if all of the following conditions are satisfied [*Com. Code § 9620(a)(1)-(3)*]:

- The debtor consents to the acceptance [*see Com. Code § 9620(c)* (conditions to effective acceptance); *[c], below*].
- The secured party does not receive, within the prescribed time period [*see Com. Code § 9620(d)*], a notification of objection to the proposal to accept the collateral, authenticated by either a person to which the secured party was required to send the proposal or any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the proposal [*see Com. Code § 9621* (notification requirements)].

- If the collateral is consumer goods, the collateral is not in the possession of the debtor when the debtor consents to the acceptance.
- *Com. Code § 9620(e)*, which imposes an obligation on the secured party to dispose of consumer goods under certain circumstances, does *not* require the secured party to dispose of the collateral, or the debtor waives the requirement [*Com. Code § 9620(a)(4)*; *see Com. Code § 9624(b)* (waiver); § 42.248].

To ensure that the *debtor* cannot unilaterally cause an acceptance of collateral, the statute also provides that compliance with the conditions enumerated above [*see Com. Code § 9620(a)*] is necessary, but not sufficient to cause an acceptance of collateral [*see Com. Code § 9620(b)(2)*; *Com. Code § 9620* (UCC Comment P 5)]. Rather, acceptance does not occur unless, in addition, the secured party consents to the acceptance in an authenticated record, or sends the debtor a proposal [*see Com. Code § 9620(b)(1)*; [2], *below*; *see also Com. Code § 9102(a)(66)* ("proposal" defined)].

Following a proposal, acceptance of collateral is automatic once the secured party becomes bound and the time for objection has passed [*see Com. Code § 9620(c)*; *see also Com. Code § 9620(d)* (when objection is timely and thus prevents acceptance of collateral from taking effect); § 42.247].

[c] Effect of Acceptance

A secured party's acceptance of collateral in full or partial satisfaction of the obligation it secures does all of the following [*Com. Code § 9622(a)*]:

- Discharges the obligation to the extent consented to by the debtor.
- Transfers to the secured party all of a debtor's rights in the collateral.
- Discharges the security interest or agricultural lien that is the subject of the debtor's consent and any subordinate security interest or other subordinate lien.
- Terminates any other subordinate interest.

A subordinate interest is discharged or terminated, even if the secured party fails to comply with Division 9 [*Com. Code § 9622(b)*].

[d] Contents of Proposal

A proposal need not take any particular form, as long as it sets forth the terms under which the secured party is willing to accept collateral in satisfaction [*see Com. Code § 9620* (UCC Comment P 4)]. A proposal to accept collateral should specify the amount (or a means of calculating the amount, such as by including a per diem accrual figure) of the secured transactions to be satisfied, state the conditions, if any, under which the proposal may be revoked, and describe any other applicable conditions [*see Com. Code § 9620* (UCC Comment P 4)]. Note, however, that a conditional proposal generally requires the debtor's agreement in order to take effect [*see Com. Code § 9620(c)(2)(A)*].

[e] Persons Entitled to Notification

The secured party must send a proposal to the debtor only if the debtor does not agree to an acceptance in an authenticated record as described in *Com. Code § 9620(c)(1)* or *Com. Code § 9620(c)(2)*. Under those provisions, the debtor may consent by agreeing to acceptance in writing after default [*Com. Code § 9620(c)(1), (2)*]. Alternatively, the debtor consents if the secured party sends a proposal to the debtor and does not receive an objection within 20 days [

Com. Code § 9620(c)(2)].

The secured party must send notification of its proposal to all of the following third parties [*Com. Code § 9621(a)*]:

- Any person from whom the secured party has received, before the debtor consented to the acceptance, an authenticated notification of a claim of an interest in the collateral.
- Any other secured party or lienholder that held, 10 days before the debtor consented to the acceptance, a security interest in or other lien on the collateral perfected by the filing of a financing statement that (1) identified the collateral; (2) was indexed under the debtor's name as of that date; and (3) was filed in the office or offices in which to file a financing statement against the debtor covering the collateral as of that date.
- Any other secured party that held, 10 days before the debtor consented to the acceptance, a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in *Com. Code § 9311(a)* [*see § 42.14[3][a]*].

A secured party that desires to accept collateral in partial satisfaction of the obligation it secures also must send its proposal to any secondary obligor [*Com. Code § 9621(b)*].

[f] Damages

A person to whom the required notice was not sent has the right to recover damages under *Com. Code § 9625(b)* [*see Com. Code § 9625(b)*; *Com. Code § 9620* (UCC Comment P 2)].

[g] Special Rules in Consumer Cases

Under some circumstances, the secured party has an obligation to dispose of consumer goods. A secured party that has taken possession of collateral must dispose of the collateral [*see Com. Code § 9610* (disposition of collateral after default at public or private sale)] if 60 percent of the cash price has been paid in the case of a purchase money security interest in consumer goods, or if 60 percent of the principal amount of the obligation secured has been paid in the case of a nonpurchase money security interest in consumer goods [*Com. Code § 9620(e)*].

The secured party must dispose of this collateral within 90 days of taking possession, or within any longer period to which the debtor and all secondary obligors have agreed in an agreement entered into and authenticated after default [*Com. Code § 9620(f)*].

An effective acceptance of collateral cannot occur if such a disposition is required, unless the debtor waives this requirement [*see Com. Code § 9624(b)*; § 42.248].

The secured party in consumer transactions may not accept collateral in partial satisfaction of the obligation it secures [*Com. Code § 9620(g)*]. If a secured party attempts an acceptance in partial satisfaction in a consumer transaction, the attempted acceptance is void [*see Com. Code § 9620* (UCC Comment P 12)].

[2] FORM

Notice of Intention to Accept Collateral in Satisfaction of Obligation

NOTICE OF PROPOSAL TO ACCEPT COLLATERAL

TO: _____ [*name of debtor*] AND TO _____ [*name of other secured parties*]:

RE: Financing Statement No. _____

Filed _____ [date] with the _____ [California Secretary of State or County Recorder
of _____ (name of county) County, California].

NOTICE IS GIVEN that _____ [name of debtor], as Debtor, is in default of the security agreement evidenced by the Financing Statement described above, and that the undersigned secured party proposes to accept the following described property, the collateral under the security agreement, in _____ [full or partial] satisfaction of the obligation secured by the agreement.

The amount of the secured obligation to be satisfied is _____.

The property proposed to be accepted by the undersigned secured party consists of: _____ [list and describe property].

Date: _____

_____ [signature of secured party]

_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Secured Transactions (Article 9) Default General Overview



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E. Remedies After Default by Debtor

19-42 California Legal Forms--Transaction Guide § 42.247

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.247 Objection to Secured Party's Acceptance of Collateral

[1] Comment

[a] Use of Form

This form may be used by debtors and subordinate secured parties who receive notice of the senior secured party's intention to accept collateral in full or partial satisfaction of the obligation [*see § 42.246*] to object to the proposed acceptance of collateral.

For discussion of the acceptance of collateral in full or partial satisfaction of the obligation it secures, see § 42.246. For discussion of disposition of collateral after default, see § 42.240[1][b].

[b] Timeliness of Objection

To be effective, a notification of objection must be received by the secured party as follows [*Com. Code § 9620(d)*]:

- In the case of a person to which the proposal was sent in accordance with *Com. Code § 9621* [*see § 42.246[1][e]*], within 20 days after notification was sent to that person.
- In the case of other objecting parties (that is, third parties who are not entitled to notification) (1) within 20 days after the last notification was sent in accordance with *Com. Code § 9621*, or, (2) if a notification was not sent, before the debtor agrees to acceptance in writing or is deemed to have consented by silence [*see Com. Code § 9620(c)*; *see also § 42.246[1][e]*].

[2] FORM

Objection to Secured Party's Acceptance of Collateral

OBJECTION TO RETENTION OF COLLATERAL

TO: _____ [name of secured party]
_____ [street address]
_____ [city], California

[If security interest was perfected by filing of financing statement, add:]

RE: Financing Statement No. _____
Filed on: _____ [date]
Filed at: _____ [place]

[Continue with the following:]

The undersigned _____ [debtor or secured party] objects to the acceptance, as proposed in your notice dated _____ [date], of any portion of the collateral described in the Security Agreement dated _____ [date] [add, if applicable: and in the Financing Statement mentioned above] for the purpose of satisfying the underlying obligation set forth in _____ [e.g., the Security Agreement entered into between the debtor and you on _____ (date)].

The undersigned demands that the collateral be disposed of by sale or lease or otherwise, in accordance with the provisions of *California Commercial Code Section 9610*.

Dated: _____
_____ [signature of debtor or secured party]
_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)DefaultGeneral Overview



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E. Remedies After Default by Debtor

19-42 California Legal Forms--Transaction Guide § 42.248

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.248 Waiver or Modification of Right by Debtor Who Has Made Substantial Payments on Obligation Secured by Consumer Goods to Require Disposition of Collateral

[1] Comment

[a] Use of Form

This form is a waiver of the special right a debtor has after default to have the collateral sold in a commercially reasonable manner if the collateral is consumer goods and the debtor has paid at least 60 percent of the cash price, in the case of a purchase money security interest in consumer goods, or at least 60 percent of the principal amount of the obligation secured has been paid, in the case of a nonpurchase money security interest in consumer goods [*Com. Code § 9624(b)*; *see Com. Code § 9620(e)*]. The waiver provision in this form must be signed by the debtor after default; it cannot be signed in advance or as part of the original security transaction [*see Com. Code § 9624(b)*].

[b] Effect of Failure to Consent to Waiver

In effect, the secured party must obtain the debtor's written consent to any retention of collateral after default in discharge of the debt. If the debtor refuses to sign a waiver, the secured party must dispose of this collateral within 90 days of taking possession, or within any longer period to which the debtor and all secondary obligors have agreed in an agreement entered into and authenticated after default [*Com. Code § 9620(f)*; *see Com. Code § 9610* (commercially reasonable disposition after default)].

[2] FORM

Waiver or Modification of Right by Debtor Who Has Made Substantial Payments on Obligation Secured by Consumer Goods to Require Disposition of Collateral

DEBTOR'S WAIVER OR MODIFICATION

OF DEFAULT RIGHTS

I, _____[*name*], the undersigned Debtor, state that:

Recitals

_____ [*Name of secured party*] ("Secured Party"), has a security interest in certain consumer goods owned by me in accordance with a Security Agreement executed by me on _____[*date*] for the purchase of the goods by me.

I am in default of the obligation secured by the security interest, although I have paid more than 60 percent of the _____[*cash price of the goods or the principal amount of the obligation secured by the security interest*].

The Secured Party has taken possession of the goods covered by the security interest and has agreed to waive any right to a deficiency on the debt secured by the security interest in the goods.

[*EITHER*]

Waiver of Rights

THEREFORE, I waive my right to require the goods subject to the security interest be disposed of by Secured Party in the manner prescribed by *California Commercial Code Section 9620(e)*.

[*OR*]

Modification of Rights

THEREFORE, I modify my rights under *California Commercial Code Section 9620(e)* in the following manner:
 _____[*set forth manner in which rights are modified*].

[*Continue with the following:*]

Consideration

This _____[*waiver or modification*] is given in consideration of the waiver by the Secured Party of any right to a deficiency on the debt secured by the described security interest.

Date: _____

DEBTOR

_____ [*signature of debtor*]

_____ [*typed name*]

SECURED PARTY

_____ [*signature of secured party*]

_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)DefaultGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionAgreements, Variance & WaiversCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionDisposition of Collateral



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E. Remedies After Default by Debtor

19-42 California Legal Forms--Transaction Guide § 42.249

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.249 Waiver by Debtor or Secondary Obligor of Right to Redeem Collateral

[1] Comment

[a] Use of Form

This form is for use in obtaining a waiver from the debtor or secondary obligor of the right to redeem the collateral after default [*see Com. Code § 9623*].

For detailed coverage of default procedures, see §§ 42.141, 42.142.

[b] Right to Redeem Collateral; Waiver

Except in a consumer goods transaction, a debtor or secondary obligor may waive the right to redeem collateral [*see Com. Code § 9623*] only by an agreement to that effect entered into and authenticated after default [*Com. Code § 9624(c)*]. Thus, the waiver of the right to redeem cannot be executed in advance or as part of the original security agreement [*see Com. Code § 9624(c)*].

Absent such a waiver, the debtor or another secured party may redeem collateral as long as the secured party has not collected [*see Com. Code § 9607*], disposed of or contracted for the disposition of [*see Com. Code § 9610*], or accepted [*see Com. Code § 9620*] the collateral [*Com. Code § 9623(c)*]. To redeem the collateral, a party must tender fulfillment of all obligations secured, plus certain expenses [*see Com. Code § 9623 (b)*]

[2] FORM

Waiver by Debtor or Secondary Obligor of Right to Redeem Collateral

WAIVER OF RIGHT TO REDEEM

[If security interest were perfected with financing statement, add:]

RE: Financing Statement No. _____

Filed on: _____ [date]

Filed at: _____ [place]

[Continue with the following:]

In consideration of _____ [describe consideration], the receipt of which is acknowledged, the undersigned _____ [name of debtor or secondary obligor] expressly agrees to waive any right to redeem any portion of the collateral _____ [described in the Financing Statement described above or described in and subject to the security interest created by the Security Agreement dated _____ (date) and executed by _____ (name of debtor)] and given by _____ [name of debtor] as security to _____ [name of secured party] for an obligation in the face amount of \$_____ [amount], which is now in default.

Date: _____

_____ [signature of debtor or secondary obligor]

_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)DefaultGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionAgreements, Variance & WaiversCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionRedemption



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E. Remedies After Default by Debtor

19-42 California Legal Forms--Transaction Guide §§ 42.250-42.259

AUTHOR: by Ann S. Manheimer, J.D.

[Reserved]

§§ 42.250[Reserved]



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F. Satisfaction of Obligation

19-42 California Legal Forms--Transaction Guide § 42.260

AUTHOR: by Ann S. Manheimer, J.D.

§ 42.260 Debtor's Demand for Termination Statement From Secured Party

[1] Comment

[a] Use of Form

This form is for use by the debtor to demand a statement from the secured party of record that it no longer claims a security interest in the collateral.

For detailed coverage of termination procedures, see § 42.140[4]. For a termination statement, see § 42.214 (Form UCC-3).

[b] Secured Party's Duty to File or Send

The secured party of record must file a termination statement if the financing statement covers consumer goods and either the security interest is terminated [*see Com. Code § 9513(a)(1)*] or the debtor did not authorize the filing of the initial financing statement [*see Com. Code § 9513(a)(2)*]. Otherwise, the secured party of record must send a termination statement to the debtor or file a termination statement only on receipt of an authenticated demand from the debtor [*see Com. Code § 9513(c)*].

After the secured party receives an authenticated demand from the debtor, the secured party must send or file a termination statement if any of the following conditions is satisfied [*Com. Code § 9513(c)*]:

- Except in the case of a financing statement covering accounts or chattel paper that has been sold or goods that are the subject of a consignment, there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value.

- The financing statement covers accounts or chattel paper that has been sold but as to which the account debtor or other person obligated has discharged its obligation.
- The financing statement covers goods that were the subject of a consignment to the debtor but are not in the debtor's possession.
- The debtor did not authorize the filing of the initial financing statement.

The liability imposed on a secured party for failing to file or send a termination statement, as required, is identical to that imposed for the filing of an unauthorized financing statement or amendment [*see Com. Code § 9625(e)*].

[c] Timeliness of Filing

A termination statement for a financing statement covering consumer goods must be filed either within one month after there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value, or, if earlier, within 20 days after the secured party receives an authenticated demand from a debtor [*Com. Code § 9513(b)*].

In all other cases, a termination statement must be filed or sent to the debtor within 20 days after a secured party receives an authenticated demand from a debtor [*Com. Code § 9513(c)*].

[2] FORM

Debtor's Demand for Termination Statement From Secured Party

DEBTOR'S DEMAND FOR TERMINATION STATEMENT

The undersigned Debtor, _____ [*debtor's name*], having discharged the obligation secured by a security agreement executed on _____ [*date*] between _____ [*debtor's name*] and the Secured Party, _____ [*secured party's name*], demands that you, as the Secured Party of Record, prepare and furnish me a written "Termination Statement" on Standard Form UCC-3 that states that the security interest under the financing statement, under File No. _____, is no longer claimed by you.

Date: _____
 _____ [*debtor's signature*]
 _____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsTermination Statements



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 43 COMMERCIAL LOANS

19-43 California Legal Forms--Transaction Guide 43.syn

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

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Reviewed by the Honorable Walter L. Blackwell IIIIn*

FOOTNOTES:

(n110)Footnote *.

Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.



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19-43 California Legal Forms--Transaction Guide Scope

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

Scope

Reviewed by the Honorable Walter L. Blackwell IIIIn* Scope

This chapter discusses various kinds of commercial loans that are typically used in financing a business. The Legal Background describes the way businesses may be financed by these types of loans. The Transaction Guide includes guides for preparing financial information for loan applications as well as guides for drafting and executing loan agreements.

The forms in this chapter include loan applications and agreements; guaranty and subordination agreements; loans secured by margin stock; and assignments of payments, real property proceeds and fixtures, agricultural products, and probate interests. The chapter also contains forms for assigning insurance policies and for financing and assigning inventory and equipment. Forms for promissory notes used in commercial lending are also included.

For coverage of commercial loans made under the California Finance Lenders Law [see *Fin. Code § 22000 et seq.*], see Ch. 102B, *Pawnbrokers, Finance Lenders, and Secondhand Goods Dealers* .

Negotiable instruments and their use in business transactions are covered in Ch. 55, *Negotiable Instruments* . Other commercial lending practices are covered in Ch. 42, *Secured Transactions* , Ch. 44, *Accounts Receivable Financing and Factoring* , Ch. 47, *Automotive Financing and Vehicle Leasing* , and Ch. 49, *Agricultural Financing* . For discussion of the law governing negotiable bills of lading, see Ch. 54, *Shipment of Property* . For discussion of warehouse receipts, see Ch. 54A, *Storage of Goods* . Letters of credit and electronic fund transfers are covered in Ch. 56, *Letters of Credit and Electronic Fund Transfers* .

FOOTNOTES:

(n111)Footnote *.

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A. Primary Sources

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§ 43.01 California Sources

[1] Statutes

Confession of judgment. *Code Civ. Proc. § 1132 et seq.*

Enforcement of creditor's remedies for nonpayment of sums due during any disability claim period for which credit disability insurance coverage is provided. *Civ. Code § 1812.402 et seq.*

Elements of promissory notes. *Com. Code § 3104.*

Rules of construction for loan instruments. *Com. Code § 3113 et seq.*

Bulk sales. *Com. Code § 6101 et seq.*

Secured transactions. *Com. Code § 9101 et seq.*

"Bank" defined. *Fin. Code §§ 102, 103, 109.*

"Commercial bank" and "trust company" defined. *Fin. Code §§ 105, 107.*

Regulation of commercial banks. *Fin. Code § 1200 et seq.*

In general. *Fin. Code § 1200 et seq.*

Loan limits. *Fin. Code § 1220 et seq.*

Secured obligations. *Fin. Code § 1223.*

Acceptance of drafts and letters of credit. *Fin. Code § 1224.*

Acceptance of drafts drawn by foreign banks. *Fin. Code § 1225.*

Real estate loan security limitations. *Fin. Code § 1227.*

Stock and bond loan security limitations. *Fin. Code § 1229.*

Additional security. *Fin. Code § 1234.*

Industrial Loan Law. *Fin. Code § 18000 et seq.*

California Finance Lenders Law. *Fin. Code § 22000 et seq.*

Commercial loans. *Fin. Code § 22500 et seq.*

"Commercial loan" defined. *Fin. Code § 22502.*

Exemptions for commercial loans. *Fin. Code §§ 22551, 22552.*

[2] Regulations

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"Commercial bank" defined. *10 Cal. Code Reg. § 10.117.*

Establishing commercial bank. *10 Cal. Code Reg. § 10.3100 et seq.*



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A. Primary Sources

19-43 California Legal Forms--Transaction Guide § 43.02

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§ 43.02 Federal Sources

[1] Statutes

Lending powers of national banks. *12 U.S.C. § 24.*

Lending limits of national banks to individuals. *12 U.S.C. § 84.*

[2] Regulations

Loans secured by leaseholds. *12 C.F.R. pt. 5.*

Loan from other than bank secured by margin stock (Regulation U). *12 C.F.R. pt. 221.*

Exemption of commercial lending from Truth in Lending Act disclosure requirements. *12 C.F.R. § 226.3(a).*



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A. Primary Sources

19-43 California Legal Forms--Transaction Guide §§ 43.03-43.04

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[Reserved]

§§ 43.03[Reserved]



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B. Secondary Sources

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§ 43.05 Law Reviews

Mann, *Explaining the Pattern of Secured Credit*, 110 Harv. L. Rev. 625 (1997).

McCabe, *Fifty Tips for Getting a Commercial Loan*, 43(6) Prac. Law. 27 (1997).

Komoroske, *Guiding Your Client Through the Lending Maze*, 41(3) Prac. Law. 81 (1995).

Dobbs, *Enforcement of Article 9 Security Interests--Why so Much Deference to the Junior Secured Party?* 28 Loy. L.A.L. Rev 131 (1994).

Jezman & Arnold, *Personal Liability in Commercial Loan Transaction*, 28 Bev. Hills B.A.J. 38 (1994).

Kraus, *Decoupling Sales Law From the Acceptance-Rejection Fulcrum*, 104 Yale L.J. 129 (1994).

Foy, *The Recondite Discountable-Contract Finance: An Elucidation of Negative-Pickup and Presale Financing Arrangements*, 27 Bev. Hills B.A.J. 15 (1993).

Schooner & Schooner, *Look Before You Lend: A Lender's Guide to Financing Government Contracts Pursuant to the Assignment of Claims Act*, 48 Bus. Law. 535 (1993).

Henson, *The Pitfalls of Purchase Money Security Interests (Part Two)*, 36 Prac. Law. 79 (1990).

Henson, *The Pitfalls of Purchase Money Security Interests (Part One)*, 36 *Prac. Law.* 85 (1990).

Kelson, *Choice of Law, Venue, and Consent-to-Jurisdiction Provisions in California Commercial Lending Agreements: Can Good Draftsmanship Overcome Bad Choice-of-Law Doctrine?* 23 *Loy. L.A.L. Rev.* 1337 (1990).

Mishkin & Schieber, *New Rules for Commercial Lenders*, 36 *Prac. Law.* 73 (1990).

Rockwell, *Basic Considerations in Reviewing Commercial Loan Documents*, 6 *Prac. Real Est. Law.* 13 (1990).



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B. Secondary Sources

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§ 43.06 Text References

[1] Matthew Bender Sources

Banking Law (Matthew Bender).

BENDER'S Uniform Commercial Code Service(Matthew Bender).

California Forms of Pleading and Practice(Matthew Bender).

Ch. 385, *Negotiable Instruments* .

Ch. 503, *Sales: Secured Transactions* .

California Legal Forms(Matthew Bender).

Ch. 7, *Corporate Records and Reports* .

Ch. 30A, *Construction Financing* .

Ch. 42, *Secured Transactions* .

Ch. 44, *Accounts Receivable Financing and Factoring* .

Ch. 48, *Agricultural Financing* .

Ch. 55, *Negotiable Instruments* .

Ch. 56, *Letters of Credit and Electronic Fund Transfers* .

California Points and Authorities, Ch. 166, *Negotiable Instruments* (Matthew Bender).

Commercial Finance Guide (Matthew Bender).

Commercial Loan Documentation Guide (Matthew Bender).

Rabkin & Johnson, Current Legal Forms with Tax Analysis(Matthew Bender).

Ch. 5B, *Assignments and Delegation of Powers*.

Ch. 5C, *Letters of Credit and Commercial Paper*.

Ch. 6, *Credit and Finance*.

Ch. 18, *Corporate Operation and Management*.

[2] Additional Text References

Nassberg, *The Lender's Handbook* (ALI 1986).

Schoeder, *Bank Officer's Handbook of Commercial Banking Law* (6th ed. 1989).

Witkin, *Summary of California Law*, vol. 4, *Negotiable Instruments* (10th ed. 2005).



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B. Secondary Sources

19-43 California Legal Forms--Transaction Guide §§ 43.07-43.09

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[Reserved]

§§ 43.07[Reserved]



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19-43 California Legal Forms--Transaction Guide § 43.10

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§ 43.10 "Commercial Loan" Defined

[1] In General

A "commercial loan" is a loan of a principal amount of \$5,000 or more, or any loan under an open-end credit program [see *Fin. Code* § 22650], whether secured or unsecured, the proceeds of which are intended by the borrower for use primarily for other than personal, family, or household purposes. In determining whether a loan is a commercial loan, a lender may rely on any written statement of intended purpose signed by the borrower, and need not ascertain that the proceeds of the loan were actually used in accordance with the borrower's stated purpose [*Fin. Code* § 22502].

A commercial loan is essentially a short-term "business purpose" loan. It is traditionally intended to meet a specific business need, rather than to provide working capital for general current use (although it may have the incidental effect of doing so), and is expected to be repaid from a specific source related to the original need. It is normally granted for a period of 90 to 180 days, but the period may range from 30 days up to one year. A commercial loan may be either secured or unsecured, depending on the credit worthiness of the borrower and the amount of the loan. Most lenders will have different lending limits or authority for secured and unsecured loans.

[2] Truth in Lending Act Inapplicable to Commercial Loans

The federal Truth in Lending Act and its implementing regulation, Regulation Z, which require disclosures of the cost of consumer credit, do not apply to credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes [15 U.S.C. § 1603(1); 12 C.F.R. § 226.3(a)].

[3] Regulation of Commercial Loans

At the state level, commercial banks are regulated by the State Banking Department in the Business and Transportation Agency [see *Fin. Code* § 100 *et seq.*; see also 10 *Cal. Code Reg.* § 10.1 *et seq.* (regulation of banks)]. Specific statutes apply to commercial banks [see *Fin. Code* § 1200 *et seq.*]. Specific limits are placed on the amount that may be loaned to an individual [see *Fin. Code* § 1221; see also *Fin. Code* § 1226 (exceptions)] or to a group of borrowers [see *Fin. Code* § 1231]. There are limits on loans secured by real property [see *Fin. Code* §§ 1227, 1239], or by stocks and bonds [see *Fin. Code* § 1229]. Commercial banks may take a lien or pledge on property as additional security for a loan already made [see *Fin. Code* § 1234].

In addition, commercial loans are subject to the California Finance Lenders Law [see *Fin. Code* § 22000 *et seq.*]. Specific statutes apply to commercial loans [see *Fin. Code* § 22500 *et seq.*]. Specified portions of the Law do not apply to commercial loans [see *Fin. Code* §§ 22550, 22551]. For coverage of the California Finance Lenders Law, see Ch. 102B, *Pawnbrokers, Finance Lenders, and Secondhand Goods Dealers* .

At the federal level, commercial loans are subject to regulation by the National Bank Act and its implementing regulations [see 12 *U.S.C.* § 21 *et seq.*; see also 12 *C.F.R.*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewBanking LawFederal ActsNational Bank Act



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19-43 California Legal Forms--Transaction Guide § 43.11

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§ 43.11 Example of a Commercial Loan

An example of a commercial loan, showing the specific business need, loan term, and anticipated source of repayment related to the original need, is that of a retail store needing, at the end of September, \$10,000 to pay a supplier for an inventory of Christmas merchandise. The loan will be repaid at the end of December of the same year from proceeds of sales of the Christmas merchandise. Most, but not all, inventory suppliers sell on credit. For example, an inventory supplier may sell on terms described as "2/10, n/30," which means that a 2-percent discount is allowed if payment is made within 10 days and, if payment is not made within 10 days, the entire amount is due within 30 days.

These terms vary significantly from industry to industry and even from supplier to supplier within the same industry. In fact, these terms are often the subject of negotiation. Taking advantage of the discount often means the difference between profitability and unprofitability for a small business. Failure to take the 2/10, n/30 discount amounts to paying interest at the annual rate of 36 percent for the remaining 20 days of the credit term. Therefore, unless the purchaser has an adequate cash balance to pay for the inventory within the 10-day discount period, a purchaser may prefer to obtain a commercial loan, pay for the inventory, and take advantage of the discount, in effect avoiding payment of a substantial rate of interest embodied in the inventory cost figure.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesGeneral Overview



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19-43 California Legal Forms--Transaction Guide § 43.12

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§ 43.12 Broad Concept of Commercial Loan

Apart from the example in § 43.11, there are numerous business purposes for which commercial loans are granted. Commercial loans are the most widely used of the various business purpose loans and the concept is a broad, flexible one.

Most California banks treat all loans as commercial loans if they do *not* fit within one of these specialized loan categories:

- Real estate loans.
- Installment loans (payable in more than one year).
- Automotive finance loans.
- Agricultural loans.
- International banking department loans.

Certain loans expected to fall within one of the above specialized categories nevertheless are handled as commercial loans by reason of the presence of certain factors or circumstances.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesGeneral Overview



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19-43 California Legal Forms--Transaction Guide § 43.13

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§ 43.13 Commercial Loan Used for Continuous Financing

Although a commercial loan usually is a one-time loan, it can also be used for continuous financing for a specific business purpose. One example is accounts receivable financing, whereby the lender advances credit to a business up to a specified limit against a continuing assignment of accounts receivable arising from sales of inventory [see Ch. 44, *Accounts Receivable Financing and Factoring*]. Other examples include chattel paper financing [see Ch. 45, *Consumer Installment Loans and Credit Sales*], inventory financing [see § 43.19[1]], and the specialized type of inventory financing known as "floor planning" [see § 43.19[2]; see also Ch. 47, *Automotive Financing and Vehicle Leasing*]. These are types of revolving credit that are granted and reviewed on not longer than an annual basis. The financing discussed in this chapter is more directly related to the objective of providing working capital for the business.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesGeneral Overview



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19-43 California Legal Forms--Transaction Guide § 43.14

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§ 43.14 Origin of Commercial Loan Concept

The concept of the commercial loan as a short-term, business-purpose loan is derived from, and revolves around, the current asset and current liabilities transactions reflected in the balance sheet of the business. Current assets include, in addition to cash, other assets or resources that are reasonably expected to be converted into cash or sold or consumed in the regular operations of the business (generally one year for most businesses) [see Ch. 7, *Corporate Records and Reports*]. Current assets typically include marketable securities, accounts receivable, inventory, and prepaid expenses. Current liabilities are debts whose liquidation is reasonably expected to require within the same operating period the use of existing current assets or the creation of other current liabilities. Many inventory items, together with the accounts receivable arising therefrom on sale on credit, are turned over three or four times a year. Thus, this is the origin of the commercial loan, most frequently granted for a period of from 90 to 180 days.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewBusiness & Corporate LawGeneral Overview



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19-43 California Legal Forms--Transaction Guide § 43.15

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§ 43.15 Commercial Loan Departments

Most banks have at least two lending departments, one for commercial loans (including short-term and installment loans payable in more than one year) and one for real estate loans. Each of the lending departments will adhere to the fundamentals of credit policy and general bank policy, but each department will have its own policies and procedures governing its lending operations.

Because of the volume of work and need for more specialized handling, large lending institutions are likely to disperse some of the functions performed in the smaller banks by the commercial loan department through creation of independent departments for agricultural loans, automotive loans, and the like. Notwithstanding this division of responsibility, there is likely to be some overlap of lending functions and supervision of loans among departments. Usually, the commercial loan department has the residual responsibility for all lending and takes responsibility for all types of loans that do not fit specifically into one of the other departments.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesGeneral Overview



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19-43 California Legal Forms--Transaction Guide § 43.16

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§ 43.16 Use of Standard Promissory Note

[1] Overview

A commercial loan borrower normally signs a standard promissory note promising to repay the principal amount loaned at a specific rate of interest either on the bank's demand or, in the absence of such a demand provision, by a scheduled maturity date such as "within 90 days after date." The rate of interest is a simple or "true" rate per annum, usually revolving at something higher than the prime rate, which is reserved for the most financially sound commercial borrowers. The bank will adjust this rate from time to time in accordance with Federal Reserve Bank rates of discount to member banks.

[2] Demand Note

Banks normally use a type of note known as the "demand note" for commercial loans. The distinguishing feature of the demand note is that the bank reserves the right to call the note at any time if it believes the borrower has become a credit risk or if the bank needs to redraft the note to reflect changed economic conditions. For a note providing for payment within a specified future period (the most usual practice for commercial loans), the parties legally contemplate that the loan will be repaid in full at maturity and not before. However, in the interest of good customer relations, the bank will normally permit the borrower to make interim payments on account towards principal or interest or both.

[3] Confession of Judgment

[a] In General

Though confession of judgment provisions are almost never written into commercial loan paper, a judgment by

confession may be obtained in California. A confession of judgment may be entered without action for money due or to become due, or to secure a person against contingent liability on behalf of the debtor [*Code Civ. Proc. § 1132*]. Under *Com. Code § 3104(c)*, a negotiable instrument may contain an authorization or power to the holder to confess judgment or realize on or dispose of collateral. For forms and additional discussion relating to confessions of judgment, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

[b] Obtaining Confession of Judgment

To obtain a judgment by confession, the statutory requirements of *Code Civ. Proc. §§ 1132-1134* must be strictly followed. A written statement by the debtor confessing judgment must be filed with the clerk of the court in which judgment is to be entered [*Code Civ. Proc. §§ 1133, 1134*]. The statement must be signed and verified by the debtor [*Code Civ. Proc. § 1133*]. The purpose of requiring that the confession be verified is to discourage a debtor from avoiding valid creditors by falsely confessing a judgment in favor of a false creditor [*L.A. Adjustment Bureau v. Noonan* (1960) 181 Cal. App. 2d Supp. 834, 839, 5 Cal. Rptr. 445 ; see *Ataka America, Inc. v. Washington West Trade Corp.* (1977) 66 Cal. App. 3d 419, 422, 136 Cal. Rptr. 71] .

When the confession of judgment is not verified by the debtor, a court (depending on the facts of the case) may hold that the confession is void. In one case, a confession of judgment was not signed or verified by the debtor and the court held that the confession was void [*Barnes v. Hilton* (1953) 118 Cal. App. 2d 108, 111, 257 P.2d 98] . However, when a debtor admitted at the time of hearing on a motion to vacate a judgment entered on an unverified confession that the amount involved was in fact owing, then the court held that the confession was enforceable [*L.A. Adjustment Bureau v. Noonan* (1960) 181 Cal. App. 2d Supp. 834, 839, 5 Cal. Rptr. 445] . When there was evidence that the judgment on a confession was for more than the amount then due, the unverified statement of confession was held invalid [*Ataka America, Inc. v. Washington West Trade Corp.* (1977) 66 Cal. App. 3d 419, 422, 136 Cal. Rptr. 71] .

For a valid confession of judgment, the statement confessing judgment must authorize the entry of judgment for a specified sum and, if it is for money due or to become due, it must state concisely the facts out of which it arose and show that the sum confessed is justly due or to become due [*Code Civ. Proc. § 1133(1), (2)*]. Vague statements of the facts do not serve the purpose of the statute, which is to put other creditors on inquiry and aid them in detecting fraud, if any. Thus a mere recitation that the creditor is the owner of a note, that it was given for goods sold and delivered by the creditor to the debtor, and that the consideration for the note was the transfer of the goods, is not sufficient. The statement must be supplemented with an indication of the kind, quantity, and price of the goods and the time of sale. If the consideration for the note consists of both the transfer of goods and money, the statement should state the amounts due severally for goods and for money and indicate when and under what circumstances the money was received. Failure to make a detailed statement as required by the statute creates a presumption of fraud, with the burden on the creditor to rebut this presumption [*Pond v. Davenport* (1872) 44 Cal. 481, 487] .

[c] Certification by Debtor's Attorney

In addition to these requirements, a judgment by confession is valid only if an attorney independently representing the debtor signs a certificate stating that the attorney has advised the debtor concerning the waiver of rights and defenses under the confession of judgment and has advised the debtor to sign the confession [*Code Civ. Proc. § 1132(b)*]. Even the possible appearance of inadvertent bias by an attorney is sufficient to invalidate the attorney's certificate. One court has held that an attorney who advised a debtor concerning the execution of a confession of judgment and who had in the past represented both the creditor and debtor involved, was not "independent" counsel as required by *Code Civ. Proc. § 1132(b)* and that a judgment entered on reliance of the attorney's certificate was void [*Wax v. Infante* (1982) 138 Cal. App. 3d 138, 140-141, 187 Cal. Rptr. 686] .

[d] Due Process Requirement

Courts have imposed a due process requirement for the validity of a confession of judgment. The United States Supreme Court has held that a debtor company validly waived its due process rights when it signed a contract with a confession of judgment clause. In its ruling, the Court relied on the particular facts of the case: the debtor was a large corporation represented by counsel; there was equal bargaining power between the debtor and creditor; the inclusion of the confession of judgment clause was specifically negotiated by the parties; and the debtor received substantial consideration for the inclusion of this term in the contract [*D.H. Overmyer Co. v. Frick Co.* (1972) 405 U.S. 174, 184-187, 92 S. Ct. 775, 31 L. Ed. 2d 124] .

The California Supreme Court considered this issue in a different factual context and held that a confession of judgment by itself does *not* demonstrate a valid waiver of due process rights [*Isbell v. County of Sonoma* (1978) 21 Cal. 3d 61, 68, 145 Cal. Rptr. 368, 577 P.2d 188] . Unless the confession of judgment agreement itself shows that it was a negotiated agreement between equal bargainers, as in *Overmyer*, the mere existence of a signed and verified confession of judgment is insufficient to prove that the debtor did in fact make a voluntary, knowing, and intelligent waiver of due process rights [*Isbell v. County of Sonoma* (1978) 21 Cal. 3d 61, 68, 145 Cal. Rptr. 368, 577 P.2d 188] .

A California judgment based solely on a sister state judgment pursuant to a confession of judgment clause also is subject to attack on due process grounds [*Commercial Nat. Bank of Peoria v. Kermeen* (1990) 225 Cal. App. 3d 396, 398, 275 Cal. Rptr. 122] . When the confession of judgment clause is part of a preprinted bank promissory note, this suggests that the clause was not open to separate negotiation and that there was not equal bargaining power as in *Overmyer* [*Commercial Nat. Bank of Peoria v. Kermeen* (1990) 225 Cal. App. 3d 396, 401, 275 Cal. Rptr. 122] .

Furthermore, when the confession of judgment clause is placed without special conspicuousness in the body of the note and is in technical or legal language, a court will not assume that the debtor was even aware of the clause or understood its significance. In this situation, one court has held that the confession of judgment clause suggested overreaching by the creditor-bank rather than a free waiver of rights by the debtor, and vacated the judgment based on the confession of judgment provision [*Commercial Nat. Bank of Peoria v. Kermeen* (1990) 225 Cal. App. 3d 396, 401-402, 275 Cal. Rptr. 122 ; see *Cole v. B.T. & G., Inc.* (1983) 141 Cal. App. 3d 995, 999, 190 Cal. Rptr. 690 (order vacating judgment of confession is final judgment so that debtor is entitled to award of attorney's fees pursuant to parties' contract)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment by ConfessionCommercial Law (UCC)Negotiable Instruments (Article 3)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsGeneral Overview



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19-43 California Legal Forms--Transaction Guide § 43.17

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§ 43.17 Commercial Installment Loans

Although commercial loan departments are most interested in short-term, single-payment business loans, they also make commercial installment loans, on either a short-term or intermediate-term basis. A commercial installment loan is an installment loan for other than personal or real estate purposes made by a lending officer with commercial installment lending authority. The loan is usually made on a simple interest basis, using a standard promissory note as in the case of the typical commercial loan. When made on a discounted basis, the interest for the entire term is computed and added to the actual amount of the loan, to arrive at the face amount of the note. The borrower repays this amount in installments, but receives the actual amount of the loan before the add-on of interest.

A commercial lending officer is responsible for the extension of credit, the documentation, and the interest rate. Sometimes these loans are handled by the installment loan department, which is responsible for the accounting on loans made on a discount basis. The commercial loan department services the loans made on a simple-interest basis.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesGeneral Overview



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19-43 California Legal Forms--Transaction Guide § 43.18

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§ 43.18 Collateral for Commercial Loan

[1] Use of Collateral

A commercial loan may be unsecured or secured, depending on the creditworthiness of the borrower and the amount of the loan. A bank making a commercial loan to a new business or small business is likely to require security.

Collateral is sought not with the view that it will constitute the sole source of repayment, but as an extra measure of security. Preferred forms of collateral include certificates of deposit, time deposits, savings accounts, bonds, stocks, cash value of life insurance policies, or other forms of liquid collateral, although the collateral acceptable is not limited to liquid collateral.

The preference for liquid collateral relates to the concept of the commercial loan as revolving around the current asset and current liability transactions of the business. However, it also relates to the ease of collectibility of the collateral. In general, a bank will accept anything as collateral that is readily marketable and has an easily ascertained value.

[2] Unacceptable Forms of Collateral

Some types of property are unacceptable as collateral for a loan, either because of law or bank policy. The following typically are not acceptable as collateral:

- Stock in the same bank from which the loan is sought.
- United States Savings Bonds.

- Property belonging to a minor.
- Securities not registered to an individual, or registered to individuals as joint tenants.
- National Service Life Insurance policies.
- An interest in a common trust fund.
- Collateral domiciled out of state.
- "Trustee" savings accounts.
- Anything that is not readily marketable.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGeneral Overview



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19-43 California Legal Forms--Transaction Guide § 43.19

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§ 43.19 Inventory and Equipment Financing Under the Commercial Code

[1] Inventory Financing

Inventory financing (also known as wholesale financing, dealer financing, or floor planning [*see* [2], *below*]) is credit extended by a bank or other financier, such as a factor or finance company, to a borrower for inventory requirements. Under the Commercial Code, goods, other than farm products, are inventory if they are any of the following [*Com. Code § 9102(a)(48); see United States v. Handy and Harman (9th Cir. 1984) 750 F.2d 777, 781 (decided under prior law)*]:

- Leased by a person as lessor.
- Held by a person for sale or lease to be furnished under a contract for services.
- Furnished by a person under a contract for services.
- Consist of raw materials, work in process, or materials used or consumed in a business.

Implicit in the definition of "inventory" is the criterion that the sales or leases are (or will be) in the ordinary course of business [*Com. Code § 9102, UCC Comment 4a*]. For example, machinery used in manufacturing is equipment, not inventory, even though it is the debtor's policy to sell machinery when it becomes obsolete or worn [*Com. Code § 9102, UCC Comment 4a*]. Inventory also includes goods that are used up or consumed in a short period of time in producing a product or providing a service, such as fuel used in operations [*Com. Code § 9102, UCC Comment 4a*].

Farm products are outside the definition of "inventory" if the debtor is engaged in farming operations with respect to the goods [Com. Code § 9102, UCC Comment 4a; *see Com. Code § 9102(a)(48)* ("inventory" defined); *see also Com. Code § 9102(a)(34)* ("farm products" defined); *Com. Code § 9102(a)(35)* ("farming operation" defined)]. However, crops, livestock, and their products cease to be "farm products" when the debtor ceases to be engaged in farming operations with them. For example, if crops, livestock, and their products come into possession of a marketing agency for sale or distribution, or of a manufacturer or processor as raw materials, they become inventory [Com. Code § 9102, UCC Comment 4a]. Products of crops or livestock also lose their status as farm products if they are subjected to the manufacturing process, even though they remain in possession of the person engaged in farming operations [*see Com. Code § 9102, UCC Comment 4a* (examples)].

Inventory financing is also distinguishable according to the purpose for which credit is extended. There are three classes of credit transactions. The most common is the preseasonal loan. An example of a preseasonal loan is the flooring credit extended to a new car dealer at the advent of the new model year so that the dealer may stock up on new models as they come off the assembly line, or to a toy or appliance dealer shortly before the Christmas sales period. These loans are usually liquidated within a relatively short time but, in any event, before the onset of the next annual season, and the collateral is secured under UCC procedures [*see Ch. 42, Secured Transactions*].

A second inventory financing situation arises when the lender learns that a regular borrower has suffered a temporary financial setback, and the financier makes available additional funds secured by inventory collateral, to help the client overcome the adverse conditions and simultaneously protect the lender's own interests. This type of loan is much less desirable than the seasonal loan, and generally is avoided by lenders.

In the third class of credit transactions, the borrower requires additional funds because of a substantial increase in business operations, and therefore needs further operating capital to bring inventory in line with the growth of merchandise turnover. This type of financing usually involves a reduced risk of loss and considerable profits for the lender because of the greater number of consumer installment contracts that are channeled to the lender by the borrower. Nonetheless, such growth inventory loans are also considered less desirable than seasonal loans because they usually are for a longer term, and recur on a practically permanent basis.

[2] Floor Planning

A major type of inventory financing is floor planning. "Floor planning" (also known as wholesale financing or dealer financing) is credit extended by a bank, factor, or finance company to a dealer for inventory requirements. Inventory financed in this manner may range from major household appliances to heavy construction machinery, but the method remains the same, regardless of the type of inventory financed [*see, e.g., Ch. 42, Secured Transactions* ; Ch. 47, *Automotive Financing and Vehicle Leasing* , §§ 47.207, 47.208 (dealer financing agreements); *see also Com. Code § 9521(a)* (UCC financing statement)].

For many dealers, floor planning is a necessity, and though flooring financing involves a higher risk than normal for the lender, requiring constant control and vigilance of the dealer's business practices and operations and yielding a relatively low rate of return, it is eagerly sought by financiers. This is because a dealer receiving flooring financing is expected to discount the retail installment paper with the same lender, and if the volume of the retail installment paper is satisfactory and defaults and/or repossessions are few, the lender may expect a profitable relationship with the dealer-borrower. If the lender is a bank, it is also likely to profit from the dealer's use of other bank facilities.

PRACTICE TIP:

Of the various types of commercial financing, "flooring" is the most intrusive from the borrower's point of view. The concept is that the lender advances money for inventory as needed and the money is repaid as the inventory is sold. The lender requires extensive and up-to-the-minute inventories and extensive reporting. Lenders even conduct spot inventories of their own, which can disrupt the business operations

of the borrower. In addition, if a spot inventory reveals goods that have been sold "out of trust" or without having been reported to the lender, those goods must be paid for immediately.

If a dispute arises between the lender and the borrower or if the borrower experiences a cash flow problem, the flooring lender has the power to immediately close down the borrower's business by demanding payment of the outstanding amounts and by refusing to advance money for more inventory.

Thus, by entering into a flooring financing arrangement, the business owner loses a great deal of control over his or her business.

[3] Use of Negotiable or Nonnegotiable Bill of Lading

A dealer-borrower generally executes a security agreement and promissory note in the lender's favor [see §§ 43.310-43.317; see also Ch. 42, *Secured Transactions*]. At the same time, the dealer will order the goods from the manufacturer or wholesale distributor and advise the latter of the lender's commitment to pay for the goods. On arrival of the goods in the city where the dealer's place of business is located, but while they are still in the carrier's possession, the dealer will execute a trust receipt. When the carrier has issued a negotiable bill of lading for the goods, [see Ch. 54, *Shipment of Property*, §§ 54.230, 54.231 (bills of lading)], the lender's security interest in this document and thus the lender's title to the goods will be perfected for 20 days without filing or taking possession or control [Com. Code § 9312(e)]. When the carrier has issued a bill of lading in the lender's name, the lender will endorse the document over to the dealer. However, the lender's security interest in the goods will nonetheless remain perfected for a period of 20 days [see Com. Code § 9312(f)]. Consequently, the dealer may take possession of the goods.

To be deemed continuously perfected, the lender must file a security interest in the goods released to the dealer on or before expiration of the 20-day period [see Com. Code § 9308(c); see also Com. Code § 9312(h) (after expiration of 20-day period, perfection depends on compliance with this division)]. This will assure that no other secured party may acquire a security interest in the goods released to the dealer. Inasmuch as the lender's lien constitutes a purchase money security interest in goods [see Com. Code § 9103(b) (definition); see also [6], *below*], the lender will take priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing, provided that the lender files a financing statement before or within 20 days after the goods are delivered to the dealer [Com. Code § 9317(e); see Com. Code §§ 9320, 9321 (exceptions)].

[4] Proceeds

The term "proceeds" means any of the following property [Com. Code § 9102(a)(64); see also *In the Matter of Munger* (9th Cir. 1974) 495 F.2d 511, 513 (term "proceeds" to be given broad, flexible meaning, decided under prior law)]:

- Whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral.
- Whatever is collected on, or distributed on account of, collateral.
- Rights arising out of collateral.
- To the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral.
- To the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.

Thus, a security agreement that gives a lender a security interest in a debtor's inventory and the proceeds of the inventory gives the lender a security interest in the debtor's accounts receivable that arise because of sales of inventory items [*Western Decor & Furnishings Industries, Inc. v. Bank of America* (1979) 91 Cal. App. 3d 293, 300-302, 154 Cal. Rptr. 287 (decided under prior law)].

A security interest attaches to any identifiable proceeds of collateral [Com. Code § 9315(a)(2); see Com. Code § 9203(f) (security interest in collateral gives secured party rights to proceeds and is also attachment of security interest in supporting obligation for the collateral)]. Proceeds that are commingled with other property are identifiable if the proceeds are goods, to the extent provided by Com. Code § 9336, governing commingled goods, or, if the proceeds are not goods, to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, as permitted by law [see Com. Code § 9315(b)].

A security interest in proceeds is a perfected security interest if the original collateral was perfected [Com. Code § 9315(c)]. However, a perfected security interest in the proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds unless any of the following conditions are satisfied [Com. Code § 9315(d)]:

- The filed financing statement covers the original collateral, and the proceeds are collateral in which a security interest may be perfected by filing in the office where the original financing statement was filed, and the proceeds are not acquired with cash proceeds [Com. Code § 9315(d)(1); see Com. Code § 9315(e)];
- The proceeds are identifiable cash proceeds; or
- The security interest in the proceeds is perfected other than under Com. Code § 9315(c) (providing for perfection of a security interest in proceeds if the security interest in the original collateral is perfected) when the security interest attaches to the proceeds or within 20 days thereafter.

The attachment of a security interest in collateral gives the secured party the rights to proceeds [see Com. Code § 9315] and is also attachment of a security interest in a supporting obligation for the collateral [Com. Code § 9203(f)]. However, if a filed financing statement covers the original collateral, a security interest in proceeds which remains perfected under Com. Code § 9315(d)(1), discussed *above*, becomes unperfected at the later of either of the following [Com. Code § 9315(e)]:

- When the effectiveness of the filed financing statement lapses under Com. Code § 9515 (governing lapsed financial statements) or is terminated under Com. Code § 9513 (governing termination).
- The 21st day after the security interest attaches to the proceeds.

Cash proceeds retain their character as cash proceeds while in the possession of a levying officer in accordance with Code Civ. Proc. § 481.010 *et seq.*, governing attachment, or Code Civ. Proc. § 680.010 *et seq.*, governing enforcement of judgments [Com. Code § 9315(f)].

PRACTICE TIP:

When attempting to claim a security interest or lien on personal property that has been seized under a writ of attachment, a writ of execution, a prejudgment or postjudgment writ of possession, or a writ of sale, a third party must follow the procedure established by Code Civ. Proc. § 720.210 *et seq.* The claim must be asserted before the levying officer sells the property, delivers possession of the property to the creditor or pays proceeds of collection to the creditor [Code Civ. Proc. § 720.220].

[5] Equipment Financing

Equipment financing is credit extended by a lender to a borrower to facilitate the purchase of equipment for a business. Under the Commercial Code, the term "equipment" means goods other than inventory, farm products, or commercial goods [*Com. Code § 9102(a)(33)*; *see Com. Code § 9102(a)(34)* ("farm products" defined); *Com. Code § 9102(a)(48)* ("inventory" defined)]. An item of equipment is chiefly characterized by its stability; it does not change form during use by the business [*see Com. Code § 9102, UCC Comment 4a*].

Goods used in a business are equipment if they are fixed assets or have, as identifiable units, a relatively long period of use. For example, machinery used in manufacturing is equipment even though the manufacturer routinely sells the machinery when it becomes obsolete or worn. However, goods used in a business are not equipment, but rather are inventory, even though not held for sale or lease, if they are used up or consumed in a short period of time in producing a product or providing a service [*Com. Code § 9102, UCC Comment 4a*; *see [1], above*].

[6] Distinctions Between Inventory and Equipment Financing Under the UCC

[a] In General

In general, the same rules apply under the Commercial Code to the perfection of a lender's security interest in collateral, regardless of whether it is equipment or inventory. In most cases, priority will be over a security interest asserted under an after-acquired property clause [*see Com. Code § 9324, UCC Comment 2*; *see also Com. Code § 9204* (discussing extent to which security interests in after-acquired property are validated)]. However, there are some distinctions in a lender's security interest, depending on whether the collateral is characterized as equipment or inventory.

[b] Purchase Money Security Interests

"Purchase money collateral" means goods or software that secures a purchase money obligation incurred with respect to that collateral [*Com. Code § 9103(a)(1)*]. "Purchase money obligation" means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used [*Com. Code § 9103(a)(2)*]. These terms are essential to the description of what constitutes a purchase money interest under the Commercial Code, because the concept of "purchase money security interest" requires a close nexus between the acquisition of collateral and the secured obligation [*see Com. Code § 9103, UCC Comment 3*]. A security interest in goods is a purchase money security interest [*Com. Code § 9103(b)*]:

- To the extent that the goods are purchase money collateral with respect to that security interest.
- If the security interest is in inventory that is or was purchase money collateral, also to the extent that the security interest secures a purchase money obligation incurred with respect to other inventory in which the secured party holds or held a purchase money security interest.
- To the extent that the security interest secures a purchase money obligation incurred with respect to software in which the secured party holds or held a purchase money security interest.

A purchase money security interest can be created only in goods and software [*see Com. Code § 9103(b), (c)*; *Com. Code § 9324, UCC Comment 2*].

With one relatively unusual exception, if the lender has a perfected purchase money security interest in goods other than inventory or livestock (for example, equipment), then that interest has priority over a conflicting security interest in the same goods [*Com. Code § 9324(a)*]. In addition, except as otherwise provided for security interests in deposit accounts [*see Com. Code § 9327*; *see also Com. Code § 9102(a)(29)* ("deposit account" defined)], if the lender has a perfected security interest in the goods' identifiable proceeds, that interest also has priority, if the purchase money security interest

is perfected when the debtor receives possession of the collateral or within 20 days after possession [*Com. Code* § 9324(a)]. The exception to this rule exists in the case in which a lender creates two purchase money security interests in the same collateral and both security interests qualify for special priority [*Com. Code* § 9324(a); see *Com. Code* § 9324(g)].

A perfected purchase money security interest in inventory generally has priority (1) over a conflicting security interest in the same inventory, (2) over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper, if so provided in *Com. Code* § 9330 (governing priority of purchaser of chattel paper), and, (3) except as otherwise provided in *Com. Code* § 9327 (governing priority of security interests in deposit accounts), in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer, provided all of the following conditions are satisfied [*Com. Code* § 9324(b)]:

- The purchase money security interest is perfected when the debtor receives possession of the inventory.
- The purchase money secured party sends an authenticated notification to the holder of the conflicting security interest.
- The holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory.
- The notification states that the person sending the notification has or expects to acquire a purchase money security interest in inventory of the debtor and describes the inventory.

This general rule is subject to two exceptions [*Com. Code* § 9324(b)]. First, the final three conditions enumerated above apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of inventory as follows [*Com. Code* § 9324(b); see *Com. Code* § 9324(c); see also *Mother Lode Bank v. General Motors Acceptance Corp.* (1975) 46 Cal. App. 3d 807, 813-814, 120 Cal. Rptr. 429 (conflicting security interests in inventory collateral, decided under prior law); § 42.211]:

- If the purchase money security interest is perfected by filing, before the date of the filing.
- If the purchase money security interest is temporarily perfected without filing or possession under *Com. Code* § 9312(f) (perfected security interests in certain negotiable documents or goods in possession of bailee) [see § 43.19(3)], before the beginning of the 20-day period under that provision.

Second, an exception to this rule exists in the case in which a lender creates two purchase money security interests in the same collateral and both security interests qualify for special priority [*Com. Code* § 9324(b); see *Com. Code* § 9324(g)].

A perfected purchase money security interest in software generally has priority over a conflicting security interest in the same collateral; and, except as otherwise provided in *Com. Code* § 9327 (governing priority of security interests in deposit accounts), a perfected security interest in its identifiable proceeds also has priority, to the extent that the purchase money security interest in the goods in which the software was acquired for use has priority in the goods and proceeds of the goods under this section [*Com. Code* § 9324(f)]. The exception to this rule exists in the case in which a lender creates two purchase money security interests in the same collateral and both security interests qualify for special priority [*Com. Code* § 9324(f); see *Com. Code* § 9324(g)].

[c] Notification Requirement

The notification requirement of *Com. Code § 9324(b)* (formerly *Com. Code § 9312(3)*) protects the inventory financier who will typically make periodic advances to the debtor against incoming inventory as new inventory is received. A fraudulent debtor could apply to a prospective purchase money lender for advances on the inventory even though the inventory financier already has a security interest in the inventory [see *Mother Lode Bank v. General Motors Acceptance Corp.* (1975) 46 Cal. App. 3d 807, 809-810, 120 Cal. Rptr. 429 (automobile dealer fraudulently refinanced automobiles to a second lender, decided under prior law)].

[d] Equipment Affixed to Realty

In some circumstances, equipment affixed by a lessee to leased realty becomes the lessor's property or becomes subject to a security interest in the lessor's favor [see *Goldie v. Bauchet Properties* (1975) 15 Cal. 3d 307, 124 Cal. Rptr. 161, 540 P.2d 1 (decided under prior law)]. *Com. Code § 9334* governs conflicting claims of lessors and secured parties to those fixtures. As to purchase money security interests, a perfected security interest in fixtures generally has priority over the conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property and all of the following conditions are satisfied [*Com. Code § 9334(d)*; see *Com. Code § 9334(h)* (exception for construction mortgage)]:

- The security interest is a purchase money security interest.
- The interest of the encumbrancer or owner arises before the goods become fixtures.
- The security interest is perfected by a fixture filing before the goods become fixtures or within 20 days after they become fixtures.

[e] Priority of Security Interests

The Commercial Code conflict of laws rules are contained in *Com. Code § 9301 et seq.* The general rule is that the law governing perfection of security interests in both tangible and intangible collateral (including, for example, both equipment and inventory), whether perfected by filing or automatically, is the law of the jurisdiction of the debtor's location [*Com. Code § 9301(1)*; see *Com. Code § 9307* (location of debtor)]. The general rule is subject to several exceptions. It does not apply to goods covered by certificate of title [see *Com. Code § 9303*], deposit accounts [see *Com. Code § 9304*], investment property [see *Com. Code § 9305*], or letter-of-credit rights [see *Com. Code § 9306*]. Nor does it apply to possessory security interests, that is, security interests that the secured party has perfected by taking possession of the collateral, security interests perfected by filing a fixture filing, security interests in timber, or security interests in as-extracted collateral [see *Com. Code § 9301*, *UCC Comment 5*; see also Ch. 42, *Secured Transactions*].

For detailed coverage of the priority of conflicting purchase money security interests, see BENDER'S Uniform Commercial Code Service(Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGoodsEquipmentCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGoodsFarm ProductsCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGoodsInventoryCommercial Law (UCC)Secured Transactions (Article 9)PriorityGeneral Overview



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19-43 California Legal Forms--Transaction Guide § 43.20

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§ 43.20 Chattel Paper Financing Under the Uniform Commercial Code

The term "chattel paper" refers to a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods [*Com. Code § 9102(a)(11)*]. For this purpose, "monetary obligation" means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term does not include charters or other contracts involving the use or hire of a vessel. If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper [*Com. Code § 9102(a)(11)*].

Chattel paper financing occurs when a seller or lessor wants to convert an expectancy of payment into cash. The seller generally sells or assigns the chattel paper with or without recourse to the lender [*see Com. Code § 9330* (priority of purchaser of chattel paper)]. When the chattel paper is assigned "with recourse," the assignor guaranties that the money owed pursuant to the chattel paper will be paid. On the other hand, "without recourse" means that the assignee will look to the obligor on the chattel paper for payment, not the assignor.

However, the seller may receive a direct loan from the lender, who will secure the loan transaction by perfecting a security interest in the payments due to the seller or by taking possession of the chattel paper [*see Com. Code §§ 9312(a), 9313* (assignee may perfect its security interest by taking possession); *Com. Code §§ 9314(a), 9105* (assignee may perfect its security interest by taking control)]. The perfection of security interests under the Commercial Code is covered in Ch. 42, *Secured Transactions*.

Generally, the seller and the lender will have entered into a continuing relationship under an agreement referred to as a

"dealer agreement." These agreements, whether used in the commercial credit context or the consumer credit context, have the same general characteristics [see Com. Code § 9330, UCC Comment 3, 10, 11 (description of dealer arrangements)]. They provide either for full recourse (under which the dealer guaranties payment), limited recourse, or no recourse. These agreements contain warranties made by the dealer, and may provide for retention by the lender of a reserve for protection against losses. Lender-dealer agreements in the consumer credit context are covered in Ch. 45, *Consumer Installment Loans and Credit Sales*, as are credit investigations and other pertinent considerations.

In financing retail businesses through the purchase of chattel paper, a lender may secure itself by taking physical possession of the paper or it may perfect its security interest by filing [see Com. Code §§ 9312(a), 9313; Com. Code § 9330, UCC Comment 2; see also Ch. 42, *Secured Transactions*]. In either case, a security interest must attach through the use of a security agreement to that effect before it can be perfected [see Com. Code § 9308]. A dealer agreement, as mentioned above, generally includes language making it a security agreement [see, e.g., *Biggins v. Southwest Bank* (9th Cir. 1973) 490 F.2d 1304, 1306-1307 (decided under prior law)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralCommercial PaperCommercial Law (UCC)Secured Transactions (Article 9)PerfectionGeneral Overview



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19-43 California Legal Forms--Transaction Guide § 43.21

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§ 43.21 Securing After-Acquired Property and Future Advances: The Floating Lien

[1] Operation of Floating Lien

A security interest may attach to both existing and future collateral, and obligations described in a security agreement may include future advances whether or not given under a loan commitment [*see Com. Code § 9204(a), (c)*]. This type of security interest is called a "floating lien" because it does not attach to any particular item, but "floats" over a shifting stock of inventory [*see Com. Code § 9205, UCC Comment 2; see Com. Code § 9102(a)(48)* ("inventory" defined)]. A security agreement incorporating a floating lien creates a continuing security interest in the lender's favor in all present and future collateral [*Com. Code § 9204(a); see Biggins v. Southwest Bank (9th Cir. 1973) 490 F.2d 1304, 1309-1311* (decided under prior law)].

Com. Code § 9204 contemplates the possibility of a continuing or revolving credit relationship between a lender and borrower in which the shifting inventory, in conjunction with the receivables generated by the inventory, constitutes the collateral pledged to the lender [*Com. Code § 9204, UCC Comment 2; Com. Code § 9205, UCC Comment 2; see Biggins v. Southwest Bank (9th Cir. 1973) 490 F.2d 1304, 1309-1310* (decided under prior law)].

[2] Advantages of Floating Lien

A security agreement that establishes a continuing security interest in inventory, receivables, and other proceeds (a floating lien) is one of the most commonly used today. A floating lien attaches to existing and after-acquired collateral [*Com. Code § 9204(a); see Biggins v. Southwest Bank (9th Cir. 1973) 490 F.2d 1304, 1309-1310* (decided under prior law)], and also covers future loans or advances extended to the borrower by the lender [*Com. Code § 9204(c); see Gerber v. Spector (1959) 174 Cal. App. 2d 489, 501-502, 344 P.2d 890* (decided under prior law)]. A floating lien permits the borrower to exercise complete control over the inventory collateral (including returned or repossessed

goods) without having to account for proceeds or substitute new collateral [see *Com. Code* § 9205(a)].

[3] "Dominion Rule" Abolished

Com. Code § 9205 abolished the "dominion rule" established in *Benedict v. Ratner*, which made floating liens void [Com. Code § 9205, UCC Comment 2; see *Benedict v. Ratner* (1925) 268 U.S. 353, 45 S. Ct. 566, 69 L. Ed. 991]. Although this provision negates *Benedict*, the filing and other perfection requirements provide for public notice that effectively overcomes any potential misleading effect of the debtor's use and control of collateral [Com. Code § 9205, UCC Comment 2; see *Com. Code* § 9301 *et seq.* (perfection and priority); *Com. Code* § 9501 *et seq.* (filing)]. Moreover, nothing in this provision prevents the debtor and secured party from agreeing to procedures by which the secured party polices or monitors collateral or to restrictions on the debtor's dominion. Rather, *Com. Code* § 9205 leaves these matters to agreement based on business considerations, not legal requirements [Com. Code § 9205, UCC Comment 2]. The parties to a floating lien may make their own terms and agree to strict accountability, segregation of collections, or daily reports, but this is not required by the Commercial Code [Com. Code § 9205, UCC Comment 5].

[4] Disadvantages of Floating Lien

The ease with which a floating lien can be established in all present and future collateral of the borrower can result in a stranglehold on the borrower's commercial activities. For example, a creditor secured by a floating lien may acquire rights in collateral whose value far exceeds the amount of the loans the creditor has granted and intends to grant to the borrower in the future. In these circumstances, manufacturers and other suppliers of inventory might hesitate to extend even normal credit terms to the borrower. A borrower may avoid this situation by preserving a cushion of assets free from the creditor's floating lien, or by providing otherwise in an agreement [see *Com. Code* § 9205, UCC Comment 2].

[5] Perfecting Floating Lien

To perfect a security interest in after-acquired property and future advances, a lender must file a financing statement [see *Com. Code* §§ 9310, 9204; see Ch. 42, *Secured Transactions* (financing statement)]. No further steps are necessary; the filing will validate the lender's lien in all collateral, whether the collateral exists at the time the security agreement is entered into or is acquired afterward [see *Com. Code* §§ 9310(a), 9204(a); see also *Goldie v. Bauchet Properties* (1975) 15 Cal. 3d 307, 319-320, 124 Cal. Rptr. 161, 540 P.2d 1 (decided under prior law)].

This filing will also secure all loans or advances made after the security agreement is signed, provided that the same type of collateral indicated in the filed financing statement is to be pledged against future loans or advances [see *Com. Code* §§ 9310(a), 9204(c); see also *State Finance Co. v. Laugharn* (9th Cir. 1940) 113 F.2d 59, 60-61 (decided under prior law)]. One important purpose of this filing requirement is to give other creditors notice that property of their borrower or prospective borrower is subject to secured claims [see *Com. Code* § 9205, UCC Comment 2; [3], *above*; see also *Pace v. Threewit* (1939) 31 Cal. App. 2d 509, 514, 88 P.2d 247 (decided under prior law); *Menick v. Carson* (S.D. Cal. 1951) 96 F. Supp. 817, 819 (decided under prior law)]. This perfection by filing will be good against any other of the borrower's creditors, with the possible exception of a conflicting purchase money security interest [see *Com. Code* § 9324; see § 43.19[6][b]].

The filed financing statement need not disclose the amount of the loan, the rate of interest, or other details of the agreement; this information may be kept confidential [see *Com. Code* § 9502(a)]. It must describe the collateral covered by the financing statement, but in general terms only [see *Com. Code* § 9502(a); see *Com. Code* § 9502(b) (additional requirements for as-extracted collateral or timber to be cut and for fixture filing which covers goods that are, or are to become, fixtures)]. This makes possible the shifting nature of the collateral. Finally, no itemization or detailed account of the amounts of future advances or the times when they will be made need be indicated in the original security agreement [see *Com. Code* § 9502(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsAfter-Acquired Property &
Future AdvancesCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsGeneral Overview



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19-43 California Legal Forms--Transaction Guide § 43.22

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§ 43.22 Financing Acquisitions and Mergers

Financing business acquisitions and mergers was customarily accomplished by equity funding or debt financing through commercial finance companies; commercial banks did not generally engage in these credit transactions. However, large commercial banks are more often financing acquisitions and mergers than in the past. The number of companies willing to sell out to another company has also been increasing. One important reason for this change was the presence of the excess profits tax; in many instances the impact of this tax could be softened by transfer of the company to another company that showed higher earning than the company being acquired during the years constituting the base for computation of the excess profits tax.

Before financing a buyer of a business, a financier primarily wishes to ascertain the management ability of the purchaser. The acquiring enterprise may be either a business that is already established, in which case the parties involved in this transaction will usually call it a "merger," or it may be a new corporation specifically organized for the purpose of acquiring the existing business.

The purchase of a business may take either of two different forms. In one form the capital stock of the acquired business enterprise is purchased; the financier supplies a so-called "turn-around" or "facilitating" loan. This is a typical merger situation. Conventional financing follows, secured by collateral in the form of accounts receivable, inventory, and equipment of the now-combined company, and the new company assumes the liabilities of the acquired company.

In a second type of acquisition, purchase of the assets of the acquired or merged company only is effected, and its liabilities may or may not be assumed. No turn-around loan is required in this instance. Generally speaking, a financier will extend turn-around financing to the acquiring company to obtain its future conventional financing, which is usually more profitable than turn-around financing.

When inventory of the acquired or merged company represents collateral, the ascertained inventory turnover is an important factor for the financier to consider, as well as its currency and marketability. As in any other inventory financing, these factors will help to establish the potential increase in the cash flow of the acquiring company.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewMergers & Acquisitions LawGeneral Overview



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§ 43.23 Import and Export Financing

An added business complication in import and export sales transactions is that one of the trading partners is a national of a foreign country or has a place of business in a foreign country. However, as in the case of a domestic sale, these transactions involve three fundamental parts: (1) an agreed price of the goods imported or exported; (2) the time, place, and mode of delivery of the goods; and (3) the mode of payment.

The mode of payment for either imported or exported goods may be through the mechanism of unsecured or secured credit. Among the unsecured credit transactions is the establishment of an open account between buyer and seller, and the term draft transaction. Secured credit transactions are typified by the surrender of complying documents against payment collected through a bank, such as in a letter of credit arrangement. Letters of credit and related import-export transactions are covered in Ch. 56, *Letters of Credit and Electronic Fund Transfers*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsControlInternational Trade LawImports & ExportsGeneral OverviewInternational Trade LawLetters of Credit



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§ 43.24 Trade Credit

[1] In General

The major source of short-term credit other than commercial loans from banks is trade credit provided by suppliers of inventory, materials, and services. "Trade credit" is credit extended from a supplier to a purchaser purely for the purpose of purchasing what is offered by the supplier. Trade credit is frequently offered on an informal, flexible basis [see [2], below].

[2] When Trade Credit Is Employed

For most small businesses or new businesses, trade credit is preferable to bank credit. Banks normally will not loan money to these types of businesses because they have no track record and usually have little in the way of collateral. Therefore, in practical terms, trade credit may be the only credit available to many businesses.

Unlike banks, trade creditors are not limited in advancing credit by governmental regulation or by industry standards. Furthermore, unlike banks who only extend credit for the purpose of earning interest on the credit extended, trade creditors may extend credit for a variety of reasons. For example, a trade creditor may extend credit to encourage a new business to carry the trade creditor's product or to encourage the business to increase the amount of the trade creditor's product carried so as to cause the business not to carry the product of a competitor.

It is not unusual for a trade creditor to allow its customer to delay payment for six months or more and still receive a prompt payment discount if some reason exists for the delay. In fact, it is unusual for a trade creditor to require strict adherence to time limitations as a condition to taking a prompt payment discount.

Another advantage of trade credit is informality. Bank credit requires the execution of many highly technical documents. Trade credit, on the other hand, is often extended by a simple telephone conversation or even by acquiescence to a pattern and practice of payment.

Businesses should almost always approach their suppliers first when seeking credit to purchase inventory. The form of credit that may be granted by an inventory supplier is limited only by the imagination and negotiating abilities of the parties. Even the obtaining of inventory on consignment whereby it is not paid for until it is sold is a type of trade credit. However, a business will never receive trade credit unless it asks for it from its suppliers.

[3] Commercial Credit and Trade Credit Compared

Commercial credit and trade credit have significant differences, which can be summarized as follows:

- *Form of economic value.* Bank credit represents money furnished to the borrower; trade credit is provided to purchase inventory, materials, or services from the trade supplier furnishing the credit, or to establish an ongoing business relationship.
- *Repayment.* Both a bank and a trade creditor are generally repaid in money, but the trade creditor may arrange to take back some merchandise if the account is unpaid. A bank cannot make a similar arrangement if the customer does not have funds to meet the obligations. However, when loans are made on a secured basis, a bank has the power to take as collateral the items that are purchased with the loan or that secure the loan.
- *Term of exposure.* Bank loan maturity periods are generally longer than trade credit terms. Payments for inventory are made in 30, 60, or 90 days according to industry characteristics or special arrangements between seller and buyer. Short-term bank loans usually extend for the entire seasonal needs of the borrower, with a minimum time of three months. During this same period the supplier's credit exposure may have been turned two or three times; each time the trade creditor has had the opportunity to review and modify the decision. As longer term bank loans are made, the bank ties up its risk for longer periods of time.
- *Regulation.* Banks are custodians of depositors' funds and are obligated to exercise care and prudence in their lending activities. In addition to their self-imposed criteria, banks are subject to regulations of state and federal authorities. Trade suppliers do not have these restrictions and may be willing to take greater risks in approving marginal accounts for credit.
- *Dollar risk.* A bank risks the full amount of its loan; a trade creditor with an account receivable of the same amount ordinarily risks considerably less because the gross profit is included in the amount of the receivable.
- *Gross profit margin.* Banks normally operate on much closer gross margins than trade creditors. A bank's gross profit is the amount of the interest earned from a loan. Thus, for example, on a commercial loan of \$10,000 at 6 percent, the bank's gross profit would be \$600 for one year and, of course, less for a shorter term. A trade creditor with a \$10,000 account receivable payable in 30 days is likely to have a 30 percent gross profit, or \$3,000, in a 30-day period. Trade creditors regularly offer a discount from the invoice price, but to gain the discount, payment typically must be made within 10 days of the invoice date and the amount of the discount is usually 2 percent. Even if the discount were taken, the trade creditor would have a 28-percent gross profit.
- *Recovery of losses.* Because bank profit margins are much lower than those of trade suppliers, a bad

debt loss becomes significant to a bank; at the low profit margin, a greater amount of business must be written with other accounts to cover losses from a customer who does not pay. Accordingly, bank analysis of a credit risk will be detailed, and interpretation of the facts will be conservative, compared to a trade creditor's analysis.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewContracts LawFormationGeneral Overview



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19-43 California Legal Forms--Transaction Guide § 43.25

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.25 Sources of Industrial Loans

When authorized to do so by the Commissioner of Corporations, a newly organized or existing California corporation may draft or amend its articles of incorporation to engage in the industrial loan business [*Fin. Code § 18100; see Fin. Code § 18000 et seq.* (Industrial Loan Law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresArticles of Incorporation &
BylawsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 43 COMMERCIAL LOANS
PART II. LEGAL BACKGROUND

19-43 California Legal Forms--Transaction Guide § 43.26

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.26 Sale of Credit Disability Insurance by Lender

A lender may wish to protect its position through the use of credit disability insurance covering the debtor [*see Civ. Code § 1812.400 et seq.*]. However, the presence of credit disability insurance will have an adverse effect on the creditor's right to enforce the debt in the event of default when the insurance was sold or arranged for by the creditor or when the creditor received compensation for its sale. In addition, certain disclosures must be made at the time of the sale. For discussion of credit disability insurance, see Ch. 45, *Consumer Installment Loans and Credit Sales* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance Law Life Insurance Credit Life



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DIVISION III: COMMERCIAL TRANSACTIONS
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PART II. LEGAL BACKGROUND

19-43 California Legal Forms--Transaction Guide § 43.27

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.27 Commercial Credit Reports

Banks and other lending institutions frequently use commercial credit reports to verify information provided in loan applications by potential borrowers. The use of commercial credit reports is subject to specific regulation [*see Civ. Code § 1785.41 et seq.*] and is not subject to the Consumer Credit Reporting Agencies Act [*Civ. Code § 1785.41; see Civ. Code § 1785.1 et seq.*].

A "commercial credit report" is a report provided to a commercial enterprise for a legitimate business purpose, relating to the financial status or payment habits of the commercial enterprise that is the subject of the report [*Civ. Code § 1785.42(a)*]. A "commercial credit reporting agency" is a person who, for monetary fees, dues, or on a cooperative nonprofit basis, provides commercial credit reports to third parties [*Civ. Code § 1785.42(b)*]. The term "subject" refers to the commercial enterprise about which the commercial credit report has been compiled [*Civ. Code § 1785.42(c)*]. Commercial credit reporting agencies may protect the identity of sources of information used in commercial credit reports [*Civ. Code § 1785.43(a)*].

On the request of a representative of the subject of a commercial credit report, a commercial credit reporting agency must provide the subject with a printed copy of the report [*Civ. Code § 1785.43(b)*]. If the subject of a commercial credit report believes the report contains an inaccurate statement of fact, a representative may file a report with the credit reporting agency identifying the disputed statement and indicating the nature of the subject's disagreement with the report. Within 30 days of receiving the subject's statement, the credit reporting agency must delete the disputed item from the report or indicate in the report that the subject's statement of disagreement will be provided on request [*Civ. Code § 1785.43(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewBanking LawConsumer ProtectionGeneral Overview



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19-43 California Legal Forms--Transaction Guide §§ 43.28-43.99

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

[Reserved]

§§ 43.28[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

19-43 California Legal Forms--Transaction Guide § 43.100

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.100 Facts

[1] Background of Principals

NOTE:

In deciding whether to extend credit, a loan analyst must try to determine whether the principals in a business are good moral risks, whether they possess sound business judgment, and whether the firm has the capacity to remain in business. The lender's appraisal of the borrower's personal reputation and business ability, therefore, weighs heavily in loan decisions. The legal form of the borrowing entity also affects creditor risk.

1. Name, address, telephone number, and fax number of firm.

2. Legal form of firm organization, such as:

- a. Sole proprietorship.
- b. Partnership.
- c. Corporation.

d. Limited liability company.

3. Names, addresses, telephone numbers, and fax numbers of principals in business.

4. General considerations:

a. Age of principals.

NOTE:

As a matter of law, banks may not discriminate in lending on the basis of age.

b. Compatibility of principals.

c. Distribution of duties.

d. Hidden ownership, if any.

5. Personal characteristics of principals:

a. Personal worths and income.

b. Other interests.

c. Relatives.

NOTE:

If a potential borrower does not show the financial strength to support a loan application, it may be possible to ask for the guaranty or endorsement of a relative.

d. Personal habits.

6. Business reputation:

a. Integrity.

b. Experience in particular business.

c. Bankruptcies.

d. Fraud.

e. Fire record.

[2] Background of Business

NOTE:

In addition to the personal characteristics of the principals, the loan analyst is interested in the business characteristics of the firm.

1. Characteristics affecting general image of business:

- a. Age of business.
- b. Firm reputation and performance record.
- c. Debt payment record.

2. Details of business operation:

- a. Industry standards.
- b. Function within industry.
- c. Marketing approach.
- d. Products or services offered.
- e. Terms offered.
- f. Lag factors in operation.
- g. Seasonal aspects of business.
- h. Fixed investments required by business.

3. Credit aspects of legal form of organization of firm:

NOTE:

Credit decisions are influenced by the legal form of entity of the business. The form of organization bears on management and control, continuity, financial operation, and liability of the firm and its principals.

a. Sole proprietorship:

NOTE:

Approximately 80 percent of all businesses in the United States are conducted as sole proprietorships.

- (1) Management and control by one person.
- (2) Continuity issues for business operated by one person.
- (3) Financial aspects tied solely to proprietor.
- (4) Unlimited personal liability.

b. Partnership:

- (1) Management and control by (likely) multiple experienced partners.
- (2) Continuity issues related to partnership agreement.
- (3) Financial standing of partners.
- (4) Liability of general partners.

NOTE:

Generally, the execution of personal guaranties by partners of partnership obligations is a redundancy that adds nothing to the obligations of the partnership. However, banks continue to require them on the theory that it reinforces in the minds of the partners their obligations.

c. Corporation:

- (1) Management and control by officers and directors.
- (2) Continuity of life of corporation.
- (3) Financial standing of shareholders.
- (4) Limited liability of shareholders.

NOTE:

One area of particular concern is that of personal guaranties of corporate obligations. Many new or small business owners wish to conduct their business through a corporation. One of the principal advantages of using a corporation to conduct business is the limitation of personal liability. Whenever an individual enters into a personal guaranty of a corporate obligation, he or she loses the corporate advantage of limiting liability. Therefore, individual guaranties of corporate obligations should be resisted. While almost all lenders will require the guaranties, a consistent resistance will eventually result in a successful corporation not needing the guaranties to obtain credit.

d. Limited liability company:

NOTE:

Limited liability companies are a relatively new type of business entity in California. They are a hybrid form, in that they provide limited liability to their members similar to that of a corporation, while allowing management and taxation similar to that of a partnership. For coverage of LLCs, see Ch. 12C, ***Limited Liability Companies***.

- (1) Management and control by members or managers.
- (2) Continuity of life of company.
- (3) Financial standing of members.
- (4) Limited liability of members.

[3] Financial Data on Borrower**NOTE:**

When applying for credit from a bank, most banks require the submission of a business plan. In preparing the business plan, the information and forms listed here and in [2], **above**, should be addressed.

Loan officers expect the applicant to be able to express a clear purpose for the loan. All information provided should be complete, accurate and truthful. If tax returns are requested, the complete return should be provided, not just selected portions of the return. Audited financial statements are not usually required. However, reviewed statements rather than simply compiled statements may be required, depending on the size of the loan requested.

It is important to understand that banks do not simply rely on the information supplied by the applicant. Independent sources are used to verify the information supplied by an applicant [*see* § 43.27 (commercial credit reports)]. Many times banks will require that the applicant authorize the bank to obtain copies of tax returns directly from the IRS. Those authorizations are used and altered tax returns will be discovered.

1. Balance sheet for current period, projected for two years.
2. Comparative balance sheet for past three years if age of business permits.
3. Income statement for current period, projected for two years.
4. Comparative income statement for past three years.
5. Statements of retained earnings for past three years.
6. Supporting schedules for respective financial statements.

NOTE:

The financial statements should take the form of an audit report of an independent public accountant.

7. Cash flow statement.
8. Cash budget.
9. Growth plan for firm.
10. If business is new, and unable to provide past financial data, financial manager should prepare pro forma statements and cash budget.
11. If firm is corporation, chart of entire stock structure and general composition of security holders and their holdings, accompanied by charter documents.
12. Summaries of contingent liabilities from litigation, leasing of assets, and like.

[4] Financial Data on Related Firms and Individuals

1. If business is parent or subsidiary of another firm, consolidated financial statements for past three years; separate financial statements for other firm should be made available.
2. If business is proprietorship, partnership, or limited liability company, statements of personal assets, liabilities, and net worth of principals.
3. Statements of personal assets, liabilities, and net worth of officers or relatives who may act as endorsers or guarantors.
4. Details of contractual relationships with suppliers, customers, promoters, and others.

[5] Inventory of Property Available as Collateral

1. Categorize collateral available for securing commercial loan:
 - a. Certificates of deposit.
 - b. Time deposits.
 - c. Savings accounts.
 - d. Bonds.
 - e. Stocks.
 - f. Cash value of life insurance policies.
 - g. Dealers' and brokers' due bills (not acceptable at all banks).
 - h. Other forms of liquid collateral.
 - i. Accounts receivable.
 - j. Contract rights.
 - k. Inventory.
 - l. Equipment.
 - m. Real property.
 - n. Other property.

NOTE:

In general, banks will accept as collateral any property that is readily marketable and that

has an easily ascertainable value.

2. Allocate collateral to individual scheduled borrowings as considered appropriate:

- a. Collateral that must remain in physical possession of business.
- b. Collateral that will or must remain in third- party control regardless of security status.
- c. Collateral, such as stocks and bonds, that can be removed with lender's acquiescence from creditor control on exchange of equivalent value.
- d. Collateral that can be transferred physically to creditor but must be regained within limited period for use purposes.
- e. Collateral that produces continuous proceeds, rights to which must be retained by borrower and separated from security interest of creditor.
- f. Collateral that produces, or consists exclusively of, proceeds that should be arranged to pay down loan, either progressively or at maturity.
- g. Collateral that is unstable, or that degenerates or depreciates.
- h. Collateral with other special characteristics, such as controlling block of stock, that should be severed from security.
- i. Collateral value that will support large loan or several loans at once.
- j. Collateral that is, or can be, subject to one or more other priorities, of other creditors.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewBusiness & Corporate LawGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

19-43 California Legal Forms--Transaction Guide § 43.101

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.101 Documents

NOTE:

The following documents may be requested by the lending institution in determining whether to offer a loan. The business should have these documents ready to turn over on request.

1. Business plan.
2. Federal and state tax returns for past three years.
3. Audited or reviewed financial statements.
4. Balance sheet for current period, projected for two years.
5. Balance sheet for past three years if age of business permits.
6. Income statement for current period, projected for two years.
7. Income statement for past three years.
8. Statements of retained earnings for past three years.

9. Supporting schedules for respective financial statements.
10. Cash flow statement.
11. Cash budget.
12. Growth plan for firm.
13. If firm is corporation, chart of entire stock structure and general composition of security holders and their holdings, accompanied by charter documents.
14. Summaries of contingent liabilities from litigation, leasing of assets, and like.
15. Significant business contracts, including:
 - a. Premises lease.
 - b. Equipment leases.
 - c. Supply contracts.
 - d. Purchase contracts.
 - e. Service contracts.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesGeneral Overview



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PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

19-43 California Legal Forms--Transaction Guide §§ 43.102-43.109

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

[Reserved]

§§ 43.102[Reserved]



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PART III. TRANSACTION GUIDE

B. Preliminary Determinations

19-43 California Legal Forms--Transaction Guide § 43.110

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§ 43.110 Determining Source of Credit

1. Trade credit from supplier of product, equipment, or services.

NOTE:

For a new or small business, trade credit may be the only source of credit available [*see* § 43.24].

2. Credit from bank:

- a. Commercial loan.
- b. Line of credit.
- c. Letter of credit.

NOTE:

For coverage of letters of credit, see Ch. 56, *Letters of Credit and Electronic Fund Transfers*.

3. Industrial loan [*see* § 43.25].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewBanking LawBonds, Guarantees & Letters of CreditLetters of Credit



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PART III. TRANSACTION GUIDE

B. Preliminary Determinations

19-43 California Legal Forms--Transaction Guide § 43.111

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.111 Preparing for Interview With Loan Officer

1. Identify all possible sources of financing.
2. Acquire reliable data as to policies and characteristics of each source of financing.
3. Determine who will attend loan interview:
 - a. Owner of sole proprietorship.
 - b. Chief financial officer of corporation.
 - c. General partner of partnership.
 - d. Manager, officer, or member of limited liability company.
4. Have client prepare evidence of following factors by which credit risk is judged:
 - a. Client's character; that is, past record of honesty and integrity, particularly with respect to previous borrowing and payment history.

- b. Client's capacity or ability to manage, based on past business record.
 - c. Client's capital or general financial position, based on financial ratio analysis.
 - d. Value and type of collateral client can offer as security for credit.
 - e. General economic conditions at time client seeks loan.
5. Obtain and review firm's credit rating from Dun & Bradstreet, Inc., Lyons Mercantile Furniture Agency, Credit Exchange, Inc., or National Credit Office, as appropriate, to deal with any negative information appearing in credit rating.
6. Prepare thorough prefinance analysis based on considerations outlined above:
- a. Definition of firm's objectives.
 - b. Financial analysis.
 - c. Analysis of business:
 - (1) Products.
 - (2) Markets.
 - (3) Costs.
 - (4) Management.
 - (5) Personnel.
 - (6) Plant and assets.
 - (7) Purchasing.
 - (8) Research and development.

NOTE:

Most of the information listed in this section will be contained in the business plan.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

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PART III. TRANSACTION GUIDE

B. Preliminary Determinations

19-43 California Legal Forms--Transaction Guide §§ 43.112-43.119

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§§ 43.112[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

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PART III. TRANSACTION GUIDE

C. Procedural Guide

1. Seeking and Obtaining Funds

19-43 California Legal Forms--Transaction Guide § 43.120

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.120 Attending Interview With Loan Officer

1. Schedule interviews with financing sources.
2. Bring to interview business plan, financial statements, cash budget, growth plan, and other documents listed in § 43.101.
3. Formulate presentation to loan officer to demonstrate:
 - a. Need for financing.
 - b. Reasons for need.
 - c. Proposed source of repayment.

NOTE:

Avoid suggesting how financing should be arranged. That is the job of the loan officer.

4. In course of interview, expect loan officer to discuss following probable terms and conditions that would be imposed on loan, as appropriate:

- a. Interest rates.
- b. Term of loan.
- c. Repayment program.
- d. Disbursement plan.
- e. Collateral.
- f. Initial and follow-up inspections or appraisals of collateral.
- g. Assignments.
- h. Subordination of other debt or liens.
- i. Continuing guaranties or endorsements.
- j. Loan costs.
- k. Accounts to be maintained including compensatory balances or other business.
- l. Records and exhibits to be required initially and for follow-up.
- m. No split borrowing without bank's knowledge and consent.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral Overview



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C. Procedural Guide

1. Seeking and Obtaining Funds

19-43 California Legal Forms--Transaction Guide § 43.121

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.121 Determining Feasibility of Loan

1. Expect loan officer to determine by end of interview whether loan application appears feasible.

NOTE:

However, unless a business is an established customer of the bank, do not expect a final decision of approval of the loan at the time of the interview.

2. If application appears feasible to loan officer, prepare to await referral to credit department of bank for investigation, analysis, and report back to loan officer for decision.
3. If application does not appear feasible, expect loan officer to say so at conclusion of interview.

NOTE:

If the loan is not feasible, the applicant should ask why not. This will allow the applicant to correct any problem or identify another lending institution with a different policy about the matter in question.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral Overview



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C. Procedural Guide

1. Seeking and Obtaining Funds

19-43 California Legal Forms--Transaction Guide §§ 43.122-43.129

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

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§§ 43.122[Reserved]



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PART III. TRANSACTION GUIDE

C. Procedural Guide

2. Drafting and Completing Forms

19-43 California Legal Forms--Transaction Guide § 43.130

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.130 Checklist of Necessary Forms

NOTE:

A commercial loan will involve executing some or all of the following forms. Banks always require the use of their own preprinted forms.

1. Promissory note [*see* §§ 43.310-43.317].

2. Borrowing authorization:

a. If corporation, have borrower complete resolution to borrow, and affix corporate seal, if any [*see* § 43.204].

b. If partnership, have borrower execute partnership authorization to borrow [*see* § 43.205].

c. If limited liability company, have borrower execute LLC authorization to borrow [*see* § 43.205; *see also* Ch. 12C, *Limited Liability Companies*].

3. Subordination agreement, if necessary [*see* § 43.230].

4. Authorization to pay proceeds of note; lender will obtain signature of borrower if proceeds are disbursed to one of several makers, credited to account of one of several makers, paid to someone other than maker, or paid in cash.
5. Security or loan agreement [*see* §§ 43.131, 43.132].
6. Secured transaction filings [*see* Ch. 42, *Secured Transactions*].
7. Loan application and financial statement [*see* §§ 43.200-43.203].
8. Assignment of insurance policies [*see* §§ 43.270-43.273].
9. Assignment of probate interest [*see* § 43.300].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesGeneral Overview



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2. Drafting and Completing Forms

19-43 California Legal Forms--Transaction Guide § 43.131

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.131 Drafting Loan Agreement

NOTE:

In most secured loan situations, the parties will find a simple security agreement sufficient for their purposes; these are executed on bank-supplied forms [*see* § 43.132]. On the other hand, loan agreements are detailed, are drafted on an ad hoc basis, and, generally result from negotiations between the parties. Typically, they will contain provisions relating to the matters indicated here.

1. Loan terms.
2. Security in form of agreement to issue lender debentures or warrants.
3. Collateral statement.
4. Conditions and borrower's obligations.
5. Warranties by borrower.
6. Affirmative covenants of borrower.

7. Negative covenants of borrower.
8. Security agreement provisions.
9. Default provisions.
10. General provisions concerning notice, cumulative rights, assignment, construction, and severability.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)General Overview



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2. Drafting and Completing Forms

19-43 California Legal Forms--Transaction Guide § 43.132

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.132 Executing Security Agreement

1. Inventory or flooring security agreement:

- a. Inventory loan security agreement typically used by banks [*see* § 43.282].
- b. Flooring security agreement [*see* Ch. 47, *Automotive Financing and Vehicle Leasing*].
- c. Agreement grants lender security interest so that it may attach to collateral enabling lender to perfect security interest.

NOTE:

The agreement should use a phrase such as "borrower grants to lender security interest in following property" [*see* *Com. Code* § 9203(b)(3)(A); *see also* Ch. 42, ***Secured Transactions***].

- d. Ensure that agreement permits borrower to possess and sell inventory if lender has floating lien [*see* *Com. Code* § 9204].
- e. Avoid agreement providing for secured party retaining physical control of inventory under field warehousing arrangement.

NOTE:

In field warehousing, perfection may be had by possession of the document (negotiable or nonnegotiable) or by filing [*see Com. Code §§ 9312, 9313*]. If the agreement provides for field warehousing, the debtor's attorney should attempt to protect the debtor by providing against filing.

- f. Cover after-acquired property by including phrase "all inventory now owned or hereafter acquired."
- g. Define proceeds to specify exactly what is included, such as insurance proceeds, returns, and repossessions [*see Com. Code §§ 9102(a)(64), 9315*].
- h. Cover future advances, using phrase such as "the security interest granted in this security agreement is to secure all obligations of borrower to lender of every kind, due or to become due, now existing or hereafter arising."
- i. Ensure that agreement constitutes binding commitment to make future advances.

NOTE:

When there is no outstanding secured obligation and no commitment to make advances or incur obligations, the debtor may demand a termination statement from the lender, providing that the lender no longer claims a security interest [*see Com. Code § 9513*].

- j. Limit description of collateral to avoid endangering debtor's use of other collateral to obtain other credit.
- k. Purchase money considerations [*see Com. Code § 9324*]:

- (1) Purchase money seller obtains priority over inventory lender by filing before debtor possesses goods.

- (2) Seller must give notice of interest to inventory financier.

- (3) Inventory security agreement may prohibit such liens or require lender's prior approval.

- (4) Borrower should attempt to include agreement permitting such liens to facilitate trade credit.

- l. Financing commingled goods [*see Com. Code §§ 9335 (accessions), 9336 (priority in commingled goods)*]:

- (1) Seller-secured parties should resolve priority problems by separate agreement.

- (2) Subordination agreements are permitted [*see Com. Code § 9339; see also § 43.230*].

- 2. Equipment loan security agreement [*see § 43.283*]:

- a. Describe equipment in following manner:

- (1) Describe equipment with particularity if debtor will later seek financing for other equipment; or

- (2) Describe equipment generally as "all equipment now owned or hereafter acquired" if debtor will not later seek other financing.

- b. Include purchase money considerations [*Com. Code § 9324(a)*]:

(1) Lender may require loan proceeds to be paid by it directly to seller; or

(2) Lender may include provision by which borrower agrees to purchase described equipment only.

c. Financing existing equipment involves peril to lender that preexisting goods or services liens have priority; therefore, security agreement should include covenant that there are no such liens [*see Com. Code § 9333*].

d. Provide for dilution or diminution of interest through accessions [*see Com. Code §§ 9335, 9336*]:

(1) Debtor may wish freedom to install replacement parts or like; or

(2) As with liens, lender may wish to require that debtor keep equipment free of other security interests or encumbrances.

e. Include provisions covering equipment as fixture [*see Com. Code § 9334*]:

NOTE:

Equipment may be affixed to real estate without causing any subordination of the lender's purchase money security interest in the equipment if the security interest is perfected by a fixture filing before the goods become fixtures or within 20 days after the goods become fixtures [*Com. Code § 9334(d)*; *see Com. Code §§ 9310* (when filing is required to perfect security interest), 9501 (filing office), 9502 (financing statement)].

(1) Generally, lender will require provision stating that debtor will not affix equipment to real estate, or default will result.

(2) Lender may require subordination agreement from real estate secured party [*see § 43.230*].

f. Require debtor to pay promptly all taxes assessed.

g. Require debtor to avoid commingling, sale, or disposition of collateral.

h. Provide that debtor is to keep collateral in good condition and repair except for reasonable wear and tear.

i. Permit lender to inspect at reasonable times.

j. Permit lender to pay taxes, encumbrances, insurance costs; reimbursable to lender.

k. Define proceeds to include insurance payments occasioned by loss or damage to collateral.

l. Include provisions relating to movable equipment [*see Com. Code §§ 9301, 9303*]:

(1) Warranty concerning location.

(2) Require debtor to notify lender if moved.

m. Specify which acts other than failure to pay constitute default.

n. Specify remedies:

- (1) Provide for notice to debtor of sale.
- (2) Provide for or avoid provision for acceleration on default.
- (3) Specify repossession procedures.
- (4) Provide for removal of fixtures.
- (5) Provide for sale of perishables or liability therefor.
- (6) Specify procedures to be applicable on public or private sale.
- (7) Provide for disposition of sale proceeds.
- (8) Limit or cover debtor's liability for attorneys' fees and other legal expenses.

o. Waive debtor's defenses against assignees [*see Com. Code § 9403; see also § 43.243*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Security AgreementsGeneral Overview



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2. Drafting and Completing Forms

19-43 California Legal Forms--Transaction Guide § 43.133

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.133 Preparing Related Documents

1. Prepare guaranty agreement [*see* § 43.220].
2. Prepare corporate resolution authorizing corporation to act as guarantor [*see* § 43.221].
3. Prepare any surety agreement given by third parties.
4. If loan is secured by margin stock, prepare statement of purpose of loan secured by margin stock, required by Federal Reserve Board [*see* 15 U.S.C. § 78g; *see also* §§ 43.260, 43.261].
5. If appropriate, prepare corporate resolution authorizing assignment of stock as security [*see* § 43.262].
6. If appropriate, prepare assignment of borrower's government contract claims as security [*see* § 43.245].
7. If appropriate, prepare assignment of insurance policy [*see* §§ 43.270-43.273].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)General
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2. Drafting and Completing Forms

19-43 California Legal Forms--Transaction Guide §§ 43.134-43.199

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

[Reserved]

§§ 43.134[Reserved]



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CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

A. Loan Applications and Agreements

19-43 California Legal Forms--Transaction Guide § 43.200

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.200 Loan Presentation

[1] Comment

[a] Use of Form

This form is a loan presentation (also known as a summary report) of information in a loan application, used by a bank to evaluate whether to make a commercial loan. This form is not completed by the loan applicant, but rather is used as an evaluation sheet by a bank officer in deciding whether to offer credit to the applicant. This form is presented here to show the type of information banks use in evaluating the applicant's financial situation.

[b] Parts of Loan Application

An application for a commercial loan usually is divided into two parts. The presentation of loan information is not submitted by the borrower, but rather is composed by the lending officer who is arranging for the loan. The officer summarizes the major points of the desired loan based on the applicant's financial statement and on a conference with the applicant on a form such as this one. The applicant mainly is responsible for completing a financial statement and credit application [see § 43.201 (form for financial statement and credit application)] containing the information that is used by the loan officer to reach a decision on whether to approve the loan.

[c] Inapplicability of Truth in Lending Act to Commercial Credit

The bank is not required to include in this form any disclosure statement under the Truth in Lending Act regarding the cost of credit, because the Act and its implementing regulation, Regulation Z, apply only to consumer credit, not

commercial credit [*15 U.S.C. § 1603(1); 12 C.F.R. § 226.3(a)*].

[2] FORM

Loan Presentation

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Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral Overview



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A. Loan Applications and Agreements

19-43 California Legal Forms--Transaction Guide § 43.201

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§ 43.201 Personal Financial Statement and Credit Application

[1] Comment

[a] Use of Form

This form is an illustrative combined financial statement and credit application to be completed by an individual applying for a commercial loan. The information contained in this form is used by the loan officer to generate the loan presentation that is the basis for deciding whether to offer credit to the applicant [*see* § 43.200]. For an application for a business loan, see § 43.202.

[b] Completing Application

Although the loan officer is primarily responsible for creating the loan presentation to submit on the applicant's behalf, the applicant must prepare and submit a detailed financial statement and credit application for the loan officer to use in preparing the presentation. The information contained in this financial statement and credit application is key in the decision-making process in the loan supervision department in considering the applicant's application. The bank may use a commercial credit report to verify this information [*see* § 43.29].

The applicant may use an accountant or the bank's loan department to assist in completing this type of form. If an audited financial statement has already been prepared, the applicant may attach a copy of the statement to this form on submission. Regardless of how prepared, the financial statement should portray an adequate listing in balance sheet form (assets and liabilities), give a meaningful running account of income and expenditures (profit and loss), and categorize the component figures into a representative number of schedules of types of property possessed in order to

disclose the most accurate net worth of the applicant.

By filling out the application completely, the applicant will avoid the delays that will be caused by the loan officer's having to ask for additional information. The loan officer will not overlook information that is not supplied.

[2] FORM

Personal Financial Statement and Credit Application

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Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral Overview



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A. Loan Applications and Agreements

19-43 California Legal Forms--Transaction Guide § 43.202

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.202 Application for Business Loan

[1] Comment

[a] Use of Form

This form is an illustrative application for a business loan, for use when a business entity, rather than a principal of the business entity, is applying for the loan. For an illustrative commercial credit application for use by an individual, see § 43.201.

When a business entity, rather than a principal of the business entity, is applying for a business loan, a different credit application form typically is submitted to the bank. This form requires disclosure of the relation of personal worth of individuals involved in the organization structure to the assets of the enterprise as a whole. It is helpful to go beyond the basic information requests and attach any prepared audited financial statements.

[b] Completing Application

This application elicits a variety of information about the business, including the following:

- The purpose of the loan.
- The proposed repayment plan.
- The source of repayment.

- Information about collateral and guarantors.
- Business references.
- A business resume.
- Insurance information.
- Disclosures about the owners of the business.
- An agreement to allow release of credit information.

In addition, the applicant is encouraged to attach any necessary supporting financial statements and other relevant documents.

[2] FORM

Application for Business Loan

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Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral Overview



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A. Loan Applications and Agreements

19-43 California Legal Forms--Transaction Guide § 43.203

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§ 43.203 Real Estate Schedule

[1] Comment--Use of Form

This form is an attachment to either a personal or business credit application, used to list the applicant's real estate holdings. It elicits more detailed information concerning an applicant's ownership interests in real estate than the standard credit applications [see §§ 43.201, 43.202]. This information normally will be a part of any credit application.

[2] FORM

Real Estate Schedule

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Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral Overview



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19-43 California Legal Forms--Transaction Guide § 43.204

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.204 Corporate Resolution to Obtain Credit

[1] Comment--Use of Form

This form is a bank form for a certified copy of a corporate resolution authorizing a corporation to apply for commercial credit.

So that there is no question as to the authority of corporate directors, officers, or agents to obtain credit on behalf of the corporation, banks usually require that the corporation provide it with a certified copy of this type of resolution covering the borrowing powers of corporate personnel applying for loans for the corporation. To ensure that the resolution complies with its requirements, a bank will usually draft the resolution (such as this one), which is presented to the corporation for completion. Alternatively, if acceptable to the bank, the corporation could draft its own resolution for approval by the bank before adoption.

This form includes the language of the resolution, as well as space for the name, title, and signature of persons authorized to act on behalf of the corporation.

A certified copy of a corporate resolution is prima facie evidence of the adoption of the resolution [*Corp. Code § 314*]. For further coverage of corporate resolutions, see Ch. 5, *Directors' Meetings, Actions, and Resolutions* .

[2] FORM

Corporate Resolution to Obtain Credit

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

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A. Loan Applications and Agreements

19-43 California Legal Forms--Transaction Guide § 43.205

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.205 Partnership Authorization for Borrowing With Personal Guaranties

[1] Comment

[a] Use of Form

This form is an authorization for a partnership to borrow money for commercial purposes and a guaranty of the loan by the partners of the partnership. When a partnership wishes to borrow money in the name of the partnership, a bank will want to receive a formal authorization of this type signed by all the general partners for the loan.

With appropriate minor modifications in language, this form can be used as an authorization of a limited liability company to borrow money [see Ch. 12C, *Limited Liability Companies*].

[b] Purpose of Guaranty

This authorization expressly recites that the partners are all to be personal guarantors of the loan in an accompanying separate continuing guaranty arrangement. It also provides that a standard form of continuing guaranty must be attached to this form [see § 43.220]. Legally, the execution of personal guaranties by partners of partnership obligations is a redundancy that adds nothing to the obligations of the partners. Nonetheless, banks continue to require them on the theory that it reinforces in the minds of the partners their obligations.

The bank ordinarily will want to see a financial statement for each of the partners personally, as well as for the partnership business, unless the partnership financial statement is unusually adequate. For general discussion of rights and duties of a guarantor, see § 43.220[1].

[2] FORM**Partnership Authorization for Borrowing With Personal Guaranties****COMBINED AUTHORITY AND INDIVIDUAL GUARANTY FOR PARTNERSHIP**

To _____ *[name of bank]*:

To induce an extension of credit by you ("Bank") to the partnership ("Partnership") herein described, the undersigned, individually, and as members and on behalf of the Partnership, agree with Bank as follows:

The following agreements and authorizations are continuing and are to apply to all present and future indebtedness of the Partnership to Bank.

Authorization for Partnership Transactions

1. As members of the Partnership we jointly and severally represent to and agree with Bank that we are the owners of and the only ones interested in a partnership business conducted by us as partners under the firm name of _____ *[name of partnership]* at *[location]*, that the business is not incorporated or organized as a limited liability company, and that a Certificate of Fictitious or Assumed Name of the Partnership has been filed if required by law.

It is agreed that _____ *[name(s) and title(s) of person(s) authorized to take actions on behalf of partnership; indicate whether named persons may act by themselves or must act together, e.g., _____ (name) (partner), _____ (name) (partner), or _____ (name) (agent), acting individually as representatives of this Partnership, or, if persons must act together: _____ (name) (partner) and _____ (name) (partner), acting together,]* [is or are] authorized by, on behalf of, and in the name of this Partnership:

(a) To borrow money from Bank in amounts and on terms that may be agreed on between Bank and these authorized person or persons and to execute and deliver or endorse evidences of indebtedness and renewals thereof bearing interest and containing other terms and conditions as may be required by Bank;

(b) To sell to, or discount or rediscount with, Bank any and all negotiable instruments, contracts, or instruments or evidences of debt at any time held or drawn by the Partnership and to draw, endorse, transfer, and deliver the same together with guaranties of payment or repurchase thereof to Bank and that Bank be authorized and directed to pay the proceeds of the sale, discount, or rediscount as directed by the endorsement without inquiring into the circumstances of their issue or endorsement or the disposition of the proceeds;

(c) To transfer, endorse, mortgage, pledge, or hypothecate to Bank any and all of the real, personal, or other property of the Partnership as security for any moneys borrowed or for any liability incurred by the Partnership to Bank, whether matured or not matured, absolute or contingent, and wherever payable;

(d) To withdraw, receive, and receipt for and to withdraw on security agreement on the responsibility and at the risk of the Partnership and to sign orders for the withdrawal, substitution, or exchange of any property pledged, assigned, transferred, or otherwise held for the Partnership's account; such withdrawals, substitutions or exchanges may also be made by the bearer of any order, receipt, or request so signed;

(e) To make, execute and deliver in the name of the Partnership any waivers, guaranties, and agreements as may be

required by the Bank;

(f) To sign any financing statements as may be requested by Bank for the purpose of official filing; and

(g) To transact any other business with Bank incidental to the powers granted in this authorization. Bank is under no obligation to see to the application of funds in any case whatsoever. The foregoing authorizations are continuing and to remain in effect as to all transactions entered into until Bank receives at the place at which this instrument is held written notice to the contrary signed by one of us.

Individual Guaranty of Partnership Transactions

2. As individuals (not as partners), in consideration of all and any credit given by Bank to the Partnership, we hereby jointly and severally guaranty prompt payment when due of any and all indebtedness now due or that may later become due from the Partnership to the Bank, however created, or arising, or evidenced, and waive notice of the acceptance of this guaranty and of any and all indebtedness at any time covered by this guaranty. This is a continuing guaranty, and is subject to all the terms and conditions of Bank's usual form of continuing guaranty attached to and made a part of this authorization.

IN WITNESS WHEREOF, the undersigned individually and as partners have caused this instrument to be executed and delivered to Bank on _____[date].

_____ [signature]

[typed name]

Individually and as Partner

_____ [signature]

[typed name]

Individually and as Partner

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesGeneral Overview



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PART IV. FORMS

A. Loan Applications and Agreements

19-43 California Legal Forms--Transaction Guide § 43.206

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§ 43.206 Business Loan Agreement

[1] Comment

[a] Use of Form

This form is an agreement between a borrower and a bank for a business loan. When a business loan application is approved by a bank, the bank and business enterprise enter into this type of agreement to formalize the understanding of the parties.

[b] Contents of Agreement

This agreement includes all of the following clauses:

- The nature of the borrower's business.
- The purpose of the loan.
- Information about owners and officers.
- Information about minimum working capital and net worth.
- Information about assets and capital equipment.

- Subordination of existing debt.
- Collateral.
- Representations.
- Default and acceleration events.
- Insurance coverage.
- Collection costs.

Typically, this type of agreement is presented to the borrower by the bank on its own preprinted form. All of the provisions apply to the borrower unless the bank waives compliance in writing.

This form limits, among other things, the amount that may be paid to principals as salaries or otherwise. Particular attention should also be paid to the representations section to be certain that they apply in each instance.

[2] FORM

Business Loan Agreement

BUSINESS LOAN AGREEMENT

TO: _____ [*name of bank*] ("Bank")

In consideration of any financial accommodations given, or to be given or continued ("Credit") by Bank to the undersigned, _____ [*name of borrower*] ("Borrower") pursuant to the following described document(s): [*specify*] and any extensions, renewals or replacements thereof (Document(s)), Borrower hereby represents, warrants, and agrees as follows, unless Bank waives compliance in writing:

1. **Nature of Business.** Borrower is a [*organizational form of business, e.g., corporation or limited liability company or partnership or sole proprietorship*]; and the business operated by Borrower is a [*type of business, e.g., machine shop*] ("Business").

2. **Purpose of Credit.** Borrower shall maintain the Business as and in the form presently conducted and shall utilize the Credit only for the following purposes of the Business: [*specify*].

3. **Owner's or Corporate Officers' Withdrawals, Salaries, Etc.** Direct or indirect withdrawals, compensation, advances, or other distributions, from the Business, in cash or otherwise, shall not exceed the following amounts for the persons indicated, nor shall amounts in excess of the limits indicated be distributed, directly or indirectly, to any other person:

[_____ Insert name(s) of parties interested in business, such as owner, partners, or officers (generally does not include employees):]

Name	Monthly Payment
_____	\$ _____
_____	\$ _____
_____	\$ _____

4. **Minimum Working Capital and Net Worth.** In the operation of the Business, a minimum tangible net worth of \$_____ shall be maintained and current assets shall be maintained in excess of current liabilities by at least \$_____.

5. **Investment in Fixed Assets.** In the operation of the Business, no investment shall be made in fixed assets in excess of \$_____ in any 12 month period.

6. **Lease of Capital Equipment.** In the operation of the Business, no lease of personal property shall be entered into which would cause Borrower's aggregate annual rental obligations under all such leases to exceed \$_____.

7. **Subordination of Existing Debt:** The following present indebtedness of Borrower shall be subordinated to amounts owing in respect of the Credit by a Subordination Agreement satisfactory to Bank:

Name of Creditor or Borrower	Amount
_____	\$ _____
_____	\$ _____
_____	\$ _____

8. **Security for Credit.** As security for amounts owing in respect of the Credit, Borrower shall deliver to Bank the following collateral or duly executed instruments of security or guaranty, and shall comply with all terms conditions and provisions set forth in those instruments: *[specify]*.

9. Representations and Warranties; Additional Covenants.

(a) Borrower is a [corporation or partnership or limited liability company or sole proprietorship] duly organized, validly existing and in good standing under the laws of the State of _____, with its principal place of business at _____[address]. Borrower has the lawful power to own its properties and to engage in the business it conducts, and is duly qualified and in good standing as a foreign corporation (or other applicable type of business entity) in the jurisdictions wherein the nature of the business transacted by it or property owned by it makes such qualification necessary.

(b) Borrower has full power and authority (corporate and other) to borrow the sums provided for under the Credit, to execute, deliver, and perform this agreement ("Agreement"), the Document(s), and all other instruments and agreements made in connection herewith and with the Credit (the Document(s) and other instruments and agreements hereinafter called "Related Documents").

(c) All action by Borrower, its directors, stockholders, members, or partners, as applicable, that is necessary for the authorization execution, delivery, and performance of this Agreement, and of the Related Documents have been duly taken.

(d) The officers or representatives of Borrower executing the Agreement and the Related Documents are duly and properly in office or acting as representatives and are fully authorized to execute the same.

(e) The Agreement has been duly authorized, executed, and delivered by Borrower, and is a legal, valid, and binding agreement of Borrower, enforceable against it in accordance with its terms, and the Related Documents have been so authorized and, when executed and delivered, shall be similarly valid, binding and enforceable against the parties

thereto.

(f) There is no charter, bylaw, or capital stock provision of Borrower, and no provision of any indenture instrument, or agreement, written or oral, to which Borrower is a party or which governs the actions of Borrower or which is otherwise binding upon Borrower or Borrower's property, nor is there any statute, rule or regulation, or any judgment, decree, or order of any court or agency binding on Borrower or Borrower's property which would be contravened by the execution, delivery or performance of this Agreement, or of the Related Documents.

(g) There is no action, suit, or proceeding at law or in equity or by or before any governmental instrumentality or other agency now pending, or, to the knowledge of Borrower, threatened against or affecting Borrower, or any properties or rights of Borrower, which, if adversely determined, would materially impair the right of Borrower to carry on the Business substantially as now conducted or would materially adversely affect the financial condition of Borrower.

(h) No event has occurred and is continuing or would result from the extension of any part of the Credit which constitutes an Event of Default as described in Paragraph 10, or which, on the lapse of time or notice or both, would become such Event of Default.

(i) All financial statements, statements as to ownership, and other statements given to Bank by Borrower are true and correct and Borrower has full and complete title to any and all property in which Borrower may grant to Bank a security interest as security for amounts owing in respect of the Credit.

(j) Borrower shall maintain executive personnel and management for the Business satisfactory to Bank.

(k) Borrower shall keep books and records in accordance with generally accepted accounting principles, shall deliver to Bank [semi-annual or quarterly or monthly] balance sheets and income statements within _____ days of the end of each relevant fiscal period, and shall deliver an annual balance sheet and income statement within _____ days of the end of its fiscal year. Borrower shall deliver such other financial statements (in form satisfactory to Bank) and such other information as Bank may request from time to time and shall permit a representative on behalf of Bank to examine and audit the books of the Business. Borrower shall inform Bank of any litigation, claim, or other loss contingency involving Borrower, or any other circumstance, the adverse determination of which might substantially prejudice the payment of amounts due in respect of the Credit.

(l) Borrower shall pay all of its obligations when due and discharge all of its liabilities when finally determined.

(m) Borrower shall not, in the operation of the Business, incur other indebtedness for borrowed money, or act as guarantor for any indebtedness of others, or lend money, lease, sell, contract to sell or lease, transfer, mortgage, assign, hypothecate or encumber any assets except in the ordinary course of business. (For the purpose of this provision, sale of accounts receivable shall be deemed the incurring of indebtedness for borrowed money.)

(n) Borrower shall not pay any dividends on any of its outstanding shares, issue, purchase or retire any of its shares or interests, reorganize, merge or be the subject of change of control, or otherwise alter or amend its capital or partnership structure.

10. Events of Default and Acceleration. On the occurrence of any of the following events or circumstances, Bank at its election may terminate any or all commitments, and other obligations of Bank to Borrower and declare all amounts outstanding in respect of the Credit to be immediately due and payable without demand or notice to Borrower:

(a) Any failure on the part of Borrower to pay any amounts owing in respect of the Credit when due, or any breach or default by Borrower of or under any term, condition, provision, warranty; or representation made herein or in any of the Related Documents; or

(b) If Borrower or any guarantor of any part of the Credit dies, becomes insolvent, is generally not paying its debts as such debts become due, suffers a material adverse change of financial condition, or defaults with respect to any order, judgment, injunction, decree, writ or demand of any court or other public authority; or

(c) If Bank in good faith believes that the prospect of payment or performance in respect of the Credit or the Related Documents is impaired.

All amounts outstanding in respect of the Credit shall be in default, and immediately due and payable in full, and all commitments and other obligations of Bank to Borrower shall be terminated, without declaration, demand or notice to Borrower if Borrower or any guarantor of any part of the Credit:

(a) Makes an assignment for the benefit of creditors; or

(b) Is the subject of any voluntary or involuntary case commenced under the federal bankruptcy laws, as now constituted or hereafter amended, or any other proceeding under other applicable laws regarding bankruptcy, insolvency, reorganization, adjustment of debt or other forms of relief for debtors in any jurisdiction; or

(c) Consents to the appointment of a receiver, trustee, custodian or similar official for substantially all of its property or permits a decree ordering such appointment to remain in effect and unstayed for 60 days; or

(d) Is the subject of any dissolution or liquidation proceeding; or

(e) Has issued against it or its property any writ of attachment, execution, or other legal process involving an amount or risk deemed material by Bank; or

(f) Has filed or recorded against it or its property any notice of levy, notice to withhold, or other claim for taxes other than real property taxes not yet delinquent involving an amount deemed material by Bank.

The events described in this paragraph 10 shall be defaults notwithstanding the terms of any of the Related Documents.

11. Insurance.

(a) **Physical.** In connection with the Business, Borrower shall maintain, with financially sound and reputable insurers, insurance with respect to its properties and business against such casualties and contingencies, of such types (as fire and public liability, including products liability) and in such amounts as is customary in the case of businesses of established reputations engaged in the same or a similar business and similarly situated (but not less than, in the case of casualty insurance, the fair value of the insured property); and, in addition, Borrower shall take out and keep in force such other insurance in form and amounts, with companies, and against risks and liability, as Bank from time to time may require; and Borrower shall, upon request of Bank, deliver to it copies of the policies concerned, and, in any event, Borrower shall promptly notify Bank of the cancellation or modification of any insurance coverage required hereby. The policies, the proceeds of which are provided to Bank as security for amounts owing in respect of the Credit, shall have a loss payable clause in favor of Bank.

(b) **Life and Disability.** Borrower shall procure and maintain the life and/or disability insurance on each designated person, partner, or officer in the amounts set forth below:

Name	Amount	Type(s) of Insurance
_____	\$ _____	_____

_____ \$ _____

_____ \$ _____

12. Collection Costs. If Bank incurs any legal or other expense in protecting or enforcing its rights hereunder or under any of the Related Documents, in addition to any other sum which Borrower may be required to pay, Borrower shall pay to Bank the amount of such legal or other expense.

13. Miscellaneous. On transfer of all or any part of the Credit or a participation interest therein, Bank may transfer all or any part of its interest herein. The Agreement benefits Bank's successors and assigns and binds Borrower's heirs, legatees, personal representatives, and successors. Borrower may not delegate or assign any of its obligations hereunder and may not assert against any assignee of Bank any claim or defense it may have against Bank. The Agreement shall be governed by the laws of the State of California. Titles preceding any paragraph of the Agreement are for convenience only and are not a part of the Agreement. The Agreement shall continue as long as any amounts owing in respect of the Credit remain unpaid. No consent or waiver under the Agreement shall be effective unless in writing. No waiver of any breach or default shall be deemed a waiver of any breach or default thereafter occurring. Unless otherwise provided in this Agreement, all accounting terms shall be construed in accordance with generally accepted accounting principles consistently applied.

14. Additional Provisions. Borrower agrees to additional provisions as follows:

[specify any additional terms and conditions]

In WITNESS WHEREOF, Borrower has executed the agreement this _____ day of *[month]*, *[year]*.

BORROWER

[borrower's signature]

Accepted:

BANK

[typed name]

By _____

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Bank Activities General Overview Contracts Law Contract Conditions & Provisions General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

A. Loan Applications and Agreements

19-43 California Legal Forms--Transaction Guide §§ 43.207-43.219

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

[Reserved]

§§ 43.207[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

B. Guaranty Agreements

19-43 California Legal Forms--Transaction Guide § 43.220

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.220 Continuing Guaranty

[1] Comment

[a] Use of Form

This form is a continuing guaranty, for use in spelling out the rights and responsibilities of a continuing guarantor in a form apart from the loan note itself. In general, this contract recites the legal obligations of a person in the position of a continuing guarantor [see [b], *below*].

A bank may require a continuing guaranty on a note regardless of whether other security has been provided. Generally, continuing guaranties are provided by insiders of a business entity who are in fact the financial substance of the enterprise, by spouses of proprietors, and by parent companies on behalf of their subsidiaries and affiliates.

An area of particular concern is that of personal guaranties of corporate obligations. Many new or small business owners wish to conduct their business through a corporation. One of the principal advantages of using a corporation to conduct business is the limitation of personal liability. Whenever the individual enters into a personal guaranty of a corporate obligation, he or she loses the corporate advantage of limiting liability. Therefore, individual guaranties of corporate obligations should be resisted. While almost all lenders will require the guaranties, a consistent resistance will eventually result in a successful corporation not needing the guaranties to obtain credit.

The guarantor is cautioned to review any form of guaranty carefully. A guarantor should never execute a continuing guaranty without fully understanding all of its obligations.

[b] "Continuing Guaranty" Defined

A "continuing guaranty" is a guaranty relating to a future liability of a principal under successive transactions that either continue the principal's liability or periodically renew it after it has been satisfied [*Civ. Code* § 2814]. A continuing guaranty is a form of suretyship obligation subject to all provisions of suretyship law [*Civ. Code* § 2787; *see Civ. Code* § 2787 *et seq.*; *see also* [c], *below*]. For example, in a case in which the principals of a corporation executed personal guaranties of payment on the corporation's commercial lease, the court found that the guaranty agreements were continuing guaranties of performance under the lease that also applied to lease amendments [*Central Building, LLC v. Cooper* (2005) 127 Cal. App. 4th 1053, 1055, 26 Cal. Rptr. 3d 212] .

A continuing guaranty may be revoked at any time by the guarantor as to future transactions, unless there is a continuing consideration as to those future transactions that the guarantor has not renounced [*Civ. Code* § 2815].

[c] Guaranties Subject to General Law of Suretyship

The distinction between surety and guarantors has been abolished, and guaranties are subject to all provisions of law relating to suretyships [*Civ. Code* § 2787].

In general, a guaranty must be in writing, but it need not recite the consideration [*Civ. Code* § 2793]. If a guaranty is entered into at the same time as the original obligation, or with the acceptance of the original debt by the creditor, and forms a part of the consideration to the creditor, no separate consideration is required. In all other cases, there must be consideration distinct from the original obligation [*Civ. Code* § 2792].

A person may become a guarantor without the knowledge or consent of the principal [*Civ. Code* § 2788]. Unless notice of acceptance is expressly required, an offer to become a guarantor may be accepted by acting on the offer [*Civ. Code* § 2795].

For further discussion of the law of suretyship, see Ch. 79, *Suretyship, Guaranty, and Indemnity* .

[d] Guarantor's Liability

A guarantor's liability is unconditional unless the terms of the guaranty specify a condition precedent to liability [*Civ. Code* § 2806]. Once the guarantor assumes liability by signing the note or a separate agreement of guaranty, he or she is liable to the creditor immediately on the principal's default, without demand or notice [*Civ. Code* § 2807; *see Com. Code* §§ 3419, 3504]. A guarantor's liability may be equal to or less than, but not greater than, the liability of the principal [*Civ. Code* § 2809].

A guarantor remains liable, despite any personal disability of the principal, even if the disability makes the contract void as against the principal. However, a guarantor is not liable if, for any other reason, there is no liability on the part of the principal at the time of the execution of the contract, or if the liability of the principal thereafter ceases unless the guarantor assumed liability with knowledge of the existence of the defense [*Civ. Code* § 2810].

[e] Release of Guarantor

Performance, or an offer of performance, exonerates the guarantor [*Civ. Code* § 2839]. The guarantor is exonerated (except to the extent he or she is indemnified by the principal) [*see Civ. Code* § 2824] if the principal and creditor alter their original note in any way without the guarantor's consent, or if the creditor's rights and remedies against the principal are impaired or suspended. This provision does not supersede *Civ. Code* § 2822(b) [*Civ. Code* § 2819]. However, a guarantor is not exonerated by a change in the terms of the underlying indebtedness if the change is made with the guarantor's consent, which may be given in advance [*American City Bank v. Tourtelot* (1978) 86 Cal. App. 3d

585, 591, 150 Cal. Rptr. 361 ; see *State Bd. of Equalization v. Carleton* (1990) 223 Cal. App. 3d 1607, 273 Cal. Rptr. 436 (advance consent to be bound despite extensions, waivers, or modifications negotiated between creditor and debtor)]. Paragraph 4 of this form provides that the guarantor authorizes the bank to change the terms of the underlying obligation without exonerating the guarantor.

A creditor's acceptance of a lesser amount in partial satisfaction of an obligation reduces the obligation of the guarantor, but does not otherwise affect it. However, if the guarantor is liable on only a portion of an obligation and the principal provides partial satisfaction of the obligation, the principal may designate the portion of the obligation that is to be satisfied [Civ. Code § 2822(a)].

For purposes of Civ. Code §§ 2819 and 2822, an agreement by a creditor to accept from the principal debtor a sum less than the balance owed on the original obligation, with the prior consent of the guarantor and without any other change to the underlying agreement between the creditor and the principal debtor, does not exonerate the guarantor for the lesser sum agreed on by the creditor and the principal debtor [Civ. Code § 2822(b)].

A guarantor's liability is not exonerated by discharge of the principal by operation of law (such as bankruptcy) [Civ. Code § 2825], delay by the creditor in proceeding against the debtor [Civ. Code § 2823], or recovery of a judgment by the creditor [Civ. Code § 2838]. An arbitration award rendered against the principal alone is not an award against the guarantor [Civ. Code § 2855]. Nevertheless, to the extent a guarantor is indemnified by the principal, the guarantor is liable to the creditor notwithstanding any modification of the contract or release of the principal [Civ. Code § 2824].

[f] Guarantor's Rights on Principal's Default

A creditor is entitled to the benefit of everything that the guarantor has received from the debtor as security for performance of the obligation. The creditor, on the maturity of the obligation, may compel application of the security to its satisfaction [Civ. Code § 2854]. A guarantor may compel the principal to perform the obligation when due [Civ. Code § 2846]. In addition, a guarantor may compel the principal to reimburse the guarantor for any amounts the guarantor has disbursed [Civ. Code § 2847]. On satisfying the obligation of the principal, the guarantor may enforce the creditor's remedies against the principal [Civ. Code § 2848], and have all the creditor's security under the obligation, whether the guarantor was aware of the security or not [Civ. Code § 2849]. If the guarantor receives that security, he or she has the rights and duties of the formerly secured party, and the transfer of collateral is not a sale or disposition of the collateral under Division 9 of the Commercial Code relating to secured transactions [see *Com. Code* § 9618(a)(2)].

In addition, a guarantor may require a creditor to proceed against the principal, or to pursue any other remedy in the creditor's power not available to the guarantor that would lessen the guarantor's liability. If the creditor fails to pursue these remedies, the guarantor is exonerated to the extent he or she is prejudiced [Civ. Code § 2845; see *Code Civ. Proc.* § 996.440 (notice requirements)].

[2] FORM

Continuing Guaranty

CONTINUING GUARANTY

1. Obligations Guaranteed. For consideration, the adequacy and sufficiency of which is acknowledged, the undersigned ("Guarantor") unconditionally guaranties and promises (a) to pay to _____ [name of bank] ("Bank") on demand, in lawful United States money, all Obligations to Bank of _____ [name of borrower] ("Borrower") and (b) to perform all undertakings of Borrower in connection with the Obligations. "Obligations" is used in its most comprehensive sense and includes any and all debts, liabilities, rental obligations, and other obligations and liabilities of every kind of Borrower to Bank, whether made, incurred or created previously, concurrently or in the future, whether voluntary or involuntary and however arising, whether incurred directly or

acquired by Bank by assignment or succession, whether due or not due, absolute or contingent, liquidated or unliquidated, legal or equitable, whether Borrower is liable individually or jointly or with others, whether incurred before, during or after any bankruptcy, reorganization, insolvency, receivership or similar proceeding ("Insolvency Proceeding"), and whether recovery thereof is or becomes barred by a statute of limitations or is or becomes otherwise unenforceable, together with all expenses of, for and incidental to collection, including reasonable attorneys' fees.

2. Limitation on Guarantor's Liability. Although this Guaranty covers all Obligations, Guarantor's liability under this Guaranty for Borrower's Obligations shall not exceed at any one time the sum of the following (the "Guaranteed Liability Amount"): (a) \$_____ for Obligations representing principal and/or rent ("Principal Amount"); (b) all interest, fees and like charges owing and allocable to the Principal Amount as determined by Bank; and (c) without allocation in respect of the Principal Amount, all costs, attorneys' fees, and expenses of Bank relating to or arising out of the enforcement of the Obligations and all indemnity liabilities of Guarantor under this Guaranty. The foregoing limitation applies only to Guarantor's liability under this particular Guaranty. Unless Bank otherwise agrees in writing, every other guaranty of any Obligations previously, concurrently, or hereafter given to Bank by Guarantor is independent of this Guaranty and of every other such guaranty. Without notice to Guarantor, Bank may permit the Obligations to exceed the Principal Amount and may apply or reapply any amounts received in respect of the Obligation from any source other than from Guarantor to that portion of the Obligations not included within the Guaranteed Liability Amount.

3. Continuing Nature/Revocation/Reinstatement. This Guaranty is in addition to any other guaranties of the Obligations, is continuing and covers all Obligations, including those arising under successive transactions which continue or increase the Obligations from time to time, renew all or part of the Obligations after they have been satisfied, or create new Obligations. Revocation by one or more signers of this Guaranty or any other guarantors of the Obligations shall not (a) affect the obligations under this Guaranty of a non-revoking Guarantor; (b) apply to Obligations outstanding when Bank receives written notice of revocation, or to any extensions, renewals, readvances, modifications, amendments or replacements of such Obligations; or (c) apply to Obligations, arising after Bank receives such a notice of revocation, which are created pursuant to a commitment existing at the time of the revocation, whether or not there exists an unsatisfied condition to such commitment or Bank has another defense to its performance. All of Bank's rights pursuant to this Guaranty continue with respect to amounts previously paid to Bank on account of any Obligations which are thereafter restored or returned by Bank, whether in an Insolvency Proceeding of Borrower or for any other reason, all as though such amounts had not been paid to Bank: and Guarantor's liability under this Guaranty (and all its terms and provisions) shall be reinstated and revived, notwithstanding any surrender or cancellation of this Guaranty. Bank, at its sole discretion, may determine whether any amount paid to it must be restored or returned; provided, however, that if Bank elects to contest any claim for return or restoration, Guarantor agrees to indemnify and hold Bank harmless from and against all costs and expenses, including reasonable attorneys' fees, expended or incurred by Bank in connection with any such contest. No payment by Guarantor shall reduce the Guaranteed Liability Amount hereunder unless, at or prior to the time of that payment, Bank receives Guarantor's written notice to that effect. If any Insolvency Proceeding is commenced by or against Borrower or Guarantor, at Bank's election, Guarantor's obligations under this Guaranty shall immediately and without notice or demand become due and payable, whether or not then otherwise due and payable.

4. Authorization. Guarantor authorizes Bank, without notice and without affecting Guarantor's liability under this Guaranty, from time to time, whether before or after any revocation of this Guaranty, to (a) renew, compromise, extend, accelerate, release, subordinate, waive, amend and restate, or otherwise amend or change the interest rate, time or place for payments or any other terms of all or any part of the Obligations; (b) accept delinquent or partial payments on the Obligations; (c) take or not take security or other credit support for this Guaranty or for all or any part of the Obligations, and exchange, enforce, waive, release, subordinate, fail to enforce or perfect, sell, or otherwise dispose of any such security or credit support; (d) apply proceeds of any such security or credit support and direct the order or manner of its sale or enforcement as Bank, at its sole discretion, may determine; and (e) release or substitute Borrower or any guarantor or other person or entity liable on the Obligations.

5. **Waivers.** To the maximum extent permitted by law, Guarantor waives (a) all rights to require Bank to proceed against Borrower or proceed against, enforce or exhaust any security for the Obligations or to marshal assets or to pursue any other remedy in Bank's power whatsoever; (b) all defenses arising by reason of any disability or other defense of Borrower, the cessation for any reason of the liability of Borrower, any defense that any other indemnity, guaranty or security was to be obtained, any claim that Bank has made Guarantor's obligations more burdensome or more burdensome than Borrower's obligations, and the use of any proceeds of the Obligations other than as intended or understood by Bank or Guarantor; (c) all presentments, demands for performance, notices of nonperformance, protests, notices of protest, notices of dishonor, notices of acceptance of this Guaranty and of the existence or creation of new or additional Obligations, and all other notices or demands to which Guarantor might otherwise be entitled; (d) all conditions precedent to the effectiveness of this Guaranty; (e) all rights to file a claim in Connection with the Obligations in an Insolvency Proceeding filed by or against Borrower; (f) all rights to require Bank to enforce any of its remedies; and (g) until the Obligations are satisfied or fully paid, with such payment not subject to return, (i) all rights of subrogation, indemnification or reimbursement, (ii) all rights of recourse to tiny assets or property of Borrower, or to any collateral or credit support for the Obligations, (iii) all rights to participate in or benefit from any security or credit support Bank may have or acquire, and (iv) all rights, remedies and defenses Guarantor may have or acquire against Borrower. Bank may foreclose, either by judicial foreclosure or by exercise of power of sale, any deed of trust which secures any Obligations, and even though such foreclosure or exercise may destroy or diminish Guarantor's rights against Borrower, Guarantor shall remain liable for any part of the Obligations remaining unpaid after foreclosure.

6. **Guarantor to Keep Informed.** Guarantor warrants having established with Borrower adequate means of obtaining, on an ongoing basis, such information as Guarantor may require concerning all matters bearing on the risk of nonpayment or nonperformance of the Obligations. Guarantor assumes sole, continuing responsibility for obtaining such information from sources other than from Bank. Bank has no duty to provide any information to Guarantor until Bank receives Guarantor's written request or specific information in Bank's possession and Borrower has authorized Bank to disclose such information to Guarantor.

7. **Subordination.** All obligations of Borrower to Guarantor which presently or in the future may exist ("Guarantor's Claims") are hereby subordinated to the Obligations. At Bank's request, Guarantor's Claims will be enforced and performance thereon received by Guarantor only as a trustee for Bank, and Guarantor will promptly pay over to Bank all proceeds recovered for application to the Obligations without reducing or affecting Guarantor's liability under other provisions of this Guaranty.

8. **Security.** To secure Guarantor's performance under this Guaranty, other than for payment of Obligations which are subject to the disclosure requirements of the United States Truth in Lending Act, Guarantor grants Bank a security interest in all monies, general and special deposits, instruments and other property of Guarantor at any time maintained with or held by Bank and all proceeds of the foregoing.

9. **Authorization.** If Borrower is a corporation, partnership or other entity, Bank need not inquire into or verify the powers of Borrower or authority of those acting or purporting to act on behalf of Borrower, and this Guaranty shall be enforceable with respect to any Obligations Bank grants or creates in reliance on the purported exercise of those powers or authority.

10. **Assignments.** Without notice to Guarantor, Bank may assign the Obligations and this Guaranty in whole or in part, and may disclose to any prospective or actual purchaser of all or part of the Obligations any and all information Bank has or acquires concerning Guarantor, this Guaranty and any security for this Guaranty.

11. **Counsel Fees and Costs.** The prevailing party shall be entitled to attorneys' fees (including a reasonable allocation for Bank's internal counsel) and all other costs and expenses which it may incur in connection with the enforcement or preservation of its rights under, or defense of, this Guaranty or in connection with any other dispute or proceeding

relating to this Guaranty whether or not incurred in any Insolvency Proceeding, arbitration, litigation or other proceeding.

12. Married Guarantors. By executing this Guaranty, a Guarantor who is married agrees that recourse may be had against his or her separate and community property for all his or her obligations under this Guaranty.

13. Multiple Guarantors/Borrowers. When there is more than one Borrower named herein or when this Guaranty is executed by more than one Guarantor, then the words "Borrower" and "Guarantor", respectively, shall mean all and any one or more of them, and their respective successors and assigns, including debtors-in-possession and bankruptcy trustees; words used herein in the singular shall be considered to have been used in the plural where the context and construction so requires in order to refer to more than one Borrower or Guarantor, as the case may be.

14. Arbitration.

(a) **Mandatory Arbitration.** Any controversy or claim between or among the parties, including but not limited to those arising out of or relating to this Guaranty, the Obligations, or any related agreements or instruments ("Subject Documents"), and also including any claim based on or arising from an alleged tort, shall be determined by arbitration in accordance with Title 9 of the United States Code and the Commercial Arbitration Rules of the American Arbitration Association ("AAA"); provided, however, that unless Bank and all parties to the Subject Documents consent to such a submission, this subparagraph 14(a) shall not apply if (i) the claim or controversy involves enforcement of this Guaranty with respect to Obligations which are incurred primarily for personal, family or household use; or (ii) the Obligations or any other obligations to Bank described in or covered by any of the Subject Documents are secured by real property. All statutes of limitation that would otherwise be applicable shall apply to any such arbitration proceeding. Judgment upon the award rendered may be entered in any court having jurisdiction.

(b) **Judicial Reference.** If the controversy or claim is not submitted to arbitration as provided and limited in subparagraph 14(a), but becomes the subject of a judicial action, any party may elect to have all decisions of fact and law determined by a reference in accordance with applicable law. If such an election is made, the parties shall designate to the court a referee or referees selected under the auspices of the AAA in the same manner as arbitrators are selected in AAA-sponsored proceedings. The referee or presiding referee of the panel shall be an active attorney or retired judge. Judgment upon the award rendered shall be entered in the court in which the proceeding commenced.

(c) **Provisional Remedies, Self-Help, and Foreclosure.** No provision of or the exercise of any rights under subparagraph 14(a) shall limit the right of any party to exercise self-help remedies such as setoff, to foreclose against any real or personal property collateral, or to obtain provisional or ancillary remedies such as injunctive relief or the appointment of a receiver from a court having jurisdiction before, during or after the pendency of any arbitration. At Bank's option, foreclosure under a deed of trust or mortgage may be accomplished either by exercise of power of sale under the deed of trust or mortgage, or by judicial foreclosure. The institution and maintenance of an action for judicial relief or pursuit of provisional or ancillary remedies or exercise of self-help remedies shall not constitute a waiver of the right of any party, including the plaintiff, to submit the controversy or claim to arbitration.

(d) **Miscellaneous.** Any arbitration questions arising under this paragraph 14 shall be governed in accordance with Title 9 of the United States Code. The provisions of this paragraph 14 shall survive any termination, amendment, or expiration of the Subject Documents unless the Bank and other parties otherwise expressly agree in writing.

15. Integration/Severability/Amendments. This Guaranty is intended by Guarantor and Bank as the complete, final expression of their agreement concerning its subject matter. It supersedes all prior understandings or agreements with respect thereto and may be changed only by a writing signed by Guarantor and Bank. No course of dealing, or parole or extrinsic evidence shall be used to modify or supplement the express terms of this Guaranty. If any provision of this Guaranty is found to be illegal, invalid or unenforceable, that provision shall be enforced to the maximum extent

permitted, but if fully unenforceable, that provision shall be severable, and this Guaranty shall be construed as if that provision had never been a part of this Guaranty, and the remaining provisions shall continue in full force and effect.

16. Joint and Several Obligations. If more than one Guarantor signs this Guaranty, the obligations of each Guarantor under this Guaranty are joint and several, and independent of the Obligations and of the obligations of any other person or entity. A separate action or actions may be brought and prosecuted against any one or more guarantors, whether action is brought against Borrower or other guarantors of the Obligations, and whether Borrower or others are joined in any such action.

17. Notice. Any notice, including notice of revocation, given by any party under this Guaranty shall be effective only upon its receipt by the other party and only if (a) given in writing and (b) personally delivered or sent by United States mail, postage prepaid, and addressed to Bank or Guarantor at their respective addresses for notices indicated below. Guarantor and Bank may change the place to which notices, requests, and other communications are to be sent to them by giving written notice of that change to the other.

18. California Law to Apply. Subject to paragraph 14 of this Guaranty, this Guaranty shall be governed by and construed according to the laws of California, and Guarantor submits to the non-exclusive jurisdiction of the state or federal courts in California.

Executed on _____[date].

Guarantor acknowledges having received a copy of this Guaranty and having made each waiver contained in this Guaranty with full knowledge of its consequences.

BANK

_____ [name of bank]

By _____ [typed name and title]

Address for Notices to Bank:

ATTN: _____

GUARANTOR

_____ [name of guarantor]

By _____ [typed name and title]

Address for Notices to Guarantor:

ATTN: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewContracts LawTypes of ContractsGuaranty Contracts



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

B. Guaranty Agreements

19-43 California Legal Forms--Transaction Guide § 43.221

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.221 Corporate Resolution to Guaranty Obligations of Third Party

[1] Comment--Use of Form

This form is an illustrative bank form for a certified copy of a corporate resolution authorizing the corporation to guaranty the obligations of a third party.

So that there is no question as to the authority of corporate directors, officers, or agents to guaranty the obligations of a third party (typically a subsidiary or affiliate of the corporation or a major supplier or customer), a bank usually requires that the corporation provide it with a certified copy of this type of resolution covering the continuing guarantee powers of corporate personnel. To ensure that the resolution complies with its requirements, a bank usually will draft the resolution (such as this one), which is presented to the corporation for completion. Alternatively, the corporation can draft its own resolution for approval by the bank before adoption, if the bank is willing to accept such a form and the form complies with the bank's requirements.

This form includes the language of the resolution, as well as space for the name, title, and signature of persons authorized to act on behalf of the corporation.

A certified copy of a corporate resolution is prima facie evidence of the adoption of the resolution [*Corp. Code* § 314]. For further coverage of corporate resolutions, see Ch. 5, *Directors' Meetings, Actions, and Resolutions*.

[2] FORM

Corporate Resolution to Guaranty Obligations of Third Party

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsDirectors & OfficersScope of AuthorityGeneral OverviewContracts LawTypes of ContractsGuaranty Contracts



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

B. Guaranty Agreements

19-43 California Legal Forms--Transaction Guide §§ 43.222-43.229

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

[Reserved]

§§ 43.222[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

C. Subordination Agreements

19-43 California Legal Forms--Transaction Guide § 43.230

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.230 Subordination of Third Party Creditor's Interest to Bank Loan

[1] Comment

[a] Use of Form

This form is an agreement providing for the subordination of a third party creditor's interest to a bank loan [see [b], *below*].

[b] Operation of Subordination Agreement

The agreement of a borrower's third-party creditor to subordinate to the bank's loan all indebtedness due the creditor from the borrower is like a guaranty in reverse. Assuming the borrower has the funds to pay the original creditor both past obligations and any incurred in the future, the agreement assures that the borrower's funds will be used to pay off the bank rather than the creditor. In addition, the creditor will not enforce any claims or apply any of the borrower's security in any other way except as trustee for the bank. This subordination agreement provides that it may be terminated by the creditor in writing but only as to bank claims arising after revocation [see [2], 16, *below*].

This type of agreement arises only when it is in the creditor's interest that the borrower receive new financing from the bank, ostensibly to put the borrower in a better position to repay the creditor after repaying the bank debt. Frequently the subordination is given by a parent corporation that is a "paper" creditor of one of its subsidiaries or affiliates. This agreement differs from subordination of a recorded or filed security interest [see Ch. 25B, *Subordination, Assumption, and Assignment* (subordination of deeds of trust)]. Nothing in Division 9 of the Commercial Code precludes subordination by agreement by a person otherwise entitled to priority [Com. Code § 9339].

[2] FORM**Subordination of Third Party Creditor's Interest to Bank Loan****SUBORDINATION AGREEMENT**

("Agreement")

TO: _____ [name of bank]
 _____ [address]

The undersigned, _____ [name of creditor] ("Creditor"), is interested in the financial success of _____ [name of debtor] ("Debtor") and acknowledges that _____ [name of bank] ("Bank") has entered or is presently intending to enter into certain financing arrangements with Debtor. Creditor agrees that the financing arrangements between Bank and Debtor are in Debtor's and Creditor's best interests, and in order to induce Bank to enter into or continue those financing arrangements, Creditor agrees as follows:

1. Obligations. The term "Obligations" is used in this Agreement in its broadest and most comprehensive sense, and shall mean all present and future indebtedness of Debtor which may be, from time to time, incurred by Debtor, including, but not limited to, any negotiable instruments evidencing the same, all guaranties, debts, demands, monies, indebtedness, liabilities and obligations owed or to become owing, including interest, principal, costs, and other charges, and all claims, rights, causes of action, judgements, decrees, remedies, security interests, or other obligations of any kind whatsoever and howsoever arising, whether voluntary, involuntary, absolute, contingent, direct, indirect, or by operation of law.

2. Creditor Obligations. The term "Creditor Obligations" shall mean all Obligations owing at any time by Debtor to Creditor.

3. Subordination of Creditor Obligations. Except as provided in Paragraph 5, below, the Creditor Obligations are hereby subordinated and subject, in the manner and to the extent described below, to any and all Obligations owed by Debtor to Bank, including, but not limited to, Obligations arising pursuant to any agreements between Bank and Debtor, now or hereafter existing, whether matured or not ("Bank Obligations"), so long as any Bank Obligations shall remain unpaid, in whole or in part, or Bank are committed or otherwise obligated to extend credit to Debtor.

4. Limitation on Action by Creditor. As long as any of the Bank Obligations remains unpaid, in whole or in part, or so long as Bank is committed or otherwise obligated to extend credit to Debtor, Creditor agrees that, except to the extent that payments under the Creditor Obligations are permitted under Paragraph 5, below, Creditor shall not do any of the following:

- (a) Collect, or receive payment upon, by setoff or in any other manner, all or any portion of the Creditor Obligations now or hereafter existing;
- (b) Sell, assign, transfer, pledge, or give a security interest in the Creditor Obligations (except subject expressly to this Agreement);
- (c) Declare or in any other manner find or hold Debtor in default under the Creditor Obligations;
- (d) Enforce or apply any security now or hereafter existing for the Creditor Obligations;

(e) Commence, prosecute or participate in any administrative, legal, or equitable action against Debtor concerning the Creditor Obligations;

(f) Join in any petition for bankruptcy, assignment for the benefit of creditors, or creditors' agreement;

(g) Take, maintain or enforce any lien or security which is senior to Bank's interest in any property, real or personal, to secure the Creditor Obligations; or

(h) Incur any obligation to, or receive any loans, advances, dividends, payments of any kind or gifts from, Debtor.

5. Employment Compensation. Notwithstanding the preceding paragraph, as long as Debtor has made each and every payment of principal and interest due and owing to Bank, is not in default under any of Debtor's agreements with Bank, and none of the following payments would cause such default, then (a) Creditor shall be entitled to receive regularly scheduled payments of principal and interest (i.e., not a prepayment or a payment resulting from acceleration) on the Creditor Obligations not exceeding \$_____ per _____; and (b) Creditor shall be entitled to receive any and all employment compensation (regular salary, reasonable bonuses, and reimbursement for actual and necessary business expenses) which is or may be due to Creditor from Debtor; provided, however, that the aggregate amount of all payments made as employment compensation from Debtor to Creditor shall not exceed, during any fiscal year of Debtor, the sum of \$_____.

6. Priority of Obligations. Except as otherwise expressly agreed to herein, all of the Bank Obligations now or hereafter existing shall be first paid by Debtor before any payment shall be made by Debtor on the Creditor Obligations. This priority of payment shall apply at all times until all of the Bank Obligations have been repaid in full. In the event of any assignment by Debtor for the benefit of Debtor's creditors, any bankruptcy proceedings instituted by or against Debtor, the appointment of any receiver for Debtor or Debtor's business or assets, or any dissolution or other winding up of the affairs of Debtor or of Debtor's business, and in all such cases, the officers of Debtor and any assignee, trustee in bankruptcy, receiver, or other person or persons in charge, respectively, are hereby directed to pay to Bank the full amount of the Bank Obligations before making any payments to Creditor.

7. Promissory Note. Creditor agrees that if part or all of the Creditor Obligations are evidenced, now or in the future, by a promissory note or other instrument, Creditor shall place or cause to be placed on its face a legend stating that the payment thereof is subject to the terms of this Agreement and is subordinate to the payment of all of the Bank Obligations. Creditor agrees to deliver to Bank a certification in form requested by Bank; and, at any time during the term of this Agreement, at the Bank's request, to deliver the original promissory note or instrument to Bank. Creditor agrees to mark all books of account in a manner that will indicate that payment thereof is subordinated pursuant to the terms of this Agreement. Creditor agrees to execute any recordable subordination agreements, financing statement amendments or other documents reasonably required by Bank to provide notice to others of this Agreement, and agrees to the recording of any such documents as Bank may require.

8. Bank's Power to Deal with Obligations. Creditor agrees that Bank shall have absolute power and discretion, without notice to Creditor, to deal in any manner with the Bank Obligations, including interest, costs and expenses payable by Debtor to Bank, and any security and guaranties therefor, including, but not limited to, release, surrender, extension, renewal, acceleration, compromise, or substitution. Creditor hereby waives and agrees not to assert against Bank any rights which a guarantor or surety could exercise; but nothing in this Agreement shall constitute Creditor a guarantor or surety. Creditor hereby waives the right, if any, to require that Bank marshal, or otherwise proceed to dispose of or foreclose upon, collateral Bank may have in any manner or order.

9. Bank's Power to Discontinue Credit. If, at any time hereafter, Bank, in its own judgement, shall determine to discontinue the extension of credit to or on behalf of Debtor, Bank may do so. This Agreement, the obligations of Creditor owing to Bank, and Bank rights and privileges hereunder shall continue until payment in full of all of the Bank

Obligations owing to Bank by Debtor notwithstanding any action or non-action by Bank with respect to the Bank Obligations or with respect to any collateral therefor or any guaranties thereof. All rights, powers and remedies hereunder shall apply to all past, present and future Bank Obligations, including, under successive transactions, any of which may continue, renew, increase, decrease or from time to time create new Bank Obligations and notwithstanding that from time to time Bank Obligations theretofore existing may have been paid in full.

10. Additional Security Interests. Creditor further agrees that in case Creditor should, contrary to Paragraph 4, above, take or receive any additional security interest in, or additional lien by way of attachment, execution, or otherwise on, any property, real or personal, or should take or join in any other measure of advantage contrary to this Agreement, at any time prior to the payment in full of all of the Bank Obligations, Bank shall be entitled to have the same vacated, dissolved and set aside by such proceedings at law, or otherwise, as Bank may deem proper, and this Agreement shall be and constitute full and sufficient grounds therefor and shall entitle Bank to become a party to any proceedings at law, or otherwise, initiated by Bank or by any other party, in or by which Bank may deem it proper to protect its interests hereunder. Creditor agrees that if Creditor violates this Agreement, Creditor shall be liable to Bank for all losses and damages sustained by Bank by reason of that breach.

11. Receipt of Payments or Other Rights by Creditor. Except as otherwise expressly agreed to herein, if Creditor shall receive any payments, security interests, or other rights in any property of Debtor in violation of this Agreement, that payment or property shall be received by Creditor in trust for Bank and shall forthwith be delivered and transferred to Bank.

12. Warranties by Creditor. Creditor represents and warrants that Creditor has not previously subordinated the Creditor Obligations for the benefit of any other party, and agrees that any such subordinations hereafter executed shall be expressly made subject and subordinate to the terms of this Agreement. Creditor further warrants having established with Debtor adequate means of obtaining, on an ongoing basis, such information as Creditor may require which may affect the ultimate satisfaction by Debtor of the Creditor Obligations. Bank shall have no duty to provide any such information to Creditor.

13. Heirs and Assigns. This Agreement shall be binding upon the successors and assigns of Creditor and shall inure to the benefit of Bank's successors and assigns.

14. Governing Law. This Agreement and all rights and liabilities of the parties hereto shall be governed as to validity, interpretation, enforcement and effect by the laws of the State of California.

15. Attorney's Fees. In the event of any dispute under this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs, whether or not a lawsuit is filed.

16. Duration. This Agreement shall remain in full force and effect until and unless Creditor delivers to Bank written notice that this Agreement has been revoked as to credit granted by bank subsequent to the delivery of that notice, but delivery of that notice shall not affect any of Creditor's obligations hereunder with respect to credit granted by Bank prior to delivery of that notice.

17. Arbitration. (a) **Mandatory Arbitration.** Any controversy or claim between or among the parties to this Agreement arising out of or relating to (i) this Agreement or any guaranties, subordination agreements, pledges or accommodation pledges, security documents and other agreements, documents and instruments of every kind relating in any way to the Bank Obligations (collectively the "Subject Documents"); (ii) any negotiations, correspondence or communications, whether or not incorporated or integrated into the Subject Documents, relating to the Subject Documents or any indebtedness evidenced thereby; or (iii) the administration or management of the Subject Documents or the credit evidenced thereby, and with respect to (i), (ii) and (iii) also including any such controversy or claim based on or arising out of an alleged tort, shall be determined by arbitration in accordance with Title 9 of the United States

Code and the Commercial Arbitration Rules of the American Arbitration Association (AAA). All statutes of limitations and waivers that would otherwise be applicable shall apply to any arbitration proceeding under this subparagraph (a). Judgment upon the award rendered may be entered in any court having jurisdiction. This subparagraph (a) shall apply only if, at the time of the proposed submission to AAA, none of the obligations to Bank described in or covered by any of the Subject Documents are secured by real property collateral or, if so secured, all parties consent to such submission.

(b) **Judicial Reference.** If the controversy or claim is not submitted to arbitration as provided and limited in subparagraph (a), but becomes the subject of a judicial action, any party may elect to have all decisions of fact and law determined by a reference in accordance with applicable state law. If such an election is made, the parties shall designate to the court a referee or referees selected under the auspices of the AAA in the same manner as arbitrators are selected in AAA-sponsored proceedings. The referee, or presiding referee of the panel, shall be an active attorney or retired judge. Judgment upon the award rendered shall be entered in the court in which such proceeding was commenced.

(c) **Provisional Remedies, Self-Help, and Foreclosure.** No provision of, or the exercise of any rights under Subparagraph 17(a), shall limit the right of any party to obtain provisional or ancillary remedies, including but not limited to injunctive relief or the appointment of a receiver, from a court having jurisdiction before, during, or after the pendency of any arbitration. The institution and maintenance of an action for judicial relief or pursuit of provisional or ancillary remedies shall not constitute a waiver of the right of any party, including the plaintiff, to submit the controversy or claim to arbitration.

(d) **Miscellaneous.** Any arbitration questions arising under this Agreement shall be governed in accordance with Title 9 of the United States Code. To the extent any terms of this Paragraph 17 conflict with any terms of the Subject Documents, the terms of this Agreement shall prevail. The provisions of this Paragraph 17 shall survive any termination, amendment, or expiration of the Subject Documents, unless Bank and other parties otherwise expressly agree in writing. Subject to the award of the arbitrator or referee, each party shall pay an equal share of the arbitrators' or referees' fees. In this regard the arbitrator or referee shall have the power to award recovery to such prevailing party of all costs and fees (including attorneys' fees and a reasonable allocation for the costs of Bank's in-house counsel), administrative fees, arbitrators' or referee's fees, and court costs, all as determined by the arbitrator or referee, as the case may be. If any provision of this Paragraph 17 is found to be illegal, invalid or unenforceable, such provision shall be fully severable, and this Paragraph 17 shall be construed as if that provision had never been a part hereof; and, the remaining provisions of this Paragraph 17 shall remain in full force and effect and shall not be affected by the illegal, invalid or unenforceable provision or by severance from this Paragraph 17.

Dated: _____

CREDITOR

_____ [name of creditor]

_____ [address]

By _____ [signature]

[typed name and title]

The undersigned, being the Debtor named in the foregoing Agreement, hereby waives its confidentiality rights with respect to this Agreement, accepts and consents to this Agreement, and agrees to be bound by all of the provisions thereof and to recognize all priorities and other rights granted thereby to _____ [name of bank] and to pay its Obligations only in accordance therewith.

Dated: _____

DEBTOR

_____ [name of debtor]

_____ [address]
By _____ [signature]
[typed name and title]

CERTIFICATION OF SUBORDINATING CREDITOR

The undersigned hereby certifies, under penalty of perjury, that the attached note is a true and correct copy of the instrument which evidences the obligations which are subordinated to _____ [name of bank] under that certain Subordination Agreement by the undersigned in favor of _____ [name of bank], dated _____, and any amendments, modifications, and supplements thereof which also subordinate those obligations, or any part thereof.

Executed at _____, California, this _____ day of _____,
_____.

Subordinating Creditor: _____ [name]
By: _____
[signature]
[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Secured Transactions (Article 9) General Overview Contracts Law Third Parties General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

C. Subordination Agreements

19-43 California Legal Forms--Transaction Guide § 43.231

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.231 Corporate Resolution to Subordinate

[1] Comment--Use of Form

This form is a illustrative bank form for a certified copy of a corporate resolution authorizing the corporation to subordinate its claims against a borrower to a bank.

Before a corporation may subordinate its claims against a borrower to a bank, the bank will require a certified copy of a resolution to the effect that the corporate action has been officially approved by the Board of Directors, with the names of the appropriate personnel who are authorized to act for the corporation. This form fulfills the bank's requirements in this regard in having the corporation subordinate its claims against the borrower to the bank. To ensure that the resolution complies with its requirements, a bank will usually draft the resolution (such as this one), which is presented to the corporation for completion. Alternatively, the corporation could draft its own resolution for approval by the bank before adoption, if the bank is willing to accept such a form and the form complies with the bank's requirements.

This form includes the language of the resolution, as well as space for the name, title, and signature of persons authorized to act on behalf of the corporation.

A certified copy of a corporate resolution is prima facie evidence of the adoption of the resolution [*Corp. Code § 314*]. For further coverage of corporate resolutions, see Ch. 5, *Directors' Meetings, Actions, and Resolutions*.

[2] FORM

Corporate Resolution to Subordinate

CERTIFIED COPY OF CORPORATE RESOLUTIONS
(TO SUBORDINATE)

I, _____ [name], hereby certify and declare to _____ [name of bank], a California banking corporation] (hereinafter "BANK"), that I am the Secretary of [subordinating corporation], a [e.g., California] corporation (hereinafter "the Corporation"), that on the _____ day of _____, the Board of Directors of the Corporation, at a properly convened meeting thereof called, noticed, and held according to all requirements of law and of the bylaws of the Corporation, properly passed and adopted resolutions, a full and accurate copy of which follows, at a meeting at which a quorum of the Board was present and voted in favor of these resolutions (or, if under the law or under the bylaws a greater than quorum attendance at that meeting or approval for these resolutions be required, then that greater attendance was had and that greater approval was voted); that these resolutions have been properly entered in the minutes of that meeting in the book of minutes of the Corporation; and that these resolutions have not been revoked, rescinded, or modified, and are now in full force and effect in the following form:

RESOLVED, that the President [or any Vice President], together with the Secretary or an Assistant Secretary [or specify other officers as appropriate] be and they are hereby authorized, empowered, and directed for and on behalf of and in the name and under the corporate seal of the Corporation and as its corporate act and deed, from time to time, to postpone or subordinate any and all debt, present or future, owing to the Corporation, and to accomplish such postponement or subordination by the execution of such instruments as may be required by _____ [name of bank] (hereinafter "BANK"), and in such a form and containing such terms and conditions as may be required by BANK (these instruments hereinafter referred to as "subordination agreements");

RESOLVED FURTHER, that all subordination agreements heretofore entered into by, or executed by, and delivered to Bank by the Corporation, together with all other existing obligations of the Corporation to BANK, are hereby expressly approved, ratified, and confirmed;

RESOLVED FURTHER, that in the event two or more resolutions of the Corporation authorize the entry into by, execution by, and delivery to BANK of subordination agreements, the provisions of those resolutions shall be deemed to be cumulative;

RESOLVED FURTHER, that a certified copy of these resolutions, certified by the Secretary or an Assistant Secretary of the Corporation, be delivered to BANK; and that these resolutions shall continue in full force and effect until written notice of their revocation by (together with a certified copy of) a resolution legally adopted by the Board of Directors of the Corporation shall have been actually received from the Corporation by BANK at its office designated and until all indebtedness and obligations by the Corporation to BANK, which indebtedness and obligations may have been incurred in connection with those subordination agreements, shall have been fully paid, satisfied, and discharged, and no such revocation, nor any receipt of any notice thereof, shall in any manner whatever affect any that indebtedness or obligation, or those subordination agreements, which (prior to actual receipt of the notice and resolution of revocation by BANK in the manner aforesaid) may have been incurred or executed as stated above;

RESOLVED FURTHER, that although the names of incumbents in designated offices may be set forth in these resolutions, that the authority hereby conferred inheres in the designated office and passes to any subsequent incumbent in those offices;

RESOLVED FURTHER, that the Secretary or an Assistant Secretary of the Corporation be and hereby is authorized and directed to certify to BANK (1) the names and specimen signatures of the persons presently incumbent in the corporate offices designated in these resolutions, and, if and when any change is made in the incumbent(s) of any such office(s), the fact of such change and the name and specimen signature of the new officer(s); and (2) the passage, adoption, and existence in full force and effect of the foregoing resolutions.

I hereby certify that the provisions of the foregoing resolutions are in conformity with the Articles of Incorporation, bylaws, minutes, and other records of the Corporation, and that the Corporation is organized and existing under the laws of the State of _____.

I further certify that the following individuals now occupy the designated offices of the Corporation and that the following specimen signatures of these individuals appearing after their titles are true and correct.

TYPE OR PRINT NAME	OFFICIAL TITLE	SIGNATURE
_____	_____	_____
_____	_____	_____
_____	_____	_____

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the Corporation, this _____ day of [month], [year].

_____ [signature of corporate secretary]

[typed name]

Secretary of _____ [name of corporation]

_____ [signature of second corporate officer, if required by bank]

[typed name]

_____ [title, e.g., President] _____ [name of corporation]

[corporate seal]

The Banking Office where this Certified Copy of Corporate Resolutions is submitted is:

_____ [branch or office of bank]

_____ [address]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Bank Activities General Overview Business & Corporate Law Corporations Directors & Officers Scope of Authority General Overview



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CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

C. Subordination Agreements

19-43 California Legal Forms--Transaction Guide §§ 43.232-43.239

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

[Reserved]

§§ 43.232[Reserved]



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PART IV. FORMS

D. Assignments of Payments

19-43 California Legal Forms--Transaction Guide § 43.240

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.240 Assignment of Savings Account or Time Deposit to Bank and Notice of Assignment

[1] Comment

[a] Use of Form

This form is an assignment of a borrower's interest in bank accounts to a lending bank as security for a loan. It provides for assignment of accounts in the lending bank as well as other banks. This form is presented by the lending bank to the borrower at the time the loan is made. This form also contains a notice of assignment, sent by the lending bank to other banks having assigned deposit accounts of the borrower.

This form of security typically will be accepted only from trusted bank clients, and care will be used to ascertain that the deposits are not held in a trustee account. Banks may easily place a "hold" on deposits of the debtor in their own possession, but must send the notice of assignment contained in this form to a different bank holding a deposit to be taken as security to protect their priority. For further discussion of assignment, see Ch. 76, *Assignment of Rights and Obligations*.

[b] Perfection of Security Interest in Bank Account

When a bank takes a security interest in a deposit account, the security interest is perfected when the bank has control of the deposit account [*Com. Code* §§ 9310(b)(8), 9312(b)(1); see *Com. Code* § 9314(a), (b) (perfection by control)]. Filing is ineffective, except as provided by *Com. Code* § 9315 with respect to proceeds [*Com. Code* § 9312, UCC Comment 5; see *Com. Code* § 9315 (secured party's rights on disposition of collateral and in proceeds)].

A secured party has control of a deposit account if any of the following conditions is satisfied [*Com. Code § 9104(a)*]:

- The secured party is the bank with which the deposit account is maintained.
- The debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the account without further consent by the debtor.
- The secured party becomes the bank's customer with respect to the deposit account.

A secured party that has satisfied any of these conditions has control, even if the debtor retains the right to direct the disposition of funds from the deposit account [*Com. Code § 9104(b)*].

A "deposit account" is a demand, time, savings, passbook, or like account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument [*Com. Code § 9102(a)(29)*].

[2] FORM

Assignment of Savings Account or Time Deposit to Bank and Notice of Assignment

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsGeneral OverviewContracts LawThird PartiesGeneral Overview



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PART IV. FORMS

D. Assignments of Payments

19-43 California Legal Forms--Transaction Guide § 43.241

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.241 Security Agreement and Assignment of Note

[1] Comment

[a] Use of Form

This form is a security agreement and assignment of a note. It is used when a lending bank has been given a security interest in a note in the possession of the borrower or a third party. This form is sent by the bank to the holder of the note to indicate that payments should be made directly to the bank, rather than to the borrower.

[b] Effect of Security Agreement

It is possible for a bank to take a security interest in a note that remains in the debtor's or another's possession. In this case, the security interest may be protected by filing, although the security interest remains perfected for 20 days without filing, when the creditor has given new value under an authenticated security agreement or has delivered the instrument to the debtor for sale or related transfers or transactions [see *Com. Code* § 9312(a), (e)-(g)]. After the 20-day period expires, perfection depends on filing a financing statement [see *Com. Code* § 9312(h)].

In the case of tangible negotiable instruments, it is advisable for the creditor to take and keep possession of the instrument. In this case, possession by or delivery to the secured party perfects the security interest without filing a financing statement [*Com. Code* § 9313(a)].

For important provisions concerning protection of associated security in real property, see Ch. 25A, *Security Interests for Real Estate Financing*.

[2] FORM**Security Agreement and Assignment of Note****SECURITY AGREEMENT AND ASSIGNMENT OF NOTE**

In consideration of any financial accommodations given, to be given or continued, the undersigned ("Assignor") grant a security interest in, deliver, indorse and assign to _____ [name of bank] ("Assignee"), its successors and assigns, the attached promissory note also described below, including but not limited to all prepayments and other moneys due and to become due thereunder, and the deed of trust referred to therein and securing it, together with all of the beneficial interest under the deed of trust and all rights accrued or to accrue under the deed of trust, and all increase in, profits and proceeds of all of the foregoing personal property (the "Collateral"). The security interest granted to Assignee secures payment of all indebtedness, obligations, and liabilities of Assignor to Assignee, except future "consumer credit" indebtedness under the federal Truth-in-Lending Act and regulations thereunder, unless the Collateral and the type of security interest acquired under this Assignment are disclosed at that time as then required by such Act and regulations, and except future obligations secured by a trust deed on real property to which California law applies, unless a separate agreement in writing states in effect that the future obligation is secured by this Assignment.

1. Warranties Regarding Collateral. Assignor warrants that no other person or entity has or claims any title, lien, or other interest in the Collateral. Assignor will defend any proceeding which may affect title to or Assignee's security interest in the Collateral or the real property securing the Collateral and will indemnify Assignee on demand against all claims, demands, and liabilities, including reasonable attorneys' fees, incurred as a result of any such proceedings. The Collateral is and will be genuine, enforceable in accordance with its terms, free from default, prepayment, defenses, and conditions precedent. All persons appearing to be obligated on the Collateral have authority and capacity to contract. Assignor will not compromise, settle, or adjust the Collateral, accept any payments from the maker(s) of the Collateral, permit any assumption of the obligations under Collateral by additional parties, or renew or extend the time of payment thereof without Assignee's prior written consent.

2. Waiver of Assignor's Rights. Assignor hereby waives any right to require Assignee to proceed against any other person or to exhaust the Collateral or to pursue any other remedy in Assignee's power, and further agrees that Assignee shall have no obligation to take action to preserve or assert any rights against prior parties with respect to the Collateral. Assignor hereby waives diligence, demand, presentment, and notice of non-payment and of non-performance with respect both to the Collateral and any obligations of Assignor secured thereby, and authorizes Assignee to grant extensions of time to the makers of the Collateral without notice to Assignor and without affecting Assignor's liability.

3. Assignee's Rights to Protect Collateral. Assignee is irrevocably appointed Assignor's attorney in fact at any time before or after default, without notice to Assignor, to obtain any insurance, discharge any lien, make any payment, and do any other act which Assignor is obligated to do under this agreement or which Assignee in good faith determines is necessary to protect the Collateral or its value, to exercise such rights as Assignor might exercise, to give notices to any persons obligated in the Collateral, to collect Collateral including proceeds, to execute and file in Assignor's name any filings, foreclosure notices, or other documents required to perfect Assignee's security interest in any Collateral or enforce the Collateral and to take any other reasonable action, all to protect and preserve the Collateral and Assignee's rights. No action or inaction by Assignee, nor any term of this agreement, shall relieve Assignor of the obligation to do any of the foregoing acts or impose on Assignee any such obligations. Assignor will immediately pay all Assignee's costs, and indemnify Assignee against all claims, demands, and liabilities including reasonable attorneys' fees, incurred in exercising any of the foregoing rights or by reason of being made a party to or intervening in any action or proceeding affecting any Collateral or Assignee's rights, with interest, on each item of cost and liability from the date paid by Assignee at the annual rate provided before or after default (as the case may be) in the promissory note evidencing the indebtedness of Assignor to Assignee to which the cost or liability is related, if any, and in all other cases at the annual rate of _____ percent. Without limiting Assignee in the exercise of any of the

foregoing rights, Assignee may:

(a) Endorse, collect, and receive delivery or payment of the Collateral;

(b) Make extension agreements with respect to or affecting the Collateral, exchange it for other Collateral, release persons liable on it or security for the payment of it, compromise disputes in connection with it, and give receipts, releases and satisfactions, either in the name of Assignor or Assignee.

4. Events of Default and Acceleration. On the occurrence of any of the following events or circumstances, Assignee shall have the right to terminate any or all commitments and other obligations of Assignee to Assignor and to declare all or any part of the obligations secured by this Assignment immediately due and payable without demand or notice to Assignor:

(a) Any default in the payment or performance of any indebtedness, obligation, or liability secured by this Assignment pursuant to the first paragraph of this Agreement; or

(b) The untruth of any representation, or breach of any warranty, or agreement contained in this Assignment or in any other writing regarding the obligations secured by this Assignment or the Collateral; or

(c) Any failure in the payment or performance of any term or condition of the Collateral by any party obligated thereon; or

(d) Any sale, conveyance, lease, succession, assignment, or other transfer of all or any part of the real property securing the Collateral which Assignee in good faith believes will impair the prospect of payment or performance of any term or condition of the Collateral.

5. Rights on Default. Upon the occurrence of any of the events, circumstances, or defaults set forth in the preceding paragraph, Assignee shall have all rights provided on default in the California Uniform Commercial Code and otherwise available by law, may sue for the full amount of or all of the indebtedness, obligations, and liabilities secured by this Assignment without proceeding against any or all of the Collateral or sue for any deficiency remaining after disposition of any or all of the Collateral, may without notice or demand setoff and apply toward payment of and obligations owing to Assignee any property under Assignee's possession or control, and may sell in any commercially reasonable manner in one or more transactions any or all of the Collateral. Sales for cash or on credit, at public auction or private sale, are all commercially reasonable. It shall be commercially reasonable if the Collateral is sold for cash without warranties of any kind by Assignee at public auction to one purchaser with a degree of sophistication then required for a purchaser at a private offering under the Securities Act of 1933 and with a representation of investment intent and appropriate legend consistent with that Act. In addition, Assignee shall notify three mortgage brokers in the county where the real property encumbered by the Collateral is located of the public sale at least 30 days prior thereto but need take no other action to obtain bidders at the sale. Assignor will also immediately pay Assignee its reasonable expenses of preparing for sale and selling the Collateral and Assignee's reasonable attorney's fees and legal expenses relating to any of the foregoing actions or to the enforcement of this Assignment.

6. Multiple Borrowers. If more than one Assignor signs this Assignment, their liability under this Assignment is joint and several. Any Assignor who is a married person agrees to recourse against his or her separate property for all obligations secured by this Assignment. The breach of any provisions of this agreement by any Assignor shall be a breach by all Assignors unless waived by Assignee. Discharge of any Assignor (except for full payment) or any extension, forbearance, change of rate of interest, or acceptance, release or substitution of Collateral or any impairment or suspension of Assignee's rights against Assignor, or any transfer of Assignor's interest to another, shall not affect the liability of any other Assignor. All Assignors waive all of the following:

- (a) Any right to require Assignee to proceed against any Assignor before any other, or to pursue any other remedy;
- (b) Any right to the benefit of or to direct the application of any Collateral until all obligations secured by this Assignment shall have been paid; and
- (c) Any right of subrogation to Assignor until all such obligations shall have been paid or performed in full.

7. Modification and Waiver. Assignee's acceptance of partial or delinquent payments or failure of Assignee to exercise any right shall nor constitute a waiver of any of the obligations of Assignor or any right of Assignee, modify this agreement, or waive any other similar default. No waiver of any right or power of Assignee or modification of this agreement shall be valid unless in writing and signed by Assignee.

8. Assignment. On transfer of all or any part of the obligations secured by this Assignment or a participation interest therein, Assignee may transfer all or any part of or interest in the Collateral. Assignee may deliver all or any part of the Collateral to any Assignor at any time. Any such transfer or delivery shall discharge Assignee from all liability and responsibility with respect to the Collateral transferred or delivered. This agreement benefits Assignee's successors and assignees and binds Assignor's heirs, legatees, personal representatives, successors, and assignees. Assignor agrees not to assert against any assignee of Assignee any claim or defense that Assignor may have against Assignee.

9. Miscellaneous. Time is of the essence of this agreement and all its provisions. Assignor will execute any additional agreements, assignments, notices, filings, or documents reasonably required by Assignee to effectuate this agreement or to preserve and protect any Collateral and Assignee's rights. This agreement shall be governed by the laws of the State of California and, unless otherwise defined or provided herein, all words used in this agreement have the meanings given them in the California Uniform Commercial Code. Titles preceding any paragraph of this agreement are for convenience only and are not part of this agreement. Any written notice under this Assignment and any obligations secured by this Assignment shall be treated as given to Assignor when personally delivered to Assignor or when placed in the United States mails, first class postage prepaid, addressed to Assignor at the address shown below, or at any address of which Assignor has notified Assignee in writing, or at the address at which Assignee customarily communicates with Assignor. Unless separate notice is requested in writing by any Assignor, notice given to any Assignor shall constitute notice to all Assignors.

Each Assignor acknowledges receipt of a copy of this Assignment.

Dated: _____

ASSIGNOR

_____ [name of assignor]

By: _____ [signature]

[typed name and title]

Address of principal place of business, or if none, residence:

Date of Assigned Note: _____

Original Principal Amount: _____

Current Balance of Principal: _____

Interest Paid To: _____

Maker of Assigned Note: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Security AgreementsGeneral OverviewCommercial Law
(UCC)Secured Transactions (Article 9)Third Party RightsAssignments



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

D. Assignments of Payments

19-43 California Legal Forms--Transaction Guide § 43.242

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.242 Notice to Borrower's Contract Debtor of Assignment of Contract**[1] Comment--Use of Form**

This form is a notice to a borrower's contract debtor of assignment of the contract to a bank. It is used by a bank to notify an account debtor who is obligated on an account, chattel paper, or general intangible [*Com. Code § 9102(a)(3)* ("account debtor" defined)] that the underlying paper has been assigned to the bank. The term "chattel paper" includes records that evidence both a money obligation and a security interest in or lease of goods, as well as a security interest in or lease of specific goods and either software used in the goods or a license of software used in the goods [*Com. Code § 9102(a)(11)*]. An "account" includes a right to payment of a monetary obligation for various types of property and services, whether or not earned by performance, that are not evidenced by, among other things, an instrument or chattel paper [*see Com. Code § 9102(a)(6)*].

[2] FORM**Notice to Borrower's Contract Debtor of Assignment of Contract**

To: _____

We are enclosing a General Security Agreement dated _____, executed by
 _____[name] granting us a security interest in the contract between yourselves and
 _____[name] as therein described.

A financing statement has been filed with the Secretary of State in accordance with the requirements of the California

Commercial Code.

Please make all payments on the aforementioned contract directly to _____ Bank,
_____ Branch, _____, California.

Please acknowledge receipt of this notice by signing and returning the enclosed copy of this letter.

Sincerely yours,

_____ Bank
By _____ [signature]
[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Third Party RightsGeneral OverviewCommercial Law
(UCC)Secured Transactions (Article 9)Third Party RightsBank Rights



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§ 43.243 Notice to Borrower's Debtor of Assignment of Accounts

[1] Comment

[a] Use of Form

This form is a notice to a borrower's debtor that the borrower's rights to payments on account from the debtor have been assigned to a lending bank. The bank will send this form to notify the borrower's debtor that all payments arising out of the subject matter of these accounts and due the bank's debtor should be paid directly to the bank.

[b] Assignment of Account

Under Division 9 of the Commercial Code governing secured transactions, an "account" includes a right to payment of a monetary obligation for various types of property and services, whether or not earned by performance, that are not evidenced by, among other things, an instrument or chattel paper [*see Com. Code § 9102(a)(6)*].

An agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor generally is enforceable by an assignee that takes an assignment that satisfies all of the following conditions [*Com. Code § 9403(b)*]; *see Com. Code § 9403(c)* (exception for defenses of type that may be asserted against holder in due course of negotiable instrument under *Com. Code § 3305(b)*):

- It is taken for value.
- It is taken in good faith.

- It is taken without notice of a claim of a property or possessory right to the property assigned.
- It is taken without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under *Com. Code § 3305(a)* (governing enforcement of obligations; defenses; claims in recoupment).

This general rule is subject to law other than Division 9 of the Commercial Code that establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9403(e)*; see *Com. Code § 9403(f)*] (this section does not displace other law that gives effect to non-consumer account debtor's agreement not to assert defenses against assignee, even if agreement would not qualify under *Com. Code § 9403(b)*).

[2] FORM

Notice to Borrower's Debtor of Assignment of Accounts

NOTICE OF ASSIGNMENT

Date: _____
 Debtor: _____
 Address: _____

Subject Matter

Description: _____
 Unpaid balance: \$ _____
 Deposit or prepayment: \$ _____
 Interest paid to: _____
 Next payment due: _____

To: _____

This is to notify you that the above-named debtor has irrevocably assigned to or provided a security interest for _____[*name*] Bank in all moneys and credits, either as proceeds or otherwise, now and hereafter becoming due, owing, or payable by you to debtor arising in connection with the above-referenced subject matter, and you are requested to make all payments thereon to this Bank at the address indicated below.

In order that our records may be complete, please sign and return the enclosed copy of this notice.

_____ [*debtor*]
 _____ [*debtor*]
 _____ Bank
 By _____
 _____ [*signature*]
 _____ [*typed name and title*]
 _____ [*address*]

ACKNOWLEDGMENT

To: _____ Bank

The undersigned acknowledges receipt of the above notice of assignment, that the above-described subject matter is correct, and advises that all moneys, credits, or proceeds are free of all setoffs, other assignments, counterclaims, or orders known to the undersigned, except as follows: _____.

Dated: _____

_____ [signature]

[typed name and title]

_____ [signature]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Third Party RightsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Third Party RightsAssignmentsCommercial Law (UCC)Secured Transactions (Article 9)Third Party RightsDefenses



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§ 43.244 Statement and Transmittal of Collections Made by Borrower Under Assignment of Accounts

[1] Comment

[a] Use of Form

This form is a transmittal form to accompany collections made by a borrower payable to a lending bank under an assignment of accounts. It is used during an interim period when a borrower has assigned accounts to a bank and has continued to receive collections from debtors after the assignment, before the debtors have received notice of the assignment from the bank [see [b], *below*].

[b] When Transmittal Form Is Needed

When a borrower assigns contracts or accounts to a bank, the borrower will often continue to receive collections from his or her own debtors after the assignment, and these collections must then be sent on to the bank. Sometimes the collections come in during the interim between the assignment and the receipt by the debtors of the notice of assignment from the bank; in other circumstances it is simply impossible or inadvisable for the debtors to be notified, and it is more convenient to let them be unaware of the assignment and to continue to pay their original creditor, the borrower. In either case, the bank can supply the assignor with a form to accompany the periodic transmittals of collections under the assigned matters.

The bank does not immediately pay down the debt, but rather deposits the money received under the assignment into a trustee account. This account represents a converted form of the security, which nonetheless should remain as security and unapplied under the terms of the loan unless arrangement has been made to repay from remittances.

[2] FORM**Statement and Transmittal of Collections Made by Borrower Under Assignment of Accounts**

Account No. _____
 Deposited for credit of _____
 Trustee Account

To: _____

Below you will find a report of collections we have made on contracts assigned to you. We enclose all original remittances received today from purchasers under these contracts, and we certify that the amounts due you and due us, as shown, are correct.

Dated: _____
 _____ [name of dealer]
 By _____ signature]
 [typed name and title]

Schedule No.	Name	Amount Due on Loan	Amount Due Company	A.B.A. Bank No.	Amount
_____	_____	\$ _____	\$ _____	_____	\$ _____
_____	_____	\$ _____	\$ _____	_____	\$ _____
_____	_____	\$ _____	\$ _____	_____	\$ _____
Totals:	_____	\$ _____	\$ _____	_____	\$ _____

Legal Topics:

For related research and practice materials, see the following legal topics:
 Commercial Law (UCC)Secured Transactions (Article 9)Third Party RightsGeneral OverviewCommercial Law
 (UCC)Secured Transactions (Article 9)Third Party RightsAssignments



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19-43 California Legal Forms--Transaction Guide § 43.245

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.245 Assignment of Borrower's Government Contract Claims to Bank

[1] Comment

[a] Use of Form

This form is an assignment of claims under a government contract. This form complies with the requirements of the federal Assignment of Claims Act of 1940 [41 U.S.C. § 15]. These assignments are also subject to requirements of Division 9 of the Commercial Code [Com. Code §§ 9310(c), 9311] regarding secured transaction filings. A copy of this form should be attached to a notice of assignment [see § 43.246] and sent to the relevant federal government agency.

This form also contains the required acknowledgment, for use by an attesting officer [see [b], below].

[b] Permissible and Prohibited Claims by Nonlenders

Claims against the United States generally may be assigned after the claims have been allowed, the amount due has been ascertained, and a warrant for payment has been issued (see the United States Assignment of Claims Act of 1908 [see 31 U.S.C. § 3727]). The transfers must be made freely and executed in the presence of at least two attesting witnesses. The assignment must recite the warrant for payment, must be acknowledged by the assignor before an officer able to take acknowledgments of deeds and must be certified by the officer. It must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transaction to the person acknowledging [31 U.S.C. § 3727].

Under the Assignment of Claims Act of 1940 [see 41 U.S.C. § 15], no contract or order may be transferred by the party

to whom the federal government gave it, and any such transfer will annul the entire contract.

[c] Permissible and Prohibited Claims by Banks and Other Financial Institutions

Under both statutes regarding the assignment of claims [*see 31 U.S.C. § 3727; 41 U.S.C. § 15*], assignments to banks or other financial institutions of payments aggregating \$1,000 or more are expressly exempted from the foregoing provisions under certain conditions. No assignment may be made when the contract itself expressly forbids an assignment. Unless expressly permitted by the contract, the assignment may not cover less than all amounts payable under the contract and not already paid, may not be made to more than one party, and may not be subject to further assignment. However, a single party may take assignment to hold as agent or trustee for multiple participants.

The assignee must file written notice of the assignment [*see § 43.246*] together with a copy of the assigning instrument (this form) with the contracting officer or head of the department or agency, the surety on any bond connected with the contract, and the disbursing officer who may be designated in the contract to make payment. An assignment is valid under either *31 U.S.C. § 3727* or *41 U.S.C. § 15* if it correctly conforms to the provisions of the specific statute, and there is no liability as to any money received on the part of the assignee to the government.

[2] FORM

Assignment of Borrower's Government Contract Claims to Bank

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Third Party RightsAssignmentsPublic Contracts
LawPerformanceAssignment & Novation



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19-43 California Legal Forms--Transaction Guide § 43.246

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.246 Notice of Assignment of Debtor's Government Contract Claims to Bank

[1] Comment--Use of Form

This form is a notice of assignment for use under an assignment pursuant to the Assignment of Claims Act of 1940 [see 41 U.S.C. § 15]. It must be sent to the appropriate federal governmental authorities along with a copy of the assignment of claims under a federal government contract [see § 43.245] when a debtor has assigned claims under the contract to a lending bank. For further discussion, see § 43.245[1].

[2] FORM

Notice of Assignment of Debtor's Government Contract Claims to Bank

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawPerformanceAssignment & Novation



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19-43 California Legal Forms--Transaction Guide §§ 43.247-43.259

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

[Reserved]

§§ 43.247[Reserved]



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E. Loans Secured by Stock

19-43 California Legal Forms--Transaction Guide § 43.260

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.260 Statement of Purpose of Loan Secured by Margin Stock--Federal Reserve Board Form U-1

[1] Comment

[a] Use of Form

This form is Federal Reserve Board Form U-1, a statement of purpose for a bank loan secured by margin stock as required by the Federal Reserve Board. "Margin stock" includes the following [12 C.F.R. § 221.2; see 12 C.F.R. § 221.7 (OTC Margin Stocks)]:

- Equity securities registered or having unlisted trading privileges on a national securities exchange.
- OTC margin stock.
- OTC securities qualified for trading in the National Market System.
- Debt securities convertible into margin stocks.
- Warrants or rights to subscribe to or purchase margin stocks.
- Shares of certain registered investment companies.

The Federal Reserve Board regulates bank loans made for the purpose of purchasing or carrying a security [see 15 U.S.C. § 78g(d)]. Whenever a bank extends credit secured directly or indirectly by any margin stock, in an amount

exceeding \$100,000, the bank must require the borrower to execute this form. The form must be signed and accepted by a duly authorized officer of the bank acting in good faith [12 C.F.R. § 221.3(c): *see* [d], *below*].

If the bank extends credit of over \$100,000 under a revolving-credit or other multiple-draw agreement secured directly or indirectly by any margin stock, this form may be executed either at the time each disbursement is made or at the time the credit arrangement is initially established [12 C.F.R. § 221.3(c)(1)]. For a discussion of the transactions exempted from the reporting requirement, *see* [c], *below*. For a complete discussion of the regulations governing bank loans secured by margin stocks, *see* Banking Law, Ch. 100, *Registration and Regulatory Requirements of the 1934 Securities Exchange Act and Other Securities Statutes* (Matthew Bender).

Special rules apply to extensions of credit by brokers and dealers [*see* 12 C.F.R. pt. 220]; other lenders are subject to restrictions similar to those applicable to banks [*see* 12 C.F.R. pt. 221; *see also* § 43.261].

[b] Restrictions on Extensions of Credit for Stock Purchases

Banks may not extend any purpose credit, secured directly or indirectly by any margin stock, in an amount that exceeds the maximum loan value of the margin stock offered as collateral [12 C.F.R. § 221.3(a)]. "Purpose credit" is any credit for the purpose, whether immediate, incidental, or ultimate, of buying or carrying margin stock [12 C.F.R. § 221.2]. The maximum loan value of any margin stock, except options, is 50 percent of its current market value [12 C.F.R. § 221.7(a)].

[c] Transactions Exempted From Coverage

Certain transactions are specifically exempted from the provisions of the Federal Reserve Board governing bank loans secured by margin stocks. A transaction is exempt, and the borrower need not complete this form, if purpose credit is extended [12 C.F.R. § 221.6]:

- To any bank.
- To any foreign banking institution.
- Outside the United States.
- To any qualified employee stock ownership plan [*see* I.R.C. § 401].
- To any "plan lender" [*see* 12 C.F.R. § 221.4], provided the bank has no recourse to any securities purchased pursuant to the plan.
- To any customer, other than a broker or dealer, to temporarily finance for the purchase or sale of securities for prompt delivery, if the credit is to be repaid in the ordinary course of business on completion of the transaction.
- Against securities in transit, if the credit is not extended to enable the customer to pay for securities purchased in an account subject to Title 12, Part 220 of the Code of Federal Regulations.
- To enable a customer to meet reasonably unforeseeable "emergency expenses" [*see* 12 C.F.R. § 221.6(h)], if the extension is supported by a statement executed by the customer and accepted and signed by a bank officer acting in good faith.

In addition, in certain specified instances, banks may extend special purpose credit to brokers and dealers without

complying with reporting and maximum loan requirements [*see 12 C.F.R. § 221.5*].

[d] Bank's Right to Rely on Borrower's Statement

This form must be signed and accepted by a duly authorized officer of the bank acting in good faith [*12 C.F.R. § 221.3(c)*]. An officer has acted in good faith if he or she is alert to the circumstances surrounding the credit transaction; if further information suggests that an inquiry is called for, he or she must investigate and be satisfied that the statement is truthful [*12 C.F.R. § 221.2; see 12 C.F.R. §§ 221.101, 221.106, 221.115* (interpretations of good faith requirements)].

[2] FORM

Statement of Purpose of Loan Secured by Margin Stock--Federal Reserve Bank Form U-1

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewBanking LawRegulatory AgenciesU.S. Federal Reserve Board of GovernorsCommercial Law (UCC)Secured Transactions (Article 9)General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

E. Loans Secured by Stock

19-43 California Legal Forms--Transaction Guide § 43.261

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.261 Statement of Purpose of Extension of Credit Secured by Margin Stock--Federal Reserve Board Form G-3

[1] Comment

[a] Use of Form

This form is Federal Reserve Board Form G-3, a statement of purpose by a lender for an extension of credit secured by margin stock. "Margin stock" includes any of the following [12 C.F.R. §§ 221.2, 221.7]:

- Equity securities registered or having unlisted trading privileges on a national securities exchange.
- OTC margin stock.
- OTC securities qualified for trading in the National Market System.
- Debt securities convertible into margin stocks.
- Warrants or rights to subscribe to or purchase margin stocks.
- Shares of certain registered investment companies.

The Federal Reserve Board regulates extensions of credit by lenders when the extensions of credit are made for the purpose of purchasing or carrying a security [see 15 U.S.C. § 78g(d)]. Banks are regulated under Regulation U [12

C.F.R. Pt. 221]. Nonbank lenders formerly were regulated under Regulation G [former 12 C.F.R. Pt. 207]. When the National Securities Markets Improvement Act of 1996 [P.L. 104-290, § 104(b)] repealed Section 8(a) of the 1934 Act [former 15 U.S.C. § 78h(a)], which distinguished between bank and nonbank lenders with respect to broker-dealers, effective April 1, 1998, it eliminated the need for separate regulations. Regulation G therefore has been merged into Regulation U [12 C.F.R. Pt. 221]. A lender other than a bank, broker, or dealer is required to register with the Federal Reserve Board under Regulation U when, in the ordinary course of business, it extends or maintains credit secured, directly or indirectly, by any margin stock and (1) the amount of credit extended within a calendar quarter is \$200,000 or more, or (2) the amount of credit outstanding during a calendar quarter is \$500,000 or more [12 C.F.R. § 221.3(b)].

Whenever a lender extends credit secured directly or indirectly by any margin stock, the lender must require the borrower to execute this form. The form must be signed and accepted by a duly authorized representative of the lender acting in good faith [12 C.F.R. § 221.3(c)(1)(ii)]. A lender's representative has acted in good faith if the representative is alert to the circumstances surrounding the credit transaction; if further information suggests that an inquiry is called for, the representative must investigate and be satisfied that the statement is truthful [12 C.F.R. § 221.1].

If the lender extends credit under a revolving-credit or other multiple-draw agreement secured directly or indirectly by any margin stock, this form may be executed either at the time each disbursement is made or at the time the credit arrangement is initially established [12 C.F.R. § 221.3(c)(2)(ii)]. For a discussion of the transactions exempted from the reporting requirement, see [c], *below*.

Similar rules apply to extensions of credit by banks, which are required to file Form U-1 instead of Form G-3 [see, e.g., 12 C.F.R. § 221.3(c)(1)(i) *see also* § 43.260]. Brokers and dealers are subject to special rules [see 12 C.F.R. Pt. 220].

[b] Restrictions on Extensions of Credit for Stock Purchases

Lenders may not extend any purpose credit, secured directly or indirectly by any margin stock, in an amount that exceeds the maximum loan value of the margin stock offered as collateral [12 C.F.R. § 221.3(a)]. "Purpose credit" is any credit for the purpose, whether immediate, incidental, or ultimate, of buying or carrying margin stock [12 C.F.R. § 221.2]. The maximum loan value of any margin stock, except options, is 50 percent of its current market value [12 C.F.R. § 221.7].

[c] Transactions Exempted From Coverage

Certain transactions are specifically exempted from the provisions of Regulation G governing extensions of credit secured by margin stocks. A transaction is exempt, and the borrower need not complete this form, when the lender is a clearing agency regulated by the Securities and Exchange Commission or the Commodity Futures Trading Commission that accepts deposits of margin stock in connection with [12 C.F.R. § 221.1(b)(2)]:

- The issuance of, or guaranty of, or the clearance of transactions in, any security (including options on any security, certificates of deposit, securities index, or foreign currency).
- The guaranty of contracts for the purchase or sale of a commodity for future delivery or options on such contracts.

[2] FORM

Statement of Purpose of Extension of Credit Secured by Margin Stock--Federal Reserve Bank Form G-3

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawRegulatory AgenciesU.S. Federal Reserve Board of GovernorsSecurities LawU.S. Commodities Futures
Trading CommissionGeneral OverviewSecurities LawU.S. Securities & Exchange CommissionGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

E. Loans Secured by Stock

19-43 California Legal Forms--Transaction Guide § 43.262

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.262 Corporate Resolution to Sell and Assign Securities

[1] Comment

[a] Use of Form

This form is a certified copy of a corporate resolution authorizing a corporation to assign securities to a bank as security for a loan. A bank usually requires a corporation to provide a certified copy of this type of resolution before the bank will accept an assignment of securities as security for a loan. To ensure that the resolution complies with its requirements, the bank normally drafts the resolution, which is presented to the corporation for completion. Alternatively, the corporation can draft its own resolution for approval by the bank before adoption, if the bank is willing to accept such a form and the form complies with the bank's requirements.

This form includes the language of the resolution, as well as space for the name, title, and signature of persons authorized to act on behalf of the corporation.

A certified copy of a corporate resolution is prima facie evidence of the adoption of the resolution [*Corp. Code § 314*]. For further coverage of corporate resolutions, see Ch. 5, *Directors' Meetings, Actions, and Resolutions*.

[b] Perfecting Security Interest in Stock

The stock that is the subject of the assignment, whether assigned on the back of the certificate or on a separate form of assignment from the debtor, is an instrument [*see Com. Code § 9102(a)(47)*]. A security interest in the stock is generally perfected by possession by the creditor [*see Com. Code § 9313(a)*] and with no notice to the corporate issuer.

Subject to the provisions of *Com. Code* §§ 9110 and 9206 (security interests in investment property), a security interest is enforceable and can attach only if each of the following conditions is satisfied [*Com. Code* § 9203(b); *see, e.g., LeFlore v. Grass Harp Productions Inc. (1997) 57 Cal. App. 4th 824, 835, 840, 67 Cal. Rptr. 2d 340* (arrangement characterized as "negative pickup" deal did not provide appellants with superior security interest in tangible film materials; failure to show all elements required by *Com. Code* § 9203(1) (*see now Com. Code* § 9203(b)), decided under prior law)]:

- Value has been given.
- The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party.
- One of the following conditions is met:
 - The debtor has authenticated a security agreement that provides a description of the collateral; or
 - The collateral is not a certificated security and is in the possession of the secured party under *Com. Code* § 9313 (governing when possession by or delivery to secured party perfects security interest without filing) in accordance with the debtor's security agreement; or
 - The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under *Com. Code* § 8301, governing delivery of securities, in accordance with the debtor's security agreement.
 - The collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control [*see Com. Code* §§ 9104, 9105, 9106, 9107 (how secured party takes control of these types of collateral)] in accordance with the debtor's security agreement.

A security interest in investment property is perfected by control under *Com. Code* § 9106 from the time the secured party obtains control and remains perfected by control until both of the following conditions are satisfied [*Com. Code* § 9314(c)]:

- The secured party does not have control.
- One of the following occurs:
 - If the collateral is a certificated security, the debtor has or acquires possession of the security certificate; or
 - If the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner; or
 - If the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated

security occurs under *Com. Code § 8301*, governing delivery of securities, and remains perfected by delivery until the debtor obtains possession of the security certificate [*Com. Code § 9313(e)*; see *Com. Code § 9206* (security interest arising in purchase or delivery of financial asset)].

A "certificated security" is a security that is represented by a certificate [*Com. Code § 8102(a)(4)*].

[2] FORM

Corporate Resolution to Sell and Assign Securities

CERTIFIED COPY OF CORPORATE RESOLUTIONS

(To Sell and Assign Securities)

I, _____ [name], hereby certify to _____ [name of bank] (hereinafter "BANK") that I am the duly elected and qualified Secretary of _____ [name of corporation], a Corporation duly organized and existing under the laws of the State of _____ (hereinafter the "Corporation"); that the following is a true copy of certain resolutions duly adopted by the Board of Directors of the Corporation at a meeting duly called, noticed and held on _____ [date], at which meeting a quorum was present and acting throughout, or by unanimous written consent of all directors dated as of _____ [date], and duly recorded in the minutes of the Board of Directors of the Corporation; that those resolutions are in conformity with the articles of incorporation, bylaws and other instruments binding or affecting the Corporation and have not been rescinded or modified; and that those resolutions continue in full force and effect:

RESOLVED, that the following: _____ [names] (hereinafter the "designated employees" and, if the designated employees are listed by title rather than by name, the authority granted by these resolutions shall not be limited to the present incumbent but shall also apply to all persons subsequently holding that title) be, and each of them hereby is, authorized and empowered on behalf of and in the name of the Corporation to sell, assign, pledge, grant a security interest in, endorse, deliver, or otherwise transfer any and all stocks, bonds, debentures, notes, warrants, evidences of indebtedness, or other securities now or hereafter standing in the name of or owned by this Corporation, and to make, execute, and deliver, under the seal of the Corporation or otherwise, any and all written instruments necessary or proper to effectuate the authority hereby conferred.

RESOLVED FURTHER, that the Secretary or any Assistant Secretary of the Corporation, be and hereby is authorized and directed to certify to _____ [name of bank] (hereinafter "BANK"): (1) the adoption and continuation in full force and effect of these resolutions; and (2) the names and specimen signatures of the incumbent designated employees and, if the designated employees are listed above by title rather than by name, the fact of any change in the incumbent designated employee and the name and specimen signature of the new incumbent designated employee.

RESOLVED FURTHER, that in the event any other resolutions of the Corporation, including the general borrowing resolutions, now or at any time hereafter authorize the performance of acts or the execution and delivery of documents pursuant to any agreement between BANK and the Corporation, the authority granted by such other resolutions shall be deemed to be cumulative with the authority granted by these resolutions and these resolutions shall continue in full force and effect until the _____ office of BANK (currently located at _____ [address]) shall have actually received written notice of their rescission or modification, together with a certified copy of resolutions duly adopted by the Board of Directors of the Corporation which rescind or modify these resolutions.

I further certify to BANK that the following persons now occupy, and have been duly appointed to hold, the positions in the Corporation designated by the foregoing resolutions and that the specimen signatures opposite their names and titles are true and correct:

TYPE OR PRINT
NAME

OFFICIAL TITLE

SIGNATURE

_____	_____	_____
—		
_____	_____	_____
—		
_____	_____	_____
—		

IN WITNESS WHEREOF, I have hereunto subscribed my name this _____ day of [month], [year].

_____ [signature of corporate secretary]

[typed name]

Secretary of _____ [name of corporation]

[corporate seal]

I hereby certify to Bank that the foregoing certificate is true and correct.

_____ [signature of second corporate officer, if required by bank]

[typed name]

_____ [title, e.g., President] of _____ [name of corporation]

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Corporations Governing Documents & Procedures General Overview Commercial Law (UCC) Secured Transactions (Article 9) Perfection General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

E. Loans Secured by Stock

19-43 California Legal Forms--Transaction Guide § 43.263

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.263 Agreement Concerning Voting Rights of Stock Held as Loan Security

[1] Comment

[a] Use of Form

This form is an agreement regarding voting rights of stock held by a bank as security for a loan. This agreement is used to clarify that a borrower may vote the stock until default on the loan. At that time, the bank may exercise its right to vote the stock, in an effort to protect the security for the loan. This form will be presented by the bank to the borrower for completion at the time the stock is given as security for the loan.

[b] Use of Stock Voting Rights to Protect Collateral

While a bank will not ignore the maximum loan value standards on stocks set by an interested governmental regulatory authority [see §§ 43.260, 43.261] or its own internal management policy, even when the acceptable value of the stock collateral fully covers the loan, there is the necessity of determining the debtor's ability to service the loan apart from the security. A financial statement is often required regardless of the security value in order to aid in this type of analysis and to hedge against the likelihood that the bank will have to foreclose on any security.

An additional factor for consideration is whether the stock collateral represents a controlling or otherwise important interest in the particular corporation. In that case, the bank will confirm by the use of this form that the debtor may retain the voting rights attached to the stock, but only so long as the debtor is not in default on the note. On default, the bank may, after giving notice, exercise the voting power to any adequate extent available in the situation to protect or enhance the security, and therefore its debtor's position on the note, without necessarily having to foreclose.

[2] FORM**Agreement Concerning Voting Rights of Stock Held as Loan Security****AGREEMENT CONCERNING VOTING RIGHTS
REGARDING COLLATERAL**

_____ [date]

In order to obtain loans from and otherwise deal with _____ Bank (the "Bank"), the undersigned has delivered to Bank [number] shares of the capital stock of _____ [name of corporation], a _____ [state of incorporation] corporation, representing _____ percent of the outstanding issued voting shares, to be held under and subject to all the terms and conditions of that certain Security Agreement, dated _____, for security for the repayment of indebtedness.

It is understood and agreed that before default, the undersigned will have the exclusive voting rights accorded to the shares, provided, however, that in the event of default in the payment of indebtedness so secured when due, or in the performance or observance of the terms and conditions of loan agreements made with or for the benefit of Bank in connection therewith, Bank will have the right, at its option, to terminate the power granted in this agreement to the undersigned to vote the shares, which option will be exercised by mailing or faxing written notice of the exercise of the option addressed to the undersigned at the address designated, and Bank will then be entitled to exercise the voting rights in the same manner as if this agreement had not been executed.

_____ [signature of borrower]

Mailing address for notice: _____

ACCEPTED:

_____ Bank

By _____ [signature]

_____ [typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Corporations Shareholders Meetings & Voting Voting Shares General Overview Commercial Law (UCC) Secured Transactions (Article 9) Application & Construction Definitions Collateral General Overview



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E. Loans Secured by Stock

19-43 California Legal Forms--Transaction Guide §§ 43.264-43.269

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

[Reserved]

§§ 43.264[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

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F. Assignment of Insurance Policies

19-43 California Legal Forms--Transaction Guide § 43.270

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.270 Assignment of Life Insurance Policy as Loan Security

[1] Comment

[a] Use of Form

This form is an assignment of a borrower's life insurance policy to a bank as security for a loan. This type of form ordinarily is a standardized bank form that the lending bank will present to the borrower at the time the loan is made.

[b] Operation of Assignment

In arranging for assignment of a life insurance policy as security for a loan, whether for benefit of the insured or the beneficiary, both parties must sign as assignors to the bank. The subscribing parties are also asked to declare that they have not made any assignment for benefit of creditors [Civ. Code § 3470]. The maker of a general assignment for the benefit of creditors may still exclude such policies from the assignment [*Code Civ. Proc.* §§ 690.60, 690.9, 690.10]. A copy of the assignment sent to the insurer acts as adequate notice and will be sufficient to perfect the bank's security interest in the policy [*see Com. Code* § 9310(b)(11); *Com. Code* § 9312(b)(4)]. The insurer will have been alerted already by receipt and response to a life insurance assignment questionnaire previously sent by the bank, in which it requests information concerning the conditions and history of the policy and confirmation of the company's cooperation in servicing the security for the bank's convenience during the assignment [*see* § 43.271].

For further coverage of assignment, see Ch. 78, *Assignment of Rights and Obligations*.

[2] FORM

Assignment of Life Insurance Policy as Loan Security
ASSIGNMENT OF POLICY AS COLLATERAL SECURITY

1. For value received the undersigned hereby assign, transfer, and set over to _____ [name of bank], its successors or assigns (herein called the "Assignee"), Policy No. _____ issued by _____ [name of insurer] (herein called the Insurer"), and any supplementary contracts issued in connection with that policy (that policy and contracts being referred to in this instrument as the "policy"), upon the life of _____ [name], and all claims, options, privileges, rights, title and interest under and in that policy (except as provided in Paragraph 3 of this agreement), subject to all the terms and conditions of the policy and to all superior liens, if any, that the Insurer may have against the policy. The undersigned by this instrument jointly and severally agree and the Assignee by the acceptance of this assignment agrees to the conditions and provisions herein set forth.

2. It is expressly agreed that, without detracting from the generality of the foregoing, the following specific rights are included in this assignment and pass by virtue of this instrument:

(a) The sole right to collect from the Insurer such part of the net proceeds of the policy, when it becomes a claim by death or maturity, as may be required for the satisfaction of all indebtedness which is secured by the assignment of that policy and to collect any disability income, unless this right is waived by the Assignee in writing.

(b) The sole right to surrender the policy and receive the surrender value of the policy at any time provided by the terms of the policy and at such other times as the Insurer may allow.

(c) The sole right to obtain one or more loans or advances on the policy, either from the Insurer or from other persons, and to pledge or assign the policy as security for any such loans or advances, whether for the purpose of paying premiums, principal or interest upon outstanding loans, principal or interest upon any indebtedness of the Insured or beneficiary to the Assignee at any time owing, or otherwise, without limitation as to the amount of any such loan or loans and without any duty of the Insurer or other lender to see to the application of the proceeds thereof.

(d) The sole right to collect and receive, if any there be, all distributions, shares of surplus, dividend deposits or additions to the policy now or hereafter made or apportioned thereto, and to determine whether the cash value of any distributions, shares of surplus, dividend deposits or additions that may be used in accordance with the terms of the policy in payment of premiums shall be so used or shall be taken by the Assignee in cash; provided, that unless and until the Assignee shall notify the Insurer in writing to the contrary the distributions, shares of surplus, dividend deposits or additions shall continue on the plan in force at the time of this assignment.

(e) The sole right to exercise all non-forfeiture rights permitted by the terms of the policy or allowed by the Insurer and to receive all benefits and advantages derived therefrom.

3. It is expressly agreed that the following specific rights, so long as the policy has not been surrendered, are reserved and excluded from this assignment and do not pass by virtue of this instrument:

(a) The right to designate and change the beneficiary.

(b) The right to elect optional modes of settlement.

However, the reservation of these rights shall in no way impair the right of the Assignee to surrender the policy completely with all its incidents or impair any other right of the Assignee hereunder, and any designation or change of beneficiary or election of a mode of settlement shall be made subject to this assignment and to the rights of the Assignee under this assignment.

4. This assignment is made and the policy is to be held as collateral security for the payment of any and all liabilities of the undersigned or any of them [*add reference to specific liabilities if desired*] to the Assignee now or hereafter owing, however the same may be evidenced and in whatever form they may be, whether those liabilities are absolute or conditional, primary or secondary (all of which liabilities secured or to become secured are herein called "liabilities"). This assignment shall also secure any loans or advances made by the Insurer or by any other person to the Assignee under the provisions of paragraph 2(c), and the assignment of the policy by the Assignee, as provided by the terms of paragraph 2(c), shall subrogate the Insurer or any other person to all the rights and priorities of the Assignee under this instrument. All advances, charges, costs and expenses, including reasonable attorneys' fees incurred or paid by the Assignee in exercising any right, power or remedy conferred by this assignment, or in the enforcement of this assignment, shall become a part of the liabilities secured hereunder. It is expressly agreed that all sums received by the Assignee under the terms of this assignment, either in the event of death of the insured, the maturity or surrender of the policy, the obtaining of a loan or advance on the policy, or otherwise, shall first be applied to the payment of one or more of the following in that order of preference that the Assignee shall determine:

- (a) Principal of and/of interest on liabilities;
- (b) Premiums on the policy;
- (c) Principal of and/or interest on loans or advances made by the Insurer on the policy.

5. Assignee covenants and agrees with the undersigned as follows:

(a) If the Assignee shall receive any sum in excess of the absolute and primary indebtedness owing to it by the undersigned and thereafter the amount of the secondary or contingent indebtedness shall be reduced by payment by the primary obligor or the failure of the condition or otherwise, by reason of which the Assignee shall hold funds realized from the policy in excess of the amount required for the satisfaction of the liabilities secured thereby, or if for any reason any proceeds of the policy shall be received by the Assignee in excess of the amount required for the satisfaction of the liabilities hereby secured, the Assignee shall pay in one sum to the person then entitled to receive payments then currently payable under the terms of the policy the amount of that excess that may then be in its hands.

(b) The Assignee will not exercise either the right to surrender the policy or (except for the purpose of paying premiums) the right to obtain policy loans from the Insurer, until there has been a default in any of the liabilities or a failure to pay any premium when due, nor until 20 days after the Assignee has mailed, by first-class mail, to the undersigned at the addresses given in this instrument, notice of intention to exercise this right.

(c) The Assignee will upon request forward the policy to the Insurer without unreasonable delay, for endorsement of any designation or change of beneficiary or any election of an option mode of settlement.

6. The Insurer is hereby authorized to recognize the Assignee's claims to rights hereunder without investigating the reason for any action taken by the Assignee, or the validity or the amount of the liabilities or the existence of any default therein, or the giving of any notice under Paragraph 5(b) above or otherwise, or the application to be made by the Assignee of any amounts to be paid to the Assignee. The sole signature of the Assignee shall be sufficient for the exercise of any rights under the policy assigned hereby and the sole receipt of the Assignee for any sums received shall be a full discharge and release therefor to the Insurer. Checks for all or any part of the sums payable under the policy and assigned herein shall be drawn to the exclusive order of the Assignee, if, when, and in such amounts as may be requested by the Assignee. The amount of the interest of the Assignee in the proceeds of this policy when it becomes a claim by death or maturity shall be payable in cash in one sum, notwithstanding any stipulations or agreements now, or at that time, limiting or directing the mode of settlement or manner of payment, as between the Insurer and the beneficiaries or payees, and shall be established, so far as concerns the Insurer and the beneficiaries and payees named

in the policy, by a sworn statement of any officer or any office manager or assistant office manager of the Assignee as to the amount of its interest, and in making any payment to the Assignee, in reliance upon such a sworn statement, the Insurer shall be fully protected and discharged to the amount thereof.

7. The undersigned agrees to pay, and the Assignee shall be under no obligation to pay, any and all premiums, and the principal of and interest on any loans or advances on the policy whether or not obtained by the Assignee, and any other charges on the policy, but any such amounts so paid by the Assignee from its own funds shall become a part of the liabilities hereby secured, shall be due immediately, and shall draw interest at a rate fixed by the Assignee from time to time not exceeding _____ percent per annum.

At the option of the Assignee, and without the necessity of demand or notice, all or any part of the liabilities shall become immediately due and payable on the happening of any of the following events:

- (a) Failure to keep or perform any of the terms or provisions of this assignment;
- (b) Default in the payment of principal or interest on the liabilities when due;
- (c) A levy of any attachment, execution, or other process, against the undersigned, or any of them, or any of the collateral securing the liabilities;
- (d) The death, insolvency, failure in business, commission of an act of bankruptcy, general assignment for the benefit of creditors, filing of a petition in bankruptcy or for relief under the provisions of the National Bankruptcy Act, of, by or against the undersigned, or any of them; or
- (e) Failure on the part of the undersigned either to pay, when due, the premiums on any or all of the policies assigned herein or to submit, not later than the expiration of 20 days from the due date of those premiums, proof of such payment to the Assignee.

8. The exercise of any right, option, privilege or power given herein to the Assignee shall be at the option of the Assignee, but (except as restricted by Paragraph 5(B), above) the Assignee may exercise any such right, option, privilege or power without notice to, or assent by, or affecting the liability of, or releasing any interest hereby assigned by the undersigned, or any of them.

9. Each of the undersigned hereby waives any right to require the Assignee to (a) proceed against any person, (b) proceed against or exhaust any collateral, or (c) pursue any remedy in the Assignee's power; and waives any defense arising by reason of any disability or other defense of any other of the undersigned or any other person, or by reason of the cessation from any cause whatsoever of liability of any other of the undersigned or any other person. Until all liabilities shall have been paid in full, none of the undersigned shall have any right of subrogation, and each of the undersigned waives any right to enforce any remedy which the Assignee now has or may hereafter have against any other of the undersigned or against any other person and any benefit of and any right to participate in any collateral or security whatsoever now or hereafter held by the Assignee. Each of the undersigned authorizes the Assignee without notice or demand and without affecting his obligation hereunder or on the liabilities, from time to time to do any or all of the following:

- (a) Renew, extend, accelerate or otherwise change the time for payment of, or otherwise change the terms of the liabilities, or any part thereof, including increase or decrease of the rate of interest thereon;
- (b) Take and hold security, other than the security herein described, for the payment of the liabilities, or any part thereof, and exchange, enforce, waive and release the security herein described, or any part thereof, or any such other security;

(c) Apply the proceeds of the policy hereby assigned or any amount received on account of the policy by the exercise of any right permitted under this assignment, or other security, and direct the order and manner of realization thereon as the Assignee in its discretion may determine; and

(d) Release or substitute any other of the undersigned or any of the endorsers or guarantors of the liabilities, or any part thereof, or any other parties thereto.

All authority, powers and rights herein granted to the Assignee shall be exercised only at its sole option, and the Assignee shall not be obligated or liable for any failure to exercise or for delay in the exercise of that authority and those powers and rights. Nothing in this instrument shall require the Assignee to institute any suit or legal action against the Insurer. The Assignee is hereby authorized and empowered to settle and compromise any claims which may arise against the Insurer, and on the surrender of the policy the Assignee may accept the cash value as may be determined by the Assignee or the Insurer at the time of the surrender.

10. In the event of any conflict between the provisions of this assignment and the provisions of the note or other evidence of any liability, with respect to the policy or rights of collateral security therein, the provisions of this assignment shall prevail.

11. Each of the undersigned declares that no proceedings in bankruptcy are pending against him or her and that his or her property is not subject to any assignment for the benefit of creditors.

12. The policy is not assigned, except to: *[name, or if not assigned: none]*.

Executed this _____ day of *[month]*, *[year]*

ASSIGNORS

Names

Addresses

Insured

Beneficiary

Beneficiary

Beneficiary

ACKNOWLEDGMENT

State of California)
County of _____) ss.

On _____ *[date]*, before me, _____ *[name and title of person taking acknowledgment]*, personally appeared _____ *[name]*, who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] *[is or are]* subscribed to the within instrument and acknowledged to me that _____ *[he or she or they]* the same in _____ *[his or her or their]* authorized

_____ [capacity or capacities], and that by _____ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

_____ [signature of person taking acknowledgment]

My commission expires: _____

(Seal)

Received and duplicate filed at the home office of the Insurer in _____ [city, state], this _____ day of [month], [year].

_____ [insurance company name]

By _____ [signature]

Authorized Official

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance Law Life Insurance Assignments & Transfers



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

F. Assignment of Insurance Policies

19-43 California Legal Forms--Transaction Guide § 43.271

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.271 Life Insurance Assignment Questionnaire

[1] Comment--Use of Form

This form is an illustrative bank questionnaire regarding a borrower's life insurance policy. In arranging for an assignment of a life insurance policy as security for a loan [see § 43.270], the lending bank will send a form such as this life insurance assignment questionnaire to the insurer.

The questionnaire requests information concerning the amount of premiums due, cash value, policy loans (if any), and whether there are any existing assignments or restrictions on assignments of the policy. If the life insurance policy is subsequently assigned to the bank, a copy of the assignment is sent to the insurer and this operates as adequate notice to the insurer to perfect the bank's security interest in the policy [see *Com. Code § 9310(b)(11)*; *Com. Code § 9312(b)(4)*].

[2] FORM

Life Insurance Assignment Questionnaire

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawLife InsuranceAssignments & Transfers



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F. Assignment of Insurance Policies

19-43 California Legal Forms--Transaction Guide § 43.272

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.272 Statement of Marital Status Regarding Assignment of Life Insurance Policy

[1] Comment--Use of Form

This form is a statement of marital status of a borrower of a commercial loan for use when the borrower is assigning an insurance policy to a bank as security for a loan. This type of form is used by a lending bank to obtain information about the borrower's marriage(s) and to ensure that there are no unknown former spouses who may have an interest in any insurance policy proceeds.

When a bank agrees to take a life insurance policy as security for a commercial loan, the bank will require a statement of marital status from the proposed borrower. This is to assure the bank that no other person may be able, under community property law or other law, to reach the proceeds of the assigned policy other than those who will be asked to join in the assignment [*see Fam. Code § 760 et seq.*].

[2] FORM

Statement of Marital Status Regarding Assignment of Life Insurance Policy

STATEMENT OF MARITAL STATUS
and/or RESIDENCE OF INSURED

(Complete Part I or Part II only; do not complete both Parts)

PART I

I hereby certify that I have been married ONLY ONCE, and then to my present spouse, _____[*name*]; and that my spouse is living and there has been no divorce.

The foregoing representations are made in support of an application for a loan to be made by _____[*name of bank*] to the undersigned, the loan to be secured by the assignment of a life insurance policy or policies.

Dated: _____
 _____[*signature of insured*]

PART II

Date of issuance of the oldest policy to be assigned: _____

I hereby certify to the correctness and completeness of the following information:

Current Marriage

Date of marriage: _____

Name of spouse: _____

Prior Marriage:

Date of first marriage: _____

Name of spouse: _____

If first spouse is deceased, date of death: _____

If marriage ended in divorce, date: _____

[*Add above information for each additional prior marriage, as necessary.*]

Places and periods of residence since date of issuance of oldest policy: _____

States of Residence

Dates of Residence

from _____ to _____
 from _____ to _____
 from _____ to _____

The foregoing representations are made in support of an application for a loan to be made by _____[*name of bank*] to the undersigned, the loan to be secured by the assignment of a life insurance policy or policies.

Dated: _____
_____ [*signature of insured*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawLife InsuranceAssignments & Transfers



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§ 43.273 Endorsement to Property Insurance Policy to Pay Bank Creditor on Injury to Loan Collateral

[1] Comment--Use of Form

This form is an endorsement to a property insurance policy, stating that a lending bank is to be paid the proceeds of any insurance on property held by the bank as security for a borrower's loan.

In order to give the bank extra assurance concerning the physical protection of nonmonetary loan security, the borrower may need to request a special endorsement to any property damage liability policy on this collateral. It is particularly desirable when the bank is not given possession of the collateral that it receive this type of beneficial interest to guaranty the value of the security against its destruction. The customer may be requested to purchase a liability policy with this kind of rider. If the bank takes possession of the property and the customer does have a policy already, it is usually easy to require the extra condition that the customer provide the bank with a special endorsement to include the bank under its protection for the duration of the security agreement.

[2] FORM

Endorsement to Property Insurance Policy to Pay Bank Creditor on Injury to Loan Collateral

COMMODITY LOSS PAYABLE ENDORSEMENT

1. Loss or damage under this policy, to any property constituting security for loans, whether by warehouse receipts, bills of lading, security agreements, trust receipts, pledge agreements, liens, or any other evidence of title or debt, or in the case of property not represented by these documents in which the Lender has an insurable interest evidenced by written

entries entered on the books of the Lender, will be adjusted with the named insured and also with the Lender, at the latter's option, and payment in settlement will be made solely to _____[*name of bank*], its successors and assigns (the "Lender") only to the extent of its insurable interest in the property and whether the interest be vested in the Lender in its individual or in its disclosed or undisclosed fiduciary or representative capacity, or otherwise, or vested in a nominee or trustee of the Lender (without the inclusion of the name or names of any other entity in any check or draft issued by this Company in making any such payment); and the Company, in making this payment, may rely on a written statement from the Lender of the amount due and is thereby discharged of all liability under this policy. In no event will the Company be liable for an amount greater than its proportion of the maximum limit(s) of liability specified in the policy at the time of loss.

2. The Lender's interest under this insurance policy will not be prejudiced, voided, or suspended (a) by any error, omission, or change in the ownership, description, possession, or location of the subject of the insurance, the interest therein, or the title thereto; (b) by commingling or by loss of identity of the insured goods, including but not limited to, through processing or manufacturing into other products; (c) by the commencement of foreclosure proceedings or any other action affecting title to or interest in any property covered by this policy; (d) by any breach of warranty, act, error, omission, neglect, or noncompliance with any of the provisions of this policy, by the named insured or others, or by the happening of any event permitted by them, or which they fail to prevent, whether occurring before or after the attachment of this endorsement, or whether before or after a loss, which under the provisions of this policy of insurance would prejudice, void or suspend the insurance as to the named insured, excluding, however, any acts or omissions of the Lender while exercising sole control and management of the property.

3. If the insured fails to pay any premium or additional premium that becomes due under the terms of this policy or on account of any change in occupancy or increase in hazard not permitted by this policy, the Company will notify the Lender in writing of this nonpayment within [*e.g.*, 60 to 120] days after the premium's due date. When the Lender is notified in writing by the Company of the insured's failure to pay, the Lender will pay the premium due within [*e.g.*, 10] days after receipt of the Company's written demand. If the Lender does not pay the premium or additional premium, the Lender's rights under this Commodity Loss Payable Endorsement will not terminate before [*e.g.*, 10] days after receipt of written notice by the Lender.

4. Whenever the Company pays to the Lender for loss or damage under this policy and claims that no further liability to the insured exists, the Company, at its option, may pay to the Lender the whole principal sum and interest and other indebtedness due from the insured, whether secured or unsecured, (with refund of all interest not accrued), and the Company, to the extent of this payment, will receive a full assignment of the debt and all rights and securities held as collateral under it.

5. If there is other insurance on the property, the Company is liable under this policy to the Lender for the proportion of loss or damage that the sum hereby insured bears to the entire valid and collectible insurance of similar character on the property under policies held by or payable to the Lender. Any Contribution Clause included in this policy is hereby nullified as to the Lender's interest. After being paid the full amount of its claim, the Lender will subrogate to the Company (pro rata with all other insurers contributing to the payment) all of the Lender's rights of contribution under the other insurance.

6. The Company reserves the right to cancel this policy at any time, and in such a case, the policy will continue in force for [*e.g.*, 10] days after written notice of cancellation is received by the Lender and will then cease.

7. This policy will remain in full force as to the Lender's interest for a period of [*e.g.*, 10] days after its expiration unless an acceptable renewal policy with the terms of this Commodity Loss Payable Endorsement has been issued by an insurance company and accepted by the Lender.

8. If legal title to and beneficial ownership of any of the property covered under this policy becomes vested in the

Lender or its agents, then insurance under this policy will continue for the full term, but any privileges granted by the Commodity Loss Payable Endorsement that are not also granted the insured under the terms and conditions of this policy will not apply to the insurance regarding that property.

9. Wherever the word "policy" is used in this Commodity Loss Payable Endorsement, it includes all endorsements relating to it.

10. All notices from the Company to the Lender regarding this policy and the Commodity Loss Payable Endorsement will be mailed, faxed, or delivered to the Lender at its office at _____[*address*].

Attached to Policy No. _____ of _____[*name*]

Issued to _____ Agency at _____

Date _____

_____[*authorized agent*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance LawClaims & ContractsGeneral OverviewInsurance LawProperty InsuranceGeneral Overview



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F. Assignment of Insurance Policies

19-43 California Legal Forms--Transaction Guide §§ 43.274-43.279

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

[Reserved]

§§ 43.274[Reserved]



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G. Financing and Assignment of Inventory and Equipment

19-43 California Legal Forms--Transaction Guide § 43.280

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.280 Agreement for Series of Loans Based on Bank's Purchase of Inventories on Borrower's Behalf

[1] Comment

[a] Use of Form

This form is an agreement between a retailer dealer (the borrower) and a bank (the lender), authorizing the bank to loan the dealer money by paying for the dealer's goods directly, and to be reimbursed by the dealer when the items are actually sold. This type of arrangement is known as "flooring" [see [b], *below*].

[b] Operation of Flooring Arrangement

Dealers in motor vehicles, boats, appliances, and other costly retail products typically have a good deal of money tied up in these goods on their receipt, and frequently do not have sufficient funds to pay for these shipments until they have resold the goods to consumers. These industries often have a predictable seasonal cycle of cash flow, and banks have arranged for continuous financing of this merchandise with the dealer's wholesaler.

This financing agreement calls for the bank to accept and pay drafts drawn on the dealer by the supplier, that the borrower (dealer) then has the option of immediately repaying with interest or of arranging for repayment through long-term financing. The loan arrangement is known as "flooring," and the bank most frequently takes short- or long-term commercial loan security in the goods subject to the draft, classified as "inventory," and requiring the filing of a financing statement for perfection [see *Com. Code* § 9102(a)(48) ("inventory" defined)]. The bank must follow up with an authorization to the supplier to present drafts drawn on the merchant to the bank for payment, which is assured until revoked as to future transactions [see § 43.281]. Retail buyers are protected by taking free of the wholesale

security agreement [see *Com. Code* § 9320].

[c] Disadvantages of Flooring Arrangements

Of the various types of commercial financing, "flooring" is the most intrusive from the borrower's point of view. Under this arrangement, the lender advances money for inventory as needed and the money is repaid as the inventory is sold. The lender requires extensive and up-to-the-minute inventories and extensive reporting. Lenders even conduct spot inventories of their own which can disrupt the business operations of the borrower. In addition, if a spot inventory reveals goods that have been sold "out of trust" or without having been reported to the lender, those goods must be paid for immediately. If a dispute arises between the lender and the borrower or if the borrower experiences a cash flow problem, the flooring lender, in effect, has the power to close down the borrower's business immediately by demanding payment of the outstanding amounts and by refusing to advance money for more inventory. Thus, by entering into a flooring financing arrangement, the business owner loses a great deal of control over the business.

[2] FORM

Agreement for Series of Loans Based on Bank's Purchase of Inventories on Borrower's Behalf

Date: _____

To: _____ [name of bank]
 _____ [city, state]

The undersigned, _____ [name], an authorized dealer for _____ [name of product], authorizes and directs you to execute and deliver to _____ [name] a letter of commitment covering purchases of the products of the manufacturer made by the undersigned and the drawing of drafts in connection with those purchases.

The undersigned agrees with you that:

On your receipt of the drafts, you may, but are not obligated to, pay them in accordance with their terms. If you do pay them, the undersigned will immediately on notice, either:

- (a) Pay to you the amount of the drafts plus your cost of handling and interest at the rate of _____ percent from the date when the amount of the draft will have been advanced by you, or by some correspondent bank on your behalf; or
- (b) Immediately execute and deliver to you a note and security agreement in your usual form in the amount of the drafts plus your cost of handling and interest at the rate of _____ percent from the date of advance to the date of delivery; the notes will have maturities and interest rates as may be agreed from time to time.

The undersigned will promptly on request execute and deliver to you any and all other instruments or documents that you may require to perfect your security interest pursuant to this transaction.

It is understood that the arrangements set forth in this agreement may be terminated at any time by notice from you to the undersigned, or from the undersigned to you, and that termination will not in any way affect the liability and responsibility for any drafts drawn before the receipt of [describe], of notice that these arrangements and the arrangements set forth in the attached commitment letter have been terminated.

Sincerely,

_____ [signature]

By _____ [*typed name and title*]
Dealer

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application &
ConstructionDefinitionsCollateralGoodsInventoryCommercial Law (UCC)Secured Transactions (Article
9)PerfectionMethodsFilingsFinancing StatementsGeneral Overview



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CHAPTER 43 COMMERCIAL LOANS

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G. Financing and Assignment of Inventory and Equipment

19-43 California Legal Forms--Transaction Guide § 43.281

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.281 Bank's Commitment to Purchase Inventories on Borrower's Behalf

[1] Comment

[a] Use of Form

This form is commitment by a bank to pay a supplier for the inventory of a retail dealer. This form is used in a "flooring" financing arrangement, in which a bank loans a dealer money by paying for inventory directly, and being reimbursed by the dealer on the retail sale of the inventory. This form provides that the supplier will present drafts directly to the bank for payment [*see* [b], *below*]. For further discussion of flooring, see § 43.280[1].

[b] Use of Drafts in Flooring Arrangement

A draft is a negotiable instrument in the form of an order submitted by the drawer on the account of the drawee [*see Com. Code § 3104*]. It is not in itself an assignment of any funds in the drawee's hands, nor is the drawee liable until he accepts the draft [*Com. Code § 3408*].

In the case of flooring, when the bank has agreed with the drawee to accept the draft from the drawer, its acceptance engages that it will pay the instrument according to its tenor at that time, and acknowledges the existence of the payee and his or her capacity to endorse [*see Com. Code § 3413*]. Based on its agreement for financing with the merchant, the bank then sends authorization to the supplier of inventory to present drafts drawn on the merchant for deliveries, which authorization stands as a commitment until withdrawn as to drafts not yet presented.

[2] FORM

Bank's Commitment to Purchase Inventories on Borrower's Behalf

Date: _____

To: *[manufacturer]*

You are hereby authorized to draw drafts on _____ *[name]* Bank, for payment of *[e.g., motor vehicles]* of your manufacture delivered or shipped to us. This arrangement does not affect our primary obligation to pay for the *[e.g., motor vehicles]*.

This authorization is to remain in effect until you are notified to the contrary in writing.

Sincerely,

_____ *[dealership]*_____ *[signature]**[typed name and title]*

Approved:

_____ *[name of bank]*By: _____ *[signature]*Title: _____ *[typed name and title]***Legal Topics:**

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGoodsInventory



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

G. Financing and Assignment of Inventory and Equipment

19-43 California Legal Forms--Transaction Guide § 43.282

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.282 Loan and Security Agreement for Receivables and Inventory

[1] Comment

[a] Use of Form

This form is a loan and security agreement between a bank and a merchant to finance the purchase of materials to be used by the merchant as stock in trade. This agreement provides that the bank will advance funds from time to time as needed, and that it will have a security interest in future receivables, inventory, deposits, and proceeds. For discussion of inventory financing under the Commercial Code, see § 43.20[1]. For coverage of secured transaction procedures in general, see Ch. 42, *Secured Transactions* .

[b] Sale of Credit Disability Insurance by Lender

A lender may wish to protect its position through the use of credit disability insurance covering the debtor [*see Civ. Code § 1812.400 et seq.; see also § 43.26*]. However, the presence of credit disability insurance will have an adverse effect on the creditor's right to enforce the debt in the event of default when the insurance was sold or arranged for by the creditor or when the creditor received compensation for its sale. In addition, certain disclosures must be made at the time of the sale. For coverage of credit disability insurance, see Ch. 45, *Consumer Installment Loans and Credit Sales* .

[2] FORM

Loan and Security Agreement for Receivables and Inventory

LOAN AND SECURITY AGREEMENT
(Receivables and Inventory)

This Agreement ("Agreement") is entered into as of _____ [date], between
_____ [name of bank] ("Bank") and _____ [name of borrower] ("Borrower");

Article 1. Definitions

1.1. "**Account Debtor**" means the person or entity obligated upon a Receivable.

1.2. "**Borrowing Base**" means the lesser of the following:

(a) \$[dollar amount]; or

(b) The total ("Receivables and Inventory Loan Value") of:

(1) _____ percent of the balance due on Eligible Receivables ("Receivables Loan Value"), and

(2) _____ percent of the value of Eligible Inventory, or if less \$_____,
not to exceed _____ percent of Receivables Loan Value ("Inventory Loan Value").

(c) For purposes of the foregoing computations:

(1) Whenever Eligible Receivables are used as a measure for Receivables Loan Value, the determination as to the amount of Eligible Receivables and Loans shall be computed as of the time in question; and

(2) Only Eligible Inventory shall be used to determine Inventory Loan Value and that value shall be based upon the lesser of Borrower's cost or Bank's independent determination of the resale value of that Inventory in such quantities and on such terms as Bank may deem appropriate.

1.3. "**Closing Date**" means the disbursement date of the first Loan under this Agreement.

1.4. "**Collateral**" means the property described in any Collateral Agreement as securing any of the Loans.

1.5. "**Collateral Agreement**" or "**Collateral Agreements**" means this Agreement and each security agreement or trust deed (if any) referred to in Article 3 of this Agreement.

1.6. "**Deposits**" means all demand, time, money market, savings or other similar accounts of Borrower maintained with Bank, or with any other financial institution, whether general or special, and whether or not containing proceeds of Collateral and all passbooks and other instruments and documents evidencing the foregoing.

1.7. "**Eligible Inventory**" means Inventory which:

(a) Is owned by Borrower free and clear of all security interests, liens, encumbrances and rights of others, except the security interest in favor of Bank.

(b) Is permanently located in the State[s] of California [and _____ (specify other states, if any)];

- (c) In Bank's opinion, is not obsolete, unsaleable, damaged, or unfit for further processing;
- (d) Has been owned by Borrower for not more than 12 months;
- (e) Is raw materials and/or finished goods; and
- (f) Is otherwise acceptable to Bank.

1.8. "**Eligible Receivable**" means a Receivable:

- (a) Arising from the sale of goods (other than cash or consignment sales) or the performance of services by Borrower in the ordinary course of its business;
- (b) Upon which Borrower's right to receive payment is absolute and not contingent upon the fulfillment of any condition whatever;
- (c) Against which is asserted no defense, counterclaim, discount, or setoff, whether well-founded or otherwise (except for those with respect to credit balances owed by Borrower to the Account Debtor for no Longer than _____ days which are otherwise acceptable to Bank);
- (d) That is a true and correct statement of a bona fide indebtedness in the amount of the Receivable incurred for merchandise sold and shipped and accepted by or for services performed for and accepted by, the Account Debtor obligated on that Receivable;
- (e) That is owned by Borrower and not subject to any right, claim, or interest of another other than the security interest in favor of Bank;
- (f) That does not arise from a sale or lease to or performance of services for an employee, affiliate, parent, officer, or subsidiary of Borrower;
- (g) That is not the obligation of a Account Debtor that is the federal government or a political subdivision thereof;
- (h) That is not the obligation of a Account Debtor located in a foreign country;
- (i) That does not arise from the sale of minerals or the like (including oil and gas) at the wellhead or minehead unless Bank shall agree to the contrary in writing;
- (j) That is not in default. A Receivable shall be deemed in default upon occurrence of any of the following:
 - (1) The Receivable is not paid in full within the _____ -day period starting on its invoice date; and if 25 percent or more of the balance due on all Receivables of the same Account Debtor at any one time outstanding are not paid within _____ days of their invoice date(s), then all Receivables of that Account Debtor shall be considered in default; or
 - (2) Any Account Debtor obligated upon such Receivable suspends business, makes a general assignment for the benefit of creditors, or fails to pay its debts generally as they come due; or
 - (3) Any petition is filed by or against any Account Debtor obligated upon that Receivable under any Bankruptcy law or any other law or laws for the relief of debtors;

(k) That does not, when added to all other Eligible Receivables that are obligations of the same Account Debtor, at any time result in a total sum that exceeds _____ percent of the total balance then due on all the Receivables; provided, however, that Bank, at its sole option, may consider a Receivable to be an Eligible Receivable even if this results in a total amount in excess of the limitations specified in this Subsection (k) if the creditworthiness of the Account Debtor is acceptable to Bank; and (l) That is otherwise acceptable to Bank.

1.9. "**Event of Default**" means any event listed in Article 7 of this Agreement.

1.10. "**Indebtedness**" shall mean and include, with respect to any person, including Borrower, all items of indebtedness which, in accordance with generally accepted accounting principles and practices, would be included in determining liabilities as shown on the liability side of the balance sheet of that person as of the date on which indebtedness is determined and shall also include all indebtedness and liabilities of others assumed or guaranteed by that person, or in respect of which that person is secondarily or contingently liable (other than by endorsement of instruments in the ordinary course of collection) whether by reason of any agreement to acquire that indebtedness or to supply or advance funds or otherwise.

1.11. "**Inventory**" means all of Borrower's goods and inventory (as inventory is defined in the California Commercial Code) and other personal property now or hereafter owned which is held for sale or lease or which is to be furnished under contract(s) of service, including that held for display or demonstration or out on lease or consignment, all raw materials, work in process, finished goods and materials used or consumed, or to be used or consumed, in Borrower's business (and all proprietary rights, patents, drawings and display materials relating thereto) and all documents of title and other documents covering any of the foregoing.

1.12. "**Loan**", and collectively "**Loans**", means the advances described in Article 2 of this Agreement.

1.13. "**Loan Account**" and "**Loan Accounts**" have the meanings specified in Section 2.4 of this Agreement.

1.14. "**Obligations**" means the Loans and any and all existing and future indebtedness and liability of every kind, nature and character, direct or indirect, absolute or contingent, joint or several (including all renewals, extensions and modifications thereof and all attorneys' fees, including allocated costs of in-house counsel, and expenses incurred by the Bank in connection with the collection or enforcement thereof including but not limited to the enforcement of this Agreement under provisions of the Bankruptcy Code whether by motion for relief from stay or otherwise), of the Borrower to the Bank however and whenever created, arising, evidenced or acquired.

1.15. "**Receivables**" means all rights to the payment of money now owned or hereafter acquired by Borrower, whether due or to become due and whether or not earned by performance including, but not limited to, accounts (as defined in the California Commercial Code), chattel paper, instruments, general intangibles, and all guaranties and security therefor and all contracts relating thereto and all returned and repossessed goods.

1.17. "**Reference Rate**" has the meaning specified in Section 2.5(a).

1.18. "**Subordinated Debt**" means Indebtedness of Borrower which has been subordinated to Borrower's Obligations in a manner which Bank has approved in writing.

1.19. "**Tangible Net Worth**" means the difference between (a) the gross book value of the assets of Borrower, and (b) the sum of (i) the amount of all intangibles such as goodwill, patents, trademarks, organization expense, treasury stock, unamortized debt discount and expense and deferred charges, (ii) the amount of reserves established by Borrower for anticipated losses and expenses, and (iii) the amount of all liabilities and indebtedness of Borrower, including accrued but deferred income taxes but excluding Subordinated Debt.

1.20. "**Termination Date**" has the meaning specified in Section 2.1.

1.21. All computations required under this Agreement shall otherwise be made in accordance with generally accepted accounting principles and practices consistently applied. Accounting terms used herein not otherwise defined shall have the meaning attributable thereto under generally accepted accounting principles, and practices.

Article 2. The Loans

2.1. From time to time, between the date of this Agreement and _____ [date] ("Termination Date"), upon request of Borrower, Bank may, at Bank's sole discretion, advance to Borrower sums which in the aggregate outstanding at any one time shall not exceed the Borrowing Base.

2.2. Each request for an advance under this Agreement ("Loan") shall be made in writing on a form acceptable to Bank or in any other manner acceptable to Bank; provided Bank is authorized to make Loans hereunder based on telephonic or other instructions of anyone purporting to be an officer, employee or other agent of Borrower.

2.3. Each Loan shall be made by a deposit to Borrower's commercial account No. _____ at the _____ office of Bank, unless Borrower shall otherwise direct Bank in writing; and if Loans are so disbursed, they are deemed to have been validly requested by Borrower.

2.4. Principal, interest, and all other sums due Bank and all sums advanced by Bank under this Agreement shall be evidenced by entries in records maintained by Bank, provided Bank may maintain separate records or ledgers with respect to advances made against Eligible Receivables and those made against Eligible Inventory (the "Loan Account" and collectively "Loan Accounts"). Each payment on and any other credits with respect to principal, interest, and all other sums due under this Agreement shall be evidenced by entries made by Bank to the appropriate Loan Account, and all such notations shall constitute prima facie evidence of the matters noted.

2.5. (a) Interest on the total outstanding principal due Bank on the Loans shall accrue daily at a rate per annum equal to the rate of interest publicly announced from time to time by Bank at its Head Office, as its reference rate ("Reference Rate") (1) plus _____ percent for Loans made against Eligible Receivables, and (2) plus _____ percent for Loans made against Eligible Inventory. Any change in the Reference Rate shall take effect with respect to the Loans on the day specified in the public announcement of that change. The Reference Rate is set by Bank from time to time as a means of pricing credit extensions to some customers and is neither tied to any external rate of interest or index nor necessarily the lowest rate of interest charged by Bank at any given time for any particular class of customers or credit extensions.

(b) Interest shall be computed on the basis of actual days elapsed over a [either: 360 (which results in greater interest than if a 365 day basis is used) or 365 (or as applicable 366)] day year.

(c) Borrower shall pay Bank on demand, or if no demand is made, on the 10th day of each month, a monthly service charge or interest for the preceding month in an amount equal to the greater of:

(1) \$ _____ [dollar amount]; or

(2) An amount equal to interest calculated no accordance with Subsection 2.5(a).

(d) After maturity (whether by acceleration or otherwise), the Loans shall bear interest at a rate per annum equal to the rate(s) provided for in Section 2.5(a) above plus _____ percent, which rate(s) shall change as the

Reference Rate changes.

(e) Borrower shall pay the entire outstanding principal amount of the Loans on demand or if no demand is made when otherwise due as provided herein.

(f) Borrower understands and agrees that interest which is not paid when due shall, at the option of Bank, be added to principal and shall bear interest at the rate(s) applied to principal evidenced by the applicable Loan Account.

2.6. Borrower agrees that, if at any time the amounts outstanding under this Agreement exceed the Borrowing Base, Borrower will immediately pay Bank the amount of the excess.

2.7. Loans under this Article are available on a revolving basis and subject to the provisions of this Agreement, Borrower may repay and reborrow as Borrower may elect.

2.8. Borrower authorizes Bank from time to time to charge against any and all Deposits of Borrower at any time maintained with Bank any amount payable by Borrower hereunder which is not paid promptly when due.

Article 3. Collateral

3.1. As security for Borrower's Obligations (including the Loans and all other sums due Bank under this Agreement), Borrower hereby grants Bank a security interest in Borrower's present and future Receivables, Inventory, Deposits, and all proceeds, products and accessions to any of these (and all insurance and proceeds covering any of the foregoing) and in such other real or personal property as Bank may require as security for the Loans pursuant to any other Collateral Agreement which provides such assets secure the Loans. As long as the Loans are outstanding, and until this Agreement is terminated as provided herein, Borrower will execute and deliver to Bank such assignments, notices, financing statements and other documents (including any original instruments, documents and chattel paper, endorsed or assigned as Bank shall specify) as Bank may request in order to perfect or confirm Bank's security interest in the Collateral or to give any third parties, including the Account Debtors, notice of Bank's interest in the Collateral.

3.2. Borrower will deliver to Bank duplicate invoices evidencing Receivables and delivery receipts and other documents with respect thereto in such form and at such times as Bank may request. Bank is authorized to destroy or return to Borrower, at Bank's option, all such documents six months after those documents are delivered to Bank.

Article 4. Conditions Precedent

4.1. Without detracting from Bank's right to refuse any requested Loan(s) hereunder, Bank's obligations hereunder are subject to the condition that, on the Closing Date, there shall have been delivered to Bank, in form and substance satisfactory to Bank, all of the following:

(a) The Collateral Agreement(s);

(b) Financing statement(s) executed by Borrower;

(c) Evidence that all security interests required to be provided in favor of Bank are valid, enforceable, and prior to the rights and interests of others.

(d) Evidence that the execution, delivery, and performance by Borrower of this Agreement and the execution, delivery, and performance by Borrower and any guarantor or subordinating creditor of any instrument or agreement required under this Agreement, as appropriate, have been duly authorized; and

(e) Such other documents, instruments and opinions as Bank may reasonably require.

4.2. As a condition precedent to each Loan including the first, under this Agreement, Bank, at its option, at any time and from time to time, may require that each request for a Loan be accompanied or preceded by the following:

(a) A certificate, in form and detail satisfactory to Bank, setting forth the Eligible Receivables and Eligible Inventory (and the related Receivables Loan Value and Inventory Loan Value) on which it is based, and

(b) Copies of the invoices for such Eligible Receivables.

4.3. Each request for a Loan under this Agreement shall be deemed a representation by Borrower that the representations and warranties contained in Section 5.1 through Section 5.6, and Section 5.8 through Section 5.10 and in any other agreement, instrument, or document executed and delivered in connection herewith are then true and accurate in all material respects as though made on and as of the day of such request, and that no further action, including any filing or recording of any agreement or statement, is necessary in order to establish and perfect Bank's first lien on, and prior perfected security interest in, all the Collateral.

Article 5. Representations and Warranties

Borrower represents and warrants that:

5.1. Borrower is duly organized and existing under the laws of the state of its organization and that the execution, delivery, and performance of this Agreement are within Borrower's powers, have been duly authorized, and are not in conflict with the terms of any charter, bylaw, partnership agreement, or other organization papers of Borrower.

5.2. The execution, delivery, and performance of this Agreement and of any instrument or agreement required by this Agreement are not in conflict with any law or any indenture, agreement, or undertaking to which Borrower is a party or by which Borrower is bound or affected.

5.3. All financial information submitted by Borrower to Bank is true and correct in all material respects and is complete insofar as may be necessary to give Bank true and accurate knowledge of the subject matter thereof.

5.4. Borrower is properly licensed and in good standing in each state in which Borrower is doing business; and Borrower has qualified under, and complied with, where required, the fictitious name statute of each state in which Borrower is doing business.

5.5. Borrower has complied with all federal, state, and local laws, rules, and regulations affecting the business of Borrower, including, but not limited to, laws regulating Borrower's sales or leases or the furnishing of services and disclosures in connection therewith.

5.6. All Collateral is owned by Borrower, free and clear of all clouds to title and of all security interests, liens, encumbrances and rights of others except the rights of Bank under the Collateral Agreements and those to which Bank has consented as provided in Section 6.14; and all Inventory and Receivables included in the Borrowing Base conform to the requirements of this Agreement for Eligible Receivables or Eligible Inventory, as the case may be, while so included.

5.7. Except for the due filing of a financing statement with respect to any Collateral Agreement, the delivery to Bank of any Collateral as to which possession is the only method of perfecting a security interest in or lien on that Collateral, and the recording of any Collateral Agreement describing Collateral that is real property, no further action is necessary in order to establish and perfect Bank's first lien on or prior perfected security interest in all property covered by any

such Collateral Agreement.

5.8. There is no litigation, tax claim, proceeding or dispute pending, or, to the knowledge of Borrower, threatened, against or affecting Borrower or its property, the adverse determination of which might adversely affect Borrower's financial condition or operations or impair Borrower's ability to perform its obligations under this Agreement or under any instrument or agreement required hereunder.

5.9. No event has occurred and is continuing or would result from the making of the Loan which constitutes an Event of Default or which, upon lapse of time or notice or both, would become an Event of Default.

5.10. If Borrower's Inventory includes beer, wine or liquor, Borrower's sales for resale exceeded seventy-five percent in dollar volume of Borrower's total sales during the 12 months immediately preceding the filing of the financing statement perfecting Bank's security interest in Borrower's Inventory.

Article 6. Covenants

Borrower covenants and agrees that so long as the credit facility established under this Agreement shall remain available and until the full and final payment of the Loans and all other indebtedness incurred hereunder, Borrower will do all of the following, unless Bank waives compliance in writing:

6.1. **Payments.** Pay principal and interest on the Loans and all other sums due under this Agreement or under any Collateral Agreement according to the terms hereof or thereof.

6.2. **Notice of Dispute.** Promptly give written notice to Bank of any of the following:

- (a) Any substantial dispute which may exist between Borrower and any governmental or regulatory body or law enforcement authority;
- (b) An Event of Default or any event which, upon a lapse of time or notice or both, would become an Event of Default;
- (c) Any other matter that has resulted or might result in a material adverse change in Borrower's financial condition or operations; and
- (d) Any event that adversely affects the value of the Collateral, the ability of Borrower or Bank to dispose of any of the Collateral, or the rights and remedies of Bank in relation thereto, including, but not limited to, the levy of any legal process against any Collateral and the adoption of any marketing order, arrangement or procedure affecting the Collateral, whether governmental or otherwise.

6.3. **Financial Information.** In addition to the financial statements required under Section 8.11(a), deliver to Bank, in form and detail satisfactory to Bank, and in such number of copies as Bank may request, all of the following:

- (a) On the 15th day of each month, a Borrowing Base Certificate (Status Report), in format and detail satisfactory to Bank, setting forth the respective amount of Receivables and Inventory and other information with respect thereto as of the last day of the preceding month;
- (b) On the 15th day of each month, statements showing, as at the immediately preceding month end, an aging of Receivables and reconciliation of Receivables and collections to the applicable Borrowing Base Certificate (Status Report);
- (c) On the 15th day of each month, a statement showing an aging of accounts payable;

(d) On the 15th day of each month, a Report of Inventory Subject to Security Interest setting forth the amount of Inventory as of the last day of the preceding month;

(e) Each time collections are delivered to Bank, a schedule of the amounts so collected and delivered to Bank;

(f) Annual financial statements (in form and detail satisfactory to Bank) of each guarantor of Borrower's Obligations under this Agreement within such a reasonable time after the end of each year or fiscal year of that guarantor as Bank requests;

(g) Promptly upon request of Bank, such other statements, lists of property or accounts, budgets, forecasts, and reports as to Borrower (and as to each guarantor of Borrower's Obligations) as Bank may request; and

(h) If any Collateral is or becomes subject to any negotiable document of title, warehouse receipt or bill of lading, the original documents promptly upon issuance.

6.4. Expenses. Pay or reimburse Bank for all costs and expenses incurred by Bank in connection with this Agreement or any instrument or agreement or financing statement furnished in connection with this Agreement (including expenses incurred by Bank in the exercise of its rights under Section 6.13).

6.5. Intent. Perform, on request of Bank, such acts as may be necessary or advisable to perfect any liens or security interests provided for herein or otherwise to carry out the intent of this Agreement.

6.6. Existence. Maintain and preserve Borrower's existence and all rights, privileges and franchises now enjoyed, conduct Borrower's business in an orderly, efficient and customary manner, keep all Borrower's properties in good working order and condition, and from time to time make all needed repairs, renewals or replacements to those properties so that the efficiency of that property shall be fully maintained and preserved.

6.7. Insurance. Maintain and keep in force in adequate amounts of such insurance, including property and liability insurance, as is usual in the business carried on by Borrower, and furnish Bank with the most current copies of fire and hazard insurance policies on Borrower's Inventory. Each fire and hazard insurance policy shall have such endorsements (including loss payable endorsements in favor of Bank) as may be required by Bank and shall be in form and substance satisfactory to Bank and issued by insurance companies acceptable to Bank.

6.8. Records. Maintain adequate books, accounts and records and prepare all financial statements required hereunder in accordance with generally accepted accounting principles and practices consistently applied, and in compliance with the regulations of any governmental regulatory body having jurisdiction over Borrower or Borrower's business, including but not limited to laws regulating Borrower's sales or leases to or performance of services for Account Debtors and disclosures in connection therewith.

6.9. Information. Cause all financial information, including information relating to Receivables, upon submission by Borrower to Bank to be true and correct in all material respects and complete to the extent necessary to give Bank a true and accurate knowledge of the subject matter thereof.

6.10. Inspection and Disclosure of Discounts. Permit the Bank, by its representatives and agents, to inspect the Collateral, to examine and make copies of the records of the Borrower relating thereto, and to discuss the Collateral, and the records of the Borrower with respect thereto with, and to be advised as to the same by the Borrower's officers and, in the case of any Receivable, with any person or entity which is or may be obligated thereon, all at such reasonable times and intervals as the Bank may determine. If any discount, credit, agreement to make a rebate or to otherwise reduce the amount owing on a Receivable exists or if, to the knowledge of the Borrower, any dispute, setoff, claim,

counterclaim or defense exists or has been asserted or threatened with respect to a Receivable, such fact shall be disclosed to the Bank in writing in connection with the inspection by the Bank of any records of the Borrower relating to that Receivable and in connection with any invoice or report furnished by the Borrower to the Bank relating to that Receivable.

6.11. **Taxes.** Pay when due all taxes, assessments and governmental charges and levies upon the Collateral, except those which are being contested in good faith by appropriate proceedings.

6.12. **Notice of Default.** Give prompt notice in writing to the Bank of the occurrence of any Event of Default and of any other development, financial or otherwise, which might materially adversely affect the Collateral, or the ability of Borrower to perform its Obligations.

6.13. **Notification of Account Debtors.** Upon the request of the Bank, notify all or such of the Account Debtors as Bank shall specify to make payment thereon at such place and in such manner as Bank shall specify.

6.14. **Liens.** Not create, incur, or suffer to exist any lien or encumbrance or security interest on any Collateral except for the security interests created by this Agreement and those consented to by Bank in writing.

6.15. **Disposition of Collateral.** Not sell, lease or otherwise dispose of the Collateral except, prior to the occurrence of an Event of Default:

- (a) Sales of Inventory in the ordinary course of business; and
- (b) Cash proceeds of Inventory and Receivables collected in the ordinary course of business.

6.16. **Change In Location or Name.** (a) Not have any Inventory at a location other than a location specified in Section 8.9(d);

(b) Not maintain records concerning the Receivables at a location other than a location specified in Section 8.9(b);

(c) Not maintain its chief executive office at a location other than that specified in Section 8.9(c);

(d) Not change its name; and

(e) Not change its mailing address without Bank's prior written consent.

6.17. **Certain Agreements on Receivables.** Not make or agree to make any discount, credit, rebate or other reduction in the original amount owing on a Receivable or accept in satisfaction of a Receivable less than the original amount thereof.

6.18. **Other Activities.** Not engage in any business activities or operations substantially different from or unrelated to Borrower's present business activities and operations.

Article 7. Events of Default

The occurrence of any of the following Events of Default shall, without notice to Borrower, terminate any obligation on the part of Bank to make or continue the Loans and, at the option of Bank, shall make all sums of interest any principal remaining on the Loans immediately due and payable, without notice of default, presentment or demand for payment, protest or notice of nonpayment or dishonor, or other notices or demands of any kind or character:

7.1. Borrower fails to pay, when due, any installment of interest or principal or any other sum due under this Agreement or any Collateral Agreement in accordance with the terms hereof or thereof.

7.2. Any representation or warranty herein or in any agreement, instrument or certificate executed pursuant hereto or in connection with any transaction contemplated hereby proves to have been false or misleading in any material respect when made.

7.3. Bank fails to have a valid and enforceable prior perfected security interest in (or first lien on) any Collateral unless Bank has agreed in writing to accept other than a first priority lien.

7.4. An involuntary lien or liens attach to the Collateral, or attach in the aggregate sum specified in Section 8.11(f) or more, to other assets or property of Borrower, except for taxes due but not in default, or for taxes which are being contested in good faith and by appropriate proceedings.

7.5. A judgment or judgments is or are entered against Borrower in the aggregate amount specified in Section 8.11(g) or more on a claim or claims not covered by insurance.

7.6. Borrower or any guarantor of any of Borrower's Obligations to Bank fails to pay Borrower's or, as the case may be, that guarantor's debts generally as they come due, or files any petition, proceeding, case, or action for relief under any Bankruptcy, reorganization, insolvency, or moratorium law, or any other law or laws for the relief of, or relating to, debtors.

7.7. An involuntary petition is filed under any Bankruptcy or similar statute against Borrower or any guarantor of any of Borrower's Obligations to Bank, or a receiver, trustee, liquidator, assignee, custodian, sequestrator, or other similar official is appointed to take possession of the properties of Borrower or that guarantor.

7.8. Borrower voluntarily suspends its business other than in the usual and normal course of Borrower's business.

7.9. Any governmental regulatory authority takes or institutes action which, in the opinion of Bank, will adversely affect Borrower's condition, operations or ability to repay the Loans.

7.10. Any default occurs under any other agreement involving the borrowing of money or the advance of credit to which Borrower may be a party as borrower or guarantor, if that default consists of the failure to pay any indebtedness when due or if that default gives to the holder of the obligation concerned the right to accelerate the indebtedness.

7.11. Any guaranty, subordination agreement, Collateral Agreement or other agreement or instrument required hereunder is breached, revoked or becomes ineffective or any default occurs under any that agreement or instrument.

7.12. Bank, in good faith, considers any Collateral to be unsafe or in danger of misuse to the extent that Bank's prospect of or right to payment or performance under this Agreement or any instrument or agreement required hereunder is impaired.

7.13. Borrower breaches, or is in default under, any term, condition, provision, representation or warranty contained herein not otherwise specifically referred to in this Article 7.

7.14. Bank, upon the occurrence of an Event of Default, in addition to any other right afforded a secured party by the California Commercial Code, may do any or all of the following:

(a) Immediately take possession of the Collateral wherever it may be found, with or without judicial process, or require Borrower to assemble the Collateral and make it available to Bank at a place designated by Bank which is reasonably

convenient to Borrower and Bank;

(b) Sell, lease or otherwise dispose of the Collateral, following any preparation or processing bank determines to be necessary or desirable, in one or more transactions upon such terms and in such manner as Bank may determine, including public or private sales, sales for cash or on credit, and with or without the Collateral present at the place of transaction; and Bank may purchase the Collateral at any such sale, free from any right of redemption by Borrower (other than redemption rights mandated by applicable law which cannot be waived); and

(c) Retain the Collateral in full satisfaction of the Loans and other obligations secured hereby.

7.15. The cash proceeds resulting from the exercise of any of Bank's remedies, after deducting all charges, expenses and costs, including attorneys' fees (and the allocable costs of Bank's in-house counsel), incurred in repossessing, holding, preparing for sale or lease, and selling or leasing the Collateral, shall be applied by Bank to the payment of the Loans and other Obligations secured by this Agreement in such an order as Bank may elect, and Borrower shall remain liable to Bank for any deficiency. Bank shall not be liable to Borrower for any damage to real or personal property which is not Collateral caused by acts or omissions of Bank or its agents done in good faith in removing, storing, processing, preserving, or disposing of the Collateral, nor for damage to the Collateral. Borrower indemnifies and holds Bank harmless from any liabilities, losses, costs and expenses, including attorneys' fees, arising from claims of third persons resulting from any such acts and omissions. Bank shall have the right to enforce any one or more of its remedies hereunder successively or concurrently and the exercise of any one remedy shall not estop or prevent Bank from pursuing any other remedy provided hereunder or by the California Commercial Code or otherwise available by law. Bank may sue for the full amount of the Loans and other Obligations secured by this Agreement without proceeding against all or any part of the Collateral.

Article 8. Miscellaneous

8.1. Application of Collections. The proceeds of collections of Receivables, when received by Bank, shall be credited to interest, principal, and other sums due Bank under this Agreement in the order and proportion determined by Bank in its sole discretion. All such credits shall be conditioned upon collection and any returned items may, at Bank's option, be charged to Borrower.

8.2. Attorney in Fact. Borrower hereby makes, constitutes and appoints Bank its irrevocable, true and lawful attorney with the power:

(a) To receive, open and dispose of all mail addressed to Borrower;

(b) To endorse the name of Borrower upon any checks or other evidences of payment that may come into the possession of Bank with respect to the Receivables or as Inventory proceeds;

(c) To endorse the name of Borrower upon any document or instrument relating to the Collateral;

(d) In Borrower's name or otherwise, to make or give any presentment, demand or notice with respect to any of the Receivables and to agree to the compromise, adjustment or extension of the time for payment of any Receivables and release or exchange of any security for, or any party primarily or secondarily liable on, any Receivables;

(e) To prosecute, defend or settle any action, claim or proceeding with respect to the Receivables; and

(f) To do any and all things necessary or proper to carry out the purposes herein contemplated including those necessary to perfect Bank's security interest in the Collateral. Notwithstanding Bank's exercise of its rights to collect the Receivables and Inventory proceeds, Bank shall be under no duty to make or give any presentments, demands or notices

or to take any steps to preserve rights against prior parties in connection with the Receivables and Inventory proceeds.

8.3. Collections. Until Bank exercises its rights to collect the Receivables and Inventory proceeds pursuant to Section 6.13 or Subsections (f) and (g) of Section 8.7 of this Agreement, Borrower will collect with diligence (and at its own cost and expense) all Receivables and Inventory proceeds, provided that no legal action shall be maintained thereon or in connection therewith without Bank's prior written consent. If a credit adjustment is made with respect to any Eligible Receivable, the amount of such adjustment shall no longer be included in the amount at such Eligible Receivable in computing the Borrowing Base. Any collection of Receivables or inventory proceeds by Borrower, whether in the form of cash, checks, notes or other instruments for the payment of money, shall be properly endorsed and assigned as requested by Bank to enable Bank to collect same and will be held in trust for Bank, and Borrower shall keep all such collections separate and apart from all other funds and property so as to be capable of identification as the property of Bank and deliver such collections daily to Bank in the identical form received. Collections in the form of cash, checks and similar proceeds shall be credited to the appropriate Loan Account when received by Bank, provided that all such credits shall be conditional credits (subject to collection) and returned items may, at Bank's option, be charged to Borrower's general account. Collections in the form of notes and similar proceeds shall be set forth on an itemized schedule prepared by Borrower and delivered to Bank with each collection showing the name of the Account Debtor the amount of each payment and such other information as Bank may request.

8.4. Notice of Disposition of Collateral. Notice at the time and place of any public sale or the time on or after which any private sale or other disposition of all or any part of the Collateral may be made shall be reasonable if sent to the Borrower, addressed as set forth in Section 8.10, at least five days prior to any such public sale or the time on or after which any such private sale or other disposition is to be made.

8.5. Compromises and Collection of Collateral. Borrower and Bank recognize that setoffs, counterclaims, defenses and other claims may be asserted by Account Debtors with respect to certain of the Receivables, that certain of the Receivables may be or become uncollectible in whole or in part and that the expense and probability of success in litigating a disputed Receivable may exceed the amount that reasonably may be expected to be recovered with respect to a Receivable. In view of the foregoing, the Borrower agrees that Bank may at any time and from time to time compromise with the Account Debtors on any Receivable, accept in full payment of any Receivable such amount as the Bank in its sole discretion shall determine, or may abandon any Receivable; and Borrower agrees any such action by the Bank shall be commercially reasonable as long as Bank acts in good faith based on information known to it at the time it takes any such action.

8.6. Use and Possession of Certain Premises Trademarks. Upon the occurrence of an Event of Default, Bank shall be entitled to occupy and use any premises owned or leased by the Borrower where any of the Collateral or any records relating to the Collateral are located until the Obligations are paid or the Collateral and the records relating thereto are removed therefrom, whichever occurs first. Bank shall have no obligation to pay the Borrower for such use and occupancy. Bank shall also be entitled, in connection with any assembly or disposition of the Collateral, to use, convey or assign any trademark, trade name, trade style, copyright, patent right or technical process used or utilized by Borrower.

8.7. Additional Optional Requirements. Borrower agrees that Bank may at any time, at Bank's sole option, whether or not Borrower is in default hereunder, do any of the following:

(a) Require Borrower to segregate all collections and proceeds of the Collateral so that they are capable of identification, and deliver daily such collections and proceeds to Bank in kind;

(b) Require Borrower to periodically deliver to Bank records and schedules, which show the status and condition of the Collateral, where it is located, or contracts or other matters that affect the Collateral;

- (c) Verify the Collateral and inspect the books and records of Borrower and make copies thereof or extracts therefrom;
- (d) Require Borrower to obtain Bank's prior written consent to any sale, contract of sale or other disposition of any Inventory or of any farm products or other goods covered by any document of title on such Inventory;
- (e) Notify any Account Debtor, any buyer of the Collateral or any other person of Bank's interest in the Collateral and the proceeds thereof;
- (f) Require Borrower to direct all Account Debtors to forward all remittances, payments and proceeds of the Collateral to a post office box under Bank's exclusive control;
- (g) Demand and collect directly any Receivables and any proceeds of the Collateral. In connection therewith Borrower irrevocably authorizes Bank to endorse or sign Borrower's name on all collections, receipts or other documents, take possession of and open the mail addressed to Borrower and remove therefrom payments of receivables and proceeds of the Collateral; and
- (h) Require Borrower to deliver to Bank any original instruments or chattel paper evidencing one or more Receivables.

8.8. Indemnity. Borrower hereby indemnifies Bank against, and holds Bank harmless from, all claims, actions, expenses and losses including attorneys' fees and costs incurred by Bank, arising from any contention, whether well-founded or otherwise, that there has been a failure to comply with any law regulating Borrower's sales or leases to, or performance of services for, Account Debtors or disclosures to be made in connection therewith.

8.9. Additional Information. Borrower represents and warrants to Bank as follows:

(a) Borrower is _____ [legal name], _____ [an individual or specify type of entity and state law under which it was organized; e.g., a California _____ (corporation or limited liability company or partnership)].

(b) Records relating to the Receivables of Borrower are maintained only at the following locations:

_____ [address]
 _____ [address]

(c) Borrower's chief executive office is located at:

_____ [address]

(d) Borrower maintains Inventory only at the following locations:

_____ [address]
 _____ [address]

(e) Borrower has conducted business only in the following other names:

_____ [name]
 _____ [name]

8.10. **Notices.** Any notice required or permitted to be given under this Agreement may be, and shall be deemed, given and sent when deposited in the United States mail, postage prepaid, or by telegraph or telex when delivered to the appropriate office for transmission, charges prepaid, addressed:

To Borrower as follows:

_____ [address]

Attention: _____

To Bank as follows:

_____ [address]

Attention: _____

8.11. Financial Provisions.

(a) **Financial Statements.** Borrower will provide Bank with all of the following:

(1) Within _____ days after the end of each fiscal year of Borrower, Borrower's annual financial statements prepared by an independent certified public accountant ("CPA") selected by Borrower and satisfactory to Bank, and

(2) Within _____ days after the end of each _____ [specify period, e.g., quarter] accounting period, Borrower's _____ [period; e.g., quarterly] financial statements prepared by a responsible financial officer of Borrower or its CPA. All such financial statements shall be in form and detail and shall include such types of statements and financial reporting as Bank may reasonably require.

(b) **Lease Obligations.** Borrower will not directly or indirectly incur, assume or have outstanding any Indebtedness to pay rent under lease(s), including lease obligations required to be capitalized on the lessee's balance sheet, if the aggregate of all such rents would exceed \$_____ during any one fiscal year of Borrower.

(c) **Fixed Asset Expenditures.** Borrower will not purchase, acquire, or incur liability for the purchase of fixed assets, including those acquired under capitalized leases, in an aggregate amount in any consecutive 12-month period in excess of \$_____.

(d) **Salaries.** Borrower will not make or permit direct or indirect withdrawals, salary, compensation, advances, or other distributions from Borrower to exceed the following amounts to the following persons:

Name	Monthly Payment
_____	_____
_____	_____
_____	_____

Nor will Borrower compensate others in excess of the foregoing amounts without Bank's prior written consent.

(e) **Financial Covenants.** Borrower will at all times while the Obligations are outstanding and until this Agreement is

terminated:

(1) Maintain a Tangible Net Worth of not less than \$_____ and a ratio of total Indebtedness to Tangible Net Worth of not more than _____ to _____.

(2) Maintain a ratio of current assets to current liabilities of not less than _____ to _____.

(3) Maintain a ratio of cash and cash equivalents plus trade receivables (net of bad debt reserves required to be maintained in accordance with generally accepted accounting principles and practices) to Borrower's total current Indebtedness of not less than _____ to _____.

(4) Maintain a working capital not less than \$_____.

(5) _____ [*add any other specialized covenants*].

(f) Referring to Section 7.4 (Permitted involuntary liens): The aggregate sum of \$_____.

(g) Referring to Section 7.5 (Judgments): The aggregate amount of \$_____.

8.12. **Miscellaneous.** The following additional provisions shall apply:

(a) **Successors.** This Agreement shall bind and inure to the benefit of the parties hereto and their respective successors and assigns; provided, however, that Borrower shall not assign this Agreement or any of the rights, duties or obligations of Borrower hereunder without the prior written consent of Bank.

(b) **Waivers.** No consent or waiver under this Agreement shall be effective unless in writing. No waiver of any breach or default shall be deemed a waiver of any breach or default thereafter occurring.

(c) **Governing Law.** This Agreement shall be governed by and construed under the laws of the State of California.

(d) **Costs.** Borrower agrees to pay reasonable attorneys' fees and all other costs and expenses incurred by Bank to enforce this Agreement or any instrument or agreement required by this Agreement.

(e) **Entire Agreement.** This Agreement and any agreement, document or instrument attached hereto or referred to herein integrates all the terms and conditions mentioned in or incidental to this Agreement, and supersedes all oral negotiations and prior writings in respect to the subject matter of this Agreement. In the event of any conflict between the terms, conditions and provisions of this Agreement and any such agreement, documents or instrument, the terms, conditions and provisions of this Agreement shall prevail.

8.13. **TERMINATION WITHOUT CAUSE.** Upon _____ days prior written notice to the other party as set forth in Section 8.10 either Bank or Borrower, at its sole discretion, may without cause and without detracting from the demand nature of Borrower's Obligations hereunder or the discretionary nature of Bank's Obligation to make Loans, terminate the arrangement under this agreement with respect to Bank's making Loans, provided that such a termination will not affect Borrower's Obligations or Bank's rights under this agreement or any Collateral Agreements, including Bank's rights with respect to the Collateral, until all Borrower's Obligations are paid in full.

Article 9. Additional Provisions

_____ [add any additional terms and conditions or, if none, state None]

IN WITNESS WHEREOF, Borrower and Bank have executed this Agreement as of the day and year first above written.

BORROWER

_____ [name]

By _____ [signature]

[typed name and title]

BANK

_____ [name]

_____ [signature]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGeneral
OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application &
ConstructionDefinitionsCollateralGoodsInventoryCommercial Law (UCC)Secured Transactions (Article 9)Security
AgreementsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

G. Financing and Assignment of Inventory and Equipment

19-43 California Legal Forms--Transaction Guide § 43.283

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.283 Security Agreement for Business and Farm Collateral

[1] Comment

[a] Use of Form

This form is a general security agreement covering business and farm collateral, as specified by the parties in the form. This form illustrates the terms typically found in a general security agreement covering business and farm collateral such as equipment, inventory, accounts, chattel paper and instruments, purchase money security interests, and farm products. For coverage of secured transaction procedures under the Commercial Code, see Ch. 42, *Secured Transactions*.

[b] Importance of Reading Loan and Security Agreements

By the time the parties get to the point of executing the loan documentation, many practitioners and borrowers are so weary of the process that they fail to closely read the documents they are given to sign and simply assume that the documents are "standard" and need not be read. *This is a mistake.* There are no "standard" documents; there are only documents drafted by banks, which are later printed to look "standard." Banks draft documents to give them the maximum protection they can imagine. This approach is often not in the best interest of the borrower and severely limits the ability of the borrower to conduct business.

For example, if all of the boxes in this form regarding property covered by the security interest were initialed, the bank would be given a security interest in virtually everything the borrower owns. This may far exceed the amount necessary to secure the loan. It could also preclude the borrower from obtaining other loans from other lenders.

This agreement also provides that the security interest granted is to secure not only the subject loan but any other past, present, or future obligation of the borrower to the bank. This means that the bank may become a secured creditor of the borrower for some obligation not even contemplated by the borrower. This form also imposes a number of obligations on the borrower that, if not complied with, may allow the bank to declare the borrower in default. These may be obligations that the borrower did not even know existed. For instance, Paragraph 1 of the "Other Provisions" part provides that loan proceeds may be used only for purposes listed in the loan application unless approved by the bank.

Another example is contained in Paragraph 7 of the "Other Provisions" part. It provides for the payment of taxes "when due." Many taxes become due on one date but are not delinquent until a later date. The payment of those taxes on the later date, while permitted by the taxing authority, would be a default under the agreement.

While the borrower may accept the requirements of the agreement, he or she nevertheless must understand those requirements, in order to avoid inadvertent default.

[2] FORM

Security Agreement for Business and Farm Collateral

GENERAL SECURITY AGREEMENT (ALL BUSINESS AND FARM COLLATERAL)

I. Grant of Security Interest

In consideration of any financial accommodations given, to be given or continued, the undersigned ("Borrower") grants to _____[*name of bank*] ("Bank") a security interest in the following described personal property of Borrower now or hereafter existing or acquired (hereinafter individually and collectively called "Collateral" as the context may require):

1. Any and all tangible and intangible property in Bank's possession or control in any manner or for any purpose; and
2. Any and all of the kinds and classes of property initialed below:

[*initial if applicable*] (a) **Equipment**, including, without limitation, machinery, tools, furniture, fixtures, attachments, motor vehicles, and farm equipment.

[*initial if applicable*] (b) **Inventory**, including, without limitation, goods, merchandise and other personal property held or to be held for sale or lease, display or demonstration, or out on lease or consignment, or to be furnished under a contract of service or so furnished, and returns from sale, lease, consignment or service, vessels under construction, and raw materials, work in process and materials used or consumed in Borrower's business.

[*initial if applicable*] (c) **Accounts**, including, without limitation, accounts receivable, rights to payment or performance under invoices or contracts or to payment for goods sold or leased or for services rendered, whether or not yet earned by Borrower's performance, and all other forms of obligations of and receivables from others.

[*initial if applicable*] (d) **Chattel paper; instruments**, including notes, drafts and acceptances; **documents of title** and receipts, including bills of lading and warehouse receipts, and the **goods** relating thereto; money; **general intangibles**, including without limitation: cash value, return premiums, and other rights under insurance policies, causes of action, judgments, royalty contracts, contracts relating to the sale, finance or lease of real property, and demand, time, savings, or any other accounts maintained with Bank or any other financial institution.

[initial if applicable] (e) **Farm products; timber** to be cut; and **minerals**, including without limitation; crops now growing or to be grown, livestock, supplies and feed used or produced in farming operations, products of crops or livestock in their unmanufactured states, and oil and gas when extracted, which crops, timber and minerals, until severed, are located on or at the real property described below or in the schedule attached hereto and made a part hereof:

[initial if applicable] (f) Certain specific items of personal property set forth below or listed in the schedule attached to this agreement and made a part of this agreement (which specification is not intended to limit the generality of any description of collateral set forth above):

3. Any and all proceeds, accessions, replacements, increase, and products of the personal property specified in Paragraph 1, above, or initialed in Paragraph 2, above,

II. Obligations Secured

[initial if applicable] 1. **Purchase Money Security Interest.** By initialing this box, Borrower acknowledges that Bank is giving value to enable Borrower to acquire rights in, or the use of, the Collateral, and Borrower agrees to use this value only for the purpose of acquiring the rights in, or use of the Collateral for which it is given.

2. **Obligations Secured.** The security interest granted by Borrower to Bank secures payment and performance of all of Borrower's present and future debts, obligations and liabilities to Bank, whether absolute or contingent, direct or indirect, liquidated or unliquidated, whether or not secured by assets in addition to the Collateral, including without limitation:

(a) The obligations set forth below or listed in the schedule attached to and made a part of this Agreement:

(b) Obligations incurred by Borrower under any promissory notes or other agreements now or later payable or transferred to Bank, this agreement, any overdrafts, cash reserves or other liabilities arising out of any present or future deposit account relationships, any future advances and any other present or future contractual or other legal liabilities to Bank however evidenced or arising, except (i) any future "consumer credit" indebtedness under the Federal Truth in Lending Act and regulations thereunder unless the Collateral and type of security interest granted to Bank under this agreement is disclosed at the time incurred if and as then required by such Act and regulations; and (ii) obligations now or later secured by a trust deed on real property to which California law applies unless set forth or listed as an obligation

in (a), above, or unless a separate agreement in writing now or later states in effect that the obligation is secured by any Collateral (the foregoing to be hereinafter collectively called "Obligations").

III. Other Provisions

Borrower warrants, represents and agrees as follows:

1. **Use of Loan Proceeds.** Borrower will use the proceeds of any loan made by Bank to Borrower and secured by the Collateral for the purpose indicated in any loan request or application and always in Borrower's business unless otherwise disclosed to and accepted by Bank in writing.

2. **Ownership and Claims to Collateral.** Borrower owns absolutely and has unrestricted power to encumber all Collateral unless Bank agrees otherwise in writing. No other person or entity has or claims any title, lien or other interest in any Collateral except for taxes not yet delinquent, and for any interest disclosed to and accepted by Bank in writing. Borrower will defend any proceeding which may affect title to or Bank's security interest in any Collateral. No financing statement containing any description which by its terms embraces the Collateral, including proceeds, is on file in any public office.

3. **Collateral in Borrower's Possession.** As to all Collateral now or later in Borrower's possession (unless specifically otherwise agreed by Bank in writing), Borrower will do all of the following:

(a) Keep the Collateral at the location(s) disclosed in writing to Bank and not remove the Collateral from that location except temporarily for use in Borrower's business or for repairs.

(b) Keep the Collateral separate and identifiable to the fullest extent possible.

(c) Maintain all of the Collateral (including equipment, inventory, farm products, and timber) in good and salable condition; repair the Collateral if necessary; clean, feed, shelter, water, medicate, fertilize, cultivate, irrigate, prune and otherwise deal with the Collateral in all ways considered good practice by owners of like property; use the Collateral lawfully, only in Borrower's business and as permitted by insurance policies; and permit Bank to inspect the Collateral at any reasonable time.

(d) Within 30 days after issuance of any certificate of registration or title to any Collateral, deliver any such certificate to Bank showing Bank's security interest noted thereon.

(e) Keep all Collateral (except growing crops, unsevered timber and minerals) as personal property or trade fixtures and keep it from becoming part of the real property where located, and obtain and deliver to Bank a waiver or subordination on Bank's standard form from any owner and encumbrancer of the real property of any rights in the Collateral, including farm products, and of any rights to prevent removal of the Collateral by Bank.

4. **Crops and Timber.** As to Collateral consisting of crops and timber, Borrower will prepare the crops or timber for market. At Bank's request Borrower will immediately notify Bank when the crops or timber are ready for market, follow Bank's instructions as to holding, shipping, storing, and marketing them, arrange for payment for such crops or timber directly to Bank and obtain the issuance of any documents of title in Bank's name. Bank, regardless of default, may take possession of the crops or timber as soon as harvested and market or otherwise handle them at Borrower's expense.

5. **Inventory and Accounts.** As to Collateral consisting of inventory and accounts, Borrower:

(a) May, until notice from Bank, sell or lease inventory Collateral in the ordinary course of trade only, and collect cash proceeds of inventory Collateral.

(b) At Bank's request, will deposit all cash proceeds as received in a general account with Bank or at Bank's option an account containing only those proceeds, and/or deliver statements identifying units of inventory acquired, disposed of and/or returned, accounts and names and addresses of account debtors.

(c) Will receive in trust, schedule on forms satisfactory to Bank, and deliver to Bank all noncash proceeds other than inventory received in trade.

6. Collateral Representing Obligations of Others. As to Collateral consisting of accounts, chattel paper, instruments, documents, general intangibles, and proceeds described in 5(c), above, at and after the time Borrower's rights under each item of such Collateral arise:

(a) All such Collateral is and will be genuine, enforceable in accordance with its terms, free from default, prepayment, defenses and conditions precedent (except as disclosed to and accepted by Bank in writing). Borrower will supply Bank with invoices or other evidence of Borrower's rights and with all originals of documents evidencing chattel paper and general intangibles on Bank's request.

(b) All persons appearing to be obligated on such Collateral have authority and capacity to contract.

(c) All chattel paper is and will be in compliance with law as to form, content and manner of preparation and execution, and properly registered and filed to perfect Borrower's interest thereunder.

(d) Bank shall be under no duty to make or give any presentments, demands for performance, notices of nonperformance, protests, notices of protest or notices of dishonor, to collect any Collateral or its proceeds, or to take any steps to preserve rights against prior parties in connection with the Collateral whether or not it has possession of the Collateral.

(e) Borrower will not compromise, settle or adjust any such Collateral or renew or extend the time of payment thereof without Bank's prior written consent.

7. Payment of Liens and Taxes. Borrower will pay when due all existing and future charges, liens or encumbrances on and all taxes and assessments now or hereafter imposed on or affecting the Collateral, including taxes on realty owned by Borrower on or at which Collateral is located.

8. Insurance of Collateral. Borrower will at all times keep the Collateral insured naming Bank as loss payee under policies in form and amounts, with companies, and against risks and liability satisfactory to Bank. In addition to amounts payable by reason of loss or damage to any Collateral (in which amounts Bank has a security interest as proceeds), Borrower hereby assigns to Bank as security for Borrower's Obligations all rights under such policies and any other policies constituting Collateral, will deliver such policies to Bank at Bank's request, and authorizes Bank to make any claim thereunder; to cancel the insurance on Borrower's default, and to receive payment of and endorse any instrument in payment of any loss, return premium or dividend. At Bank's request Borrower will obtain at Borrower's expense an endorsement to any such insurance if currently available.

9. Information From Borrower. Borrower will give Bank any information it reasonably requires from time to time regarding Borrower's financial condition or the Collateral and events which could affect either or both, and will permit Bank access at reasonable times to its records containing such information. All information received by Bank at any time from Borrower (including but not limited to the value, condition and ownership of Collateral, financial statements, financing statements, and statements made in documentary Collateral) is and will be correct and complete as of the time such information is supplied whether or not specifically requested by Bank, and Borrower will notify Bank of any later adverse change in any such information. Borrower will notify Bank in writing of any change of Borrower's name,

residence, chief place of business, or mailing address before such a change occurs.

10. Bank's Rights to Protect Collateral. Bank is irrevocably appointed Borrower's attorney in fact at any time before or after default, without notice to Borrower, to obtain any insurance, discharge any lien, make any payment and do any other act which Borrower is obligated to do under this agreement, to exercise such rights as Borrower might exercise, to use such equipment as Borrower might use, to enter Borrower's premises to give notice of Bank's security interest, to collect Collateral including proceeds, to execute and file in Borrower's name any financing statements, other filings and amendments thereto, or applications for registration or like documents, required to perfect Bank's security interest in any Collateral, and to take any other reasonable action, all to protect and preserve the Collateral and Bank's rights. No action or inaction by Bank, nor any term of this agreement, shall relieve Borrower of the obligation to do any of the foregoing acts or impose on Bank any such obligations. Borrower will immediately pay all Bank's costs, and indemnify Bank against all claims, demands, and liabilities including reasonable attorneys' fees, incurred in exercising any of the foregoing rights or by reason of being made a party to or intervening in any action or proceeding affecting any Collateral or Bank's rights, with interest on each item of cost and liability from the date paid by Bank at the annual rate provided before or after default (as the case may be) in the promissory note evidencing the indebtedness of Borrower to Bank to which the cost or liability is related, if any, and in all other cases at the annual rate of _____ per cent. Without limiting the Bank in the exercise of any of the foregoing rights, Bank may do any or all of the following:

- (a) Endorse, collect and receive delivery or payment of instruments and documents constituting Collateral;
- (b) Make extension agreements with respect to or affecting Collateral, exchange it for other Collateral, release persons liable on it or security for the payment of it, and compromise disputes in connection with it;
- (c) Use or operate Collateral for the purpose of preserving any Collateral or its value or for preparing and disposing of Collateral, or abandon any Collateral.

11. Prohibited Transfers. Borrower will not sell, lease, contract to sell or lease, transfer or create any encumbrance, purchase money or other security interest in any Collateral (other than to sell or lease inventory Collateral as permitted by Paragraph 5) until all Obligations have been paid, even though Bank has a security interest in proceeds of such Collateral and regardless of whether any sale, lease, encumbrance or transfer is to an organization or person controlled by Borrower or its then principals. If Borrower is an organization, Borrower will not without Bank's prior written consent change the legal form of its organization or its business structure in any way which Bank in good faith decides might adversely affect the prospect of repayment of any of the Obligations, impair the continuing validity or perfection of its security interest as to any Collateral (including later-acquired property), or make a filed financing statement misleading, and Borrower will not without Bank's prior written consent merge with or into any other organization or be subject to a change of control by reason of a transfer of shares, voting power, or other means.

12. Events of Default and Acceleration. On the occurrence of any of the following events or circumstances, Bank shall have the right to terminate any or all commitments and other obligations of Bank to Borrower and to declare all or any part of the Obligations immediately due and payable without demand or notice to Borrower:

- (a) If Borrower fails to pay or perform any of the Obligations when due; or
- (b) If Borrower or any guarantor of any of the Obligations dies, becomes insolvent, is generally not paying his debts as such debts become due, suffers a material adverse change of financial conditions, or defaults with respect to any order, judgment, injunction, decree, writ or demand of any court or other public authority; or
- (c) If Bank in good faith believes that the prospect of payment or performance of any Obligations is impaired.

All Obligations shall be in default, and immediately due and payable in full, and all commitments and other obligations of Bank to Borrower shall be terminated, without declaration, demand or notice to Borrower if Borrower or any guarantor of any of the Obligations does any of the following:

- (a) Makes an assignment for the benefit of creditors;
- (b) Is the subject of any voluntary or involuntary case commenced under the federal bankruptcy laws, as now constituted or hereafter amended, or any other proceeding under other applicable laws regarding bankruptcy, insolvency, reorganization, adjustment of debt or other forms of relief for debtors in any other jurisdiction;
- (c) Consents to the appointment of a receiver, trustee, or similar official for substantially all of his or its property or permits a decree ordering such appointment to remain in effect and unstayed for 60 days;
- (d) Is the subject of any dissolution or liquidation proceedings;
- (e) Has issued against him or his property any writ of attachment, execution, or other legal process involving an amount of risk deemed material by Bank; or
- (f) Has filed or recorded against him or his property any notice of levy, notice to withhold, or other claim for taxes other than real property taxes not yet delinquent involving an amount deemed material by Bank. The events described in this Paragraph 12 shall be defaults under all Obligations notwithstanding the terms of any instrument evidencing any of the Obligations.

13. Bank's Rights on Default. Upon the occurrence of any of the events, circumstances or defaults set forth in paragraph 12 above, Bank shall have all rights provided in the California Uniform Commercial Code and otherwise available by law, may take possession of any Collateral and enter any premises where any Collateral is kept, with or without judicial process, may sue for the full amount of any or all of the Obligations without proceeding against any or all of the Collateral or sue for any deficiency remaining after disposition of any or all of the Collateral, may without notice or demand setoff and apply toward payment of any Obligations any and all demand, time, savings or any other deposit accounts, instruments, or other property under Bank's possession or control, and may sell or lease in any commercially reasonable manner in one or more transactions any or all of the Collateral in its then condition or following any commercially reasonable preparation or processing. Sales for cash or on credit to any wholesaler, retailer or user of the Collateral, or at public auction or private sale, are all commercially reasonable. Bank may require Borrower to assemble any or all of the Collateral and make it available to Bank at the entrance to the location of the Collateral, or at any office of Bank in the county where the Collateral is or should have been located under the terms of this agreement. Bank may sell or lease any or all of the Collateral without having it present at the place of the transaction. Whenever any Collateral is in Bank's possession, Bank may use, operate and consume it in any commercially reasonable manner or as it deems appropriate for paying or performing Borrower's Obligations. Bank shall have no liability to the Borrower for any damage to real or personal property which is not Collateral caused by acts or omissions of Bank or its agents done in good faith in the course of removing, storing, processing, maintaining, preserving, protecting or disposing of Collateral nor for any such damage to Collateral except as a result of Bank's failure to sell or lease Collateral in a commercially reasonable manner. Borrower will indemnify and hold Bank harmless from any claims, demands and liability, including attorney's fees, arising from claims of third persons resulting from such acts or omissions. Borrower will also immediately pay Bank its reasonable expenses of retaking, holding, preparing for sale or lease, selling, or leasing any Collateral and the like and its reasonable attorney's fees and legal expenses related to any such action. Interest on each item due from Borrower under this paragraph shall be payable on demand and accrue from the date paid by Bank at the rate provided in paragraph 10. Bank is not obligated to collect, take possession of, or otherwise realize on any Collateral.

14. Multiple Borrowers. If more than one Borrower signs, this agreement, their liability under this agreement is joint

and several. The initials of any Borrower in one or more boxes at the beginning of this agreement operate to encumber all the described Collateral. Any Borrower who is a married person agrees to recourse against his or her separate property for all Obligations. The breach of any provisions of this agreement by any Borrower shall be a breach by all Borrowers unless waived by Bank. Discharge of any Borrower (except for full payment) or any extension, forbearance, change of rate of interest, or acceptance, release or substitution of Collateral or any impairment or suspension of Bank's rights against a Borrower, or any transfer of a Borrower's interest to another, shall not affect the liability of any other Borrower. All Borrowers waive:

- (a) Any right to require Bank to proceed against any Borrower before any other, or to pursue any other remedy;
- (b) Presentment, protest and notice of protest, demand and notice of nonpayment, demand of performance, notice of sale, and advertisement of sale;
- (c) Any right to the benefit of or to direct the application of any Collateral until all Obligations shall have been paid; and
- (d) Any right of subrogation to Bank until all Obligations shall have been paid or performed in full.

15. Modification and Waiver. Bank's acceptance of partial or delinquent payments or failure of Bank to exercise any right shall not constitute a waiver of any of the Obligations of Borrower or any right of Bank, modify this agreement, or waive any other similar default. No waiver of any right or power of Bank or modification of this agreement shall be valid unless in writing and signed by Bank.

16. Assignment. On transfer of all or any part of the Obligations or a participation interest therein, Bank may transfer all or any part of or interest in the Collateral. Bank may deliver all or any part of the Collateral to any Borrower at any time. Any such transfer or delivery shall discharge Bank from all liability and responsibility with respect to such Collateral transferred or delivered. This agreement benefits Bank's successors and assignees and binds Borrower's heirs, legatees, personal representatives, successors and assignees. Borrower agrees not to assert against any assignee of Bank any claim or defense Borrower may have against Bank.

17. Miscellaneous. Time is of the essence of this agreement and all its provisions. This agreement and any supplementary schedules incorporated in it contain the entire Security Agreement between Bank and Borrower with respect to all Collateral. Borrower will execute any additional agreements, assignments, notices, filings or documents reasonably required by Bank to effectuate this agreement or to preserve and protect any Collateral and Bank's rights. This agreement shall be governed by the laws of the State of California and, unless otherwise defined or provided herein, all words used in this agreement have the meanings given them in the California Uniform Commercial Code, but if perfection of the security interest in any Collateral is required by the law of any other state and not required in California, then to that extent the laws of the other state shall apply to this agreement although the meanings of words will nevertheless be determined by reference to the California Uniform Commercial Code. Titles preceding any paragraph of this agreement are for convenience only and are not a part of this agreement. Any written notice under this agreement and any Obligations shall be treated as given to Borrower when personally delivered to Borrower or when placed in the United States mails, first class postage prepaid, addressed to Borrower at the address shown below, or at any address of which Borrower has notified Bank in writing, or at the address at which Bank customarily communicates with Borrower. Unless separate notice is requested in writing by any Borrower, notice given to any Borrower shall constitute notice to all Borrowers.

Each Borrower acknowledges receipt of a copy of this Agreement.

BORROWERS

Dated: _____

_____ [signature of first borrower]

[typed name]

_____ [address of principal place of business]

Dated: _____

_____ [signature of second borrower]

[typed name]

_____ [address of principal place of business]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Security AgreementsGeneral OverviewContracts LawSecured TransactionsSecurity AgreementsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

G. Financing and Assignment of Inventory and Equipment

19-43 California Legal Forms--Transaction Guide §§ 43.284-43.289

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

[Reserved]

§§ 43.284[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

H. Assignment of Real Property Proceeds and Fixtures

19-43 California Legal Forms--Transaction Guide § 43.290

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.290 Bank's Instructions for Assignment of Borrower's Proceeds in Pending Escrow**[1] Comment--Use of Form**

This form is a notice in the form of escrow instructions sent to an escrow agent servicing a transaction in property through which a borrower (usually as seller) is entitled to proceeds that have been assigned to a bank. This form is used when the borrower has pledged these proceeds as security for a commercial loan. For further discussion of escrow instructions, see Ch. 26, *Real Property Escrows*.

An important consideration in preserving the security is the conduct of a title search to determine whether the borrower is entitled to these proceeds. For coverage of title searches, see Ch. 26A, *Title Insurance*.

[2] FORM**Bank's Instructions for Assignment of Borrower's Proceeds in Pending Escrow**

[title or escrow company]

_____[address]

To:

An Escrow, No. _____, has been established with your company covering the sale of property at _____[address], and the seller is _____[name].

This letter will be your nonrevocable authority to remit to _____ Bank, _____
Branch, from the proceeds of this escrow the sum of \$_____.

Please acknowledge receipt of these instructions directly to _____ Bank,
_____[*address*], California.

Sincerely,

_____ [*signature*]

Borrower

_____ [*signature*]

Borrower

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleEscrow



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

H. Assignment of Real Property Proceeds and Fixtures

19-43 California Legal Forms--Transaction Guide § 43.291

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.291 Severance Agreement Regarding Interest in Chattels on Real Property

[1] Comment

[a] Use of Form

This form is an agreement between a commercial borrower and a lending bank regarding chattels on real property that are security for a loan. This agreement is used to clarify that the bank has a security interest in the chattels apart from the real property and, if the borrower defaults on the loan, may enter onto the premises to claim them.

[b] Assignment of Chattels on Real Property

The assignment of chattels on real property most commonly arises in the case of business fixtures to be installed on the opening or remodeling of a retail business. Financing is generally for the improvements, which are normally classified as equipment [see *Com. Code § 9102(a)(33)* ("equipment" defined)]; the lender's security interest is perfected on the filing of a financing statement [*Com. Code § 9310(a)*; see Ch. 42, *Secured Transactions*].

The borrower is usually a tenant of a third-party landlord, though it is sometimes the owner of the property, which is subject to mortgage beyond the security level. Most leases to businesses allow trade fixtures to remain in the possession of the tenant, but do not definitively describe what portion of the property constitutes the fixtures. Therefore, it is necessary to spell out the security fixtures not only in the agreement with the borrowing tenant, but also in a separate agreement with the landlord [see § 43.292]. The agreement may be considered to affect real property and may be recorded to further protect the bank's security interest in these chattels.

While the landlord's waiver [see § 43.292] still protects the lender against a landlord's claims to fixtures [Com. Code § 9334(d)-(g)], there are alternative means for such protection. A special financing statement known as a "fixtures filing" may be used to assure the lender's priority over any interest of the landlord or the landlord's successors [see Com. Code §§ 9310, 9334, 9501(b), 9502; see also Ch. 42, *Secured Transactions*].

[2] FORM

Severance Agreement Regarding Interest in Chattels on Real Property

After Recording Mail to

____ Bank
 _____ Office
 _____ [address]
 _____, California

SEVERANCE AGREEMENT

The undersigned Debtor has entered into an agreement (the "Security Agreement") creating a security interest for the undersigned Creditor in the following personal property which, together with all replacements and additions, are called Collateral: [describe collateral]. This Collateral is to be located or installed on the real property (the "Premises") in the County of _____, State of California, and described as follows: [describe property].

In consideration of the financial accommodation extended and secured by the Collateral in the Security Agreement, the undersigned jointly and severally agree that, on default by Debtor of the Security Agreement, Creditor at any time may enter on the Premises and take possession of, sever, and remove the Collateral, notwithstanding that it may have been affixed to or become a part of the Premises, and in that event Creditor will pay for or repair any damage to the Premises caused by the removal of the Collateral.

This Agreement is binding on the respective representatives, successors, and assigns of all the undersigned.

Dated: _____
 _____ [name]

Debtor
 _____ [name]

Debtor
 _____ [name]

Creditor

[Attach notarial acknowledgment.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Bank Activities General Overview Commercial Law (UCC) Secured Transactions (Article 9) Application & Construction Definitions Collateral Goods Equipment Commercial Law (UCC) Secured Transactions (Article 9) Application & Construction Definitions Collateral Goods Fixtures Contracts Law Types of Contracts Severance



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CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

H. Assignment of Real Property Proceeds and Fixtures

19-43 California Legal Forms--Transaction Guide § 43.292

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.292 Waiver and Severance Agreement for Chattels on Real Property

[1] Comment--Use of Form

This form is a waiver and severance agreement regarding chattels attached to real property. The agreement provides that each person having an interest in the real property agrees that the chattels, which are security for a bank loan, may be removed from the property by the bank at any time. This form must be completed by each owner and encumbrancer of the real property.

The bank's agreement with the tenant concerning the chattels is strengthened when the landlord is notified of the agreement and signs a waiver to any rights to the chattels. While the landlord's waiver still protects the lender against a landlord's claims to fixtures [*Com. Code § 9334(d)-(g)*], there are alternative means for such protection. A special financing statement known as a "fixtures filing" may be used to assure the lender's priority over any interest of the landlord or the landlord's successors [*see Com. Code §§ 9310, 9334, 9501(b), 9502; see also Ch. 42, Secured Transactions*].

For further discussion of security interests in chattels attached to real property, see § 43.291[1].

[2] FORM

Waiver and Severance Agreement for Chattels on Real Property

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application &
ConstructionDefinitionsCollateralGoodsGeneral OverviewContracts LawContract Conditions &
ProvisionsWaiversGeneral OverviewContracts LawTypes of ContractsSeverance



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

H. Assignment of Real Property Proceeds and Fixtures

19-43 California Legal Forms--Transaction Guide §§ 43.293-43.299

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

[Reserved]

§§ 43.293[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

I. Assignment of Probate Interest

19-43 California Legal Forms--Transaction Guide § 43.300

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.300 Assignment of Interest in Pending Probate Proceedings

[1] Comment--Use of Form

This form is an agreement between a bank and a borrower, assigning to the bank the borrower's interest in an estate as security for a loan.

The bank trust department needs to examine the probate file for statutory regularity and the will of the decedent that has been accepted for probate, in particular, to determine the vested character of the interest to be assigned as security. This anticipated interest in an estate is a general intangible [*Com. Code § 9102(a)(42)* ("general intangible" defined)]. A financing statement need not be filed to perfect a security interest created by an assignment of a beneficial interest in a trust or a decedent's estate [*Com. Code § 9310(b)(2)*; see *Com. Code § 9309(13)*].

Notice of the assignment with any documentation necessary to establish fairness of the loan transaction should be forwarded to the executor or administrator in time for his or her analysis, because the law allows (but does not require) for a hearing before distribution to an heir or devisee's assignee as to the propriety in terms of fairness of the transfer [see *Prob. Code § 11604*]. The executor should be asked to acknowledge receipt of the notice and acknowledge that there are no prior existing claims.

[2] FORM

Assignment of Interest in Pending Probate Proceedings

ASSIGNMENT OF INTEREST IN ESTATE

In consideration of financial accommodations given, the Borrower named below grants to _____ Bank (the "Bank") a security interest in all of Borrower's right, title, and interest in the Estate of _____ [name], deceased, which is now the subject of probate in the Superior Court of the State of California in the County of _____, under No. _____, in any trust decreed thereunder and in any property that may be distributed to Borrower thereunder, to secure payment and performance of all Borrower's present or future debts or obligations to Bank, whether absolute or contingent.

Borrower warrants that the amount that Borrower will receive on distribution of this Estate will be at least \$ _____, and that Borrower has made no prior assignment of this interest.

Dated: _____
_____ [signature]

Borrower

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)Application &
ConstructionDefinitionsCollateralIntangiblesCommercial Law (UCC)Secured Transactions (Article
9)PerfectionGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

I. Assignment of Probate Interest

19-43 California Legal Forms--Transaction Guide §§ 43.301-43.309

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

[Reserved]

§§ 43.301[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

J. Promissory Notes for Commercial Lending

19-43 California Legal Forms--Transaction Guide § 43.310

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.310 Straight Note With Flat Interest Running Until Payment or Demand

[1] Comment

[a] Use of Form

This form is a note evidencing a commercial loan that provides for flat interest payments running until payment or demand of the note. Two alternative forms of this note are provided: one for use by an individual, and one for use by a partnership.

The basic type of commercial promissory document is the standard promissory note. This is the type of note normally drawn for preferred customers, such as large corporate accounts. This type of note is also commonly used in other secured kinds of financing; that is, when the collateral is frozen cash (for example, savings account) or appraised stocks or bonds in the bank's possession.

This type of note is appropriate for short seasonal loans that need to be made to trusted businesses that are short of cash while acquiring inventories but realize cash almost immediately on shipping merchandise and obtaining instant receivables. Notes are commonly drafted for three or six months after date of draw, and the interest is a true figure at slightly higher than prime rates, payable monthly or at maturity. The borrower typically repays substantial amounts of principal with interest payments. The notes may be considered for renewal at the end of their terms, but the bank is free to impose new terms and at a new interest rate.

For a selection of alternative notes and discussion of the Commercial Code governing negotiable instruments, see Ch. 55, *Negotiable Instruments* .

[b] Characteristics of a Negotiable Instrument

A negotiable instrument is an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges, which complies with all of the following [*Com. Code § 3104(a)*; see [c], below]:

- It is payable to bearer or to order when it is issued or first comes into the holder's possession.
- It is payable on demand or at a definite time.
- It does not state any other undertaking or instruction by the person promising or ordering payment, with limited exceptions [*see Com. Code § 3104(a)(3)*].

A negotiable instrument is a "note" if it is a promise [*Com. Code § 3104(e)*], which is a written undertaking to pay money signed by the person undertaking to pay [*Com. Code § 3103(a)(9)*].

[c] Payability

A promise is "payable on demand" if it (1) states it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or (2) does not state any time for payment [*Com. Code § 3108(a)*]. If an instrument payable at a fixed date is also payable on demand before that date, it is payable on demand until the fixed date. If demand for payment is not made before the fixed date, the instrument becomes payable at a definite time on the fixed date [*Com. Code § 3108(c)*].

A promise is "payable at a definite time" if it is payable at the end of a definite period of time after sight or acceptance, at a fixed date or dates, or at a time or times readily ascertainable when the promise is issued. This is subject to the rights of prepayment, acceleration, extension at the option of the holder, or extension to a further definite time at the option of the maker or acceptor, or automatically [*Com. Code § 3108(b)*].

A promise is "payable to bearer" if it does any of the following [*Com. Code § 3109(a)*]:

- States that it is payable to bearer or the order of bearer, or otherwise indicates that the person in possession of the promise is entitled to payment.
- Does not state a payee.
- States that it is payable to cash or the order of cash, or otherwise indicates that it is not payable to an identified person.

A promise is "unconditional" unless it states [*Com. Code § 3106(a)*]:

- An express condition to payment;
- That the promise is subject to or governed by another writing; or
- That rights or obligations concerning the promise are stated in another writing.

The mere reference to another writing does not make the promise conditional [*Com. Code § 3106(a)*].

[d] Controlling Terms and Alteration

If an instrument contains contradictory terms, typewritten terms prevail over printed terms, handwritten terms prevail over typewritten and printed terms, and words prevail over numbers [*Com. Code § 3114*]. The parties to a negotiable instrument may modify, supplement, or nullify their obligation by a separate agreement [*see Com. Code § 3117*].

[e] Negotiability

"Negotiation" is the transfer of possession of an instrument by a person other than the issuer to a person who thereby becomes a holder [*Com. Code § 3201(a)*]. Transfer of an instrument vests in the transferee any right the transferor had to enforce the instrument [*Com. Code § 3203(b)*]. Negotiation of an instrument is effective even if obtained from an infant, a corporation exceeding its powers, or a person lacking capacity. Negotiation is also effective even if the instrument is obtained by fraud, duress, mistake, in breach of a duty, or illegally [*Com. Code § 3202(a)*]. A negotiable instrument may be antedated, postdated, or undated [*Com. Code § 3113*].

[f] Time for Payment

An instrument payable on demand becomes overdue at the earliest of (1) the day after the day demand for payment is made, (2) 90 days after its date, if it is a check, or (3) when the instrument has been outstanding for an unreasonably long period of time, if it is not a check [*Com. Code § 3304(a)*]. In general, an instrument payable at a definite time becomes overdue on default or on the day after the due date [*Com. Code § 3304(b)*].

[g] Discharge

An instrument is "paid" to the extent that payment is made (1) by or on behalf of a party obliged to pay the instrument and (2) to a person entitled to enforce the instrument. The obligation of a party obliged to pay an instrument is discharged to the extent of the payment [*Com. Code § 3602(a)*; *see Com. Code § 3602(b)* (exceptions)]. The obligation to pay may also be discharged by a tender of payment [*see Com. Code § 3603*] or by an act or agreement [*see Com. Code § 3604*].

[h] Liability of Signers

A person is not liable on an instrument unless the person signed the instrument, or the person is represented by an agent or representative who signed the instrument, and the signature is binding [*Com. Code § 3401(a)*; *see Com. Code § 3402*]. In some circumstances, the representative may also be liable for the instrument [*see Com. Code § 3402(b)(2)*]. In general, persons who have the same liability on an instrument are jointly and severally liable in the capacity in which they sign [*Com. Code § 3116(a)*; *see Com. Code § 3419* (liability of accommodation party)].

[i] Sale of Credit Disability Insurance by Lender

For discussion of regulation of lenders who provide credit disability insurance [*see Civ. Code § 1812.400 et seq.*], see Ch. 45, *Consumer Installment Loans and Credit Sales*.

[2] FORM

Straight Note With Flat Interest Running Until Payment or Demand

[Individual note]

Initials: _____

G/L Account No.: _____

Loan No.: _____

Security [*stock, insurance, savings, C/M, unsecured, etc.*]: _____

Other [*end guaranty sub etc.*]: _____

Rate: _____

As of date: _____

Maturity: _____

Charge/bill: _____

Installment: _____

STRAIGHT NOTE--INDIVIDUAL

\$ _____, California _____ [date] _____
after date, for value received, I promise to pay to _____ Bank, or order, at its _____
Office in _____, California, the sum of \$ _____, with interest at the rate of
_____ percent per annum from this date until paid, interest payable [*e.g.*, monthly] and principal and
interest payable in lawful money of the United States of America. On default in payment of any interest when due, the
whole of the principal sum will, at the option of the holder of this note, become immediately due and payable, without
demand or notice. If payment is not made at maturity, I promise to pay all costs of collection and reasonable attorneys'
fees.

Signature: _____

Typed name: _____

Address: _____

Telephone number: _____

[*Partnership note*]

Initials: _____

G/L Account No.: _____

Loan No.: _____

Security [*stock, insurance, savings, C/M, unsecured, etc.*]: _____

Other [*end guaranty sub etc.*]: _____

Rate: _____

As of date: _____

Maturity: _____

Charge/bill: _____

Installment: _____

STRAIGHT NOTE--PARTNERSHIP

\$ _____, California _____ [date] _____
after date for value received, the undersigned, a partnership, promises to pay to _____ Bank, or order,
at its _____ Office in _____, California, the sum of \$ _____, with
interest at the rate of _____ percent per annum from this date until paid, interest payable [*e.g.*, monthly] and principal and
interest payable in lawful money of the United States of America. On default in payment of any interest when due, the
whole of the principal sum will, at the option of the holder of this note, become immediately due and payable, without
demand or notice. If payment is not made at maturity, the undersigned promises to pay all costs of collection and
reasonable attorneys' fees.

_____ [*name of partnership*]

A Partnership

_____ [*address*]

_____ [*telephone number*]

By _____

General Partner

By _____

General Partner

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General OverviewContracts LawNegotiable
InstrumentsTypesPromissory Notes



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

J. Promissory Notes for Commercial Lending

19-43 California Legal Forms--Transaction Guide § 43.311

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.311 Installment Note With Separate Schedules for Repayment of Principal and Interest

[1] Comment

[a] Use of Form

This form is an installment note that provides for the payment of principal and interest at different rates by the use of separate schedules. Two alternative versions of this note are provided: one for use by an individual, and one for use by a partnership.

A common variation of standard commercial note calls for specified repayments of principal and interest on separate schedules. This may be useful, for instance, in the case of a seasonal business that cannot foresee repayment of the note within a short, definite period, but is capable of paying minimum repayments of principal on a regular basis. In this illustration, a higher interest may be delayed and accumulated until periods when cash receivables are traditionally high for the borrower. Thus, the note may be drafted so that interest is payable quarterly or semiannually, while the principal is scheduled on a monthly basis of 12 equal installments. If the note is for a longer duration, the principal payments may be scheduled for equal sums spaced out over three- or six-month periods, with the interest being paid on a more regular basis in the interim.

For various forms for notes, and discussion of the Commercial Code governing negotiable instruments, see Ch. 55, *Negotiable Instruments* .

[b] Sale of Credit Disability Insurance by Lender

For discussion of regulation of lenders who provide credit disability insurance [see *Civ. Code* § 1812.400 *et seq.*], see Ch. 45, *Consumer Installment Loans and Credit Sales*.

[2] FORM

Installment Note With Separate Schedules for Repayment of Principal and Interest

[Individual note]

Loan No.: _____
 Initials: _____
 Rate: _____
 Maturity date: _____

INSTALLMENT NOTE--INTEREST SEPARATELY--INDIVIDUAL

_____ [date]
 _____ [city/state]

In installments as stated below, for value received, I promise to pay to _____ Bank, or order, at its _____ Office in _____, California, the sum of \$_____, with interest on unpaid principal at the rate of _____ percent per annum from this date until paid, interest payable [e.g., quarterly] and principal and interest payable in lawful money of the United States of America. The principal sum is payable in equal, successive [e.g., monthly] installments of \$_____ each, commencing on _____ [date] and continuing until _____ [date], at which time any unpaid balance of principal and all accrued interest will be due and payable.

On default in payment of any installment or of any interest when due, the whole of the principal sum then remaining unpaid and all accrued interest will, at the option of the holder, become immediately due and payable, without demand or notice. If any payment is not made at maturity, I promise to pay all costs of collection and reasonable attorneys' fees.

Signature: _____
 Typed name: _____
 Address: _____
 Telephone number: _____

[Partnership note]

Loan No.: _____
 Initials: _____
 Rate: _____
 Maturity date: _____

INSTALLMENT NOTE--INTEREST SEPARATELY--PARTNERSHIP

_____ [date]
 _____ [city/state]

In installments as stated below, for value received, the undersigned, a partnership, promises to pay to _____ Bank, or order, at its _____ Office in _____, California, the sum of \$ _____, with interest on unpaid principal at the rate of _____ percent per annum from this date until paid, interest payable [*e.g.*, quarterly] and principal and interest payable in lawful money of the United States of America. The principal sum is payable in equal, successive [*e.g.*, monthly] installments of \$ _____ each, commencing on _____ [*date*] and continuing until _____ [*date*], at which time any unpaid balance of principal and all accrued interest will be due and payable. On default in payment of any installment or of any interest when due, the whole of the principal sum then remaining unpaid and all accrued interest will, at the option of the holder, become immediately due and payable, without demand or notice. If any payment is not made at maturity, the undersigned promises to pay all costs of collection and reasonable attorneys' fees.

_____ [*name of partnership*]

A Partnership

_____ [*address*]

_____ [*telephone number*]

By _____

General Partner

By _____

General Partner

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General OverviewContracts LawTypes of ContractsInstallment Contracts



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

J. Promissory Notes for Commercial Lending

19-43 California Legal Forms--Transaction Guide § 43.312

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.312 Installment Note With Single Schedule for Repayment of Principal and Interest Combined

[1] Comment--Use of Form

This form is an installment note that provides for a single schedule for the repayment of principal and interest at the same time. Two alternative forms of this note are provided: one for use by an individual, and one for use by a partnership.

This note, a common type of installment note used for commercial purposes, calls for equal scheduled payments combining principal and interest. This arrangement is based on the principle of the straight amortized loan, in which the installment figure remains the same, and, since (true) interest owing is higher at the beginning than at the end of the loan when less principal is outstanding, the ratio of principal to interest is different for each payment. However, at maturity, there may yet remain a large principal balance to be paid. The size of the payment must be computed so that an adequate amount of principal is repaid in each earlier installment so as to allow either for complete pay off by the last installment, or a manageable figure of principal remaining that the borrower can pay off or easily refinance on maturity of the note.

For a selection of alternative notes and discussion of the Commercial Code governing negotiable instruments, see Ch. 55, *Negotiable Instruments* .

[2] FORM

Installment Note With Single Schedule for Repayment of Principal and Interest Combined

[Individual note]

Loan No.: _____
 Initials: _____
 Rate: _____
 Maturity Date: _____

INSTALLMENT NOTE--INTEREST INCLUDED--INDIVIDUAL

_____ [date]
 _____ [city/state]

In installments as stated below, for value received, I promise to pay to _____ Bank, or order, at its _____ Office in _____, California, the sum of \$ _____, with interest on unpaid principal at the rate of _____ percent per annum from this date until paid, principal and interest payable in lawful money of the United States of America in equal, successive [*e.g.*, monthly] installments of \$ _____ each, commencing on _____ [date] and continuing until _____ [date], at which time any unpaid balance of principal and all accrued interest will be due and payable. Each payment will be applied first to interest then due and the remainder to principal.

On default in payment of any installment when due, the whole of the principal sum then remaining unpaid and all accrued interest will, at the option of the holder, become immediately due and payable, without demand or notice. If any payment is not made at maturity, the undersigned promises to pay all costs of collection and reasonable attorneys' fees.

Signature: _____
 Typed name: _____
 Address: _____
 Telephone number: _____

[Partnership note]

Loan No.: _____
 Initials: _____
 Rate: _____
 Maturity date: _____

INSTALLMENT NOTE--INTEREST INCLUDED--PARTNERSHIP

_____ [date]
 _____ [city/state]

In installments as stated below, for value received, the undersigned, a partnership, promises to pay _____ Bank, or order, at its _____ Office in _____, California, the sum of \$ _____ with interest on unpaid principal at the rate of _____ percent per annum from this date until paid, principal and interest payable in lawful money of the United States of America in equal successive [*e.g.*, monthly] installments of \$ _____ each, commencing on _____ [date] and continuing until _____ [date], at which time any unpaid balance of principal and all accrued

interest will be due and payable. Each payment will be applied first to interest then due and the remainder to principal.

On default in payment of any installment when due, the whole of the principal sum then remaining unpaid and all accrued interest, at the option of the holder, will become immediately due and payable, without demand or notice. If any payment is not made at maturity, the undersigned promises to pay all costs of collection and reasonable attorneys' fees.

_____ [*name of partnership*]

A Partnership

_____ [*address*]

_____ [*telephone number*]

By _____

General Partner

By _____

General Partner

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General OverviewContracts LawTypes of
ContractsInstallment Contracts



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

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AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.313 Installment Note With Payment of Principal at Maturity and Interest in Installments

[1] Comment--Use of Form

This form is an illustrative commercial installment note that provides for equal installment payments of interest with a lump sum payment of principal at maturity. For a note providing for payment of both interest and principal in installments, see § 43.312.

This form includes an acceleration clause reciting incidents of default that are grounds for acceleration of payment. The incidents of default relate to the debtor's failure to fulfill the obligations under the note, such as failure to pay interest or principal when due, and certain detrimental changes in the debtor's financial situation, such as the debtor's filing for bankruptcy.

For a selection of alternative notes and discussion of the Commercial Code governing negotiable instruments, see Ch. 55, *Negotiable Instruments* .

[2] FORM

Installment Note With Payment of Principal at Maturity and Interest in Installments

COMMERCIAL PROMISSORY NOTE

Borrower Name: _____

Borrower Address: _____

Bank Branch Office: _____
 Loan Number: _____
 Maturity Date: _____ Amount: \$ _____

FOR VALUE RECEIVED, the undersigned ("Debtor") promises to pay to the order of _____ [name of bank] ("Bank"), as indicated below, the principal sum of \$ _____, or so much thereof as is disbursed, together with interest on the balance of that principal sum from time to time outstanding, at a per annum rate equal to Bank's Instructions for Assignment of Borrower's Proceeds in Pending Escrow [_____ percent or the Reference Rate plus _____ percent, that per annum rate to change as and when the Reference Rate shall change or specify other rate or formula]; provided, however, that Debtor shall pay total interest over the term of this note of not less than \$ _____. [If applicable, add: As used herein, the term "Reference Rate" shall mean the rate announced by Bank from time to time at its corporate headquarters as its "Reference Rate." The Reference Rate is an index rate determined by Bank from time to time as a means of pricing certain extensions of credit and is neither directly tied to any external rate of interest or index nor necessarily the lowest rate of interest charged by Bank at any given time.] All computations of interest under this note shall be made on the basis of a year of 360 days, for actual days elapsed.

1. Principal Payments. Debtor shall pay principal

[EITHER:]

in full on _____ [date]; however, at any time prior to the maturity of this note, Debtor may borrow, repay and reborrow hereon so long as the total outstanding at any one time does not exceed the principal amount of this note.

[OR]

in full on _____ [date].

[OR]

in [number] installments of \$ _____ each on the [e.g., first] day of each [e.g., month] (commencing _____ [date first installment payment will be due]) and in a final installment of \$ _____ on _____ [date], on which date all principal and interest then unpaid shall be due and payable.

[Continue with the following:]

2. Interest Payments. Debtor shall pay interest on the _____ [e.g., first] day of each _____ [e.g., month] (commencing _____ [date first interest payment will be due]) [or specify other provisions for payment of interest].

3. Interest-Included Option. If a fixed rate of interest is applicable to this note and other principal and interest payment terms are not stated in the preceding paragraphs, Debtor shall pay principal and interest together in _____ installments of \$ _____ each on the [e.g., first] day of each [e.g., month]

(commencing _____ [date first payment will be due]) and in a final installment of \$_____ on _____ [date], on which date all principal and interest then unpaid shall be due and payable.

4. Manner and Time of Payment. Debtor shall pay all amounts due under this note in lawful money of the United States at Bank's _____ Office, or such other office as may be designated by Bank, from time to time.

5. Late Payments. If any installment payment required by the terms of this note is unpaid 10 days after due, Debtor shall at the option of Bank, pay a fee of \$_____ to Bank.

6. Interest Rate Following Default. In the event of default, at the option of Bank, and, to the extent permitted by law, interest shall be payable on the outstanding principal under this note at a per annum rate equal to _____ percent in excess of the interest rate specified in the initial paragraph of this note, calculated from the date of default until all amounts payable under this note are paid in full.

7. Default and Acceleration of Time for Payment. Default shall include, but not be limited to, any of the following:

- (a) The failure of Debtor to make any payment required under this note when due;
- (b) Any breach, misrepresentation or other default by Debtor, any guarantor, co-maker, endorser, or any person or entity other than Debtor providing security for this note (hereinafter individually and collectively referred to as the "Obligor") under any security agreement, guaranty or other agreement between Bank and any Obligor;
- (c) The insolvency of any Obligor or the failure of any Obligor generally to pay that Obligor's debts as such debts become due;
- (d) The commencement as to any Obligor of any voluntary or involuntary proceeding under any laws relating to bankruptcy, insolvency, reorganization, arrangement, debt adjustment or debtor relief;
- (e) The assignment by any Obligor for the benefit of such Obligor's creditors;
- (f) The appointment, or commencement of any proceedings for the appointment, of a receiver, trustee, custodian or similar official for all or substantially all of any Obligor's property;
- (g) The commencement of any proceeding for the dissolution or liquidation of any Obligor;
- (h) The termination of existence or death of any Obligor;
- (i) The failure of any Obligor to comply with any order, judgment, injunction, decree, writ or demand of any court or other public authority;
- (j) The filing or recording against any Obligor, or the property of any Obligor, of any notice of levy, notice to withhold, or other legal process for taxes other than property taxes;
- (k) The default by any Obligor personally liable for amounts owed hereunder on any obligation concerning the borrowing of money;
- (l) The issuance against any Obligor, or the property of any Obligor, of any writ of attachment, execution, or other judicial lien; or

(m) The deterioration of the financial condition of any Obligor which results in Bank deeming itself, in good faith, insecure.

Upon the occurrence of any such default, Bank, in its discretion, may cease to advance funds hereunder and may declare all obligations under this note immediately due and payable; however, upon the occurrence of an event of default under (d), (e), (f), or (g), all principal and interest shall automatically become immediately due and payable.

8. Additional Agreements of Debtor. If any amounts owing under this note are not paid when due, Debtor promises to pay all costs and expenses, including reasonable attorneys' fees, incurred by Bank in the collection or enforcement of this note. Debtor and any endorser of this note, for the maximum period of time and the full extent permitted by law, (a) waive diligence, presentment, demand, notice of nonpayment, protest, notice of protest, and notice of every kind; (b) waive the right to assert the defense of any statute of limitations to any debt or obligation hereunder; and (c) consent to renewals and extensions of time for the payment of any amounts due under this note. If this note is signed by more than one party, the term "Debtor" includes each of the undersigned and any successors in interest thereof, all of whose liability shall be joint and several. Any married person who signs this note agrees that recourse may be had against the separate property of the person for any obligations hereunder. The receipt of any check or other item of payment by Bank, at its option, shall not be considered a payment on account until that check or other item of payment is honored when presented for payment at the drawee bank. Bank may delay the credit of that payment based upon Bank's schedule of funds availability, and interest under this note shall accrue until the funds are deemed collected. In any action brought under or arising out of this note, Debtor and any endorser of this note, including their successors and assigns, hereby consent to the jurisdiction of any competent court within the State of California, except as provided in any addendum attached hereto, and consent to service of process by any means authorized by California law. The term "Bank" includes, without limitation, any holder of this note. This note shall be construed in accordance with and governed by the laws of the State of California.

[If appropriate, add: The attached Arbitration Addendum is hereby made a part of this note.]

DEBTOR:

_____ [name]

_____ [type of entity, e.g., A individual or A California corporation or A California
 _____ (general or limited) partnership or A California limited liability company or specify other type
 of entity]

By _____ [signature]

[typed name and title]

Date signed: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
 Contracts LawTypes of ContractsInstallment Contracts



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

J. Promissory Notes for Commercial Lending

19-43 California Legal Forms--Transaction Guide § 43.314

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.314 Discount Note With Single Payment Schedule for Repayment

[1] Comment

[a] Use of Form

This form is a discount note that provides for a single payment of principal and interest on maturity of the note. Two alternative forms of this note are provided: one for use by an individual, and one for use by a partnership.

[b] Operation of Discount Notes

The discount note is a way of handling a loan scheduled for short-term payoff but in fact of more speculative duration. No interest payments are separately scheduled for the prescribed life of the note. Instead, the interest is figured into the maturity figure and made to represent the face amount of the note. In effect, while the bank disburses to the commercial borrower an agreed amount of proceeds, this figure does not appear on the note itself. Rather, the borrower signs a note to repay at a relatively short but projected comfortable distance, in a single installment, a figure higher than the amount borrowed, the difference representing the true bank interest. On prepayment, unearned interest is refundable.

For a selection of alternative notes and discussion of the Commercial Code governing negotiable instruments, see Ch. 55, *Negotiable Instruments* .

[2] FORM

Discount Note With Single Payment Schedule for Repayment

[Individual note]

Loan No.: _____
 Initials: _____
 Rate: _____
 Maturity date: _____

DISCOUNT NOTE--SINGLE PAYMENT--INDIVIDUAL

_____ *[date]*
 _____ *[city/state]*

_____ after date, for value received, I promise to pay to _____ Bank, or order, at its _____ Office in _____, California, the sum of \$ _____, with interest at the rate of _____ percent per annum from maturity until paid, principal and interest payable in lawful money of the United States of America. If payment is not made at maturity, I promise to pay all costs of collection and reasonable attorneys' fees.

Signature: _____
 Typed name: _____
 Address: _____
 Telephone number: _____

[Partnership note]

Loan No.: _____
 Initials: _____
 Rate: _____
 Maturity date: _____

DISCOUNT NOTE--SINGLE PAYMENT--PARTNERSHIP

_____ *[date]*
 _____ *[city/state]*

_____ after date, for value received, the undersigned, a partnership, promises to pay to _____ Bank, or order, at its _____ Office in _____, California, the sum of \$ _____, with interest at the rate of _____ percent per annum from maturity until paid, principal and interest payable in lawful money of the United States of America. If payment is not made at maturity, the undersigned promises to pay all costs of collection and reasonable attorneys' fees.

_____ *[name of partnership]*

A Partnership

_____ *[address]*
 _____ *[telephone number]*

By _____
 General Partner

By _____
General Partner

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General OverviewContracts LawNegotiable
InstrumentsGeneral OverviewContracts LawNegotiable InstrumentsTypesGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

J. Promissory Notes for Commercial Lending

19-43 California Legal Forms--Transaction Guide § 43.315

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.315 Discount Note With Installment Payment Schedule for Repayment

[1] Comment--Use of Form

This form is a discount note that provides for installment payments. Two alternative forms of this note are provided: one for use by an individual, and one for use by a partnership. For a general discussion of discount notes, see § 43.314[1][b].

When the maturity date on a discount note must be stretched out for a relatively long period, the bank prefers to arrange a schedule of installment repayments. No amortization is necessary, because the interest is due from the beginning as figured into the face payoff amount of the note. In addition, the installments do not have to retire the note entirely by the maturity date, but a remainder of principal that can comfortably be managed by the borrower on the due date can be left to accompany the final installment payment.

For a selection of alternative notes and discussion of the Commercial Code governing negotiable instruments, see Ch. 55, *Negotiable Instruments* .

[2] FORM

Discount Note With Installment Payment Schedule for Repayment

[Individual note]

Loan No.: _____

Initials: _____

Rate: _____

Maturity date: _____

DISCOUNT NOTE--INSTALLMENT--INDIVIDUAL

_____ [date]

_____ [city/state]

In installments as stated below, for value received, I promise to pay to _____ Bank, or order, at its _____ Office in _____, California, the sum of \$ _____ in equal successive [*e.g.*, monthly] installments of \$ _____ each, commencing on _____ [date] and continuing until _____ [date], at which time any unpaid balance will be due and payable, with interest on each of the installments at the rate of _____ percent per annum from maturity until paid; the installments and interest to be payable in lawful money of the United States of America.

On default in payment of any installment when due, the whole of the sum then remaining unpaid and all accrued interest will, at the option of the holder, become immediately due and payable, without demand or notice. If any payment is not made at maturity, the undersigned promises to pay all costs of collection and reasonable attorneys' fees.

Signature: _____

Typed name: _____

Address: _____

Telephone number: _____

[Partnership note]

Loan No.: _____

Initials: _____

Rate: _____

Maturity date: _____

INSTALLMENT NOTE--DISCOUNT--PARTNERSHIP

_____ [date]

_____ [city/state]

In installments as stated below, for value received, the undersigned, a partnership, promises to pay to _____ Bank, or order, at its _____ Office in _____, California, the sum of \$ _____ in equal successive [*e.g.*, monthly] installments of \$ _____ each, commencing on _____ [date] and continuing until _____ [date], at which time any unpaid balance will be due and payable, with interest on each installment at the rate of _____ percent per annum from maturity until paid; the installments and interest to be payable in lawful money of the United States of America.

On default in payment of any installment when due, the whole of the sum then remaining unpaid and all accrued interest will, at the option of the holder, become immediately due and payable, without demand or notice. If any payment is not

made at maturity, the undersigned promises to pay all costs of collection and reasonable attorneys' fees.

_____ [*name of partnership*]

A Partnership

_____ [*address*]

_____ [*telephone number*]

By _____

General Partner

By _____

General Partner

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 43 COMMERCIAL LOANS

PART IV. FORMS

J. Promissory Notes for Commercial Lending

19-43 California Legal Forms--Transaction Guide § 43.316

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.

§ 43.316 Prepayment Addendum

[1] Comment--Use of Form

This form is a provision for a prepayment fee. If this form is used, the bank will be entitled to additional compensation if the debtor pays the note in advance. It provides that all prepayments will include payment of accrued interest on the principal that is prepaid, and that a prepayment fee is payable when prepayment occurs because of an acceleration of payment on the debtor's default.

[2] FORM

Prepayment Addendum

PREPAYMENT ADDENDUM

1. **Prepayment.** This Note may only be prepaid in whole or in part provided Bank has received not less than five business days prior written notice of an intention to make such a prepayment and the undersigned pays a prepayment fee to Bank in an amount equal to:

(a) The difference between:

(i) The interest rate on this Note on the principal amount which the undersigned intends to prepay; and

(ii) The return which Bank could obtain if it used the amount of the prepayment of principal to purchase

at bid price regularly quoted United States Securities having a maturity date most closely coinciding with the maturity date of this Note and those United States Securities were held by Bank until the maturity date of this Note ("Yield Rate");

(b) The above difference, if greater than zero, is multiplied by a fraction, the numerator of which is the days in the period between the date of prepayment and the maturity date of this Note and the denominator of which is 360 days;

(c) The above product is multiplied by the amount of the principal so prepaid (except in the event that principal payments are required and have been made as scheduled under the terms of the Note, then the amount multiplied in this Paragraph shall be the lesser of the amount prepaid or 50 percent of the total of the amount prepaid and the amount of principal scheduled under the terms of this Note to be outstanding at the maturity date of this Note);

(d) The above product is then discounted to present value using the Yield Rate as the annual discount factor.

In no event shall Bank be obligated to make any payment or refund to the undersigned, nor shall the undersigned be entitled to any setoff or other claim against Bank, should the return which Bank could obtain under the prepayment formula exceed the interest that Bank would have received if no prepayment had occurred.

All prepayments shall include payment of accrued interest on the principal amount prepaid and shall be applied to payment of interest before application to principal.

Such prepayments, if any, shall also be payable if prepayment occurs as the result of the acceleration of the principal by Bank because of any default hereunder by the undersigned. If, following such an acceleration, all or any portion of the unpaid principal is satisfied, whether through sale of the property encumbered by any security agreement or other agreement securing this Note, if any, at a foreclosure held thereunder or through the tender of payment at any time following acceleration, but prior to such a foreclosure sale, then satisfaction of that portion of the principal shall be deemed an evasion of the prepayment prohibition set forth above, and Bank, automatically and without notice or demand, shall be entitled to receive, concurrently with that satisfaction the prepayment fee set forth above, and the obligation to pay that prepayment fee shall be added to the principal of this Note.

THE UNDERSIGNED HEREBY ACKNOWLEDGES AND AGREES THAT BANK WOULD NOT LEND TO THE UNDERSIGNED THE LOAN EVIDENCED BY THIS NOTE WITHOUT THE UNDERSIGNED'S AGREEMENT AS SET FORTH ABOVE IN THIS PARAGRAPH, TO PAY BANK A PREPAYMENT FEE UPON THE SATISFACTION OF ALL OR ANY PORTION OF THE PRINCIPAL BEARING INTEREST AT A FIXED INTEREST RATE FOLLOWING THE ACCELERATION OF THE MATURITY DATE HEREOF BY REASON OF A DEFAULT HEREUNDER. THE UNDERSIGNED HAS CAUSED THOSE PERSONS SIGNING THIS NOTE ON THE UNDERSIGNED'S BEHALF TO SEPARATELY INITIAL THE AGREEMENT CONTAINED IN THIS PARAGRAPH BY PLACING THEIR INITIALS BELOW:

INITIALS: _____

A determination by Bank as to the amount, if any, payable pursuant to this Paragraph, shall be conclusive on the undersigned.

2. Changes, Legal Restrictions. If Bank determines at any time in the future that the effect of any applicable law, rule or regulation, or change therein, or any change in the interpretation or administration thereof by any court or other governmental authority, central bank, or comparable agency charged with the interpretation or administration therefor, or compliance by Bank (or its lending office) with any request or directive (whether or not having the force of law) of any such authority, central bank or comparable agency is to increase the cost to Bank (or its lending office), of making or maintaining this loan or to reduce the amount of any sum received or receivable by Bank (or its lending office) with

respect thereto by an amount deemed by Bank to be material and such cost or reduction is not already reflected in the interest rate charged by Bank for this loan, then the undersigned shall pay to Bank, on demand, such additional amounts as Bank may determine to be required to compensate Bank for that additional cost or reduction. Any additional payment under this clause will be completed from the effective date at which such additional costs have to be borne by Bank. For the purposes of this clause, the determination of Bank shall be conclusive if made reasonably and in good faith.

3. **Amendment.** Except as provided above, this Addendum and the provisions contained herein cannot be changed, modified or amended except by a written instrument executed by both the undersigned and the holder of this Note.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 44 ACCOUNTS RECEIVABLE FINANCING AND FACTORING

19-44 California Legal Forms--Transaction Guide 44.syn

§ 44.syn Synopsis to Chapter 44: ACCOUNTS RECEIVABLE FINANCING AND FACTORING

§ 44.01 California Sources

[1] Statutes

[a] Accounts Receivable in General

[b] Attachment

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§ 44.05 Law Reviews and Periodicals

§ 44.06 Text References

§ 44.20 Accounts Receivable

[1] Nature of Accounts Receivable

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§ 44.21 Accounts Receivable Financing

[1] UCC Application

[a] Division 9

[b] Definition of Accounts

[c] Payment Rights Other Than Accounts

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[ii] Deposit Accounts

[iii] General Intangibles and Payment Intangibles

[iv] Goods

[v] Instruments

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[vii] Letter of Credit Rights

[2] Security Interest in Accounts

[a] Assignment of Accounts

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§ 44.22 Factoring

[1] Nature of Transaction

[a] Financing as Essential Purpose

[b] Types of Factoring

[c] Limited Recourse (Chargeback)

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[2] UCC Application

[a] Sale of Accounts

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[d] Effect of Possession of Collateral

[e] Rules After Default

[i] No Duties Imposed on Buyer

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[a] Account Debtor's Agreement to Waive Defenses

[b] Absence of Agreement to Waive Defenses

[c] Effect of Modified or Substituted Account Debt

[4] Notification to Account Debtors

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Scope

§ 44.100 Facts

Scope

§ 44.101 Documents

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§ 44.110 Drafting and Reviewing Documents

Scope

§ 44.120 Preliminary Determinations

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§ 44.121 Drafting and Reviewing Documents

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§ 44.200 Accounts Financing Agreement

[1] Comment--Use of Form

[2] FORM

Accounts Financing Agreement

§ 44.201 Demand for Release of Account Debtor

[1] Comment--Use of Form

[2] FORM

Demand for Release of Account Debtor

§ 44.202 Factoring Agreement--Maturity Factoring

[1] Comment--Use of Form

[2] FORM

Factoring Agreement--Maturity Factoring

§ 44.203 Factoring Agreement--Advance Factoring

[1] Comment--Use of Form

[2] FORM

Factoring Agreement--Advance Factoring

§ 44.204 Notification to Account Debtor

[1] Comment

[a] Use of Form

[b] Ensuring Effectiveness

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Notification to Account Debtor



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 44 ACCOUNTS RECEIVABLE FINANCING AND FACTORING

19-44 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses, and provides forms for use in, advising a business owner about cash-flow financing transactions that are secured by, or involve the sale (or purported sale) of, the accounts receivable of the business. These transactions are of two general kinds:

- Ordinary accounts receivable financing, in which the business owner borrows against the accounts receivable, and the lender closely monitors operations of the business and usually collects loan repayments from the operating receipts on a daily basis.
- Factoring (also called discounting), in which the business owner sells the accounts receivable to a finance company (which may resell the accounts to another) that undertakes to collect from the account debtors and may have limited recourse to the business owner.



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A. Primary Sources

19-44 California Legal Forms--Transaction Guide § 44.01

§ 44.01 California Sources

[1] Statutes

[a] Accounts Receivable in General

Antifraud provisions of *Civ. Code § 3440 et seq.* (conveyance of personal property without delivery is void as against transferor's creditors) do not apply to sales of accounts governed by Commercial Code. *Civ. Code § 3440.1(c)*.

Accounts arising out of sale of oil or gas at wellhead or other minerals at minehead, in which debtor had interest before extraction, are "as-extracted collateral." *Com. Code § 9102(a)(6)(B)*.

Industrial Loan Law is partially suspended in case of loan to primary borrower who has pledged accounts receivable to secure loans that, taken in aggregate, amount to \$10,000 or more. *Fin. Code § 18191(c)*.

[b] Attachment

For purposes of civil attachment proceedings, "account debtor" has meaning defined in *Com. Code § 9102(a)(3)*, and "account receivable" has same meaning as "account" defined in *Com. Code § 9102(a)(2)*. *Code Civ. Proc. §§ 481.020, 481.030*.

Account receivable is property subject to civil attachment if arising out of conduct by individual defendant (who is natural person) of trade, business, or profession, except for account with principal balance of less than \$150. *Code Civ. Proc. § 487.010(c)(2)*.

Accounts receivable resulting from sale of oil or gas at wellhead or other minerals at minehead may be levied on under writ of attachment. *Code Civ. Proc. §§ 488.080(a)(2), 488.325, 488.475(a)(2)*.

Accounts receivable in general may be levied-on under writ of attachment. *Code Civ. Proc. §§ 488.080(a)(10), 488.470.*

[c] Criminal Acts

Person who knowingly makes or causes to be made, either directly, indirectly, or through any agency whatsoever, any false statement in writing, with specific intent that it shall be relied on, respecting financial condition, or means or ability to pay, of that person, another person, or firm or corporation in which that person has interest or for which he or she is acting, for purpose of procuring discount of account receivable, in any form whatsoever, is guilty of crime. *Penal Code § 532a(1).*

Person who, knowing that false statement in writing has been made respecting financial condition or means or ability to pay, of that person, another person, or firm or corporation in which that person is interested or for whom he she is acting, procures, on reliance on that false statement, for benefit of either that person, another person, or firm or corporation in which that person is interested or for whom he she is acting, discount of account receivable is guilty of crime. *Penal Code § 532a(2).*

Person who, knowing that statement in writing has been made, respecting financial condition or means or ability to pay, of that person, another person, or firm or corporation in which that person is interested or for whom he she is acting, represents on later day in writing that statement previously made, if made on that later day would be true, when in fact, that statement if then made would be false, and procures, in reliance on that person's statement made on that later day, for benefit of that person, another person or firm or corporation, discount of account receivable is guilty of crime. *Penal Code § 532a(3).*

[d] Enforcement of Judgments

For purposes of enforcement of civil judgments, "account debtor" has meaning defined in *Com. Code § 9102(a)(3)*, and "account receivable" has same meaning as "account" defined in *Com. Code § 9102(a)(2)*. *Code Civ. Proc. §§ 680.120, 680.130.*

Judgment lien can encumber judgment debtor's accounts receivable. *Code Civ. Proc. § 697.530(a)(1).*

Person obligated on account receivable is authorized to pay or compromise amount without notice to or consent of judgment creditor unless and until there is levy, notwithstanding filing of notice of judgment lien. *Code Civ. Proc. § 697.530(f).*

Accounts receivable are subject to existing execution lien on minerals (including oil or gas) to be extracted, if accounts resulted from sales of encumbered minerals at minehead (or wellhead). *Code Civ. Proc. § 697.750.*

Accounts receivable resulting from sale of oil or gas at wellhead or other minerals at minehead may be levied on under writ of execution. *Code Civ. Proc. §§ 699.080(a)(2), 700.020(a), (b)(2), 700.180(a)(2).*

Accounts receivable in general may be levied on under writ of execution. *Code Civ. Proc. §§ 699.080(a)(7), 700.170.*

Account debtor's duties after receiving service of writ of execution levying on account debt. *Code Civ. Proc. § 701.050.*

Levying officer's duty to collect, not sell, accounts receivable levied-on under writ of execution. *Code Civ. Proc. § 701.520(a)(1).*

[2] Regulations

Retailer's sales and use tax liability can be reduced by bad debt deduction for worthless accounts receivable; collection expenses cannot be included in computation. *18 Cal. Code Reg. § 1642.*

Value of account receivable, whether secured or unsecured, is presumed to be face value plus accrued interest, if any, to date of gift, for gift tax purposes; lower value may be established by submission of satisfactory proof that account is worth less because of default in interest, uncollectability in part by reason of insolvency of parties liable, or for other cause. *18 Cal. Code Reg. § 15551.13.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil

ProcedureRemediesProvisional RemediesAttachmentsCommercial Law (UCC)Secured Transactions (Article 9)General OverviewCriminal Law & ProcedureCriminal OffensesFraudGeneral Overview



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§ 44.02 Federal Regulations

Creditor must comply with certain Regulation B notification requirements and records-retention requirements when extending trade credit, credit incident to factoring agreement, or other similar types of business credit. *12 C.F.R. §§ 202.9(a)(3), 202.12(b)(5).*

Banks for cooperatives and agricultural credit banks [*see* Ch. 48, *Agricultural Financing*], under policies adopted by their boards of directors, are authorized to finance foreign trade receivables on behalf of eligible cooperatives, to include advances against collections, trade acceptances, factoring, and open accounts. *12 C.F.R. § 614.4700(a).*

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral Overview



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19-44 California Legal Forms--Transaction Guide § 44.05

§ 44.05 Law Reviews and Periodicals

Reisman, *The Uniform Commercial Code and the Convention on International Factoring*, 22 UCC L.J. 320 (1990).



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B. Secondary Sources

19-44 California Legal Forms--Transaction Guide § 44.06

§ 44.06 Text References

Ruda, *Asset Based Financing: A Transactional Guide* (Matthew Bender).

Wong & Leichtling, *Commercial Finance Guide*, Ch. 6, *Accounts and Inventory Financing* (Matthew Bender).

Commercial Law and Practice, Ch. 34, *Inventory and Accounts Financing* (Matthew Bender).

Leichtling & Wong, *Commercial Loan Documentation Guide* (Matthew Bender).

Rabkin & Johnson, *Current Legal Forms with Tax Analysis*, Ch. 6, *Credit and Finance* (Matthew Bender).

Hart, *Forms and Procedures Under theUCC* (Matthew Bender).

Coogan et al., *Secured Transactions Under theUCC* (Matthew Bender).



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§ 44.20 Accounts Receivable

[1] Nature of Accounts Receivable

A business owner's right to receive payment for particular goods or services that were sold on credit is commonly called an account receivable. The financial industry often refers to accounts receivable as just "receivables." Accounts receivable can be used by the cash-strapped business owner to raise short-term operating funds, through borrowing against the accounts or selling the accounts to a finance company, because the business owner needs money currently and cannot wait for the customers to pay what they owe.

Typically, commercial banks offer loans to be secured by accounts receivable. Other companies and individual financiers make a business of buying accounts receivable; this business is known as factoring. However, banks may engage in factoring as well as lending [*see, e.g., 12 C.F.R. § 225.28(a), (b)(1)*] (factoring is properly incidental to banking or managing or controlling banks and so may be engaged-in by bank holding company or its subsidiary)], and many finance companies can engage in lending as well as factoring. Industrial loan companies that engage in factoring or accounts-receivable financing are subject to special regulation [*see § 44.22[5]*].

A company in the factoring business may be called, or call itself, by any of numerous descriptive names, including but not limited to "finance company," "factoring company," "financial services company," "capital corporation," "credit corporation," and "acceptance corporation."

[2] Financing Arrangements

For the business owner, borrowing against accounts receivable entails not only the cost of paying interest, but also the administrative burden of undergoing the lender's oversight of the business operations. In normal cases, the lender monitors the business on a regular basis, usually daily, and regularly takes part of the receipts as repayment of the loan. Thus, the lender is in a position to act quickly (to sell the accounts securing the loan) in the event that receipts decline or the business operations otherwise deteriorate to the point where the lender feels threatened with a loss. The interest charge to the business owner would reflect not only the normal cost of borrowing but also the cost to the lender of overseeing the business operations.

Selling the accounts receivable [see § 44.22] entails virtually no administrative burden on the business owner. However, the business owner's total cost of funds usually is higher than for borrowing. The cost will reflect the debt-collection burden, which is being passed from the business owner, as well as the bad debt risk, and a present value discount of the aggregate face amount of the accounts. (Factoring and the selling of accounts receivable are sometimes spoken of in terms of "discounting" those accounts; see, for example, the Penal Code provisions cited in § 44.01[1][c] as well as *Rev. & Tax. Code* § 24438(c)(5), which defines a "lending or finance business" of a bank or other corporation as a "business of making loans or purchasing or discounting accounts receivable, notes, or installment obligations.")

Factoring can help to solve a business owner's cash flow problem if business borrowing has reached the owner's credit ceiling with regular lenders, or the business owner cannot get regular loans at all. Factoring is available even to a business in Chapter 11 bankruptcy proceedings; since factoring is not lending, the business owner's creditworthiness is not an issue (but the finance company will require that the customers of the business have good credit ratings). Moreover, the processing time for a factoring transaction is relatively short, compared with normal loan-approval procedures, so that a business owner in need of cash without delay can get it fairly fast from a factoring company. On the other hand, factoring may not be available if the business is very small or does not generate a steady stream of invoices to reliable customers.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)General Overview



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§ 44.21 Accounts Receivable Financing

[1] UCC Application

[a] Division 9

In the terminology of Division 9 of the Commercial Code, accounts receivable are simply accounts [*see Com. Code § 9102(a)(2)*; [b], *below*]. In the case of normal accounts-receivable financing, Division 9 will apply because (but only because) the parties will create a security interest by contract [*Com. Code § 9109(a)(1)*]. For discussion of creating and perfecting the security interest, see Ch. 42, *Secured Transactions* .

Division 9 applies directly to a sale of accounts [*Com. Code § 9109(a)(3)*], which is the essential element in a factoring transaction [*see § 44.22*].

[b] Definition of Accounts

The term "account" is defined in Division 9 as a right to payment of a monetary obligation, whether or not earned by performance, when that obligation is for any of the following [*Com. Code § 9102(a)(2)*]:

- Is for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of;
- Is for services rendered or to be rendered;
- Is for a policy of insurance issued or to be issued;
- Is for a secondary obligation incurred or to be incurred;
- Is for energy provided or to be provided;
- Is for the use or hire of a vessel under a charter or other contract;

- Arose out of the use of a credit or charge card or information contained on or for use with the card, or
- Arose as winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a state, or person licensed or authorized to operate the game by a state or governmental unit of a state.

The term "account" also includes health care insurance receivables [*Com. Code § 9102(a)(2)*; see *Com. Code § 9102(a)(46)* (definition)].

A person obligated on an account is called an "account debtor" in Division 9 [see *Com. Code § 9102(a)(3)*].

Transactions involving the following rights to payment of a monetary obligation are governed by laws apart from the Commercial Code or by provisions of that code apart from the Division 9 provisions concerning accounts. Therefore, "account" in Division 9 does not include any of the following items [*Com. Code § 9102(a)(2)*; see [c], below]:

- Rights to payment evidenced by chattel paper [see [c][i], below] or an instrument [see [c][v], below].
- Commercial tort claims [see *Com. Code § 9102(a)(13)* (definition)].
- Deposit accounts [see [c][ii], below].
- Investment property [see [c][vi], below].
- Letter of credit rights or letters of credit [see [c][vii] below].
- Rights to payment for money or funds advanced or sold--except that accounts do include rights arising out of the use of a credit card or charge card or information contained on or for use with the card.

[c] Payment Rights Other Than Accounts

[i] Chattel Paper

Accounts, under Division 9 of the Commercial Code, are different from chattel paper [see *Com. Code § 9102(a)(2)*]. Under Division 9, chattel paper includes any record or records evidencing both a monetary obligation and one of the following, provided (in every case) the monetary obligation is secured by the goods or owed under the lease of the goods, including a monetary obligation with respect to software used in the goods [*Com. Code § 9102(a)(11)*]:

- A security interest in specific goods.
- A security interest in specific goods and software used in the goods.
- A security interest in specific goods and license of software used in the goods.
- A lease of specific goods.
- A lease of specific goods and license of software used in the goods.

In other words, when a transaction, which could result in creation of an account, involves the creation of a security interest in specific goods, the provisions of Division 9 concerning accounts will not apply, and the provisions

concerning chattel paper will apply instead. For discussion of chattel paper transactions under Division 9, and related forms, see Ch. 42, *Secured Transactions* .

Chattel paper does not include charters or other contracts involving the use or hire of a vessel, or records evidencing a right to or payment arising out of the use of a credit or charge card or information for use with the card [*Com. Code* § 9102(a)(11)].

[ii] Deposit Accounts

Deposit accounts, which are not "accounts" for purposes of Division 9 of the Commercial Code [*Com. Code* § 9102(a)(2)], comprise demand, time, savings, passbook, and similar accounts maintained with a bank [*Com. Code* § 9102(a)(11)]. Some provisions in Division 9 concern security interests in deposit accounts. The rights and liabilities of deposit-account holders and their banks are governed by laws other than Division 9. For discussion, see California Forms of Pleading and Practice, Ch. 95, *Banks, Deposits, and Checks* (Matthew Bender).

Investment property and accounts evidenced by an instrument are not deposit accounts [*Com. Code* § 9102(a)(29)].

[iii] General Intangibles and Payment Intangibles

Division 9 of the Commercial Code contains provisions concerning "general intangibles." General intangibles are items of personal property, including things in action, that are not tangible--except for accounts (and a number of other specified items) [*Com. Code* § 9102(a)(2), (42)]. Thus, a provision of Division 9 concerning general intangibles would not necessarily apply to accounts and account debtors.

General intangibles include payment intangibles. A "payment intangible" is a general intangible under which a debtor's principal obligation is a monetary obligation [*Com. Code* § 9102(a)(61)].

[iv] Goods

Any provision concerning goods in Division 9 of the Commercial Code would not apply to accounts and account debtors, since the definition of "goods," for purposes of Division 9, excludes accounts [*see Com. Code* § 9102(a)(44)] (as well as other items mentioned in the foregoing and following subsections).

[v] Instruments

Instruments, which are excluded from the definition of accounts subject to Division 9 of the Commercial Code [*see Com. Code* § 9102(a)(2)], comprise not only negotiable instruments, but also all other writings evidencing a right to the payment of a monetary obligation, except for security agreements and leases, if the writing is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment [*Com. Code* § 9102(a)(47)]. Some provisions in Division 9 concern security interests in instruments. The rights and liabilities of issuers and holders of instruments are governed by other law. For discussion, see California Forms of Pleading and Practice, Ch. 385, *Negotiable Instruments* (Matthew Bender).

Instruments do not include investment property, letters of credit, or writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card [*Com. Code* § 9102(a)(47)].

[vi] Investment Property

Investment property, which is excluded from the definition of accounts subject to Division 9 of the Commercial Code [*see Com. Code* § 9102(a)(2)], would be a security, whether certificated or uncertificated, or security entitlement, securities account, commodity contract, or commodity account [*Com. Code* § 9102(a)(49)]. Some provisions in

Division 9 concern security interests in investment property. Transactions involving investment property are discussed in Ch. 6K, *Nonissuer Transactions in Investment Securities* .

[vii] Letter of Credit Rights

A letter of credit right, which is excluded from the definition of accounts subject to Division 9 of the Commercial Code [see *Com. Code* § 9102(a)(2)], is a right to payment and performance under a letter of credit, whether or not the beneficiary has demanded, or is at the time entitled to demand, payment or performance. The term does not include the right of a beneficiary to demand payment or performance under a letter of credit [*Com. Code* § 9102(a)(51)]. For discussion of letters of credit, see Ch. 56, *Letters of Credit and Electronic Fund Transfers* .

[2] Security Interest in Accounts

[a] Assignment of Accounts

In normal accounts receivable financing, the lender commonly will not require the business owner to make specific assignments of the accounts that stand as collateral. The financing agreement typically requires the business owner to forward the payments made by the account debtors (the customers of the business) to the lender, and the result is the same, in practice, as if the accounts had been assigned, provided the account debtors make their payments.

The lender normally will take a general assignment of the accounts, however. If the accounts are assigned to the lender, then either the lender or the business owner can elect to use a statutory notification procedure to divert the account debtors' payments away from the business owner and to the lender instead. In general, when an account has been assigned, the account debtor may discharge the account obligation by paying the assignor--the business owner, in the present context--until, but not after, the account debtor receives a notification, authenticated by either the assignor or the assignee (lender), that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge the obligation by paying the assignee and may not discharge the obligation by paying the assignor [*Com. Code* § 9406(a)].

In a factoring transaction, on the other hand, the accounts are routinely and specifically assigned, and the notification to account debtors is routinely made [see § 44.22[1][d]]. Usually the business owner sends this notification along with, or as part of, a regular invoice or statement of account to the customer.

Except in the case of an assignment constituting the sale of an account [*Com. Code* § 9209(c)], if there is no outstanding secured obligation, and the secured party is not committed to make advances, incur obligations, or otherwise give value [*Com. Code* § 9209(a)], then within 10 days after receiving an authenticated demand by the debtor (the business owner, in this context), the secured party must send to any account debtor that has received notification of an assignment to the secured party as assignee under *Com. Code* § 9406(a) an authenticated record that releases the account debtor from any further obligation to the secured party [*Com. Code* § 9209(b)]. For a form for a demand, see § 44.201.

[b] Termination Statement

If a financing statement covers accounts as to which the account debtor, or another person obligated, has discharged the underlying obligation, and the secured party receives an authenticated demand from the debtor, then within 20 days after receiving that demand, the secured party must cause the secured party of record (usually the same party) to send to the debtor a termination statement for the financing statement or file the termination statement in the filing office [*Com. Code* § 9513(c)(2)]. For discussion and forms for a demand and the termination statement (Form UCC-3), see Ch. 42, *Secured Transactions* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGeneral
OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application &
ConstructionDefinitionsCollateralCommercial PaperCommercial Law (UCC)Secured Transactions (Article
9)Application & ConstructionDefinitionsCollateralIntangiblesCommercial Law (UCC)Secured Transactions (Article
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§ 44.22 Factoring

[1] Nature of Transaction

[a] Financing as Essential Purpose

A factoring transaction is usually described as a sale of accounts receivable to a financier or finance company--called the factor (and the business owner usually is called a client). The transaction is better described as a sale of nothing more than the business owner's financial interest in the accounts. The finance company buys the right to collect from the account debtors; and the company then retains a fee out of what is collected and transmits the remainder to the business owner. The fee, sometimes called a commission, is the amount by which the accounts are discounted. The transaction is a financing transaction because the finance company does not step into the business owner's shoes relative to the account debtors, but only steps between those parties for the limited purpose of taking-over the debt-collection part of their relationship. (The factor is not a mere debt collector, however; the collection is done in the factor's own interest, not as an agent of the business owner.)

EXAMPLE:

Epsilon Distributing Company makes a factoring agreement for a 70-percent advance and a 5-percent fee. Epsilon subsequently ships a product to a customer and sends an invoice for \$10,000 with payment due in 30 days; and the invoice carries a notification that payment is to be made directly to the finance company. A copy of the invoice is sent to the finance company. The finance company verifies with Epsilon's customer that the product was received and accepted and that payment will be sent to the finance company when the invoice comes due. The finance company immediately advances \$7,000 to Epsilon and makes an accounting entry for a \$3,000 reserve. One month later, the customer pays \$10,000 to the finance company. The finance company retains its 5-percent fee (\$500) and forwards the rest of the reserve (\$2,500) to Epsilon.

The finance company will structure the transaction so that it clearly is neither a loan to the business owner nor an assumption by the finance company of the business owner's rights and liabilities relative to the account debtors. If the transaction could be characterized as a loan, then the finance company would be subject to many undesirable legal requirements, restrictions, and consequences prescribed for lenders; in particular, the company would be subject to the

usury law [see, e.g., *Baruch Inv. Co. v. Huntoon* (1967) 257 Cal. App. 2d 485, 492, 65 Cal. Rptr. 131 ("accounts receivable financing is an uncertain area in the usury law and no exact tests have been formulated. The question whether a transaction is a sale or a usurious loan is one of fact and the trier of fact should look to substance rather than to form.")], and its fees (commissions, discounts) would be treated as interest income. Moreover, the business owner would then have a debt, whereas avoidance of debt is one of the sought-after advantages of factoring. If the transaction is properly structured, the finance company's factoring fee is not interest, which is a charge for the use of money, but is an administrative fee, which is charged for assuming the credit risk and the collection burden on the factored accounts.

If the transaction could be characterized as the finance company's assumption of the business owner's rights and liabilities, on the other hand, then the finance company would become, in effect, a principal in the business, which both parties would view as an undesirable result, for many reasons.

Therefore, in a factoring transaction, the finance company assumes only enough risk to avoid being a lender or a principal, namely, nothing more than the business owner's credit risk that the account debts will not be paid because of financial circumstances (such as a debtor's bankruptcy). All other risks arising from the business relationships underlying the accounts--that an account debtor might rescind a sale, that there might be a warranty claim, and so forth--remain with the business owner.

Factoring is sometimes described as "off balance sheet financing" because it is a device for converting accounts receivable into immediate cash without increasing the business's debt load.

[b] Types of Factoring

- **"Accounts receivable factoring"** is the purchase of a business's accounts receivable, normally without recourse. The finance company assumes the credit risk on approved accounts, but the business owner assumes the risk for disputes with customers. The finance company places emphasis on the credit quality of the account debtors.
- **"Advance factoring"** is this type, in which the finance company advances payment to the business owner, before the maturity date (usually an average maturity date) for the factored accounts.
- **"Maturity factoring"** is a transaction in which the finance company handles the credit and collection functions, and remits to the business owner each month on the average maturity date for the factored accounts.

In the financial industry, sometimes a distinction is made between "retail factoring" for a business with retail customers and "wholesale factoring" for a business that sells to manufacturers or distributors.

An exporting business may have two factors, one for domestic receivables and another for foreign receivables. This arrangement may be called "refactoring." That term could be applied as well when financiers and finance companies buy and resell factored accounts, in what can be described as inter-factor factoring transactions [see generally, e.g., *Advance Industrial Finance Co. v. Western Equities, Inc.* (1959) 173 Cal. App. 2d 420, 423, 343 P.2d 408]. It is possible, however, for a finance company to be in the same position as some other kind of business, with respect to selling its accounts receivable in a factoring transaction; or possibly a finance company selling its accounts receivable is simply selling assets deemed no longer worth holding [see, e.g., *Coronet Credit Corp. v. West Thrift Co.* (1966) 244 Cal. App. 2d 631, 635, 53 Cal. Rptr. 433 (sale of conditional sales contracts, personal loan accounts, and chattel mortgages that selling company had charged-off as being of no value)]. In other words, a sale of accounts receivable by one finance company to another is not necessarily a *resale* of factored accounts.

[c] Limited Recourse (Chargeback)

Since the finance company will not have any control of the relationship between the business owner and the account debtors, the company will demand protection from the risk of loss arising from that relationship, apart from the credit risk. An account debtor could stop making payments because of a dispute with the business owner (for instance, regarding the quality of goods sold). This would be unrelated to the credit risk that the finance company assumed, and the company will want a right to rescind the factoring transaction as to that troublesome account, which the company would charge back to the business owner. (A chargeback right triggers a provision in Division 9 of the Commercial Code [see *Com. Code* § 9607(c); [2][e][ii], *below*].) In the event of a chargeback, the business owner is bound, in the usual case, to reimburse the amount that the finance company paid for the account; and if it is not reimbursed, that amount can be withheld from the aggregate reserves debited to the business owner on the finance company's books [see, e.g., *Southern Cal. Thrift & Loan v. Sylvania Elec. Products, Inc.* (1967) 248 Cal. App. 2d 642, 648, 56 Cal. Rptr. 706 ; *Peskin v. Herron* (1962) 210 Cal. App. 2d 482, 486, 26 Cal. Rptr. 821 (trial court found that it was customary practice of finance company, and agreed to by all the parties, that finance company would apply the reserve account to satisfy any uncollected accounts receivable upon which finance company had recourse); *Peskin v. Phinney* (1960) 182 Cal. App. 2d 632, 634-635, 6 Cal. Rptr. 389 (plaintiff financier factored accounts for lumber company, and 20 per cent of each account's face value was held by plaintiff in a general reserve fund to cover the plaintiff's costs, including losses from noncollection, involved in any dispute that might arise over the quality and quantity of lumber delivered to any customer); see also *Produce Clearings v. Butler* (1964) 231 Cal. App. 2d 494, 497, 42 Cal. Rptr. 114 (plaintiff finance company, on discovering that business owner had assigned some fictitious accounts under factoring agreement, recouped plaintiff's losses by charging the losses against a reserve fund held by plaintiff under the provisions of the factoring agreement)].

An attempt to get protection against the credit risk, however, by the use of any recourse device such as a guaranty of payment or a chargeback provision based simply on nonpayment, would put the finance company in jeopardy of an adverse finding that the transaction is really a loan, and possibly in violation of the usury law [see, e.g., *Milana v. Credit Discount Co.* (1945) 27 Cal. 2d 335, 339-342, 163 P.2d 869 ; *Baruch Inv. Co. v. Huntoon* (1967) 257 Cal. App. 2d 485, 494, 65 Cal. Rptr. 131); *Axe v. Commercial Credit Corp.* (1964) 227 Cal. App. 2d 216, 220-222, 38 Cal. Rptr. 558 ; but see *Investors Thrift v. AMA Corp.* (1967) 255 Cal. App. 2d 205, 207, 63 Cal. Rptr. 157 (*Milana* opinion distinguished); *Advance Industrial Finance Co. v. Western Equities, Inc.* (1959) 173 Cal. App. 2d 420, 428-429, 343 P.2d 408 (inter-factor transaction between finance companies, which had usual form of factoring transaction, was not really loan transaction merely because buying company was protected by guaranty of payment of factored accounts; *Milana* opinion distinguished)].

On the other hand, the finance company could safely use a recourse device, such as guaranty, if the factoring agreement clearly limited its use to accounts that the finance company bought without preapproval, and as long as the finance company strictly confined its use to that context [see *Refinance Corp. v. Northern Lumber Sales* (1958) 163 Cal. App. 2d 73, 80, 329 P.2d 109] .

[d] Notification of Assignment

The finance company will want each account debtor to be notified that the account has been assigned to the company, so that payments on the account will be sent directly to the finance company. Unless there has been proper notification of an assignment of an account, an account debtor has no legal duty to send payments to the assignee [see *Com. Code* § 9406(a); [4], *below*]. Usually the business owner sends this notification along with, or as part of, a regular invoice or statement to the account debtor [see § 44.204].

The fact that notification of the assignment was given to the account debtors would support a finding that the arrangement in question was a factoring transaction, not a lending transaction [see *Baruch Inv. Co. v. Huntoon* (1967) 257 Cal. App. 2d 485, 493, 65 Cal. Rptr. 131 ("but notice of assignment and collection by the 'buyer' are evidentiary factors for the trier of fact to consider in making its determination. Notification normally indicates a sale, and

non-notification normally indicates a loan."}).

[2] UCC Application

[a] Sale of Accounts

Division 9 of the Commercial Code applies to a sale of accounts [*Com. Code § 9109(a)(3)*], which is the essential element in a factoring transaction. However, the provisions of *Com. Code § 9601 et seq.*, which govern default, generally do not apply [*see Com. Code § 9601(g)*; [e], *below*]. Division 9 does *not* apply to any of the following similar transactions:

- A sale of accounts as part of a sale of the business out of which they arose [*Com. Code § 9109(d)(4)*; *see Ch. 17, Buying and Selling a Business or Professional Practice*].
- An assignment of accounts for the purpose of collection [*Com. Code § 9109(d)(5)*; *see California Forms of Pleading and Practice*, Ch. 60, *Assignments* (Matthew Bender)].
- An assignment of a single account to an assignee in full or partial satisfaction of a preexisting indebtedness [*Com. Code § 9109(d)(7)*; *see California Forms of Pleading and Practice*, Ch. 6, *Accord and Satisfaction* (Matthew Bender)].

Once accounts are sold, they become "collateral" for purposes of Division 9 [*Com. Code § 9102(a)(12)(B)*].

In general, except as otherwise provided in *Com. Code § 9406* [*see* [4], *below*], unless otherwise agreed in a sale of goods, all rights of either seller or buyer can be assigned except when the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on the other party by his or her contract, or impair materially the other party's chance of obtaining return performance [*Com. Code § 2210(2)*].

[b] Seller's Status

A seller of accounts is treated as a "debtor" for purposes of Division 9 of the Commercial Code [*see Com. Code § 9102(a)(28)(B)*]. In general a debtor in that context is a person having any interest, other than a security interest or a lien, in collateral, whether or not that person is an obligor [*Com. Code § 9102(a)(28)(A)*].

[c] Buyer's Status

The interest of a buyer of accounts is a "security interest" (an interest in personal property or fixtures that secures payment or performance of an obligation), for purposes of Division 9 of the Commercial Code [*Com. Code § 1201(36)(a)*]. Therefore, the buyer is a secured party [*Com. Code § 9102(a)(72)(D)*].

[d] Effect of Possession of Collateral

After a sale of accounts, the accounts constitute collateral in the possession of the secured party for purposes of Division 9 of the Commercial Code. The general duty of a secured party in possession--which is to use reasonable care in the custody and preservation of the collateral [*Com. Code § 9207(a)*]-is not imposed in this case unless the buyer, as the secured party, is entitled under an agreement either (1) to charge back uncollected collateral or (2) otherwise to have full or limited recourse against the seller of the accounts, as the debtor, or against a secondary obligor based on the nonpayment or other default of an account debtor or other obligor on the collateral [*Com. Code § 9207(d)(1)*].

The buyer, as the secured party, does not have other duties normally imposed, or certain rights conferred, on a secured party in possession [*see Com. Code § 9207(c),(d)(2)*], except to whatever extent the parties' agreement created such

rights or duties. Some general rules affecting the parties' interests also will not be applied [*see Com. Code § 9207(b), (d)(2)*], except to whatever extent the parties' agreement reiterated those rules.

[e] Rules After Default

[i] No Duties Imposed on Buyer

Com. Code § 9601 provides, confusingly, that except as otherwise provided in *Com. Code § 9607(c)* [*see [ii], below*], "this part" imposes no duties on a secured party that is a buyer of accounts [*Com. Code § 9601(g)*]. The object of that reference to "this part" is obscure, since the Commercial Code does not contain units denominated as parts, but apparently it is Chapter 6 of Division 9, governing default.

[ii] Effect of Having Recourse

The buyer of the accounts, as a secured party, has a statutory duty to proceed in a commercially reasonable manner when undertaking to collect from or enforce an obligation of an account debtor or other person obligated on collateral, if the buyer is entitled to charge back uncollected collateral or otherwise to have full or limited recourse against the debtor or a secondary obligor [*Com. Code § 9607(c)*; *cf. Western Decor & Furnishings Industries, Inc. v. Bank of America* (1979) 91 Cal. App. 3d 293, 304-305, 154 Cal. Rptr. 287 (applying former *Com. Code § 9502(2)(a)*; evidence supported finding that secured lender acted in commercially reasonable manner)].

[iii] No Surplus or Deficiency

Despite the preclusive language of *Com. Code § 9601(g)* [*see [i], above*], there is an additional applicable rule, twice stated, in Chapter 6 of Division 9. If the underlying transaction is a sale of accounts, the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency. In addition, *Code Civ. Proc. § 701.040(b)*, relating to the payment of proceeds, applies only if the security agreement provides that the debtor is entitled to any surplus [*Com. Code §§ 9608(b), 9615(e)*]. This rule is consistent with the intended effect of a factoring transaction and the usual lack of recourse for the buyer of accounts.

[3] Avoiding Defenses

[a] Account Debtor's Agreement to Waive Defenses

The following rules are subject to any law other than Division 9 of the Commercial Code insofar as that other law establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9403(e)*].

In general, an agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee that takes an assignment for value [*see Com. Code §§ 3303(a), 9403(a)* (value defined)], in good faith, without notice of a claim of a property or possessory right to the property assigned, and without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under *Com. Code § 3305(a)* [*Com. Code § 9403(b)*]. This does not apply to defenses of a type that may be asserted against a holder in due course of a negotiable instrument under *Com. Code § 3305(b)* [*Com. Code § 9403(c)*]. For further discussion, see Ch. 55, *Negotiable Instruments* .

In a consumer transaction, if a record evidences the account debtor's obligation, and any law other than Division 9 of the Commercial Code requires that the record include a statement to the effect that the rights of an assignee are subject to claims or defenses that the account debtor could assert against the original obligee, but the record does not include such a statement, then the record has the same effect as if the record included such a statement, and the account debtor may

assert against an assignee those claims and defenses that would have been available if the record included such a statement [*Com. Code § 9403(d)*]. Except to that extent, the rules in the preceding paragraph do not displace any law other than Division 9 that gives effect to an agreement by an account debtor not to assert a claim or defense against an assignee [*Com. Code § 9403(f)*].

[b] Absence of Agreement to Waive Defenses

The following rules are subject to any law other than Division 9 of the Commercial Code insofar as that other law establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9404(c)*].

In general, unless an account debtor has made an enforceable agreement not to assert defenses or claims, the rights of an assignee are subject to both of the following [*but see Com. Code § 9404(e)* (section does not apply to assignment of health care insurance receivable)]:

- All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract [*Com. Code § 9404(a)(1)*]; and
- Any other defense or claim of the account debtor against the assignor that accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee [*Com. Code § 9404(a)(2)*; *see [4], below*].

The claim of an account debtor against an assignor may be asserted against an assignee only to reduce the amount the account debtor owes [*Com. Code § 9404(b)*].

In a consumer transaction, if a record evidences the account debtor's obligation, and law other than Division 9 requires that the record include a statement to the effect that the account debtor's recovery against an assignee with respect to claims and defenses against the assignor may not exceed amounts paid by the account debtor under the record, but the record does not include such a statement, then the extent to which a claim of an account debtor against the assignor may be asserted against an assignee is determined as if the record included such a statement [*Com. Code § 9404(d)*].

[c] Effect of Modified or Substituted Account Debt

In general, a modification of or substitution for an assigned contract is effective against an assignee if made in good faith. The assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide, nevertheless, that the modification or substitution is a breach of contract by the assignor [*Com. Code § 9405(a)*; *but see Com. Code § 9405(d)* (section does not apply to assignment of health care insurance receivable)]. These rules apply to the extent that either the right to payment under an assigned contract has not been fully earned by performance or the right to payment has been fully earned by performance and the account debtor has not received effective notification of the assignment [*Com. Code § 9405(b)*; *see [4], below*].

The above rules are subject to any law other than Division 9 of the Commercial Code insofar as that other law establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9405(c)*].

[4] Notification to Account Debtors

The rules discussed in this subsection are subject to any law other than Division 9 of the Commercial Code insofar as that other law establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9406(h)*].

In general, after an assignment of an account, the account debtor may discharge the obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge the obligation by paying the assignee and may not discharge the obligation by paying the assignor [*Com. Code § 9406(a)*]. If requested by the account debtor, an assignee must seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge the obligation by paying the assignor, even if the account debtor has received a proper notification [*Com. Code § 9406(c)*].

A term in an agreement between the account debtor and an assignor is ineffective to the extent that it does either of the following [*Com. Code § 9406(d)*]:

- Prohibits, restricts, or requires the consent of the account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account; or
- Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account.

Thus, an assignment of accounts will not be precluded even if the business owner's terms to customers purportedly would prevent it.

[5] Limitation on Industrial Loan Company

Industrial loan companies are governed by Division 7 of the Financial Code [*see Fin. Code § 18000 et seq.*]. No industrial loan company that has investment certificates outstanding may engage in factoring or accounts receivable financing with any borrower or client unless all of the following requirements are met [*10 Cal. Code Reg. § 40.603*]:

- The company must have within its organization as an officer or employee at least one person possessing no less than five years of responsible experience in factoring or accounts-receivable financing [*10 Cal. Code Reg. § 40.603(a)*].
- The company must establish a program for field audits or examinations of client borrowers to establish the validity, quality, and quantity of the collateral assigned to the company as security and must conduct such an audit or examination of each client borrower at least once every three months [*10 Cal. Code Reg. § 40.603(b)*].
- The company generally must require that all payments on any particular account must be made to a lock box or a post office box that is under its control and management if the account debtor (business owner's customer) is not notified of the assignment of the account to the company (called a case of nonnotification). This is not required if the amount advanced to the business owner is less than \$20,000 and is also 100-percent secured by real property or personal property of a kind listed in *10 Cal. Code Reg. § 40.612* (including tangible property such as vehicles, boats, and livestock as well as intangibles such as insurance policies and tradable securities), and the company requires that any payments made to the business owner must be forwarded in kind to the company [*10 Cal. Code Reg. § 40.603(c)*].

[6] Federal Regulation

Since factoring is the purchase of accounts receivable, it is not subject to the Equal Credit Opportunity Act [*15 U.S.C. §*

1601 *et seq.*] or Regulation B [12 C.F.R. pt. 202]. However, if there is a credit extension incident to the factoring arrangement, then certain notification rules and records-retention rules apply [*see* 12 C.F.R. §§ 202.9(a)(3), 202.12(b)(5)], as do other relevant sections of the act and regulation [*see* 12 C.F.R. pt. 202, supp. I, comment P 9(a)(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)Third Party RightsAssignmentsContracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawSecured TransactionsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 44 ACCOUNTS RECEIVABLE FINANCING AND FACTORING
PART III. TRANSACTION GUIDE

19-44 California Legal Forms--Transaction Guide

NOTE:

This transaction guide is for use in advising a business owner on qualifying for, and consummating, an accounts receivable financing transaction or a factoring transaction. For discussions oriented toward the lender's or financier's view of a transaction, see the other Matthew Bender publications cited in § 44.06.



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 44 ACCOUNTS RECEIVABLE FINANCING AND FACTORING
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

19-44 California Legal Forms--Transaction Guide § 44.100

§ 44.100 Facts

1. Facts about business that will obtain loan or sell accounts:
 - a. Type of organization (such as corporation or partnership).
 - b. Names and positions of responsible individuals (such as corporate officers or managing partner).
 - c. Accountant contact information.
 - d. Other states or countries, if any, where business operations are conducted.
2. Facts about auxiliary transaction, if any.
3. Facts about existing business debts, including existing loans from intended lender as well as relationships with other lenders.

NOTE:

A lender usually will be reluctant to enter an accounts receivable financing transaction if the business owner has an existing relationship, especially for inventory financing, with another lender. Two or more lenders for a given business almost always will find coexistence to be difficult, because of priority issues and each one's power to disturb the other's relationship with the business owner when moving to protect its own interests. Therefore, a lender with an existing relationship will seldom be receptive if the business owner wants to get financing from another lender, even though that other lender could have only a junior lien. Conversely, a second or new lender normally would not want to be in the position of a junior lienholder and so would be equally unreceptive to a business owner's two-lender financing plan. As a practical matter, the business owner should select the one lender that appears to be best for all

anticipated borrowing needs.

4. Facts about existing or potential liens (in addition to other lenders' liens) and liabilities, such as claims regarding:

- a. Warranties on goods and services sold.
- b. Federal, state, and local taxes.
- c. Employees' wages, fringe benefits, and pensions.

5. Whether business owner's insurance covers loss from inability to collect on accounts receivable.

NOTE:

Business insurance can be obtained to protect against loss resulting from the business owner's inability to collect on accounts receivable after underlying records are damaged or destroyed. If the business owner has this kind of insurance coverage, that fact would be of interest to a lender or factor.

6. Facts, if any, tending to show desirability of factoring rather than borrowing to meet business needs such as:

- a. Taking advantage of cash discounts from suppliers.
- b. Meeting payrolls.
- c. Increasing cash flow when business credit does not qualify for ordinary bank financing.
- d. Concentrating on products or services instead of receivables management.
- e. Responding to seasonal demands and opportunities.
- f. Keeping pace with internal growth and expansions.

NOTE:

Manufacturers, distributors, importers, wholesalers, and service companies are typical candidates for factoring. These kinds of businesses tend to have the needs listed above and to generate invoice streams that finance companies are prepared to accept. If the customers are primarily consumers, on the other hand, the business usually will not be considered a good candidate for factoring.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewContracts LawSecured TransactionsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 44 ACCOUNTS RECEIVABLE FINANCING AND FACTORING
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

19-44 California Legal Forms--Transaction Guide § 44.101

§ 44.101 Documents

1. Copies of internally generated documents that might have to be submitted to lender or financier [*see* § 44.110].
2. Copies of official documents that might have to be submitted to lender or financier:
 - a. Certificates from Secretary of State, Franchise Tax Board, Board of Equalization, and other state agencies.
 - b. Certificates from local entities (such as business license certificate).
 - c. Certified copies of filed documents (such as fictitious business name statement) and recorded documents.
3. Accountant's analysis of existing accounts receivable, showing facts that lender or financier will use for determining eligibility of each account:
 - a. Name of account debtor (business customer that bought goods or services on credit).
 - b. Whether sale is subject to rescission at buyer's discretion.
 - c. Whether business owner has continuing exposure on warranty.
 - d. Credit terms of sale, including:
 - (1) Payment schedule.

(2) Security interest, if any.

e. Age of account (that is, how many payments in arrears, and how many months).

f. Customer's creditworthiness.

g. Any past or existing or potential claims against business owner made by customer in connection with this account or any other.

NOTE:

This analysis must be accurate and detailed because the information will provide the principal business basis for the financing decisions to be made by the lender or the factor, as the case may be.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewContracts LawSecured TransactionsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 44 ACCOUNTS RECEIVABLE FINANCING AND FACTORING
PART III. TRANSACTION GUIDE
B. Procedural Guide to Accounts Financing

19-44 California Legal Forms--Transaction Guide § 44.110

§ 44.110 Drafting and Reviewing Documents

NOTE:

Documents directly related to the loan, including the financing agreement and financing statement, as well as certain related documents such a lien subordination agreement, will be drafted by the lender. Supporting documents will be produced by the business owner.

1. Determine that business owner has supporting documents--documents other than financing agreement, subordination or termination agreements respecting existing liens, and financing statement--that are in order and not only allow or facilitate transaction but also raise no impediment:

- a. Copies of organizational documents such as articles of incorporation or partnership agreement [*see* Ch. 2, *Formation of Corporations* ; Ch. 12C, *Limited Liability Companies* ; Ch. 15, *General Partnerships* ; Ch. 15A, *Formation of Limited Partnerships*].
- b. Copies of filed fictitious business name statements [*see* Ch. 1A, *Role of Counsel in Starting a New Business*].
- c. Authorization documents such as board resolutions and certificates of incumbency for officers [*see* Ch. 5, *Directors Meetings, Actions, and Resolutions*].
- d. Pertinent financial records and statements, particularly aged-accounts list [*see* Ch. 7, *Corporate Records and Reports*].
- e. Opinion letters from business owner's attorney (for example, regarding any existing or potential legal liabilities) and accountant (for example, regarding any existing or potential tax liabilities).

f. Guaranty agreements, if any, and related documents (such as opinion letter from guarantor's attorney or accountant) [*see* Ch. 79, *Suretyship, Guaranty, and Indemnity*].

g. Auxiliary transaction documents, if any.

NOTE:

If the lender requires a guarantor, then the guarantor might have to provide some of the same kinds of documents to be provided by the business owner. If the financing transaction is part of, or legally related to, some other separate transaction (for example, part of a leveraged buy-out of the business), the lender probably will want to review the documents for that other transaction.

2. Determine that appropriate documents have been drafted to terminate or subordinate any existing lien that otherwise would have priority or could interfere with lender's security interest in collateral.

NOTE:

The lender will check available public records to discover, and will require the business owner to disclose, the existence of any liens that would have priority or could interfere. The lender normally will require termination or subordination of any such liens that can be terminated or subordinated, in order to clear the encumbered property for attachment of the lender's lien. This will extend beyond the accounts receivable (which usually will not be subject to any existing lien, except perhaps one in favor of the present lender) to other property that will be covered by the financing agreement as collateral. Failure to displace existing liens could cause a lender to cancel a pending transaction. For discussion and forms relating to priorities between real estate liens, see Ch. 25B, ***Subordination, Assumption, and Assignment*** , and relating to priorities between personal property liens, see Ch. 42, ***Secured Transactions*** .

3. Determine that financing agreement contains provisions in appropriate language for essential elements of financing transaction:

a. Creation of security interest in accounts, which is to be done as in other contexts for secured transactions; for discussion and forms, see Ch. 42, ***Secured Transactions*** .

b. Description of collateral, which lender usually will want to describe in very broad terms so as to include other property in addition to accounts (such as tax refunds and license revenues).

NOTE:

The lender will draw a distinction between eligible accounts and collateral. The loan amount and repayment requirements will be based on the accounts receivable that are acceptable to the lender for that purpose. The collateral securing the loan will comprise not only those accounts but also whatever additional property the lender can identify and pull into the agreement for this purpose. The description of collateral may extend to the business owner's rights as a credit seller under Division 2 of the Commercial Code, which are discussed in Ch. 52, ***Sales of Goods Under the Uniform Commercial Code*** .

c. Business owner's promise not to discount, factor, or create competing security interest in, any collateral without lender's consent.

d. Description of eligible accounts receivable on which borrowing formula will be based, including:

- (1) Existing accounts.
- (2) Accounts anticipated to arise from future business.
- (3) Ineligible accounts, which may be ineligible for any number of reasons, such as:
 - (a) Account was created by sale to affiliated buyer.
 - (b) Account is already in arrears.
 - (c) Underlying transaction is not completed.
 - (d) Account debtor may have right of setoff.
 - (e) Collection may prove difficult (for instance, account debtor is in foreign country).

NOTE:

Both parties expect that new accounts will arise from future business; that is generally each party's fundamental reason for consummating the transaction. Therefore, the financing agreement will include appropriate after-acquired property provisions to cover future accounts as both additional collateral and also the basis for the revolving credit (allowing future advances) that the transaction creates.

The lender might require an assignment of accounts, but that is not necessary for creation of a security interest under the Commercial Code. However, assignment would empower the lender to take certain loss-prevention steps if necessary (for example, notifying account debtors to send payments directly to the lender).

e. Business owner's usual representations and warranties regarding each account:

- (1) It is good and valid obligation.
- (2) It represents undisputed debt incurred by account debtor for fixed sum, set forth in invoice for goods delivered or services rendered.
- (3) It is not subject to any defense, offset, or counterclaim.
- (4) It will be paid in full when due.
- (5) Business owner will not compromise or adjust it without lender's prior consent.

f. Borrowing formula, which covers:

- (1) Aggregate dollar amount that can be outstanding at any time.
- (2) Percentage of eligible-accounts value that will be reserved (for example, if reserve is 15 percent, then outstanding dollar amount cannot exceed 85 percent of eligible-accounts value).

NOTE:

Notwithstanding the presence of an overarching collateral description in the agreement, the lender will limit the business owner's available line of credit to some percentage of the aggregate value of eligible accounts; and the unavailable portion is called a reserve.

g. Lender's commitment to advance funds, which could be wholly discretionary (lender will advance funds when and as lender determines) or could be fixed to some extent according to schedule or formula.

NOTE:

In general, if the lender is willing to be committed to a schedule or formula for advancing funds, then the lender will offer that commitment only in exchange for broad covenants, restrictive conditions, and a detailed, lengthy list of events of default.

h. Operations requirements to be imposed on business owner, including:

- (1) Recordkeeping with respect to accounts.
- (2) Custody, preservation, and submittal of any related documents, such as:
 - (a) Invoices.
 - (b) Shipping documents.
 - (c) Credit documents.
 - (d) Reports of collections.
 - (e) Checks, drafts, and warrants.
- (3) Periodic submittal of aged accounts list showing which accounts are in arrears and by how much.
- (4) Procedure for creating new accounts.
- (5) For ordinary accounts receivable financing:
 - (a) Daily processing of payments received on accounts.
 - (b) Daily depositing of account debtors' payments in special deposit account or lockbox at lender's place of business.

NOTE:

The distinguishing feature, and most vital element, of an ordinary accounts receivable financing transaction is the lender's daily monitoring of the payments received by the business owner on customers' accounts. The lender will want to see the actual checks received from the customers; thus the lender will be able to confirm that legitimate accounts exist and are being paid down at an acceptable rate. Funds will be advanced (or not) by the lender on a daily basis (or possibly weekly), according to the agreed-on formula.

Sometimes the lender will undertake a verification plan. It may involve using a fictitious auditing firm as a cover for contacting selected account debtors to get verification of the

account details supplied by the business owner. The fictitious name is used to avoid any semblance of a notification of assignment.

(6) For floating lien financing:

- (a) Periodic, usually monthly, reconciliation of accounts receivable and outstanding loan balance.
- (b) Resulting payment to lender, as required by borrowing formula.

NOTE:

Floating lien financing is essentially like ordinary accounts-receivable financing but involves less-intensive monitoring by the lender. The lender generally will not offer this kind of financing except to financially strong businesses with historically sound management. The business owner is trusted to make a monthly reconciliation and send a payment to the lender, according to the borrowing formula; and then the business owner can draw further on the available credit. This is obviously easier than ordinary accounts receivable financing for the business owner. In addition, because of the lender's diminished oversight burden, the cost of borrowing is somewhat lower in this case than in the ordinary case.

- i. Events of default; in addition to those that are common in most contracts, these may include any that are peculiarly necessary in present transaction.

NOTE:

The lender might require that the net worth of the business must be maintained at or above a prescribed amount, for example.

- 4. Determine that financing statement contains appropriate description of collateral, conforming to agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPerfectionMethodsFinancing StatementsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 44 ACCOUNTS RECEIVABLE FINANCING AND FACTORING
PART III. TRANSACTION GUIDE
C. Procedural Guide to Factoring

19-44 California Legal Forms--Transaction Guide § 44.120

§ 44.120 Preliminary Determinations

1. Determine how finance company's payments to business owner are to be structured:

- a. As invoices mature, regardless of whether customers have actually made payments on accounts (called maturity factoring).
- b. Through advances against invoices as they are issued.

NOTE:

The usual factoring practice is that when the business owner generates an invoice for goods sold or services rendered, the finance company "buys" that invoice by advancing the major portion (which could be up to 85 percent) of the amount due. The remainder is called a reserve. The customer eventually pays the invoice amount directly to the finance company, and the finance company then recovers the advance, takes a commission, and forwards or credits the balance to the business owner.

2. Ascertain finance company's procedure for approving credit sales in advance, if factoring transaction covers future sales.

NOTE:

When, as in most cases, the factoring transaction covers future sales, the finance company will want to approve each future sale, insofar as the buyer's creditworthiness is concerned. The business owner's goal should be to have a continuing relationship with the finance company, in which the finance company sets up credit approval guidelines to be applied on the basis of an account debtor's credit rating, so that the business owner need not obtain approval for each and every sale.

3. Determine whether business owner will require advances that finance company will not provide; and in that case,

determine also:

- a. Whether finance company would agree to bank or other lender making loan in lieu of advances.
- b. Whether bank or other lender would be willing to make such loan.

NOTE:

It might be necessary to arrange some interim financing in the case of maturity factoring, which would be a specialized accounts receivable loan. The finance company might be able and willing to provide the loan. If not, then a loan might be arranged with a bank or some other lender, which would find security in the factoring transaction (that is, the finance company's obligation to the business owner). This would necessitate a three-way negotiation.

- 4. Determine whether sales of goods are free of liens of manufacturers, previous sellers, and lenders.

NOTE:

Finance companies generally will not factor invoices arising from sales of goods unless the business owner's title to the goods is free of liens.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application &
ConstructionDefinitionsCollateralIntangiblesCommercial Law (UCC)Secured Transactions (Article 9)Attachment of
Security InterestsAfter-Acquired Property & Future AdvancesContracts LawSales of GoodsGeneral OverviewContracts
LawSecured TransactionsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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C. Procedural Guide to Factoring

19-44 California Legal Forms--Transaction Guide § 44.121

§ 44.121 Drafting and Reviewing Documents

1. Review factoring agreement for conformity to essential terms of typical agreement.
 - a. Agreement has initial term of one year and will be renewed on annual basis thereafter.
 - b. Business owner assigns substantially all accounts receivable to finance company, typically on nonrecourse basis.
 - c. In advance-factoring agreement, business owner may request advances up to stipulated maximum percentage (which typically is 70-to-85 percent) of eligible net sales.
 - d. Finance company charges fee on net sales factored and interest on amounts advanced at stipulated index rate plus premium.
 - e. Business owner is subject to financial covenants under agreement, including requirement to maintain minimum tangible net worth and minimum working capital.
 - f. Obligations to finance company are collateralized by continuing security interest in all assets of business owner, except fixed assets.
 - g. Obligations may be guaranteed by parent or affiliate and further guaranteed by individuals such as shareholders.

NOTE:

The business owner may have a further agreement with the finance company to open letters of credit to facilitate purchases of inventory, as needed. Letters of credit typically are subject to the finance company's approval and secured by acquired inventories. Open

letters of credit customarily may not exceed a stipulated dollar ceiling at any time. For related discussion and forms, see Ch. 56, ***Letters of Credit and Electronic Fund Transfers*** .

2. Review formula for determining average maturity date of accounts and subsequent adjustments, if finance company will provide maturity factoring.

NOTE:

The finance company may apply a formula for determining what is called the "average maturity date" of the assigned accounts, which determines the date for payment to the business owner. The finance company will allow for adjustments based on its developing collection experience.

3. Determine whether factoring agreement should include any of following provisions:

NOTE:

The finance company is the secured party, and the business owner is the debtor, in the context of Commercial Code provisions.

- a. Secured party is entitled to charge back uncollected collateral, or secured party is otherwise entitled to full or limited recourse against debtor or secondary obligor based on nonpayment or other default of account debtor or other obligor on collateral.

NOTE:

Unless the buyer of the accounts, as the secured party, is entitled to charge back uncollected collateral or otherwise to have recourse as described, the buyer will have no statutory duty to use reasonable care in the custody and preservation of the collateral in the buyer's possession [*see Com. Code § 9207(a), (d)(1)*]. It would be very unusual for a factoring agreement to provide for recourse based solely on nonpayment by an account debtor.

- b. Provisions reiterating statutory rules that would not otherwise apply [*see Com. Code § 9207(d)(2)*]:

(1) Reasonable expenses, including cost of insurance and payment of taxes or other charges, incurred in custody, preservation, use, or operation of collateral are chargeable to debtor and are secured by collateral [*Com. Code § 9207(b)(1)*].

(2) Risk of accidental loss is on debtor to extent of deficiency in any effective insurance coverage [*Com. Code § 9207(b)(2)*].

(3) Secured party must keep collateral identifiable [*Com. Code § 9207(b)(3)*].

(4) Secured party may use collateral for any of following purposes [*Com. Code § 9207(b)(4)*]:

(a) For purpose of preserving collateral or its value.

(b) As permitted by order of court having competent jurisdiction.

(c) In manner and to extent agreed by debtor.

c. Provisions imposing duties or conferring rights that would not otherwise exist (which are imposed and conferred on secured parties by statute in contexts apart from factoring transactions) [*see Com. Code § 9207(d)(2)*]:

(1) Secured party may hold as additional security any proceeds, except money or funds, received from collateral [*Com. Code § 9207(c)(1)*].

(2) Secured party must apply money or funds received from collateral to reduce secured obligation, unless remitted to debtor [*Com. Code § 9207(c)(2)*].

(3) Secured party may create security interest in collateral [*Com. Code § 9207(c)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 44 ACCOUNTS RECEIVABLE FINANCING AND FACTORING
PART IV. FORMS

19-44 California Legal Forms--Transaction Guide § 44.200

§ 44.200 Accounts Financing Agreement

[1] Comment--Use of Form

This form is representative of agreements that lenders use for accounts receivable financing. A business owner's attorney may refer to this form when reviewing the form of agreement proffered by the business owner's lender.

[2] FORM

Accounts Financing Agreement

ACCOUNTS FINANCING AGREEMENT

Article 1. Definitions

1.01. Lender. "Lender" means _____[*name*], whose place of business in California, for purposes of this agreement, is located at _____[*street address*] in _____ County.

1.02. Borrower. "Borrower" means _____[*name*], whose place of business in California, for purposes of this agreement, is located at _____[*street address*] in _____ County.

1.03. Account. "Account" means any account receivable, instrument, chattel paper, general intangible, or contract right, now or hereafter owned or acquired by Borrower, however arising or acquired.

1.04. Account Debtor. "Account Debtor" means any obligor on any Account.

1.05. Collateral. "Collateral" means all of the Accounts in the aggregate or any of them; and all proceeds of and collections on the Accounts or any of them; and all guaranties and other security for the Accounts or any of them; and all right, title, and interest of Borrower in any goods the sale or lease of which shall have given rise to any Account, including the right of stoppage in transit; and all returned, rejected, rerouted, or repossessed goods the sale or lease of

which shall have given rise to any Account.

1.06. Obligations. "Obligations" means all liabilities and obligations of Borrower to Lender of every kind and description, direct, absolute or contingent, due or to become due, whether now existing or hereafter arising, under this or any other agreement, document, or instrument now or hereafter executed and delivered by Borrower to Lender or under any oral agreement between Borrower and Lender or by operation of law, whether or not evidenced by any written agreement, document, or instrument, including duties to perform acts and refrain from taking action as well as obligations to pay money, including, without limitation, those arising under [*specify*].

1.07. Receivables Loan Balance. "Receivables Loan Balance" means the aggregate amount of Borrower's indebtedness to Lender incurred pursuant to this agreement, from time to time.

1.08. Schedule. "Schedule" means a written or printed document, which shall be in a form and a format acceptable to Lender and shall be executed in whatever quantities Lender may require, for the purpose of assigning any Account or Accounts to Lender.

Article 2. Lien and Security Interest

2.01. Creation of Lien and Security Interest. Borrower, for valuable consideration, receipt of which is acknowledged, grants to Lender a continuing general lien and security interest in the Collateral, in the proceeds of the Collateral, and in all of Borrower's books and records relating to the Collateral. The lien and security interest of Lender is to secure the payment and performance of the Obligations.

Article 3. Representations, Warranties, and Covenants

Borrower represents, warrants, and covenants to Lender as follows.

3.01. Accounts. All books, records, and documents relating to the Accounts are and will be genuine and in all respects what they purport to be. The amount of any Account shown on the books and records of Borrower represented as owing or to be owing at maturity by the Account Debtor is and will be the correct amount actually owing or to be owing by the Account Debtor at maturity. Each Account Debtor has and will have capacity to contract. Borrower has no knowledge of any fact that would impair the validity or collectability of any Account.

3.02. No Violation of Law or Agreement. The execution, delivery, and performance of this agreement are not in contravention of law or of any indenture, agreement, or undertaking to which Borrower is a party or by which Borrower is bound [*if borrower is corporation, add: and the same are within Borrower's corporate powers, have been duly authorized, and are not in contravention of Borrower's charter, bylaws, or other corporation documents*].

3.03. Authenticity of Accounts. At the time of assignment, each Account represents and will represent an undisputed, bona fide sale and delivery of goods or services rendered, or both (or in the case of a contract right, represents and will represent an undisputed, bona fide agreement), and is not and will not be subject to any setoff, counterclaim, discount, or condition of any nature, except as specified in writing on or before the delivery to Lender of Schedules for the assignment of Accounts. Borrower is, or at the time of the assignment will be, the lawful owner of each Account, with the unqualified right to assign each Account and grant liens and security interests to Lender. Borrower, with respect to each Account, shall deliver to Lender such papers as Lender may require, including, without limitation, the original delivery or other receipts and duplicate invoices.

3.04. Books and Records. Borrower keeps and shall continue to keep all books and records concerning the Collateral at the place of business identified in Paragraph 1.02, unless written notice to the contrary is given by Borrower to Lender.

3.05. Places of Business. Apart from the place of business identified in Paragraph 1.02, Borrower has _____ [no other place of business *or* places of business at, and only at, the following location(s): _____].

3.06. Truth of Information. All information furnished by Borrower to Lender concerning the Collateral and proceeds of the Collateral, Borrower's financial condition, and all relevant facts, is and shall be complete, accurate, and correct in all material respects at the time furnished. All covenants, representations, and warranties contained in this agreement shall be true and correct at the time of the execution of this agreement and shall be deemed continuing.

3.07. Regulatory and Accounting Compliance. Borrower has fully complied and shall fully comply with the requirements of all applicable laws, federal, state, and local. All reserves shown on Borrower's books and records are now and shall be maintained in sufficient amounts to fully reflect all liabilities that have accrued or may accrue.

3.08. No Claims or Encumbrances. The Collateral is and, for as long as the Obligations remain unpaid to any extent, shall remain free of any liens, charges, security interests, encumbrances, and adverse claims, except for the benefit of Lender.

3.09. Qualified Corporation. Borrower is duly organized and existing under the laws of _____ (state of incorporation) and is duly qualified and in good standing in every other state in which Borrower is required to be qualified to do business.]

Article 4. Loans

4.01. Revolving Credit. Lender agrees, during the continuance of this agreement, to make loans and advances to Borrower, payable on demand, against those of the Accounts that Lender in its sole discretion considers eligible for borrowing. Up to _____ percent of the face value of each Account shall be paid on acceptance of the Account by Lender; the remainder, being not less than _____ percent of face value, shall be held by Lender as a reserve to secure the collection and payment of the Account and to secure the payment and performance of the Obligations. If the Receivable Loan Balance shall at any time exceed _____ percent of the aggregate face value of the accepted Accounts, Lender may, but need not, require Borrower, on demand, to pay the excess to Lender or may require Borrower to deliver additional security to Lender.

4.02. Promissory Notes. To evidence the loans, Borrower, at Lender's request, shall execute and deliver to Lender promissory notes payable to Lender on demand. The notes shall be in the amount of any portion or portions, or all, of the Receivables Loan Balance, as Lender may request. The notes shall provide for the payment to Lender of interest at the rate provided in Paragraph 4.04 and shall be on forms acceptable to Lender. The execution and delivery of the notes shall not constitute payment, satisfaction, or release of the Obligations.

4.03. Checks Received. Checks received by Lender shall not constitute payment. Solely for the purpose of computing interest earned by Lender, credit for the checks be given as of the third calendar day after receipt, to allow for clearance.

4.04. Interest Computed Daily. Until the Obligations are fully discharged, Borrower shall pay, monthly, as interest, _____ percent per [year *or other period*] computed daily on the Receivables Loan Balance, from the date accrued until the date paid.

4.05. Minimum Interest. Borrower agrees to pay interest in an amount not less than \$ _____ per [month *or year*], regardless of the amount of the Receivables Loan Balance.

4.06. Statement to Borrower. Lender shall furnish to Borrower, each month, an extract or a statement of Borrower's

account, prepared from Lender's records, which shall conclusively be deemed correct and accepted by Borrower unless Borrower delivers to Lender a written statement of exceptions within [*specify, e.g., 30 days*] after the extract or statement has been furnished.

Article 5. Returned Goods; Instruments

5.01. Returned Goods. Borrower shall physically segregate all rejected, rerouted, repossessed, or returned goods sold or delivered in respect of any Account, shall immediately notify Lender, shall receive the goods in trust for Lender, and shall hold the goods for disposition as Lender may direct or, at Lender's option, shall promptly refund all advances, loans, and extensions made on the Accounts.

5.02. Instruments. Borrower shall deliver to Lender, endorsed to Lender, all instruments, chattel paper, guarantees, or other documents immediately when received by Borrower as evidence or in payment of, or as security for, any of the Accounts, and shall immediately transfer to Lender all security received for any of the Accounts.

Article 6. Inspection of Records; Further Assurances

6.01. Records. At all times Borrower shall allow Lender by or through any of Lender's officers, agents, employees, attorneys, and accountants, to possess, to remove to the premises of Lender or any agent of Lender for as long as Lender may desire, to make full use of in aid of Lender's rights under this agreement, and to examine, audit, and make extracts and copies from, Borrower's books and all other records, and, for the purposes or to aid Lender in the enforcement of any rights under this agreement, to enter, to remain on, and, without cost to Lender, to use the premises of Borrower or wherever the books and records may be found, as often and for as long as Lender may desire.

6.02. Trial Balance. Borrower shall deliver to Lender an aged accounts-receivable trial balance in whatever form and as often as Lender requires.

6.03. Accounts Statements. Borrower shall furnish to Lender, promptly on request, Borrower's monthly statements of Accounts to customers. Lender may from time to time verify the validity, amount, and any other matters relating to the Accounts by means of mail, telephone, or otherwise, in the name of Borrower, Lender, or any other name, as Lender may choose.

6.04. Assurances and Schedules. Borrower shall do all things required by Lender in order more completely to vest Lender's rights under this agreement. The Accounts shall be assigned to Lender by Schedules, but the lien and security interest of Lender under this agreement shall not be limited in any way to or by the inclusion of Accounts within the Schedules. To the extent the terms and provisions of this agreement conflict with the Schedules, this agreement shall be controlling. Borrower need not furnish Schedules unless Lender shall so request, but Borrower's failure to execute and deliver Schedules shall not limit the security interest granted to Lender.

6.05. Financial Statements. Borrower shall deliver to Lender, within [*specify, e.g., 60 days*] after Borrower's accounting year-end, financial statements (including balance sheet, profit and loss figures, and accountant's comments) for that year and, at Lender's request, shall deliver to Lender financial statements for each month by [*specify, e.g., the 15th day of the following month*]. All annual financial statements shall be prepared by certified public accountants acceptable to Lender.

6.06. Notice of Changes. Borrower shall promptly notify Lender in writing of any change of officers, directors, and key employees, change of location of offices, change of location of any moveable assets (except the shipment, temporary storage, or use in manufacturing processes, of inventory in the ordinary and normal course of Borrower's business), change of Borrower's name or legal status, any sale or purchase out of the regular course of Borrower's business, and any other material change in the business or financial affairs of Borrower.

Article 7. Notice of Assignment; Collection; Expenses

7.01. Notification to Account Debtors. Borrower, on the request of Lender and only then, shall give notice of the assignment of or the granting of a security interest in all or any of the Accounts, to the Account Debtors. Notice shall be given in the form and at the times Lender shall request. Lender may give the notice at any time and from time to time in Lender's or Borrower's name, without notice to Borrower, and so require the Account Debtors to pay the Accounts directly to Lender.

7.02. Attorney in Fact. Borrower irrevocably appoints Lender as Borrower's true and lawful attorney, with full power of substitution, in the name of Borrower or in the name of Lender or otherwise, for the use and benefit of Lender, but at the cost and expense of Borrower, without notice to Borrower or any of Borrower's representatives or successors, to repair, alter, or supply goods, if any, necessary to fulfill in whole or in part the purchase order of any Account Debtor from which any of the Collateral has arisen; to demand, collect, receipt for, and give renewals, extensions, discharges, and releases of any Collateral; to institute and to prosecute legal and equitable proceedings to realize on the Collateral; to settle, compromise, compound, or adjust claims in respect of the Collateral or any legal proceedings brought in respect of the Collateral; and generally to sell in whole or in part for cash, credit, or property to others, or to buy, at any public or private sale, or to assign, make any agreement with respect to, or otherwise deal with, any of the Collateral as fully and completely as if Lender were the absolute owner, for all purposes. Borrower shall have no power to make any allowance or credit to any Account Debtor without Lender's written consent.

7.03. Collection. Borrower irrevocably appoints Lender as Borrower's true and lawful attorney, with full power of substitution, to take control in any manner of any cash or noncash items of payment or proceeds of those items; to endorse the name of Borrower on any notes, acceptances, checks, drafts, money orders, bills of lading, freight bills, chattel paper, or other evidences of payment or Collateral that may come into Lender's possession; to sign Borrower's name on any invoices relating to any Accounts, on drafts against Account Debtors, and on notices to Account Debtors; to sign Borrower's name on any proof of claim in bankruptcy against Account Debtors; to sign Borrower's name on any notice of lien, claim of mechanic's lien, or assignment or satisfaction of mechanic's lien; and to do all other acts and things necessary, in Lender's sole judgment, to carry out this agreement. All checks and other forms of remittance received by Borrower and submitted by or on behalf of Account Debtors shall be endorsed payable to the order of Lender or in any other manner that Lender may designate from time to time. Borrower's signature or name, in every instance described in this paragraph, may be inserted by Lender in longhand, in typewriting, by rubber stamp, or otherwise. Every endorsement, however signed or made, shall be deemed to be the valid endorsement of Borrower.

7.04. Borrower Collecting for Lender. Borrower shall have the privilege of collecting the Accounts for the account of and in trust for Lender. The privilege may be revoked by Lender at Lender's option, at any time by either (a) giving notification of assignment of, or lien and security interest in, the Accounts to the Account Debtors, and no notice to Borrower shall be required, or (b) giving notice of the revocation to Borrower. All currency and coins, checks, notes, drafts, other things of value, and items of payment together with any and all relating vouchers, identifications, communications, or other data received or collected from Account Debtors by Borrower (or by any receiver, trustee, or successor in the interest of Borrower, or by any person acting on behalf of Borrower) in reference to the Accounts shall belong to Lender and shall be immediately transmitted by Borrower to Lender at the place of business identified in Paragraph 1.01 (or, if directed by Lender, deposited in Lender's account in a bank designated by Lender) in the original form in which the same are received and endorsed by Borrower. Borrower shall have no right to commingle with Borrower's own funds, use, divert, or withhold any of the proceeds of any collections. Borrower hereby relinquishes all dominion over the Accounts and the proceeds of Accounts and collections received on Accounts. Borrower shall make book entries in a form satisfactory to Lender disclosing the absolute and unconditional assignment of Accounts to Lender and shall keep a separate account of all collections received. Borrower shall advise Lender immediately of any claims or disputes arising with respect to any Account and of any occurrence that may in any way impair or affect any of the Accounts or tend to reduce the value of the Accounts. Should any suit or proceeding be instituted by or against Lender or Borrower on any of the Collateral or for the collection or enforcement of any Account, Borrower, without

expense to Lender, shall make available Borrower's officers, employees, agents, books, records, and files, as Lender may deem necessary to make proper proof in court.

7.05. Damages to Lender. Lender shall be entitled to recover from Borrower all damages sustained by Lender by reason of any misrepresentation, breach of warranty, or breach of covenant of Borrower, expressed or implied, whether caused by the acts or defaults of Borrower, Account Debtors, or others; and also all reasonable attorneys' fees, court costs, court reporter expenses, long distance telephone charges, telegram costs, collection expenses, accountants' fees, supervisory fees, expenses of attorneys, agents, officers, auditors, collectors, clerks, and investigators for travel, lodging, and food costs, traveling expenses, disbursements, and all other expenses that may be incurred by Lender in enforcing payment of any Account or the Obligations, in attempting to enforce payment, in realizing on any Collateral, whether against any Account Debtor, Borrower, Borrower's guarantors, or others, in supervising the records and proper management and disposition of the collection of Accounts, in prosecuting or defending any proceeding arising from the efforts of Lender to recover any money or other thing of value, or otherwise to enforce or protect any of Lender's rights.

7.06. Insurance. As to any insurance that Borrower now or hereafter may maintain covering risks of damage to or loss or destruction of books and records, each policy of insurance shall contain a loss-payable clause in a form satisfactory to Lender naming Lender as payee and providing that all proceeds payable under the policy shall be payable in any event to Lender, unless written consent to the contrary is obtained from Lender. The proceeds shall be applied to the Receivables Loan Balance. Each insurer shall agree to give Lender [*specify, e.g., 30 days*] written notice before any policy shall be altered or canceled. No act or default of Borrower or any other person shall affect the right of Lender to recover under a policy in case of damage, loss, or destruction. Certified copies of the policies shall be delivered to Lender on demand.

Article 8. Financing Statements and Notices of Assignment

8.01. Financing Statements. At the request of Lender, Borrower shall join with Lender in executing one or more financing statements or notices of assignment of accounts receivable pursuant to any applicable law, in any form satisfactory to Lender.

8.02. Filing. Without the written consent of Lender, Borrower shall not allow any financing statement or notice of assignment of accounts receivable covering any Collateral or proceeds to be on file in any public office.

Article 9. Events of Default; Acceleration

9.01. Default. All Obligations, notwithstanding any time or credit allowed by any instrument evidencing a liability, shall become immediately due and payable, without notice or demand, on the occurrence of any of the following events of default:

- (a) Borrower fails to make any payment or to perform any Obligation promptly when due.
- (b) Any warranty, representation, or statement made or furnished to Lender by or on behalf of Borrower is false in any material respect when made or furnished.
- (c) Any event arises that results in the acceleration of the maturity of the indebtedness of Borrower to others under any indenture, agreement, or undertaking.
- (d) There occurs any loss, theft, damage, destruction, sale, or encumbrance to or of any of the Collateral, or any levy, seizure, or attachment shall be made on any of the Collateral.
- (e) Lender determines, at any time or times hereafter, that it is insecure with respect to the performance

by Borrower of all or any part of the Obligations.

(f) Any of the following occurs; it being expressly agreed that on the happening of any event described below, Borrower and each of Borrower's guarantors and sureties having or acquiring knowledge of it shall immediately give written notice of the event or fact to Lender:

(1) Dissolution, termination of existence, insolvency, business failure, appointment of a receiver for any part of the property of, assignment for the benefit of creditors by, or commencement of any proceeding under any bankruptcy or insolvency law by or against, Borrower or any guarantor or surety for Borrower;

(2) Entry of a court order that enjoins, restrains, or in any way prevents Borrower from conducting all or any part of its business affairs in the ordinary course;

(3) Failure to pay any federal, state, or local tax or other debt of Borrower unless the same is being contested in good faith;

(4) Termination of guaranty by any guarantor of Borrower's indebtedness to Lender, whether under this agreement or otherwise.

9.02. Injunctive Relief. In the event that Borrower violates any of the warranties, covenants, terms, and conditions of this agreement, no remedy at law will provide adequate relief to Lender. Lender shall be entitled to temporary and permanent injunctive relief in that case without the necessity of proving actual damages.

9.03. Self-Help. At any time or times when Borrower is in default under this agreement, Lender shall have the right to enter on Borrower's premises and to receive and open all mail directed to Borrower, provided that Lender shall turn over to Borrower all mail not relating to Collateral. In the event of default, Lender shall have the right, in the name of Borrower, to notify the U.S. Postal Service to change the address for the delivery of mail addressed to Borrower to any address Lender may designate.

Article 10. Rights and Remedies

10.01. Lender's Rights and Remedies. On the occurrence of any event of default, and at any time thereafter, Lender shall have the rights and remedies of a secured party under the Uniform Commercial Code and under any and all other laws in addition to the rights and remedies provided in this agreement or in any other instrument or paper executed by Borrower. All of Lender's rights, powers, and remedies are cumulative and none is exclusive.

Article 11. One General Obligation; Cross Collateral

11.01. One Obligation. All loans and advances by Lender to Borrower under this agreement and under all other agreements constitute one loan, and all indebtedness and obligations of Borrower to Lender under this and all other agreements, present and future (including, without limitation, any document listed in Paragraph 1.06), constitute one general obligation secured by collateral and security held and to be held by Lender under this agreement and all other agreements between Borrower and Lender now and hereafter existing. All of the rights of Lender contained in this agreement shall likewise apply insofar as applicable to any modification of or supplement to this agreement and to any other agreements, present and future, between Lender and Borrower.

Article 12. Application of Payments

12.01. Application. All payments made by or in behalf of and all credits due to Borrower may be applied and reapplied

in whole or in part to any of the Obligations to the extent and in the manner that Lender may elect.

Article 13. Termination

13.01 Termination of Agreement. This agreement, on acceptance by Lender, shall continue until _____[date] and from year to year thereafter unless terminated as to future transactions by the giving of notice by registered mail by either party to the other, not less than [*specify, e.g., 30 days*] before any anniversary of this agreement. Borrower, at the termination date, shall make payment in full of the Obligations, whether evidenced by installment notes or otherwise, and whether or not all or any part of the Obligations may otherwise then be due and payable by Borrower to Lender. Lender may terminate on immediate notice at any time after occurrence of any event of default described in Article 9. Termination of this agreement shall not in any way affect or impair any right of Lender arising before or by reason of the termination, nor shall termination relieve Borrower or any of the guarantors of any obligation to Lender under this agreement or otherwise until all of the Obligations are fully paid and performed, nor shall termination affect any right or remedy of Lender arising from the Obligations, and all agreements, warranties, and representations of Borrower shall survive termination.

Article 14. Waivers

14.01. Borrower's Claims. Borrower hereby waives any and all causes of action and claims against Lender as a result of any possession, collection, or sale by Lender of any Collateral in the event of a default, notwithstanding the effect of the possession, collection, or sale on the business of Borrower, and Borrower waives all rights of redemption, if any.

14.02. No Waiver by Lender. The failure at any time or times hereafter to require strict performance by Borrower of any of the provisions, warranties, terms, and conditions contained in this agreement or any other agreement, document, or instrument now or hereafter executed by Borrower and delivered to Lender, shall not waive, affect, or diminish any right of Lender hereafter to demand strict compliance and performance under this agreement and with respect to any other provisions, warranties, terms, and conditions contained in other agreements, documents, and instruments. Any waiver of any default shall not waive or affect any other default, whether of the same or of a different type. None of the warranties, conditions, provisions, and terms contained in this agreement or any other agreement, document, or instrument now or hereafter executed by Borrower and delivered to Lender shall be deemed to have been waived by any act or knowledge of Lender or Lender's agents, officers, or employees, but can be waived only by an instrument in writing, signed by an officer of Lender and directed to Borrower, specifying the waiver.

14.03. Notices. Borrower waives any and all notice or demand which Borrower might be entitled to receive with respect to this agreement by virtue of any applicable statute or law, and waives demand, protest, notice of protest, notice of default or dishonor, notice of payments and nonpayments, or of any default, release, compromise, settlement, extension, or renewal of all commercial paper, accounts, contract rights, instruments, chattel paper, guaranties, and otherwise, at any time held by Lender on which Borrower may in any way be liable, notice of nonpayment at maturity of any and all accounts, instruments, or chattel paper, or notice of any action taken by Lender unless expressly required by this agreement, and hereby ratifies and confirms whatever Lender may do pursuant to this agreement and agrees that Lender shall not be liable for any acts of commission or omission or for any errors of judgment or mistakes of fact or law.

Article 15. Miscellaneous Provisions

15.01. Binding Effect of Agreement. This agreement shall be binding on and inure to the benefit of the parties and their respective heirs, successors, representatives, and assigns.

15.02. Governing Law; Submission to Jurisdiction. The validity, interpretation, enforcement, and effect of this agreement shall be governed by the laws of the State of California. Borrower hereby consents to the jurisdiction of all

courts in California and hereby appoints _____ [name], whose address is _____ [address], as Borrower's agent for service of process in California.

15.03. Severability. In the event that any provision of this agreement is deemed to be invalid by reason of the operation of any law or by reason of the interpretation placed on any law by any court, this agreement shall be construed as not containing the invalid provision. The invalidity of the provision shall not affect the validity of any other provision of this agreement. Any and all other provisions of this agreement that are otherwise lawful and valid shall remain in full force and effect.

15.04. Notices and Payments. Any notice, payment, or refund required under this agreement or by reason of the application of any law shall be deemed to have been given by either party when the same shall have been deposited in the U.S. mail, postage prepaid, at least [specify, e.g., five calendar days] before the same shall be effective (except that notice of termination shall be given in the manner set forth in Article 13), and addressed as follows:

(a) If to Borrower: at the address of Borrower specified in Paragraph 1.02, or to the latest address of Borrower of which Lender shall have received notice from Borrower.

(b) If to Lender: at the address of Lender specified in Paragraph 1.01, or to the latest address of Lender of which Lender shall have sent notice to Borrower.

15.05. Attorneys' Fees. If, at any time or times hereafter, Lender employs counsel for advice or other representation with respect to any Collateral or this agreement or any other agreement, document, or instrument heretofore, now, or hereafter executed by Borrower and delivered to Lender, or to commence, defend, or intervene, file a petition, complaint, answer, motion, or other pleadings, or to take any other action in or with respect to any suit or proceeding relating to this agreement or any other agreement, instrument, or document heretofore, now, or hereafter executed by Borrower and delivered to Lender, or to protect, collect, lease, sell, take possession of, or liquidate any of the Collateral, or to attempt to enforce any security interest or lien in any Collateral, or to represent Lender in any litigation with respect to the affairs of Borrower or in any way relating to any of the Collateral, or to enforce any rights of Lender, or the Obligations, or liabilities of Account Debtors or any other person, firm, or corporation that may be obligated to Lender by virtue of this agreement or any other agreement, document, or instrument heretofore, now, or hereafter delivered to Lender by or for the benefit of Borrower; then, in any of those events, all of the reasonable attorneys' fees arising from those services, and any expenses, costs and charges relating to those services, shall constitute additional Obligations, secured by the Collateral, payable on demand.

15.06. Effect of Headings. Headings of articles and paragraphs in this agreement shall not have any legal effect but are provided only to facilitate the reading of the text.

15.07. Effective Date. This agreement shall not become effective until accepted by Lender on the signature of a duly authorized officer at the address set forth in Paragraph 1.01.

_____, Borrower

By _____ [signature]

[typed name and title]

[corporate seal]

Attest: _____, Secretary

Accepted by Lender at _____ [city and state] on _____ [date]

_____ [signature]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewContracts LawSecured TransactionsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 44 ACCOUNTS RECEIVABLE FINANCING AND FACTORING
PART IV. FORMS

19-44 California Legal Forms--Transaction Guide § 44.201

§ 44.201 Demand for Release of Account Debtor**[1] Comment--Use of Form**

This form may be used by a business owner to demand that a lender send a "record" releasing an account debtor that previously received notification of an assignment of the account to the lender. The business owner may put such a demand to the lender once the obligations between the business owner and the lender have been discharged; and the lender must comply within 10 days after receiving such a demand [see *Com. Code* § 9209(a), (b); § 44.21[2][a]]. A certified or registered letter would be appropriate for making the demand.

A record, in this context, is information that is inscribed on a tangible medium or is stored in an electronic or other medium and is retrievable in perceivable form [*Com. Code* § 9102(a)(69)]. The record must be "authenticated" [see *Com. Code* § 9102(a)(7)] by the lender. Presumably the lender could and would use the same means as for the previous notification of assignment.

[2] FORM**Demand for Release of Account Debtor**

_____ [name and address of lender]
[identification of loan]

_____ [I or We or name of business owner] hereby demand[s] that _____ [you or name of lender] send to any account debtor that has received notification of an assignment to _____ [you or name of lender], as assignee under *Commercial Code* Section 9406(a), an authenticated record that releases the account debtor from any further obligation to _____ [you or name of lender], pursuant to *Commercial Code* Section 9209(b).

_____ [signature]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewContracts LawSecured TransactionsGeneral
OverviewContracts LawTypes of ContractsReleases



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DIVISION III: COMMERCIAL TRANSACTIONS
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19-44 California Legal Forms--Transaction Guide § 44.202

§ 44.202 Factoring Agreement--Maturity Factoring

[1] Comment--Use of Form

This form is representative of the agreements used by finance companies in maturity factoring transactions, in which the business owner receives payment from the finance company based on the maturity dates of invoices, regardless of whether the customers have made payments. A business owner's attorney may refer to this form when reviewing the form of agreement proffered by the business owner's intended factor.

[2] FORM

Factoring Agreement--Maturity Factoring

FACTORING AGREEMENT

This agreement is made by _____[*name*] as Seller and _____[*name*], a California banking corporation, as Factor, on _____[*date*] at [*place*], California.

1. Security Interest. To secure the payment and performance of all liabilities of Seller to Factor, Seller hereby grants Factor a security interest, pursuant to the California Uniform Commercial Code, in all of Seller's accounts receivable now existing or hereafter arising ("Accounts"), together with all interests of Seller now existing or hereafter arising in goods as to which any Account for goods sold or delivered has arisen, and the proceeds of all of the foregoing.

2. Sole Factor. Seller hereby, irrevocably, for the term of this agreement, constitutes and appoints Factor as Seller's sole factor for all of Seller's sales and authorizes Factor to pass on the credit risk of Seller's customers ("Customers"). During the term of this agreement, Seller shall not sell, transfer, pledge, create a security interest in, or hypothecate any of the Accounts to any person, firm, association, or corporation.

3. Approval of Accounts. Seller shall not make any sale of goods unless and until the proposed sale shall be first submitted to Factor for approval in writing as to the amount and terms of sale and the credit to be extended to the Customer. Terms of sale shall not exceed [*specify, e.g., 30 days*], and no change from original terms shall be made

except with the prior written consent of Factor. Sales shall be invoiced on forms satisfactory to Factor, and proof of delivery, satisfactory to Factor, shall be submitted on each sale. Original invoices, together with one copy of each, shall be furnished to Factor. At Factor's option, invoices may be mailed by Factor at Seller's postage expense. Factor shall not be obligated to purchase any account from Seller, nor shall the terms of this agreement in any way restrict or prohibit any purchase by Factor from Seller on a guaranteed basis.

4. Sale and Purchase of Accounts. Seller shall sell and Factor shall buy, at the gross invoice amount, all Accounts created by Seller's sales and services that have previously been approved by Factor in writing, and Factor shall pay for the Accounts when the goods have been finally accepted by Customer. All such Accounts shall be owned by and payable directly to Factor, and Seller hereby assigns and transfers to Factor all right, title, and interest in and to all such Accounts, and shall execute and deliver to Factor, in confirmation of Seller's title, a detailed assignment of the Accounts, in a manner and a form satisfactory to Factor. Factor shall have the right to give notice of this assignment to Customers; to bring all proceedings for collection in Factor's name; and to exercise Seller's rights of stoppage in transit, replevin, and reclamation. Should any remittance be made directly to Seller, Seller shall receive it in trust for Factor, as the property of Factor, and immediately turn over to Factor the identical check or other form of payment received. Seller hereby irrevocably appoints Factor, or any person designated by Factor, as Seller's true and lawful attorney in fact to receive, open, and dispose of all mail addressed to Seller, and to endorse the name of Seller on any notes, acceptances, checks, drafts, money orders, or other remittances; to endorse the name of Seller on any invoice, freight, or express bill or bill of lading, storage receipt, warehouse receipt, or other instrument or document in respect to any Account; to sign the name of Seller to drafts against Seller, assignments, or verifications of Accounts and notices to Customers; to change the post office address of Seller in the event Seller ceases business from bankruptcy or otherwise, or breaches this agreement, or if for any reason Factor feels insecure; and to do all other acts and things necessary to carry out the intent of this agreement. The authority granted to Factor shall remain in full force and effect until all Accounts assigned to Factor have been paid in full.

5. Payments to Seller. Factor shall remit to Seller the net proceeds due from the sales of Accounts. Net proceeds shall be computed by deducting from the gross invoice amount any trade and cash discount, Factor's commission, and Factor's reserve. In order to protect and indemnify Factor against possible returns, claims, allowances, or any sum that may be due or become due under any and all liabilities of Seller to Factor, Factor may reserve and withhold an amount, which shall be held by Factor in a designated Reserve Account, equal to _____ percent of the gross face amount of all invoices bought by Factor. If the amount in the Reserve Account exceeds that percentage of all of Seller's invoices purchased by Factor, the excess may be remitted by Factor to Seller, at such times and in such amounts as Factor, in its sole discretion, deems proper. Any reserve amount held by Factor or other property in Factor's possession shall be held as security for payment of any and all obligations owed by Seller to Factor, regardless of how the obligations arose.

6. Indemnity. Seller shall indemnify and protect Factor against liability, loss, or expense caused by or arising out of the rejection of goods or alleged claims or offsets of every kind and nature by Customers, other than those resulting from Customers' financial inability to pay. Knowledge or discovery by Factor of disputes between Customers and Seller with respect to Accounts sold to Factor, regardless of the manner in which knowledge or discovery of disputes is received by Factor, shall be conclusive and binding on Seller, and the Accounts shall thereafter be subject to the provisions of this paragraph. Seller shall immediately advise Factor of any and all disputes with Customers and, subject to Factor's approval, shall promptly settle the disputes. Factor shall have the right to charge against the Reserve Account the entire amount of any sale or sales, the amounts of which are in dispute, before or after the maturity date or that are not paid at maturity for any reason other than the financial inability of the Customers to pay. If, for any reason, the balance in the Reserve Account is insufficient to reimburse Factor for the full amount of the invoice charged to it, the deficiency due Factor shall be an indebtedness immediately due and payable. Factor shall be relieved of any credit risk responsibility involved in any disputed Account, sale, or sales. The charging of any disputed sale or Accounts against the Reserve Account shall not be deemed a reassignment but shall merely constitute a bookkeeping entry, and title to the Accounts, and to the goods constituting the same, shall remain with Factor as security for any indebtedness due or to become due.

7. Payments to Factor. Whenever there may be any sum of money due or to become due to Factor under this agreement, or on any indebtedness due to Factor, for open account or otherwise, Seller shall pay that sum on demand. All of Seller's property in Factor's possession or control may be withheld as security for the indebtedness. On termination of this agreement, any sum due or to become due to Factor shall be immediately due and payable, and on Seller's failure to pay the sum on demand, Factor shall have the right to dispose of any and all of Seller's property in Factor's possession or control in satisfaction of the indebtedness. Seller hereby authorizes Factor to sell the property at either public or private sale at Factor's sole discretion, with any expenses incurred in the selling of the property to be charged to Seller. Seller agrees to pay to Factor, on demand, any deficiency remaining thereafter.

8. Stoppage in Transit. The right of stoppage in transit on all shipments of sales under this agreement is reserved to Factor, and Seller on request shall stop any such delivery, or assert a vendor's lien in favor of Factor to take any other proceedings to effect that right. Any goods returned by reclaim, exercise of vendor's lien, or under the right of stoppage in transit shall be considered returned goods.

9. Sales Taxes. Any and all taxes levied by any and all authorities on sales, accounts receivable, or any transactions under this agreement shall be paid by Seller; however, if Seller does not pay, Factor is hereby authorized to pay the taxes and to charge the sums against the Reserve Account.

10. Books and Records. Seller shall keep proper books of account showing all sales, claims, and allowances on goods. All books, accounts, correspondence, and papers shall be open to Factor's inspection at all times. Until all Accounts are fully paid, Seller shall furnish to Factor, within [*specify, e.g., 30 days*] following the close of each quarterly calendar period, balance sheets and profit and loss statements of Seller as of the close of the preceding quarter and such other information as Factor may from time to time reasonably request. In addition, Seller shall furnish to Factor, within [*specify, e.g., 90 days*] after the close of Seller's accounting year, a copy of the annual audit of Seller prepared in accordance with generally accepted accounting principles and certified in a manner satisfactory to Factor by an accountant or accountants selected by Seller and satisfactory to Factor. In the event that Seller fails to perform promptly or breaches any of the promises or obligations in this paragraph, Factor shall be entitled to recover from Seller, and Seller shall pay to Factor, all attorney's fees, court costs, and all other expenses that may be incurred by Factor in the collection of any and all sums due to Factor from Seller or any guarantor of Seller.

11. Factor's Commission. Factor shall perform the services provided for in this agreement in consideration of, and Seller shall pay Factor, a commission computed and payable as follows: [*specify*]. The foregoing rate is based on Seller's representation that Seller's usual terms are [*specify*]. No additional dating shall be given without the prior written approval of Factor. When the approval is given, Factor's commission shall be increased at the rate of _____ percent for each additional [*specify, e.g., 30 days*] or dating or fraction thereof.

12. Settlements; No Waivers. Factor shall have the right to settle or adjust all disputes or claims directly with Customers, with respect to any Accounts, and to compromise or extend the time of payment for any Account on such terms and conditions as Factor may determine, without affecting the liability of Seller under this agreement. The waiver by Factor of any breach of this agreement or warranty or representation shall not be construed as a waiver of any subsequent breach. The failure to exercise any right under this agreement by Factor shall not operate as a waiver of the right, and all rights and remedies in this agreement are cumulative.

13. Default; Termination. If Seller should default in the performance of or breach any of the provisions of this agreement, or default in the payment of any indebtedness otherwise owing to Factor, or if a petition in bankruptcy or application for other relief under the Bankruptcy Code is filed by or against Seller, or a receiver is appointed for the assets or affairs of Seller, or if Seller shall make a general assignment for the benefit of creditors, or if Seller shall become insolvent, or if, in the opinion of Factor, there is a materially adverse change in the financial condition of Seller, or if an attachment or execution should be levied against Seller, or if for any other reason Factor shall deem itself

insecure, then, in any such event, Factor may at its option terminate this agreement forthwith. If this agreement is terminated for any of the above reasons, or for any other reason, all sums due to Factor from Seller shall become immediately due and payable. In the event that Factor ceases to act as Factor for Seller, Seller shall furnish to Factor indemnity satisfactory to Factor against any items that could be charged to Seller under the terms of this agreement. If Seller ceases to do business, all Accounts purchased by Factor on a nonrecourse basis shall be immediately deemed to have been purchased with recourse and shall become immediately due and payable. Demand of performance, advertisement, and presence of property at sale are hereby waived, and Factor is hereby authorized to sell under this agreement any evidence of debt assigned to Factor. All demands and presentments of every kind or nature are expressly waived by Seller. Seller hereby waives the right to request Factor to proceed against Customers or to proceed against any security that Factor may hold, including but not limited to Accounts assigned under this agreement; and Seller waives the right to require Factor to pursue any other remedy for the benefit of Seller. Factor may proceed against Seller for the amount of any indebtedness owed by Seller to Factor without taking any action against Customers or any other party and without selling or otherwise proceeding against or applying any security that Factor may hold, including but not limited to assigned Accounts.

14. Term of Agreement. This agreement shall be effective for a term of [*specify, e.g., one year*] from the date of this agreement and shall be deemed renewed for a similar term thereafter, unless Seller shall give Factor, by registered mail, notice of cancellation [*specify, e.g., 30 days*] before the expiration of any such term. Factor, however, may terminate this agreement at any time on [*specify, e.g., 30 days*] written notice by registered mail sent to Seller; but if Seller is in default under any provision of this agreement, Factor may terminate this agreement immediately.

15. Ineligible Accounts. Any sales, or the subsequent Accounts created from sales, as to which the credit risk has been rejected by Factor, may at the discretion of Seller be placed with Factor, and may be purchased at the election of Factor, but in that case the credit risk will be retained by Seller. All such sales or Accounts shall be known as Department Risk Sales or Unapproved Accounts and shall be marked by the letters D.R. or U.A. For the services rendered by Factor in regard to the credit work and information connected with such Accounts, including the issuing of statements and bookkeeping services, Factor shall receive a commission or discount as is set forth under Paragraph 11. Any and all collection work undertaken that pertains to such Accounts shall be at the option and sole discretion of Factor, and the costs and expenses of the collection shall be charged to Seller or to the Reserve Account. Should any such Account remain unpaid beyond the maturity date, or on any prior insolvency on the Account, Factor shall have the right to charge the unpaid amount against the Reserve Account, without the charge being deemed a reassignment.

16. Credit Balance. When all sums due to Factor have been paid, any credit balance on Factor's books in favor of Seller shall be paid to Seller on execution and delivery of a termination agreement.

17. Additional Documents. Seller shall execute and deliver to Factor any and all additional instruments or documents, including but without limiting the generality of the foregoing, all documents required by the California Uniform Commercial Code for the perfection or modification of security interests, and to do all things that Factor from time to time may deem necessary or convenient to carry into effect the provisions of this agreement.

18. Entire Agreement. This agreement expresses the entire understanding of the parties and may not be altered or amended except with the written consent of each of the parties and except as provided in any other written document signed and delivered by Seller to Factor. This agreement shall be binding on and inure to the benefit of the respective heirs, executors, administrators, and successors of the parties.

19. Notices. Any notice pursuant to this agreement shall be sent to the parties at the following addresses, unless previously changed in writing, in person or by registered mail as follows:

(a) To Seller at _____[*address*].

(b) To Factor at _____[*address*].

20. Governing Law. This agreement and the rights, obligations, and duties of each of the parties shall be construed according to the laws of the State of California.

21. Construction. Wherever in this agreement the context so requires, the singular shall include the plural. Headings of paragraphs in this agreement shall not have any legal effect but are provided only to facilitate the reading of the text.

SELLER

Dated: _____

_____ [*name*], Seller

By _____ [*signature*]

[*typed name and title*]

FACTOR

Dated: _____

_____ [*name*], Factor

By _____ [*signature*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewContracts LawSecured TransactionsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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19-44 California Legal Forms--Transaction Guide § 44.203

§ 44.203 Factoring Agreement--Advance Factoring

[1] Comment--Use of Form

This form is representative of the agreements used by finance companies in advance factoring transactions, in which the business owner receives an advance payment from the finance company immediately on "selling" an invoice to the company, then receives a further payment after the customer has paid the invoice in full. This form has the format of a letter to the business owner from the finance company. A business owner's attorney may refer to this form when reviewing a proposed agreement proffered by the business owner's intended factor.

[2] FORM

Factoring Agreement--Advance Factoring

_____[date]
_____[name and address of business owner]

We hereby confirm our commitment for a factoring arrangement with you pursuant to the terms of this security agreement.

1. Appointment of Factor. You hereby appoint us as sole Factor, and we consent to act as such on the terms and conditions set forth in this agreement.

2. Address. You certify that your address set forth above is your mailing address, your principal place of business, and the office where all of your books and records concerning your accounts are maintained. You shall not change your mailing address, principal place of business, or place where your records concerning accounts are maintained without our prior written approval.

3. Legally Qualified Business. You certify that you are duly qualified or licensed to do business in the State of California and have complied, and will continue to comply, with all applicable statutes, rules, and regulations.

4. Officers, Partners, or Agents. You certify that the following are the correct names and addresses of your officers, partners, or agents: [specify]. You further certify that those persons have signed the enclosed signature cards and that you understand that we shall rely on them until we receive written notice to the contrary.

5. Sale of Accounts. You hereby agree to sell to us all accounts receivable and contract rights, herein called collectively the Accounts, now existing or hereafter created in your business, including the proceeds of the Accounts, and your title in the goods giving rise to the Accounts. You will not sell, assign, or otherwise encumber the Accounts to anyone except us.

6. Assignment of Accounts and Notice. You shall execute and deliver to us, in a manner and a form prescribed by us, formal schedules and assignments of each Account sold; however, in the absence of any such assignment, this security agreement shall be deemed the assignment of each Account. In addition, you shall have printed on the face of all invoices, bills, notices, and shipping documents a statement to the effect that the Account has been assigned to us and is payable only to us. We shall have the right to determine the exact language and form of such statements. You shall pay all postage for mailing the statements to account debtors.

7. Factor Must Approve Credit of Account Debtors. In accordance with Paragraphs 11 and 12, we shall credit you with the net face value of each Account sold to us, provided that the sale of goods or services creating the Account has been approved in writing by us, and credit approval has not been withdrawn by us before the final acceptance of the goods or services by the account debtors free from claim or dispute. We specifically retain the right to withdraw our approval of credit to any account debtor if, in our sole discretion, any account debtor becomes unsatisfactory, or if there shall arise any claim or dispute with any account debtor; provided, however, that the goods or services involved have not already been finally accepted by the account debtor without claim or dispute. We shall not incur any liability whatsoever to you, or any other person, by reason of any such withdrawal of credit approval. You shall cooperate and execute any forms we may supply in conjunction with the determination of credit approval, and you shall be bound by our judgment.

8. No Recourse as to Credit Risk. We shall have no recourse against you for the nonpayment of any Account that has been approved by us, due solely to the inability or wrongful refusal of the account debtor to pay. If any Account is not paid on maturity for any reason other than the account debtor's inability or wrongful refusal to pay, we shall have the absolute right to charge back to you all Accounts of that account debtor, and you will pay us for those Accounts on demand. You or any of your authorized agents shall promptly advise us of any claims or disputes and promptly adjust the same, at your expense and subject to our written approval. We are authorized to charge you, and you shall pay us on demand, the amount of any liability, loss, or expense caused us by any transaction under this security agreement, including, but not limited to, any allowance or deduction resulting from adjustment of any Account, except loss incurred by us due solely to the inability or wrongful refusal of the account debtor to pay.

9. Records and Statements. You shall at all times maintain correct, adequate, and current books and records, and we shall have the right to examine, copy, and make extracts from your books and records at any time during normal business hours. We shall have the right to execute and file any financing statements, notices, and other instruments and to do all acts necessary to carry out this security agreement and to perfect our security interest. You will assist us in that connection when we deem it advisable.

10. Interest on Debtor's Account. Interest on your account shall be computed at the rate of _____ percent per year on all debit and credit balances. You shall be charged interest monthly on the amount of all sales shipped during that particular month, based on terms of payment plus [number] days in addition to allow for late payments and for clearance of commercial paper.

11. Advances and Reserve. At your request, and in our sole discretion, we shall advance to you, on our acceptance of Accounts, _____ percent of the net face value of the Accounts and will in the ordinary course of

business credit your account each month with the net face value of all Accounts purchased during the month. As used in this security agreement, the "net face value" shall be the gross amount of the Account, less returns, allowances, and discounts to the account debtor on the shortest selling terms. We shall give you a statement of your account once each month concerning the transactions of the previous month and pay you, as requested, any amount due you, after making the appropriate deduction in accordance with the terms of this agreement. You shall permit us to hold, as a reserve, a sum equal to _____ percent of the aggregate amount of sales during the [number] days preceding, but in no event less than the reserve held at the end of the preceding month. The reserve is for the purpose of protecting us against possible returns, claims, allowances, and other dilution of the Accounts other than the inability or wrongful refusal of the account debtor to pay. Unless you notify us in writing to the contrary within [number] days after receipt of any monthly statement of account, the statement shall be deemed correct and binding and conclusive as between you and us.

12. Unapproved Accounts. In the event that you sell us any Accounts that have not received our written credit approval, you will nevertheless assign the same to us, and we shall make advances in such amounts as we shall deem satisfactory in our sole discretion. We shall record and collect any such Accounts in the same manner as other approved Accounts sold to us, except that we shall not assume any responsibility for nonpayment of unapproved Accounts, and we shall have the right to charge back to you any such unapproved Accounts.

13. Compensation for Factoring. As compensation for our services, you shall be charged, and you agree to pay monthly, commissions on the aggregate sales price set forth in all of the Accounts, less discounts on the shortest selling terms, in the following manner: [specify].

14. Security Interest in All Accounts Granted. In order to secure your obligations, you hereby grant us a continuing security interest in all present and future Accounts and contract rights, including the proceeds of the Accounts and contract rights, and all goods represented by the Accounts or contract rights, the products or proceeds of any resale, any and all credit balances held by us for your account, and any and all other property of yours now or hereafter in our possession or under our control, as collateral for the payment of any liabilities, absolute or contingent, due from you to us and of all claims by us against you, due or to become due, whether now existing or hereafter arising and whether incurred directly, under this agreement, or otherwise, or whether acquired by us from others. The lien of this security interest shall include the proceeds of any insurance policies concerning the goods giving rise to the Accounts. All advances made by us to you shall be repaid at our office located at _____[address] or any other location we may hereafter designate in writing.

15. Termination of Agreement by Factor. We shall have the absolute right to immediately terminate this agreement in the event any of the following occur:

- (a) You make any misrepresentation concerning any Account or any other matter pertaining to or arising out of this agreement.
- (b) You violate any of the terms or provisions of this agreement.
- (c) Any indebtedness owed by you to us is not paid when due.
- (d) An adverse change occurs in your financial standing, as to which we shall have the sole and exclusive judgment.
- (e) A petition is filed by or against you under any bankruptcy or insolvency statute, or you commit any act of bankruptcy.
- (f) You become insolvent.

16. Effect of Termination. Should this agreement be terminated for any reason, any and all indebtedness owed by you to us shall be deemed immediately due and payable, and we shall have the right to liquidate your account. In the event of termination, we shall not be obligated to make any advances or remit to you any equity balances until your account has been fully liquidated. You shall remain liable for any deficiency, and all Accounts charged back to you shall be retained as further security, for which we shall credit you with the amounts actually collected.

17. Taxes. We reserve the right to pay or withhold any taxes or levies that may be imposed by any governmental authority, whether related to sales or goods, and in our discretion the amount shall be charged to you, or directly paid by you.

18. Returned Goods. We shall retain title to any goods returned or rejected and to any goods that are subject to any dispute or chargeback, and we shall retain title notwithstanding the termination of this agreement. We shall retain title to the goods in the event of liquidation of your account, and we may take possession of the goods, as well as any goods on which we have a lien, at any time, and dispose of the goods on [number] days notice at private or public sale; and if the sale be public, we may purchase the goods. In the event any returned goods shall come into your possession, you shall hold the goods in trust for us and segregate the goods. You shall deliver those goods to us, or any person we may designate, in our discretion and on our demand. We shall have the rights of an unpaid seller, including the rights of replevin, reclamation, and stoppage in transit as well as any other rights granted us by applicable law. Any goods recovered by us shall be considered returned goods for the purposes of this agreement. We shall not be liable to you or any third party by reason of our exercise of any of our rights under this agreement.

19. Commercial Paper to Be Remitted in Form Received. All checks or other commercial paper that may come into your possession regarding any Account, whether drawn to your order or our order, shall forthwith be turned over to us in kind. You shall duly endorse any check or other form or commercial paper to our order. You hereby constitute us, or any duly authorized agent of ours, as attorney in fact for the purpose of endorsing your name on all checks and other forms of commercial paper.

20. Adjustment of Accounts. You hereby authorize us, with respect to all rejected, disputed, or returned goods, to make adjustments or allowances with the account debtors involved, which adjustments or allowances shall be binding on you, or your assignees, receivers, or trustees in bankruptcy, unless you shall pay the full amount of the Account involved within [number] days after we have mailed written notice to you of any proposed adjustment or allowance.

21. No Waiver or Oral Modification of Agreement. This agreement cannot be modified orally or by the course of conduct of the parties or in any other manner except by a written agreement signed by the parties. No failure on our part to exercise any right, privilege, or remedy under this agreement shall be construed as a waiver of that right, privilege, or remedy, nor shall it be construed as a waiver of any future or similar circumstance.

22. Controlling Law. The validity, interpretation, and performance of this agreement shall be controlled by and construed under the laws of the State of California.

23. Termination by Either Party. This agreement shall be in force and effect for one year from the effective date of this agreement, and from year to year thereafter, unless either party shall give the other party written notice of termination at least [number] days before the effective date of termination, by registered or certified mail.

24. Notices. All notices concerning any matter in relation to this agreement shall be in writing and sent by regular mail to the last address that we have designated in writing from time to time.

25. Effective Date. The effective date of this agreement is _____ [date] .

_____ [name of finance company]

By _____ [signature]
[typed name and title]

Signed and delivered at _____ [city], California, on _____ [date].

Accepted and approved,

_____ [name of business owner]

By _____ [signature]
[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewContracts LawSecured TransactionsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 44 ACCOUNTS RECEIVABLE FINANCING AND FACTORING
PART IV. FORMS

19-44 California Legal Forms--Transaction Guide § 44.204

§ 44.204 Notification to Account Debtor

[1] Comment

[a] Use of Form

This form is a notice to account debtors that the accounts have been assigned to the finance company in a factoring transaction. It may be used by the business owner when the finance company requires the business owner to give notification to account debtors, and the finance company does not prescribe or provide a different form. Finance companies usually prescribe the form of notification.

This form may be enclosed with a regular account billing statement. If this form is to be printed as part of the billing statement, the resulting statement should be reviewed for compliance with applicable requirements, if any, under state and federal credit-selling laws and regulations. For discussion of some of those laws, see Ch. 45, *Consumer Installment Loans and Credit Sales*.

[b] Ensuring Effectiveness

No form of notification is prescribed in Division 9 of the Commercial Code, but the following rules concern the effectiveness of a notification. The following rules are subject to any law other than Division 9 of the Commercial insofar as that other law establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9406(h)*]:

- Notification is ineffective if it does not reasonably identify the rights assigned [*Com. Code § 9406(b)(1)*].
- Notification is ineffective at the option of the account debtor if the notification notifies the account debtor to make less than the full amount of any installment or other periodic payment to the assignee, even if (1) only a portion of the account has been assigned to that assignee, or (2) a portion has been assigned to another assignee, or (3) the account debtor knows that the assignment to that assignee is limited [*Com. Code § 9406(b)(3)*]. An account debtor may not waive or vary this option [*Com. Code §*

9406(g)].

[2] FORM

Notification to Account Debtor

_____ [name of business owner] has assigned _____ [specify, e.g., your account or the proceeds of the enclosed invoice for \$ _____] to _____ [name of finance company or this company]. Please make your check payable to _____ [name of finance company] and send it directly to _____ [address or reference to address, e.g., the address shown above].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Secured Transactions (Article 9) General Overview Commercial Law (UCC) Secured Transactions (Article 9) Third Party Rights Assignments Contracts Law Secured Transactions General Overview



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CHAPTER 45 CONSUMER INSTALLMENT LOANS AND CREDIT SALES

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[1] Statutes

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§§ 45.03-45.04 [Reserved]

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§ 45.10 Closed-End Credit

§ 45.11 Direct Loans

§ 45.12 Credit Sales

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[4] Operation of Dealer Financing Agreements

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[2] Definitions

[a] Annual Percentage Rate

[b] Consumer Loan

[c] Covered Loan

[d] Licensed Person

[e] Licensing Agency

[f] Original Principal Balance

[g] Originate

[h] Points and Fees

[i] Servicer

[3] Exemptions

[4] Prohibited Loan Provisions and Acts

[a] Prepayment Penalty

[b] Payment Schedule

[c] Payments From Loan Proceeds

[d] Interest Rate

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[g] Credit Insurance

[h] Default on Existing Loan

[i] Borrower's Risk Grade

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§ 45.22 Credit Information Reporting

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[2] Duty to Deliver Copy of Consumer Contract, Credit Application

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[b] Definitions

[i] Consumer Report

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[b] Types of Contracts Subject to Requirement

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[1] Comment

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[2] FORM

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[a] Use of Form

[b] Notice Requirement

[2] FORM

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[1] Comment--Use of Form

[2] FORM

Notice of Action Taken and Statement of Reasons--Alternative Form

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[1] Comment--Use of Form

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[1] Comment--Use of Form

[2] FORM

Notice of Action Taken, Statement of Reasons, and Counteroffer

§ 45.214 Disclosure of Right to Request Specific Reasons for Credit Denial

[1] Comment

[a] Use of Form

[b] Alternative Manner of Notification

[2] FORM

Disclosure of Right to Request Specific Reasons for Credit Denial

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Notice of Incomplete Application and Request for Additional Information

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Itemization of Amount Financed for Truth in Lending Disclosures

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Variable-Rate Model Clauses for Truth in Lending Disclosures

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Demand Feature Model Clauses for Truth in Lending Disclosures

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[b] Grouping of Disclosures

[c] Type Size

[d] Related Forms

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[a] Use of Form

[b] Definitions

[2] FORM

Required Notice Preserving Consumers' Claims and Defenses in Consumer Credit Contracts

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Summary of Consumer's Rights Under Consumer Credit Reporting Agencies Act

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Notice of Delinquency to Cosigner of Credit Contract

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[b] Applicability of Disclosure Requirement

[c] Purpose and Effect of Statute

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Credit Disability Insurance Claims Disclosures



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 45 CONSUMER INSTALLMENT LOANS AND CREDIT SALES

19-45 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers government regulation of consumer closed-end (single-transaction) credit. It begins with a discussion of closed-end credit arrangements, including direct loans and credit sales, which are the two main types of closed-end financing. This discussion includes an introduction to typical financing arrangements between retailers who make credit sales and the lending institutions that ultimately provide the credit; for in-depth discussion of dealer financing, refer to Rabkin & Johnson, *Current Legal Forms with Tax Analysis*, Ch. 6, *Credit and Finance* (Matthew Bender), and *Forms and Procedures Under the UCC, Article 9, Secured Transactions*, Pts. 10-15 (Matthew Bender).

The federal Truth in Lending Act [15 U.S.C. §§ 1601-1667e] and its implementing regulation, Federal Reserve Board Regulation Z [12 C.F.R. pt. 226], as they apply to closed-end credit, are discussed. The California Unruh Act [Civ. Code §§ 1801-1812.20] requirements for retail installment contracts are also covered, and coordinated with the federal regulations. The chapter also deals with equal credit rights at both the state and federal levels, cosigner liability, credit disability insurance, and the regulation of credit reporting agencies. Special rules governing consumer loans secured by real property are also covered in this chapter.

If the credit transaction involves the purchase of an automobile, the attorney should consult Ch. 47, *Automotive Financing and Vehicle Leasing*, and use only the portions of this chapter that concern the Truth in Lending Act. Government regulation of open-end credit plans, including Truth in Lending Act and Unruh Act requirements, can be found in Ch. 46, *Credit Card and Other Open-End Credit Transactions*. If an extension of credit is secured by an interest in the consumer's dwelling, somewhat different rights and duties, including a right to rescind the contract, arise under the Truth in Lending Act. These provisions are covered in Ch. 25, *Real Estate Loans*.

This chapter contains coverage only of consumer credit transactions. For a discussion of credit extensions to businesses, see Ch. 42, *Secured Transactions*, Ch. 43, *Commercial Loans*, and Ch. 44, *Accounts Receivable Financing and Factoring*.



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§ 45.01 California Statutes

Right to translation of contract negotiated in Spanish, Tagalog, Vietnamese, or Korean, in language in which contract was negotiated. *Civ. Code § 1632.*

Consumer Credit Reporting Agencies Act. *Civ. Code §§ 1785.1-1785.36.*

Holden Credit Denial Disclosure Act. *Civ. Code §§ 1787.1-1787.4.*

Customer Records. *Civ. Code §§ 1798.80-1798.84.*

Notification requirements in case of unauthorized acquisition of unencrypted computerized data containing confidential personal information. *Civ. Code §§ 1798.29, 1798.82.*

Rights and remedies. *Civ. Code § 1798.84.*

Requirement for notice to cosigners of their liability on underlying debt. *Civ. Code § 1799.91.*

Security interest in religious articles. *Civ. Code § 1799.97.*

Consumer Contract Awareness Act of 1990. *Civ. Code §§ 1799.200-1799.207.*

Unruh Act; regulation of retail installment sales. *Civ. Code § 1801 et seq.*

Creditor's remedies: credit disability insurance. *Civ. Code §§ 1812.400-1812.410.*

Consumer loans secured by specified real property. *Fin. Code § 4970 et seq.*

Definitions. *Fin. Code § 4970.*

Prohibited acts and limitations for covered loans. *Fin. Code § 4973.*

Unintentional noncompliance; knowledge of broker's noncompliance. *Fin. Code § 4974.*

Noncompliance is violation of licensing law. *Fin. Code § 4975.*

Administrative and civil penalties, forced restitution, and disgorgement. *Fin. Code § 4977.*

Damages to consumer; voidability of nonconforming loan. *Fin. Code § 4978.*

Duty of licensed person to inform employees. *Fin. Code § 4978.6.*

Documentation to consumer or licensing agency. *Fin. Code § 4979.*

Broker's fiduciary duty. *Fin. Code § 4979.5.*

Excessive points and fees. *Fin. Code § 4979.6.*

Credit insurance. *Fin. Code § 4979.7.*

Nonliability of holder in due course; nonapplication to persons chartered by Congress to engage in secondary mortgage market transactions. *Fin. Code § 4979.8.*

Suspension of certain civil obligations and liabilities of national guard and military reserve members during qualifying periods of military service after September 11, 2001. *Mil. & Vet. Code § 400 et seq.*

Misdemeanor to make adverse report relating to creditworthiness of military service member by or to any person or entity engaged in practice of assembling or evaluating consumer credit information, after service member has applied for or received a stay, postponement, or suspension of payment of any tax, fine, penalty, insurance premium, or other civil obligation or liability. *Mil. & Vet. Code § 401(a)(3), (c); see Mil. & Vet. Code § 400 (applicability).*



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§ 45.02 Federal Sources

[1] Statutes

Truth in Lending Act; regulation of consumer credit cost disclosures. *15 U.S.C. § 1601 et seq.*

Mortgage Disclosure Improvement Act. *15 U.S.C. § 1638(b)(2)*].

Fair Credit Reporting Act. *15 U.S.C. § 1681 et seq.*

Equal Credit Opportunity Act. *15 U.S.C. § 1691 et seq.*

Electronic Signatures in Global and National Commerce Act (E-Sign Act). *15 U.S.C. § 7001 et seq.*

Servicemembers Civil Relief Act. *50 U.S.C. App. § 501 et seq.*

[2] Regulations

Equal Credit Opportunity (Regulation B). *12 C.F.R. pt. 202.*

Truth in Lending (Regulation Z). *12 C.F.R. pt. 226.*

Definitions. *12 C.F.R. § 226.2.*

Exempt transactions. *12 C.F.R. § 226.3.*

Finance charge determination. *12 C.F.R. § 226.4.*

Closed-end credit disclosures. *12 C.F.R. §§ 226.17, 226.18.*

Annual percentage rate determination. *12 C.F.R. § 226.22.*

Right to rescind. *12 C.F.R. § 226.23.*

Advertising credit terms. *12 C.F.R. § 226.24.*

Required disclosures for closed-end credit may be provided in electronic form. *12 C.F.R. § 226.17(a)(1).*

Disclosures for certain closed-end home mortgages may be provided in electronic form. *12 C.F.R. § 226.31(b).*



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§ 45.05 Law Reviews

Good & Wyman, Representing Consumer Debtors: Fiduciary Duties of Counsel, 45(2) Prac. Law. 27 (1999).

Komoroske, Guiding Your Client Through the Lending Maze, 41(3) Prac. Law. 81 (1995).

Lamont, Negative Option Offers in Consumer Service Contracts: A Principled Reconciliation of Commerce and Consumer Protection, 42 UCLA L. Rev. 1315 (1995).

Nehf, Effective Regulation of Rent-to-Own Contracts, 52 Ohio St. L.J. 751 (1991).

Juzwiak, Mr. Micawber Revisited: A Critique of the Credit Practices Rule, 64 S. Cal. L. Rev. 417 (Jan. 1991).

Fischer, Consumer Credit: An Overview of New Credit and Charge Card Disclosure Requirements, 23 U.C.C. L.J. 3 (1990).

Comment, California's Characterization of Credit Acquisitions During the Post Separation Period, 25 San Diego L. Rev. 1071 (1988).

Rabin & Brownlie, Usury Law in California: A Guide Through the Maze, 20 U.C. Davis L. Rev. 397 (1987).

Mair, Unconscionability and the Enforcement of Standardized Contracts in Commercial Transactions, 16 Pac. L.J. 247 (1984).



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§ 45.06 Annotations

Annot., What Are "Primarily Consumer Debts" Under 11 USCS § 707(b), Authorizing Dismissal of Chapter 7 Bankruptcy Case if *Granting Relief Would Be Substantial Abuse of Chapter's Provision*, 101 A.L.R. Fed. 771 (1991) .

Annot., What Constitutes Reliance on Loan or Credit Application Under Bankruptcy Code Provision Concerning Nondischargeability of Individual Debt Obtained Through False Pretenses, False Representation, or Actual Fraud, Other Than Statement Respecting Debtor's or Insider's Financial Condition, 97 A.L.R. Fed. 402 (1990) .



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PART I. RESEARCH GUIDE
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19-45 California Legal Forms--Transaction Guide § 45.07

§ 45.07 Text References

[1] Matthew Bender Sources

California Forms of Pleading and Practice(Matthew Bender).

Ch. 127, *Consumer Contracts and Loans* .

Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts*.

Ch. 129, *Consumer Credit Reporting* .

Ch. 500, *Sales: Sales Under the Commercial Code* .

Ch. 501, *Sales: Retail Installment Sales* .

Ch. 502, *Sales: Warranties* .

Ch. 504, *Sales: Consumers Legal Remedies Act* .

Rabkin & Johnson, *Current Legal Forms with Tax Analysis*, Ch. 6, *Credit and Finance* (Matthew Bender).



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[Reserved]

§§ 45.08[Reserved]



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19-45 California Legal Forms--Transaction Guide § 45.10

§ 45.10 Closed-End Credit

"Closed-end credit" generally refers to a single extension of credit that usually takes the form of the loan of a fixed amount or a single purchase credit transaction. Under Regulation Z [12 C.F.R. pt. 226], closed-end credit is defined by exclusion: it includes any consumer credit other than open-end credit [12 C.F.R. § 226.2(a)]. "Open end credit plan" and "open end consumer credit plan" mean consumer credit extended under a plan under which the creditor reasonably contemplates repeated transactions, a finance charge may be imposed from time to time on any outstanding unpaid balance, and further credit is generally made available to the consumer to the extent that any outstanding balance is repaid [15 U.S.C. § 1602(i); 12 C.F.R. § 226.2(a)(20)]. An open-end credit arrangement typically involves a credit card or revolving account.

The most common closed-end credit arrangements are direct loans and credit sales.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral Overview



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19-45 California Legal Forms--Transaction Guide § 45.11

§ 45.11 Direct Loans

Direct loans are made by a bank directly to the consumer requesting the loan. The consumer is or becomes the bank's customer and comes in personally to see a loan officer in the appropriate department of the bank.

The loan officer will evaluate the prospective customer's reputation, earning capacity, ability to repay the loan, and purpose for requesting the loan. The loan application and credit evaluation procedures must comply with state and federal equal credit protection law [see § 45.20], and federal Truth in Lending legislation [see §§ 45.30-45.36]. However, when a bank or other supervised financial organization extends direct loans to consumers, it is not generally subject to the requirements for retail installment contracts imposed by the Unruh Act [see *Civ. Code* § 1801.6(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewBanking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview



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19-45 California Legal Forms--Transaction Guide § 45.12

§ 45.12 Credit Sales

[1] Definition

Rather than obtaining a loan directly from a bank, a consumer may arrange financing for a purchase through the dealer. A transaction in which a dealer or seller is also a creditor is a credit sale [12 C.F.R. § 226.2(a)(16)]. Whether the dealer assigns the obligation to a bank [see [2], *below*] or extends the credit personally, the consumer deals directly only with the dealer in a credit sale transaction.

[2] Financing Agreements Between Dealer and Bank

Due to the growth of the practice of time buying, dealers wishing to remain competitive are increasingly being called upon to extend credit to the consumer. If the dealer extends the credit personally, the dealer will wait to recover the cost of the item sold as well as to realize a profit. Therefore, dealers frequently enter into an agreement with a bank or finance company for continuous financing of consumer contracts.

A bank will subject a dealer to extensive scrutiny before entering an arrangement to purchase contracts under a standing financing agreement. The thoroughness of this examination will depend on whether the dealer is seeking terms providing for the purchase of installment paper with or without recourse [see [3], *below*]. The examination endeavors to ascertain both whether the dealer can be trusted to accurately take accurate credit applications and report facts on which the bank will rely, and whether consumers whose obligations the bank will be purchasing will be satisfied with the goods and services provided by the dealer.

[3] Terms of Dealer Financing Agreements

The terms available to a dealer seeking financing of installment paper vary among lending institutions and even within the same bank. The first important term is whether the paper will be purchased with or without recourse. If purchased with recourse, the dealer remains liable for installment contracts in default typically through an agreement to repurchase them. If purchased without recourse, the bank can never look to the dealer to recover funds already advanced; however, the dealer may have on deposit with the bank a reserve consisting of a portion of the service charges which may be

earned on each contract and some without-recourse agreements provide that this reserve may be applied to cover losses resulting from defaulting consumers.

While at first glance, it might appear that a dealer would always prefer to sell paper without recourse and avoid liability for funds already received, this is not always the best decision because a bank will charge substantially more for purchasing without recourse. Therefore, if the dealer believes there will be few defaulting consumers, it may be preferable to sell paper with recourse to obtain a better rate from the bank.

[4] Operation of Dealer Financing Agreements

The bank will provide forms complying with the Unruh Act and federal Truth in Lending Act to a dealer operating under a financing agreement with the bank. When a consumer wants credit, the dealer will take the consumer's credit application on a bank form. The application will be shown to the bank before the sale is made so that the dealer can be certain that the bank will purchase the resulting paper. If the bank approves the application, the dealer will consummate the sale with the consumer by having the consumer execute the appropriate sales documents and disclosure statements. The dealer will then assign the paper to the bank on the previously agreed terms, receiving the agreed advance from the bank.

After the installment paper has been assigned to the bank, the bank will send the consumer a coupon or payment booklet and notice of the assignment of the contract. The consumer will generally mail payments to the bank directly (direct collection). A few high volume dealers will be allowed by the bank to make their own collections and forward them to the bank (indirect collection). A dealer may prefer indirect collection if the dealer does not want the consumer to know that the contract has been assigned or wants a continuing relationship with the consumer in the hope of getting additional business.

[5] Installment Paper as Collateral

In addition to raising money through sale of installment paper, a high-volume dealer may borrow money secured by the paper by assigning the paper to the bank as collateral for a loan. A volume dealer may prefer this financing arrangement to the outright sale of its paper because the bank's charge to the dealer is less on this type of loan. In addition, if the dealer has the ability to handle its own collections efficiently, the dealer receives the service charges generated by the consumer paper, and the consumer remains in contract with the dealer as opposed to becoming the bank's customer.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral OverviewContracts LawSales of GoodsGeneral Overview



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19-45 California Legal Forms--Transaction Guide § 45.13

§ 45.13 Consumer Loans Secured By Real Property

[1] Governing Statutes

Fin. Code § 4970 et seq. imposes requirements on regulated lenders (banks, savings associations, credit unions, finance lenders, residential mortgage lenders) and real estate brokers, with respect to the making of consumer loans that are secured by real property [see *American Financial Services Association v. City of Oakland* (2003) 111 Cal. App. 4th 1435, 1463, 4 Cal. Rptr. 3d 745 (reviewing history of legislation and holding that it did not preempt city's lending ordinance)]. The requirements discussed in this section affect covered loans for which applications are made after June 2002 [Stats. 2001, Ch. 732, § 3].

[2] Definitions

[a] Annual Percentage Rate

"Annual percentage rate" means the annual percentage rate for the loan calculated according to the provisions of the federal Truth in Lending Act [see 15 U.S.C. § 1601 *et seq.*] and the regulations adopted under that act by the Federal Reserve Board [*Fin. Code § 4970(a)*]. For discussion of the act and Regulation Z (concerning formalities and disclosures under the Act), see §§ 45.30 *et seq.* and 45.50 *et seq.*

[b] Consumer Loan

"Consumer loan" means a consumer credit transaction that is secured by real property located in California used, or intended to be used or occupied, as the principal dwelling of the consumer that is improved by a one-to-four residential unit. "Consumer loan" does not include a reverse mortgage, an open line of credit as defined in Regulation Z [see 12 C.F.R. § 226.1 *et seq.*], or a consumer credit transaction that is secured by rental property or second homes. "Consumer loan" does not include a bridge loan with a maturity of less than one year if the purpose of the loan is a bridge loan connected with the acquisition or construction of a dwelling intended to become the consumer's principal dwelling [*Fin. Code § 4970(d)*].

[c] Covered Loan

A "covered loan" is a consumer loan [see [b], *above*] in which the original principal balance of the loan does not exceed the most current conforming loan limit for a single-family first mortgage loan established by the Federal National Mortgage Association, in the case of a mortgage or deed of trust, and with respect to which one of the following conditions is met:

- For a mortgage or deed of trust, the annual percentage rate at consummation of the transaction will exceed by more than eight percentage points the yield on U.S. Treasury securities having comparable periods of maturity on the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor [*Fin. Code § 4970(b)(1)*].
- The total points and fees payable by the consumer at or before closing for a mortgage or deed of trust will exceed 6 percent of the total loan amount [*Fin. Code § 4970(b)(2)*]; see *Wolski v. Fremont Investment & Loan (2005) 127 Cal. App. 4th 347, 350, 25 Cal. Rptr. 3d 500* (yield spread premium (YSP) paid in connection with residential mortgage loan was not included in definition of points and fees payable by borrower at or before closing under *Fin. Code § 4970(b)(1)(B)*; transaction was not "covered loan" when total points and fees exceeded six percent only if YSP was included); see also [h], *below*].

[d] Licensed Person

"Licensed person" means any of the following [*Fin. Code § 4970(g)*]:

- A real estate broker licensed under the Real Estate Law [see *Bus. & Prof. Code § 10000 et seq.*];
- A commercial or industrial bank organized under the Banking Law [see *Fin. Code § 99 et seq.*];
- A savings association organized under the Savings Association Law [see *Fin. Code § 5000 et seq.*];
- A credit union organized under the California Credit Union Law [see *Fin. Code § 14000 et seq.*];
- A finance lender or broker licensed under the California Finance Lenders Law [see *Fin. Code § 22000 et seq.*]; or
- A residential mortgage lender licensed under the California Residential Mortgage Lending Act [see *Fin. Code § 50000 et seq.*].

A licensed person includes any person engaged in the practice of consumer lending, as defined in *Fin. Code § 4970 et seq.*, for which a license is required under any other provision of law, but whose license is invalid, suspended or revoked, or who has not obtained the required license [*Fin. Code § 4970(g)*].

Nothing in *Fin. Code § 4970 et seq.* prevents any enforcement by a governmental entity against any person who originates a loan and who is exempt or excluded from licensure by all of the licensing agencies, based on a violation of any provision of *Fin. Code § 4970 et seq.* In addition, nothing in *Fin. Code § 4970 et seq.* prevents the Department of Real Estate from enforcing *Fin. Code § 4970 et seq.* against a licensed salesperson employed by a licensed real estate broker as if that salesperson were a licensed person under *Fin. Code § 4970 et seq.* [*Fin. Code § 4970(g)*].

[e] Licensing Agency

"Licensing agency" means the Department of Real Estate for licensed real estate brokers, the Department of

Corporations for licensed residential mortgage lenders and licensed finance lenders and brokers, and the Department of Financial Institutions for commercial and industrial banks and savings associations and credit unions organized in California [*Fin. Code § 4970(f)*].

[f] Original Principal Balance

"Original principal balance" means the total initial amount the consumer is obligated to repay on the loan [*Fin. Code § 4970(e)*].

[g] Originate

"Originate" means to arrange, negotiate, or make a consumer loan [*Fin. Code § 4970(h)*].

[h] Points and Fees

"Points and fees" includes the following:

- All items required to be disclosed as finance charges under 12 C.F.R. § 226.4(a) and (b), including the Official Staff Commentary, as amended from time to time, except interest [*Fin. Code § 4970(c)(1)*].
- All compensation and fees paid to mortgage brokers in connection with the loan transaction [*Fin. Code § 4970(c)(2)*].
- All items listed in 12 C.F.R. § 226.4(c)(7), only if the person originating the covered loan receives direct compensation in connection with the charge [*Fin. Code § 4970(c)(3)*].

A yield spread premium (YSP) paid in connection with a residential mortgage loan is *not* included in the definition of points and fees payable by a borrower at or before closing under *Fin. Code § 4970* [*Wolski v. Fremont Investment & Loan* (2005) 127 Cal. App. 4th 347, 350, 25 Cal. Rptr. 3d 500 (transaction did not violate predatory lending law because it was not "covered loan"; total points and fees exceeded six percent only if YSP was included)].

For discussion of the referenced federal regulations (concerning components of the finance charge under the federal Truth in Lending Act), see §§ 45.51[1] and [2].

[i] Servicer

The term "servicer" has the same meaning provided in 12 U.S.C. § 2605(i)(2) (in the Real Estate Settlement Procedures Act of 1974) [*Fin. Code § 4970(i)*].

[3] Exemptions

Fin. Code § 4970 et seq. do not apply to persons chartered by Congress to engage in secondary mortgage market transactions [*Fin. Code § 4979.8*]. These provisions also do not impose liability on an assignee that is a holder in due course [*Fin. Code § 4979.8*].

[4] Prohibited Loan Provisions and Acts

[a] Prepayment Penalty

A covered loan may not include a prepayment fee or penalty after the first 36 months after the date of consummation of the loan [*Fin. Code § 4973(a)(1)*]. A covered loan may include a prepayment fee or penalty *up to* the first 36 months

after the date of consummation of the loan if all of the following conditions are satisfied:

- The person who originates the covered loan has also offered the consumer a choice of another product without a prepayment fee or penalty [*Fin. Code § 4973(a)(2)(A)*].
- The person who originates the covered loan has disclosed in writing to the consumer at least three business days prior to loan consummation the terms of the prepayment fee or penalty to the consumer for accepting a covered loan with the prepayment penalty and the rates, points, and fees that would be available to the consumer for accepting a covered loan without a prepayment penalty [*Fin. Code § 4973(a)(2)(B)*].
- The person who originates the covered loan has limited the amount of the prepayment fee or penalty to an amount not to exceed the payment of six months' advance interest, at the contract rate of interest then in effect, on the amount prepaid in any 12-month period in excess of 20 percent of the original principal amount [*Fin. Code § 4973(a)(2)(C)*].
- A covered loan will not impose the prepayment fee or penalty if the covered loan is accelerated as a result of default [*Fin. Code § 4973(a)(2)(D)*].
- The person who originates the covered loan will not finance a prepayment penalty through a new loan that is originated by the same person [*Fin. Code § 4973(a)(2)(E)*].

[b] Payment Schedule

A covered loan with a term of five years or less must not provide at origination for a payment schedule with regular periodic payments that, when aggregated, do not fully amortize the principal balance as of the maturity date of the loan [*Fin. Code § 4973(b)(1)*].

For a payment schedule that is adjusted to account for the seasonal or irregular income of the consumer, the total installments in any year must not exceed the amount of one year's worth of payments on the loan. This prohibition does not apply to a "bridge loan," which is a loan with a maturity of less than 18 months that only requires payments of interest until the time when the entire unpaid balance is due and payable [*Fin. Code § 4973(b)(2)*].

A covered loan must not contain a provision for negative amortization under which the payment schedule for regular monthly payments causes the principal balance to increase, unless the covered loan is a first mortgage and the licensed person discloses to the consumer that the loan contains a negative amortization provision that may add principal to the balance of the loan [*Fin. Code § 4973(c)*].

[c] Payments From Loan Proceeds

A covered loan must not include terms under which periodic payments required under the loan are consolidated and paid in advance from the loan proceeds [*Fin. Code § 4973(d)*].

A person who originates a covered loan must not pay a contractor under a home improvement contract from the proceeds of a covered loan other than by an instrument payable to the consumer or jointly to the consumer and the contractor or, at the election of the consumer, to a third-party escrow agent for the benefit of the contractor in accordance with terms and conditions established in a written escrow agreement signed by the consumer, the person who originates a covered loan, and the contractor prior to the disbursement of funds. No payments, other than progress payments for home improvement work that the consumer certifies is completed, may be made to an escrow account or jointly to the consumer and the contractor unless the person who originates the loan is presented with a signed and dated

completion certificate by the consumer showing that the home improvement contract was completed to the satisfaction of the consumer [*Fin. Code § 4973(g)*].

[d] Interest Rate

A covered loan may not contain a provision that increases the interest rate as a result of a default. However, this does not apply to interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan documents, provided the change in the interest rate is not triggered by the event of default or the acceleration for the indebtedness [*Fin. Code § 4973(e)*].

[e] Acceleration

A covered loan must not contain a call provision that permits the lender, in its sole discretion, to accelerate the indebtedness. This prohibition does not apply, however, if repayment of the loan has been accelerated in accordance with the terms of the loan documents as a result of the consumer's default, or pursuant to a due-on-sale provision, or due to fraud or material misrepresentation by a consumer in connection with the loan or the value of the security for the loan. A licensed person must not refinance or arrange for the refinancing of a consumer loan such that the new loan is a covered loan that is made for the purpose of refinancing, debt consolidation or cash out, that does not result in an identifiable benefit to the consumer, considering the consumer's stated purpose for seeking the loan, fees, interest rates, finance charges, and points [*Fin. Code § 4973(i)*].

[f] Points and Fees

A person who originates a covered loan must not make a covered loan that finances points and fees in excess of \$1,000 or 6 percent of the original principal balance, exclusive of points and fees, whichever is greater [*Fin. Code § 4979.6*].

[g] Credit Insurance

After June 2002, a person who originates a consumer loan must not finance, directly or indirectly, into a consumer loan transaction or finance to the same borrower, within 30 days of a consumer loan transaction, any credit life, credit disability, credit property, or credit unemployment insurance premiums, or any debt cancellation or suspension agreement or contract fees, provided that insurance premiums, debt cancellation, or suspension fees computed and paid on a monthly basis will not be considered financed by the person originating the loan. Credit insurance does not include a contract issued by a government agency or private mortgage insurance company to insure the lender against loss caused by a mortgagor's default [*Fin. Code § 4979.7*].

[h] Default on Existing Loan

It is unlawful for a person who originates a covered loan to recommend or encourage a consumer to default on an existing consumer loan or other debt in connection with the solicitation or making of a covered loan that refinances all or any portion of the existing consumer loan or debt [*Fin. Code § 4973(h)*].

[i] Borrower's Risk Grade

A person who originates a covered loan must not steer, counsel, or direct any prospective consumer to accept a loan product with a risk grade less favorable than the risk grade for which the consumer would qualify based on that person's then current underwriting guidelines, prudently applied, considering the information available to that person, including the information provided by the consumer. A person will not be deemed to have violated *Fin. Code § 4973* if the risk grade determination applied to a consumer is reasonably based on the person's underwriting guidelines if it is an appropriate risk grade category for which the consumer qualifies with the person [*Fin. Code § 4973(m)(1)*].

If a broker originates a covered loan, the broker must not steer, counsel, or direct any prospective consumer to accept a loan product at a higher cost than that for which the consumer could qualify based on the loan products offered by the persons with whom the broker regularly does business [*Fin. Code § 4973(m)(2)*].

[5] Duties of Person Originating Loan

[a] Assessment of Borrower's Ability to Repay

A person who originates covered loans may not make or arrange a covered loan unless at the time the loan is consummated, the person reasonably believes the consumer, or consumers, when considered collectively in the case of multiple consumers, will be able to make the scheduled payments to repay the obligation based upon a consideration of their current and expected income, current obligations, employment status, and other financial resources, other than the consumer's equity in the dwelling that secures repayment of the loan. In the case of a covered loan that is structured to increase to a specific designated rate, stated as a number or formula, at a specific predetermined date not exceeding 37 months from the date of application, this evaluation must be based upon the fully indexed rate of the loan calculated at the time of application. The consumer must be presumed to be able to make the scheduled payments to repay the obligation if, at the time the loan is consummated, the consumer's total monthly debts, including amounts owed under the loan, do not exceed 55 percent of the consumer's monthly gross income, as verified by the credit application, the consumer's financial statement, a credit report, financial information provided to the person originating the loan by or on behalf of the consumer, or any other reasonable means [*Fin. Code § 4973(f)(1)*].

No presumption of inability to make the scheduled payments to repay the obligation can arise solely from the fact that at the time the loan is consummated, the consumer's total monthly debts, including amounts owed under the loan, exceed 55 percent of the consumer's monthly gross income [*Fin. Code § 4973(f)(2)*].

In the case of a stated income loan, the reasonable belief requirement in *Fin. Code § 4973(f)(1)* applies; however, for stated income loans, that belief may be based on the income stated by the consumer, and other information in the possession of the person originating the loan after the solicitation of all information that the person customarily solicits in connection with loans of this type. A person must not knowingly or willfully originate a covered loan as a stated income loan with the intent, or effect, of evading the provisions of *Fin. Code § 4973(f)* [*Fin. Code § 4973(f)(3)*].

[b] Disclosure to Consumer

A covered loan may not be made unless the a specified disclosure has been provided to the consumer no later than three business days prior to signing of the loan documents of the transaction [*Fin. Code § 4973(j)(1)*; see § 45.229].

[c] Information to Employees

A person who originates covered loans must inform any employee, who originates covered loans on behalf of the person, of the administrative, civil, and criminal penalties for a violation of *Fin. Code § 4970 et seq.* [*Fin. Code § 4978.6*].

[d] Documentation to Consumer or Licensing Agency

On request, a person who originates a covered loan must provide the licensing agency or the consumer, at no cost, documentation regarding his or her loan that clearly demonstrates whether any loan is a covered loan. This documentation must include, but is not limited to, full disclosure of the original principal balance, the annual percentage rate, and the total points and fees, as defined in *Fin. Code § 4971* [*Fin. Code § 4979*].

[e] Evasion or Avoidance

A person who originates a covered loan cannot avoid, and must not attempt to avoid, the application of *Fin. Code* § 4970 *et seq.* by doing either of the following:

- Structuring a loan transaction as an open-end credit plan for the purpose of evading the provisions of *Fin. Code* § 4970 *et seq.* when the loan would have been a covered loan if the loan had been structured as a closed-end loan [*Fin. Code* § 4973(n)(1)].
- Dividing any loan transaction into separate parts for the purpose of evading the provisions of *Fin. Code* § 4970 *et seq.* [*Fin. Code* § 4973(n)(2)].

A person who originates a covered loan must not act in any manner, whether specifically prohibited by *Fin. Code* § 4973 or of a different character, that constitutes fraud [*Fin. Code* § 4973(o)].

[6] Noncompliance

[a] Unintentional Errors

Any compliance failure that was not willful or intentional and resulted from a bona fide error, that occurred notwithstanding the maintenance of procedures reasonably adopted to avoid those errors, including, but not limited to, those involving clerical errors, computation errors, computer malfunction and programming errors, and printing errors must be corrected no later than 45 days after receipt of the complaint or discovery of the error. A person who originates a covered loan is not administratively, civilly, or criminally liable for a bona fide error that is duly corrected. An error in legal judgment is not a bona fide error [*Fin. Code* § 4974(a)].

[b] Automatic Licensing-Law Violation

Any licensed person who violates any provision of *Fin. Code* §§ 4973, 4979.6, or 4979.7 is deemed to have violated that person's licensing law [*Fin. Code* § 4975(a)(1)]. After any action under *Fin. Code* § 4978.5 resulting in a conviction, the licensing agency may bring a proceeding to suspend the license of the licensed person for not less than six months and not more than three years [*Fin. Code* § 4975(a)(2)]. After any action under *Fin. Code* § 4978.5 resulting in a second or subsequent conviction, the licensing agency may bring a proceeding to permanently revoke the license of the licensed person or impose any lesser licensed sanction for at least three years [*Fin. Code* § 4975(b)].

A licensing agency may exercise any authority available to it under any other provisions of law, to administer and enforce *Fin. Code* § 4970 *et seq.*, including, but not limited to, investigating and examining the licensed person's books and records, and charging and collecting the reasonable costs for these activities. The licensing agency may not charge a licensed person twice for the same service. Any civil, criminal, and administrative authority and remedies available to the licensing agency pursuant to its licensing law may be sought and employed in any combination deemed advisable by the licensing agency to enforce the provisions of *Fin. Code* § 4970 *et seq.* [*Fin. Code* § 4977(c)].

[c] Administrative Penalty, Forced Restitution, or Disgorgement

A licensing agency may, by order after appropriate notice and opportunity for hearing, levy administrative penalties against a person who violates any provision of *Fin. Code* § 4970 *et seq.* A person may be liable for administrative penalties of not more than \$2,500 for each violation [*Fin. Code* § 4977(a)].

If the licensing agency determines that it is in the public interest, the licensing agency may include, in any action for penalties authorized by *Fin. Code* § 4977(b), a claim for relief in addition to the penalties, including a claim for restitution or disgorgement, and the court has jurisdiction to award the additional relief [*Fin. Code* § 4977(d)].

[d] Civil Penalty

Any person who willfully and knowingly violates any provision of *Fin. Code § 4970 et seq.* is liable for a civil penalty of not more than \$25,000 for each violation which must be assessed and recovered in a civil action brought in the name of the people of the State of California by the licensing agency in any court of competent jurisdiction [*Fin. Code § 4977(b)*].

Nothing in *Fin. Code § 4977* impairs or impedes the attorney general from representing a licensing agency in bringing an action to enforce *Fin. Code § 4970 et seq.* at the request and on behalf of the licensing agency [*Fin. Code § 4977(e)*].

[e] Liability to Consumer for Damages

A person who fails to comply with *Fin. Code § 4970 et seq.* is liable to the consumer in an amount equal to any actual damages suffered by the consumer, plus attorneys' fees and costs. For a willful and knowing violation of *Fin. Code § 4970 et seq.*, the person is liable to the consumer in the amount of \$15,000 or the consumers actual damages, whichever is greater, plus attorneys' fees and costs [*Fin. Code § 4978(a)*]. The court may also award punitive damages to the consumer on a finding that such damages are warranted pursuant to *Civ. Code § 3294* [*Fin. Code § 4978(b)*].

Nothing in *Fin. Code § 4978* abrogates existing common law provisions prohibiting double recovery of damages [*Fin. Code § 4978(c)*].

[f] Knowledge of Broker's Violation

If a person who originates covered loans makes a loan when the person knew of and showed reckless disregard for a violation of *Fin. Code § 4970 et seq.* by a broker, the person and broker are jointly and severally liable for all damages awarded under *Fin. Code § 4970 et seq.* with respect to the broker's unlawful conduct. However, this provision does not impose or transfer liability for a breach of the broker's fiduciary duty [*Fin. Code § 4974(b)*].

[g] Voidability of Nonconforming Loan

A provision in a covered loan that violates *Fin. Code § 4970 et seq.* is unenforceable. A court in which any action is brought by, or on behalf of, an aggrieved consumer for relief may issue an order or injunction to reform the terms of the covered loan to conform to the provisions of *Fin. Code § 4970 et seq.* [*Fin. Code § 4978(b)*].

[7] Broker's Fiduciary Duty

A person who provides brokerage services to a borrower in a covered loan transaction by soliciting lenders or otherwise negotiating a consumer loan secured by real property, is the fiduciary of the consumer, and any violation of the person's fiduciary duties is a violation of *Fin. Code § 4979.5*. A broker who arranges a covered loan owes this fiduciary duty to the consumer regardless of who else the broker may be acting as an agent for in the course of the loan transaction [*Fin. Code § 4979.5(a)*].

Except for a broker or a person who provides brokerage services, no licensed person or subsequent assignee has administrative, civil, or criminal liability for a violation of *Fin. Code § 4979.5* [*Fin. Code § 4979.5(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewBanking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionReal Estate Settlement ProceduresGeneral OverviewReal Property LawFinancingGeneral Overview



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A. Closed-End Credit Arrangements

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[Reserved]

§§ 45.14[Reserved]



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19-45 California Legal Forms--Transaction Guide § 45.20

§ 45.20 Equal Credit Opportunity Act

The Equal Credit Opportunity Act [15 U.S.C. §§ 1691-1691f] prohibits discrimination by a creditor against a credit applicant in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, or age (provided applicant has capacity to contract) [15 U.S.C. § 1691(a)]. In addition, a creditor may not discriminate against an applicant merely because all or part of the applicant's income derives from public assistance or because the applicant has exercised any right under consumer protection laws [15 U.S.C. § 1691(a)]. A detailed set of regulations implements the Act [see 12 C.F.R. pt. 202 (Regulation B)]. These regulations control the information that may be requested in credit applications, the factors that may be considered in evaluating credit worthiness, and, to some extent, the types and forms of credit extensions and accounts [12 C.F.R. §§ 202.5-202.7; see § 45.120[1]].

Under the Equal Credit Opportunity Act, a "creditor" is a person who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit. The term also includes a creditor's assignee, transferee, or subrogee [12 C.F.R. § 202.2(l)]. In general, "creditor" also includes a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made [12 C.F.R. § 202.2(l); see 12 C.F.R. §§ 202.4, 202.5(a)].

California has similar but less extensive legislation concerning the rights of credit applicants [Civ. Code §§ 1812.30-1812.35]. California law requires that credit applicants who control similar amounts of property and earnings be treated equally in credit transactions, regardless of sex or marital status. Additionally, no person may be denied credit in his or her own name on the basis of sex or marital status [Civ. Code § 1812.30(a)-(d)]. Violation of either the federal or state law may result in civil liability for actual and punitive damages [15 U.S.C. § 1691e(b); Civ. Code § 1812.31].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionEqual Credit OpportunityGeneral Overview



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19-45 California Legal Forms--Transaction Guide § 45.21

§ 45.21 Credit Denial Disclosures

Under the Equal Credit Opportunity Act, a creditor must notify an applicant of action taken on a credit request within 30 days after receipt of the application [15 U.S.C. § 1691(d)(1)]. In particular, the applicant is entitled to a statement of the specific reasons for the denial of credit, or a notification of credit denial informing the applicant of his or her right to a statement of the specific reasons [12 C.F.R. § 202.9(a)(2); see § 45.210]. The notification and statement of reasons must be in writing unless the creditor did not receive more than 150 credit applications during the preceding calendar year in which case all disclosures may be made orally [12 C.F.R. § 202.9(d)].

In California, the Holden Credit Denial Disclosure Act of 1976 [Civ. Code §§ 1787.1-1787.3] contains almost identical disclosure requirements on the denial of credit; however, there is no exception for creditors having a small number of applicants. All creditors must provide a written notification of credit denial [Civ. Code § 1787.2(b)(2)]. The statement of reasons may be given orally if the written notification advises the applicant of the right to have the reasons confirmed in writing on written request [Civ. Code § 1787.2(b)(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 45.22 Credit Information Reporting

[1] Duty to Report Information in Names of Both Husband and Wife

To ensure that credit histories will be available to women who become divorced or widowed, the Equal Credit Opportunity Act requires that credit information be reported in the names of both the husband and wife [see 12 C.F.R. § 202.10]. Any new account must be designated to reflect the participation of both spouses if both will be contractually liable on the account or if both will be allowed to use it; any existing account must be designated to reflect this participation within 90 days of a written request for this designation from one of the spouses [12 C.F.R. § 202.10(a)]. These requirements apply only to those creditors who choose to furnish credit information; there is no mandate that a creditor furnish credit information on its accounts [12 C.F.R. pt. 202, supp. I, § 202.10(1) (Official Staff Interpretations)]. If a creditor furnishes credit information in response to an inquiry about an account designated to reflect the participation of both spouses, the creditor must furnish the information in the name of the spouse about whom the information is requested [12 C.F.R. § 202.10(c)].

In California, credit agencies have further reporting duties in this regard. Information concerning joint accounts must be filed under the name of each person or spouse and each party must have access to the credit history of the joint account without having to refer to the name of the other person [Civ. Code § 1812.30(e)]. For further discussion of credit reporting agencies, see Ch. 92, *Service Contracts*.

[2] Duty to Deliver Copy of Consumer Contract, Credit Application

Under California's Consumer Contract Awareness Act of 1990 [Civ. Code §§ 1799.200-1799.207], a copy of a consumer contract [see Civ. Code § 1799.201(b) (definition)] must be delivered to the consumer at the time it is signed if it is executed at a place of business of the seller. If the contract is not signed by the consumer at a place of business of the seller and the seller does not provide a copy of the contract for the consumer to keep, the seller must mail or deliver a copy of the contract to the consumer within 10 calendar days after the seller receives the signed contract [Civ. Code § 1799.202(a)]. The copy provided to the consumer cannot contain any blank spaces to be completed after the consumer signs and it must contain the seller's signature, if it provides for that signature, and it may contain the consumer's signature [Civ. Code § 1799.202(a)]. Similar requirements apply to consumer contract guaranties [see Civ. Code §

1799.206(a)].

Within a reasonable time after receiving a written request from a consumer, a seller or financial institution must mail a copy of the consumer's completed consumer credit application to the consumer at the address in the request [*see Civ. Code § 1799.202(d)*].

Any waiver of the provisions of the Consumer Contract Awareness Act of 1990 is contrary to public policy and is unenforceable [*Civ. Code § 1799.207*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionEqual Credit
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19-45 California Legal Forms--Transaction Guide § 45.23

§ 45.23 Credit Reporting Agency Requirements

[1] Consumer Credit Reporting Agencies Act

The California Consumer Credit Reporting Agencies Act [*Civ. Code §§ 1785.1-1785.36*] requires consumer credit reporting agencies to adopt reasonable procedures in the furnishing of consumer information that meets the needs of commerce and that are fair and equitable to the consumer [*Civ. Code § 1785.1(d)*]. The Act is modeled largely on the federal Fair Credit Reporting Act [*see* [2], *below*], and imposes similar requirements [*see, e.g., Schoendorf v. U.D. Registry, Inc. (2002) 97 Cal. App. 4th 227, 238, 118 Cal. Rptr. 2d 313* (tenant's action against reporting agency for refusal to add clarifying information to her report in violation of both state CCRAA and federal FCRA)]. Accordingly, separate requirements of the California act are covered in [2], *below*, only when they differ from federal requirements. For detailed discussion of both the California and federal acts, *see Ch. 92, Service Contracts, § 92.80*.

Civ. Code § 1785.13(a)(3) has been held to be unconstitutional by the Court of Appeal for the Second District, as a violation of the free speech rights of the *First Amendment* [*U.D. Registry, Inc. v. State of California (1995) 34 Cal. App. 4th 107, 114-116, 40 Cal. Rptr. 2d 228*]. *Civ. Code § 1785.13(a)(3)* forbids a consumer credit reporting agency from including information about unlawful detainer actions in a consumer credit report, unless the lessor was the prevailing party.

[2] Fair Credit Reporting Act

[a] Purpose

The purpose of the Fair Credit Reporting Act is to require consumer credit reporting agencies to adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner that is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of that information [*15 U.S.C. § 1681(b)*].

[b] Definitions

[i] Consumer Report

A "consumer report" is any written, oral, or other communication of information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living [15 U.S.C. § 1681a(d)(1)]. The consumer report serves the purpose of establishing the eligibility of the consumer for credit or insurance used for personal, family, or household purposes, for employment purposes, or for other purposes limited by statute [15 U.S.C. § 1681a(d)(1); see 15 U.S.C. § 1681b (permissible purposes)].

The California act uses the term "consumer credit report," and excludes many types of reports and communications from that term [see *Civ. Code* § 1785.3(c)].

[ii] Investigative Consumer Report

An "investigative consumer report" is a consumer report or portions of such a report in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer. The report may not contain factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency if that information was obtained directly from a creditor of the consumer or from the consumer [15 U.S.C. § 1681a(e)].

Anyone who arranges for an investigative report must, on written request made by the consumer within a reasonable period after the consumer's receipt of the disclosure, make a complete and accurate disclosure of the nature and scope of the investigation requested. This subsequent disclosure must be made in writing and mailed or otherwise delivered to the consumer not later than five days after the date the request was received or the date the report was first requested, whichever is later [15 U.S.C. § 1681d(b)].

The person arranging for the report must also certify to the consumer reporting agency that it has made the disclosure required under 15 U.S.C. § 1681d(a) and that it will make the additional disclosure to the consumer required under 15 U.S.C. § 1681d(b) [15 U.S.C. § 1681d(b); see 15 U.S.C. § 1681d(c) (limitations on liability)].

For further discussion of investigative consumer reports under the Fair Credit Reporting Act, see *Ch. 92, Service Contracts*, § 92.80.

Under California law, investigative consumer reports must be prepared in accordance with the Investigative Consumer Reporting Agencies Act [*Civ. Code* § 1786 *et seq.*]. For discussion of this act, see *Ch. 92, Service Contracts*, § 92.80.

[c] Disclosure Procedure

With specified exceptions, a consumer reporting agency must make the disclosures required by 15 U.S.C. § 1681g in writing, on the request and proper identification of the consumer [see 15 U.S.C. §§ 1681g(a), 1681h(a); § 45.230]. However, if authorized by a consumer, a credit agency may make the required disclosures otherwise than in writing and in a form specified by the consumer in accordance with statutory requirements, if available from the agency [15 U.S.C. § 1681h(b)(1); see 15 U.S.C. § 1681h(b)(2) (requests may be in person, by telephone after written request, or by electronic or other reasonable means, if available from agency)].

The agency must provide trained personnel to explain to the consumer any information that is being furnished to him or her [15 U.S.C. § 1681h(c)]. The consumer may be accompanied by another person of his or her choosing, who must furnish reasonable identification. However, the agency may require the consumer to give it a written statement granting permission to discuss the consumer's file in that other person's presence [15 U.S.C. § 1681h(d); see 15 U.S.C. § 1681h(e) (limitations on liability)].

[d] Dispute and Deletion Procedures

The consumer may notify the consumer reporting agency directly, or indirectly through a reseller, of any dispute about either the completeness or accuracy of any item of information contained in the consumer's file. The agency must then investigate free of charge and record the current status of that information in accordance with specified procedures [*see 15 U.S.C. § 1681i(a)*] before the end of the 30-day period beginning on the date the agency receives notice of the dispute by the consumer [*15 U.S.C. § 1681i(a)(1)(A)*; *see 15 U.S.C. § 1681i(a)(1)(B), (C)* (extension of period to investigate; limitations on extension); *see also, e.g., Dennis v. BEH-1, LLC* (9th Cir. 2007) - F.3d -, 2007 U.S. App. LEXIS 22690, at *9 (credit reporting agency must exercise reasonable diligence in re-examining court file to determine whether adverse judgment has, in fact, been entered against consumer; overlooking documents in court file expressly stating that no adverse judgment was entered falls far short of this standard; Experian Information Solutions, Inc., negligently failed to conduct reasonable reinvestigation)].

Within five business days, the consumer reporting agency must provide prompt notice of the dispute to the furnisher of the information [*see 15 U.S.C. § 1681i(a)(2)*] and must review and consider all relevant information submitted by the consumer [*see 15 U.S.C. § 1681i(a)(4)*]. After reinvestigation, the agency must promptly delete inaccurate or unverifiable information [*see 15 U.S.C. § 1681i(a)(5)*]. The agency must provide written notice of the results of the reinvestigation, including a description of the reinvestigation procedure, to the consumer within five business days of completion of the reinvestigation [*see 15 U.S.C. § 1681i(a)(6)*].

If the reinvestigation does not resolve the dispute, the customer is entitled to file a brief statement setting forth the nature of the dispute. The agency may limit such a statement to not more than 100 words if it assists the consumer in writing a clear summary of the dispute [*15 U.S.C. § 1681i(b)*].

After a statement of the dispute is filed (unless there are reasonable grounds to believe that the dispute is frivolous or irrelevant), the consumer reporting agency must, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer, and the agency must provide either the consumer's statement or a clear and accurate codification or summary of the dispute [*15 U.S.C. § 1681i(c)*].

Following any deletion of information that is found to be inaccurate, or the accuracy of which can no longer be verified, or following any notation as to disputed information, at the request of the consumer, the agency must furnish either (1) a notification that the item has been deleted or (2) a statement, codification, or summary of the dispute. This must be furnished to any person specifically designated by the consumer who, within the previous two years, has received a consumer report for employment purposes or who, within six months, has received a consumer report for any other purpose, if the report contained the deleted or disputed information [*15 U.S.C. § 1681i(d)*].

A consumer may dispute the accuracy of furnished information directly with a furnisher of information that is a financial institution, if the circumstances of the dispute meet conditions required to be specified in regulations by the federal banking agencies, the National Credit Union Administration, and the Federal Trade Commission [*see 15 U.S.C. § 1681s-2(a)(8)(A)-(D)*]. In that event, the financial institution has a duty to investigate (unless the dispute is frivolous or irrelevant) and to notify consumer reporting agencies of any discovered inaccuracies in the information furnished by the financial institution to those agencies [*15 U.S.C. § 1681s-2(a)(8)(E),(F)*].

When a furnisher of inaccurate information is not a financial institution, a consumer is obliged to deal with the consumer reporting agency whose report disclosed the inaccurate information [*see 15 U.S.C. § 1681s-2(b)* (duties of furnishers of information on receiving notice of dispute)]. If the consumer directly notifies the furnisher of the information, stating that the accuracy of the information is disputed, that notification will not trigger any duty by the furnisher to investigate the dispute [*Sanai v. Saltz* (2009) 170 Cal. App. 4th 746, 764-765, 88 Cal. Rptr. 3d 673 (furnisher of credit information has no responsibility to investigate credit dispute under 15 U.S.C. § 1681s-2(b) until after it receives notice from consumer reporting agency; notification from consumer is not enough)]. When the furnisher

of the information receives notice of the dispute from the consumer reporting agency, the furnisher must [15 U.S.C. § 1681s-2(b)(1)]:

- Investigate the consumer's claim.
- Review all relevant information provided by the consumer reporting agency [see 15 U.S.C. § 1681i(a)(2)].
- Report the results of the investigation to the consumer reporting agency.
- Correct the information with each nationwide agency to which the furnisher has given the information, if the furnisher finds the information is inaccurate.
- Modify, delete, or permanently block that item of information, if the furnisher find the information is inaccurate.

The agency must complete all investigations and reports before the end of the 30-day period beginning on the date the furnisher receives notice of the dispute by the consumer [15 U.S.C. § 1681s-2(b)(2); see 15 U.S.C. § 1681s-2(c), (d) (limitations on liability; enforcement)].

[e] Fees for Disclosure or Notification of Deletion

A consumer is entitled to one free credit report during any 12-month period from the nationwide credit reporting agencies and all "nationwide specialty consumer reporting agencies" [see 15 U.S.C. § 1681j(a)(1); 15 U.S.C. § 1681j(g) (prevention of deceptive marketing of credit reports); see also 15 U.S.C. § 1681a(w) (definition)]. Reports from specialty agencies may contain data regarding the consumer's employment history, residential rental history, check writing history, insurance claims, or medical records or payments [see 15 U.S.C. § 1681a(w)].

A consumer is further entitled to a free credit report within 60 days after the consumer notifies the agency in accordance with statutory procedures, if a person takes any adverse action based, in whole or in part, on any information contained in a credit report [see 15 U.S.C. § 1681j(b); see 15 U.S.C. § 1681m (procedures)].

Free disclosures are also available when the decision of denial or increase of charges relating to credit for personal, family, or household purposes is based wholly or in part on certain information obtained from a third person other than a consumer reporting agency. The information must bear on the consumer's creditworthiness, credit standing, or credit capacity, character, general reputation, personal characteristics, or mode of living. The user, within a reasonable period, on the consumer's written request for the reasons for the adverse action received within 60 days after learning of the adverse action, must disclose the nature of the information to the consumer. The user of the information must clearly and accurately disclose to the consumer the consumer's right to make such a written request at the time the adverse action is communicated to the consumer [15 U.S.C. § 1681m(b)].

Free disclosure is also available under certain other circumstances [see 15 U.S.C. § 1681j(c), (d)].

Otherwise, the agency may impose a reasonable charge, which must be indicated to the consumer before disclosure or notification [see 15 U.S.C. § 1681j; see also Civ. Code § 1785.17 (California fees)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionFair Credit ReportingGeneral

OverviewBanking LawConsumer ProtectionFair Credit ReportingConsumer Reports



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19-45 California Legal Forms--Transaction Guide § 45.30

§ 45.30 Coordination of Truth In Lending Act and Unruh Act

Two principal statutes govern consumer credit terms in California. The federal Truth in Lending Act (TILA), Subchapter I of the Consumer Credit Protection Act [15 U.S.C. §§ 1601-1667e], is designed to foster the informed use of consumer credit through uniform disclosure of credit terms and cost. The Act is administered under Regulation Z [12 C.F.R. pt. 226], issued by the Board of Governors of the Federal Reserve System. The Unruh Act [Civ. Code §§ 1801-1812.20] provides consumer protection from abusive credit practices in the area of retail installment sales. The implementing feature of both acts is a detailed disclosure document.

While there are differences in coverage and application, the two laws are similar in purpose and contain many of the same disclosure requirements. Both acts can, and frequently do, apply to the same credit transaction. TILA preempts any inconsistent provisions of the Unruh Act [15 U.S.C. § 1610(a)]. The Unruh Act therefore permits the required disclosures to be made in any manner or terminology required or permitted by Regulation Z, provided that any additional requirements imposed by the Unruh Act must also be complied with and further provided that a creditor must always furnish a separate written itemization of the amount financed in the disclosure document [Civ. Code § 1801.5; see Civ. Code § 1803.3(b); 12 C.F.R. § 226.18(c)]. There are no inconsistencies between the two statutes that make compliance with both difficult; in fact, all contracts subject to the Unruh Act must contain the disclosures required by Regulation Z, whether or not Regulation Z is applicable to the transaction [Civ. Code § 1803.3(b)]. Thus, the different disclosure requirements can be coordinated in those credit transactions to which both acts apply [see Civ. Code § 1801.5 (Regulation Z disclosures); 15 U.S.C. § 1638(b)(1) (disclosures by closed-end creditors); 12 C.F.R. §§ 226.17 (disclosure requirements), 226.28 (effect on state laws); see also 12 C.F.R. § 226.36 (rules governing electronic delivery of disclosures, including definition of "electronic communication")].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview



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§ 45.31 Making Use of Truth in Lending Disclosures

Different lending institutions legitimately use different methods for computing and stating interest rates. Even when two lenders use the same method and offer the same rate, one might impose a flat service charge, a premium for mandatory credit life insurance, or some other fee not required by the other. The Truth in Lending Act (TILA) disclosures standardize cost-of-credit calculations to permit accurate comparisons between different lenders. Thus, while the interest rate stated in one contract may not be comparable to that stated in another, the annual percentage rate (which, along with the other TILA information, must be conspicuously segregated from other contract terms [*see 15 U.S.C. § 1638(b)(1)*]), will be directly comparable. Similarly, the finance charge will be a comprehensive dollar total of all items that make up the cost of credit, permitting the consumer to see at a glance what it will cost him or her to borrow money or to purchase an item on an installment basis, regardless of how the lender denominates the items that constitute that cost.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionTruth in LendingGeneral Overview



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§ 45.32 Transactions Covered by Truth in Lending and Unruh Acts

[1] In General

The Truth in Lending Act (TILA) and Unruh Act apply only to consumer credit transactions, and only to those involving specified creditors [see [3], *below*]. A "consumer credit transaction" is one in which the credit extended, or the goods purchased, are primarily for personal, family, or household purposes [15 U.S.C. § 1602(h); 12 C.F.R. § 226.2(a)(12); *Civ. Code* § 1799.90]. Federal law specifically excludes credit for agricultural purposes from coverage, but the state act is silent on the subject [15 U.S.C. § 1603(1)]. Application of the Unruh Act to sales of goods for agricultural purposes is unlikely [see *Com. Code* § 9109 (farm equipment as business equipment, not consumer goods, under UCC); *Crestwood Lumber Co. v. Citizens Sav. & Loan Assn.* (1978) 83 Cal. App. 3d 819, 823, 148 Cal. Rptr. 129 (Unruh Act applies to consumer goods only); *Witkin, Summary of California Law*, vol. 4, *Sales*, § 268 (10th ed. 2005)].

[2] Limitations on Application of Truth in Lending Act

The Truth in Lending Act is not applicable to all consumer credit transactions. Credit extensions in excess of \$25,000 are not covered unless they are secured by real property or a dwelling [12 C.F.R. § 226.3(b)]. Additionally, the Act applies only if the credit is subject to a finance charge, or is payable by written agreement in more than four installments [12 C.F.R. § 226.1(c)].

[3] Limitations on Application of Unruh Act

[a] Applicable Only to Retail Installment Sales

The Unruh Act applies only to retail installment sales of consumer goods or services. A retail installment sale is a sale by a person engaged in the business of selling consumer goods or services to a consumer, not principally for the purpose of resale, with payment in installments [see *Civ. Code* §§ 1802.1-1802.6]. Leases of goods are included if the lessee contracts to pay a sum substantially equivalent to or in excess of their value and it is agreed that the lessee will become for no consideration, or for a nominal consideration has the option of becoming, the owner of goods [*Civ. Code* §

1802.6].

[b] Contract Must Be Entered or Performed in California

The Unruh Act applies to retail installment contracts entered into or performed in California [*see Civ. Code §§ 1802.6, 1802.7*]. A contract will be deemed to have been made in California if either the seller offers or agrees in California to sell to a buyer who is a resident of California, or if a buyer who is a resident of California accepts or makes the offer in California to buy, regardless of the situs of the contract as specified in it [*Civ. Code § 1802.19(a)*]. Any solicitation or communication to sell, whether oral or written, that originates outside of California but that is forwarded to, and received in California by, a buyer who is a resident of California, will be deemed to be an offer or agreement to sell in California [*Civ. Code § 1802.19(b)*]. Any oral or written solicitation or communication to buy originating within California from a buyer who is a California resident, that is forwarded to, and received by, a retail seller outside of California, is deemed to be an acceptance or offer to buy in California [*Civ. Code § 1802.19(c)*].

[c] Unruh Act Inapplicable to Contracts for Certain Sales and Services

The Unruh Act does not apply to contracts for the construction, sale, or construction and sale of an entire residence, mobilehome, or commercial or industrial structure [*Civ. Code § 1801.4*]. In addition, contracts for the sale of real property are not covered by the Act [*Civ. Code § 1801.4; but see Bus. & Prof. Code §§ 10240-10248.3; see also Ch. 25, Real Estate Loans*]. The Unruh Act also does not apply to contracts for the sale of certain aircraft, or certain vessels having a value over \$25,000 [*Civ. Code § 1801.4*].

Motor vehicles are not treated as goods under the Unruh Act, nor are any goods sold with a motor vehicle under a contract governed by the Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 1802.1; see Civ. Code §§ 2981-2984.4*] or leased with a motor vehicle under a contract governed by the Vehicle Leasing Act [*see Civ. Code §§ 2985.7-2990; see also Ch. 47, Automotive Financing and Vehicle Leasing*]. However, the term "goods" does include a trailer that is sold in conjunction with a vessel unless the cash price of the vessel, including all accessories and equipment sold with it, exceeds \$25,000 [*Civ. Code §§ 1801.4, 1802.1; see Veh. Code § 9840(a)* ("vessel" defined)].

While certain services furnished in connection with the sale or repair of goods [*see Civ. Code § 1802.1* (definition)] are covered by the Unruh Act, the services of physicians and dentists and services subject to federal tariffs are outside coverage of the Act [*Civ. Code § 1802.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19-45 California Legal Forms--Transaction Guide § 45.33

§ 45.33 Creditors Covered by Truth in Lending Act

Under the Truth in Lending Act (TILA), a covered "creditor" is any person who regularly extends consumer credit payable by agreement in more than four installments, or consumer credit for which a finance charge may be imposed. The term also includes credit card issuers, whether or not the amount due is payable in more than four installments or a finance charge is required [15 U.S.C. § 1602(f); 12 C.F.R. § 226.2(a)(17)]. Under the implementing guidelines of Regulation Z [12 C.F.R. pt. 226], TILA applies to individuals and businesses that offer or extend credit when (1) the credit is offered or extended to consumers, (2) the offering or extension is done regularly, (3) the credit is subject to a finance charge or is payable by a written agreement in more than four installment, and (4) the credit is primarily for personal, family, or household purposes [12 C.F.R. § 226.1(c)(1)].

A person "regularly extends consumer credit" only if it is extended more than 25 times, or more than five times for transactions secured by a dwelling, in the preceding or current calendar year [12 C.F.R. § 226.2(a)(17) n.3]. Only a creditor to whom an obligation is initially payable is required to make disclosures as a creditor [15 U.S.C. § 1602(f); 12 C.F.R. § 226.2(a)(17)], although certain disclosure requirements apply to persons who are not creditors but who provide applications for home equity plans to consumers [12 C.F.R. § 226.1(c)(3); see 12 C.F.R. § 226.5b(d) (required disclosures); see Ch. 25, *Real Estate Loans*]. However, assignees of the initial creditor are liable for disclosure violations that are apparent on the face of the disclosure statement [15 U.S.C. § 1641(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionTruth in LendingGeneral Overview



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§ 45.34 Creditors Covered by Unruh Act

The Unruh Act applies only to persons engaged in the business of selling goods or furnishing services to retail buyers [*Civ. Code § 1802.3*; *see Civ. Code § 1802.4* ("retail buyer" defined)]. Financial institutions that provide purchase-money loans can be subject to the Unruh Act, but only if they are joint venturers with, or are related by common ownership and control to, the actual seller of the goods or services financed [*Civ. Code § 1801.6(b)*]. The Unruh Act is applicable only to credit sales, and then only to those credit sales that also meet the definition of a retail installment contract [*see Civ. Code § 1802.6* (definition)]. The Truth in Lending Act (TILA) is generally applicable to those same retail transactions, as well as to other credit sales and direct loans. Unlike TILA, the Unruh Act contains no exemption for creditors handling fewer than 25 annual transactions [*see Civ. Code § 1802.3* (Unruh Act); *cf. 12 C.F.R. § 226.2(a)(17)* n.3 (TILA)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection General Overview Banking Law Consumer Protection Truth in Lending General Overview



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§ 45.35 Disclosure Documents

[1] Truth in Lending Act Transactions

The disclosure document for closed-end credit transactions under the Truth in Lending Act (TILA) need not take any particular form. It must be in writing, in a form the consumer may keep [12 C.F.R. § 226.17(a)]. The model documents issued by the Federal Reserve Board take the form of separate disclosure statements [see 12 C.F.R. pt. 226, app. H], but use of separate documents is not mandatory. If the TILA disclosures are placed in any document that also contains other information, the required disclosures (other than the creditor's identity) must be grouped together and conspicuously segregated from everything else [15 U.S.C. § 1638(b)(1); 12 C.F.R. § 226.17(a)(1)].

The required disclosures may be made in a language other than English, provided that the disclosures are made available in English on the consumer's request [12 C.F.R. § 226.27]. This requirement for providing English disclosures on request does not apply to catalogs and other multiple page advertisements or electronic advertisements subject to 12 C.F.R. § 226.16 (governing advertisements for open-end credit plans) and 12 C.F.R. § 226.24 (governing advertisements for closed-end credit) [12 C.F.R. § 226.27].

Disclosure documents also may be delivered electronically [see 12 C.F.R. § 226.17(a)(1) (general disclosures for closed-end credit), 12 C.F.R. § 226.31(b) (disclosures for certain closed-end home mortgages)]. For discussion of the rules governing electronic delivery of disclosure documents, see § 45.220[1][c].

[2] Unruh Act Transactions

The required disclosure document for transactions under the Unruh Act must be in the form of a written contract [Civ. Code § 1803.1]. The entire agreement between the parties, including any promissory notes or other evidence of indebtedness, must be contained in a single document [Civ. Code § 1803.2(a)]. The contract must be executed by the consumer, and a legible copy must be delivered to the consumer at the time of execution [Civ. Code §§ 1799.202, 1803.7; see Civ. Code §§ 1803.8 (requirements for catalog sales), 1808.2, 1808.3 (requirements for add-on sales)].

The required contents [see § 45.125 [1]] need not be stated in any particular sequence, with the exception of the

mandatory itemization of the amount financed [*Civ. Code* § 1803.3(b)]. Information other than the required disclosures may be included in the contract, unless the provisions are specifically prohibited by the Act [*Civ. Code* § 1804.1; see § 45.125[3]].

[3] Transactions Subject to Both Acts

A creditor subject to both acts can comply through the use of single disclosure document. The document will take the form of a retail installment contract, with a section reserved exclusively for Truth in Lending Act (TILA) disclosures [see § 45.225 (form)]. Note that all contracts subject to the Unruh Act must contain the disclosures required by Regulation Z (implementing regulations for TILA), whether or not Regulation Z is applicable to the transaction [*Civ. Code* § 1803.3(b)]. Therefore, meeting the disclosure requirements of the two acts is not difficult.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionTruth in LendingGeneral Overview



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§ 45.36 Failure to Comply With Truth in Lending Act

Failure to comply with the Truth in Lending Act (TILA) may subject the violator to civil liability in individual or class actions. Any civil action for a violation that may be brought against the original creditor may be brought against a voluntary assignee if the violation from which the claimed liability arises is apparent on the face of the instrument [15 U.S.C. § 1641(a)]. The civil liability for noncompliance can be the actual damage sustained, plus twice the amount of any finance charge (not less than \$100 and not more than \$1,000), plus attorneys' fees and costs [15 U.S.C. § 1640(a)(1), (2)(A)]. In the case of a class action, civil liability will be in the amount allowed by the court, up to the lesser of \$500,000 or 1 percent of the creditor's net worth, plus attorneys' fees and costs [15 U.S.C. § 1640(a)(2)(B)]. Attorneys have a legal right to a fee award in a successful action for rescission under TILA [see 15 U.S.C. § 1640(a)(3)]; attorneys may seek those fees in actions initiated after settlement of their client's claims [James v. Home Const. Co. of Mobile (11th Cir. [Ala.] 1982) 689 F.2d 1357, 1359]. The Federal Reserve Board and certain other federal agencies have the authority to issue administrative orders requiring restitution of amounts collected in excess of charges set forth in the disclosure statements [15 U.S.C. § 1607(e)].

No provision of TILA imposing liability for noncompliance will apply to any act or omission in good faith in conformance with applicable regulations or interpretations, even if the regulation or interpretation involved is subsequently amended, rescinded, or found invalid [15 U.S.C. § 1640(f)]. Evidence of compliance with TILA (other than advertising requirements) must be preserved by the creditor for a period of two years after the date each disclosure is required to be made [12 C.F.R. § 226.25(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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[Reserved]

§§ 45.37[Reserved]



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§ 45.50 Overview of Truth in Lending Act Disclosures

The Truth in Lending Act (TILA) is a disclosure act. The intent of the law is to promote the informed use of consumer credit by requiring disclosures about its terms and cost [15 U.S.C. § 1601; 12 C.F.R. § 226.1(b)]. To enable the creditor to compare credit costs, TILA provides uniform definitions for credit-related terms, and establishes standard methods of computing credit costs.

Sections 45.51-45.54 discuss some of the more complex provisions of TILA and explain certain requirements basic to the scheme contemplated by the Act and too complex to be simply listed in the Transaction Guide. For a detailed list of all TILA disclosure requirements, see § 45.123.

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 45.51 Finance Charge Disclosure Under Truth in Lending Act

[1] In General

One of the key standardized credit terms under TILA is the finance charge. It represents the cost of consumer credit, and it is stated as a dollar amount [12 C.F.R. § 226.4(a)]. The finance charge is the sum of all charges, payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor, as an incident to or as a condition of the extension of credit; it does not include charges of a type payable in a comparable cash transaction [15 U.S.C. § 1605(a)]. However, when credit sales are the major portion of a seller's business and subject the seller to bookkeeping, collection, or financing cost, a decision to charge cash and credit customers the same total price does not necessarily mean that there is no finance charge. Courts will examine the economics of the seller's business to see whether an undisclosed finance charge is being imposed in a supposedly "free" extension of credit [see *Yazzie v. Reynolds* (10th Cir. [N.M.] 1980) 623 F.2d 638, 642-643] .

If the disclosed "cash price" in a credit sale is higher than the total price that the seller would fix for a cash buyer, then for purposes of TILA, the difference is a finance charge and must be disclosed as such. This normally would be the case whenever the disclosed "cash price" in a credit sale is inflated because the buyer needs financing. (That practice usually is driven by various requirements imposed by financial companies as conditions for providing financing.) Moreover, when a higher "cash price" in a credit sale necessarily entails additional costs for the buyer, those also must be disclosed as finance charges. The extra amount of sales or use tax payable by the credit buyer is one such additional cost. If the buyer will have to pay any license fee or similar amount that is computed on the basis of the cash price--as in the case of buying a motor vehicle, for example--then the extra amount paid because of the higher "cash price" is a finance charge that must be disclosed [*Thompson v. 10,000 RV Sales, Inc.* (2005) 130 Cal. App. 4th 950, 970, 974, 31 Cal. Rptr. 3d 18] .

[2] Regulation Z

Regulation Z contains a detailed list of charges that should be included in computing the finance charge [12 C.F.R. § 226.4(b)]. Examples of finance charges include interest, service charges, points, loan fees, and certain types of insurance premiums related to the credit transaction. Regulation Z also contains a detailed list of charges to be excluded

from the finance charge [12 C.F.R. § 226.4(c); see *Household Credit Services, Inc. v. Pfennig* (2004) 541 U.S. 232, 235, 124 S. Ct. 1741, 158 L. Ed. 2d 450 (Regulation Z, which specifically excludes over-limit fees from definition of "finance charge," is not unreasonable interpretation of 15 U.S.C. § 1605(a))]. In general, these include application fees charged to all credit applicants regardless of whether credit is actually extended, charges for actual unanticipated late payments or delinquency, and fees for participation in a credit plan.

Certain charges may also be excluded from the finance charge if they are itemized and disclosed to the consumer [see 12 C.F.R. § 226.4(d), (e)]. These include fees and taxes for perfecting security interests and certain insurance premiums. The effect of exclusion is to lower the annual percentage rate that a consumer is likely to use in comparing costs of credit [see § 45.53].

Three additional rules apply to the finance charge. First, interest, dividends, or other income received or to be received by the consumer on deposits or investments may not be deducted in computing the finance charge [12 C.F.R. § 226.4(f)]. Second, demand obligations are considered to have a maturity of one year for the purpose of computing the amount of finance charge and the annual percentage rate; provided that, if the obligation is alternatively payable on a stated maturity, the stated maturity governs [12 C.F.R. § 226.17(c)(5)]. Third, the annual percentage rate need not be disclosed if the finance charge does not exceed \$5 on an amount financed of \$75 or less, or if the finance charge does not exceed \$7.50 on an amount financed of more than \$75 [15 U.S.C. 1638(a)(4); 12 C.F.R. § 226.18(e) n. 42].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 45.52 Prepaid Finance Charge Disclosure Under Truth in Lending Act

A prepaid finance charge is any finance charge paid separately, in cash or by check, before or at the consummation of the transaction, or withheld at any time from the proceeds of the credit [12 C.F.R. § 226.2(a)(23)]. It commonly includes such items as service fees, points, finder's fees, and loan guarantee insurance, but only if those items are paid separately from the regular finance charge. If a prepaid finance charge is involved in the credit transaction, it is not only disclosed as part of the finance charge, but also subtracted from the "amount financed," which discloses the amount of credit advanced [15 U.S.C. § 1638(a)(2); 12 C.F.R. § 226.18(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 45.53 Annual Percentage Rate Disclosure Under Truth in Lending Act

The annual percentage rate relates the finance charge to the amount financed over the specified period of a year. The method of computing the annual percentage rate depends on whether the transaction is "open-end" [12 C.F.R. § 226.14; see Ch. 46, *Credit Card and Other Open-End Credit Transactions*] or "closed-end" [12 C.F.R. § 226.22]. In closed-end credit transactions, the creditor may use either the actuarial method of computing the annual percentage rate or the United States Rule [12 C.F.R. § 226.22(a)(1)]. In either case, the rate disclosed must be accurate to the nearest one eighth of one percent [12 C.F.R. § 226.22(a)(2)].

Appendix J to Regulation Z contains the mathematical equation and technical instructions necessary for determining the annual percentage rate in closed-end credit transactions. However, it is easier to determine the rate by using the two volumes of tables and instructions compiled by the Federal Reserve Board. The Regulation Z Annual Percentage Rate Tables may be obtained from Publications Services, Division of Support Services, Federal Reserve Board, Washington, D.C. 20551, or from any Federal Reserve Bank. Any other chart or table that complies with the applicable regulations may be used in determining and annual percentage rate [12 C.F.R. § 226.22(b)(2)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 45.54 Disclosures Under Truth in Lending Act for Advertising of Credit

If an advertisement for any closed-end sale or loan states specific credit terms, it may state only those terms that actually are available from the creditor [12 C.F.R. § 226.24(a)]. Required disclosures must be made clearly and conspicuously [12 C.F.R. § 226.24(b)]. A creditor who advertises the rate of finance charge must state the rate as an "annual percentage rate," using that term [15 U.S.C. § 1664(c); 12 C.F.R. § 226.24(c)]. If the annual percentage rate may be increased after consummation, the advertisement must state that fact [12 C.F.R. § 226.24(c)]. If an advertisement is for credit not secured by a dwelling, the advertisement may not state any other rate, except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate [15 U.S.C. § 1664(c); 12 C.F.R. § 226.24(c)].

If the advertisement states the downpayment, number of payments, amount of any payment, period of repayment, or the finance charge, certain additional disclosures must be made within the advertisement [see 15 U.S.C. § 1664(d); 12 C.F.R. § 226.24(d)]. In connection with these additional disclosure requirements, catalogs or other multiple page advertisements or advertisements using electronic communication are treated as single advertisements if certain requirements are met. [see 12 C.F.R. § 226.24(e)(1)]. A catalog or other multiple-page advertisement or an electronic advertisement (for example, an advertisement appearing on an Internet Web site) complies with the required disclosures [see 12 C.F.R. § 226.24(d)(2)] if the table or schedule of terms includes all appropriate disclosures for a representative scale of amounts up to the level of the more commonly sold higher-priced property or services offered [12 C.F.R. § 226.24(e)(2); see 12 C.F.R. §§ 226.17(a)(1), 226.31(b) (required disclosures may be provided in electronic form); see also § 45.220[1][c]]. If a catalog or other multiple-page advertisement, or an electronic advertisement gives information in a table or schedule in sufficient detail to permit determination of the required disclosures [12 C.F.R. § 226.24(e)(2)].

Advertisements for credit secured by a dwelling, other than television or radio advertisements, including promotional materials accompanying applications, must disclose rates and payments, as specified [see 12 C.F.R. § 226.24(f)(1)-(3); see 12 C.F.R. § 226.24(g) (alternate disclosures for television and radio advertisements); see 12 C.F.R. § 226.24(i) (prohibited acts or practices)]. Disclosures must be "clear and conspicuous," as specified [12 C.F.R. § 226.24(b); see 12 C.F.R. § 226.24(f)(2)(i), (ii), (3)(i), (ii)].

For each advertisement that relates to a consumer credit transaction secured by the principal dwelling of a consumer, in which the extension of credit may exceed the fair market value of the dwelling, if the advertisement is disseminated in paper form to the public or through the internet, rather than by radio or television, the advertisement must clearly and conspicuously state that [15 U.S.C. § 1664(e); 12 C.F.R. § 226.24(h); see 12 C.F.R. § 226.24(i) (prohibited acts or practices in advertisements for credit secured by a dwelling)]:

- The interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for federal income tax purposes; and
- The consumer should consult a tax adviser for further information regarding the deductibility of interest and charges.

Procedures for complying with these advertising requirements can be *found in § 45.123[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 45.55 Oral Disclosures Under Truth in Lending Act

A creditor responding orally to an inquiry about the cost of credit must answer in terms of the annual percentage rate; the only other rate that may be stated is a simple annual rate or periodic rate applied to an unpaid balance [12 C.F.R. § 226.26(b)]. If the annual percentage rate cannot be determined in advance, the annual percentage rate for a sample transaction must be given, and other cost information for that consumer's specific transaction may be given [15 U.S.C. § 1665a; 12 C.F.R. § 226.26(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 45.60 Limitations on Security Interests Under Unruh Act

No retail installment contract (other than one for services) may provide for a security interest in goods already fully paid for by the consumer or goods that have not been sold by the seller [*Civ. Code § 1804.3(a)*].

A retail installment contract for goods may not provide for a security interest in real property, unless the primary goods sold are to be attached to that real property [*Civ. Code § 1804.3(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 45.61 Unruh Act Regulation of Finance or Service Charges

[1] Interest Rate Limitations

Private individuals and corporations in California are prohibited from taking more than 10 percent simple interest per annum on loans that are primarily for personal, family, or household purposes [*Cal. Const. art. XV, § 1*]. However, banks and certain other regulated financial institutions are exempt from this usury provision. Moreover, sellers of consumer goods or services who impose a service or finance charge that is added to the cost of the goods or services are not within the usury prohibition. Setting a time-price on the sale of goods or services is not considered to involve the "loan" or "forbearance" of money or other things of value [*Southwest Concrete Products v. Gosh Construction Corp.* (1990) 51 Cal. 3d 701, 705, 274 Cal. Rptr. 404, 798 P.2d 1247 ; *Boerner v. Colwell Co.* (1978) 21 Cal. 3d 37, 45, 145 Cal. Rptr. 380, 577 P.2d 200] .

[2] Regulation of Finance or Service Charge

The Unruh Act regulates the amount of finance or service charges in retail installment contracts [*Civ. Code § 1805.1*]. All retail installment contracts must provide for the calculation of finance charges on the simple-interest basis if the date on which the final installment is due, according to the original terms of the contract, is more than 62 months after the date of the contract [*Civ. Code § 1805.7*]. There is no maximum dollar limitation on finance charges levied on sales of goods and services under a retail installment contract. Instead, finance charges are limited, with minor exceptions, to the amount disclosed in the contract, and annual fees are prohibited [*Civ. Code §§ 1803.3(b), 1805.1*].

A seller's advertisement soliciting buyers to enter into a retail installment contract must clearly state the periodic rate or range of periodic rates that will be used to determine the finance charge imposed on the contract. The disclosure must be expressed as an annual percentage rate or a range of annual percentage rates. This disclosure requirement does not apply to advertisements by sellers who intend to sell the solicited contracts to a financing agency or some other assignee [*Civ. Code § 1803.11*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 45.62 Unruh Act Right to Prepay

A consumer has a statutory right to prepay the entire indebtedness on a retail installment contract at any time, without penalty [*Civ. Code § 1806.3(a)*]. On prepayment of the outstanding balance in full, the buyer is entitled to a refund credit for the full amount of any unearned portion of the finance charge [*see Civ. Code § 1806.3(a)(1)*].

If the indebtedness created by a retail installment contract is satisfied before maturity by repossession, surrender, or redemption of the collateral, or by any judgment, the consumer's outstanding indebtedness must be computed as of the date the collateral or its value is recovered. The creditor is not entitled to a finance charge based on the full term of maturity [*Civ. Code § 1806.3(b)*; *see Civ. Code § 1806.3(a)* (computation of outstanding indebtedness)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 45.63 Required Notices to Cosigner

[1] Notice of Liability

A creditor who obtains the signature of more than one person on a consumer credit contract must deliver to each cosigner a notice concerning his or her liability as a cosigner or guarantor, unless the signing parties are married to each other. The notice must be delivered before the cosigner becomes obligated on the contract [*Civ. Code § 1799.91(a)*]. In this context a "cosigner" is one who does not in fact receive any of the money, property, or services that are the subject matter of the contract [*Civ. Code § 1799.91(a)*]. No action can be brought against the cosigner who did not in fact receive the subject matter of the contract by a creditor or assignee from the creditor unless that notice is included in the contract [*Civ. Code § 1799.95*]. A "consumer credit contract" for the purpose of this requirement is a contract covered by the Unruh Act or the Rees-Levering Motor Vehicle Sales and Finance Act, and any loan or credit extension that is either unsecured or secured by property other than real estate and made primarily for personal, family, or household purposes [*Civ. Code § 1799.90(a)(1)-(4)*; *see Civ. Code §§ 1801 et seq.* (Unruh Act), 2981 et seq. (Rees-Levering Act)]. The term "consumer credit contract" and thus the notice requirement also apply to loans or credit extensions intended primarily for personal, family, or household purposes that are subject to the statutes governing real estate loans [*see Bus. & Prof. Code § 10240 et seq.*], personal property brokers [*see Fin. Code § 22000 et seq.*], industrial or thrift loans [*see Fin. Code § 18000 et seq.*], and consumer finance lenders [*see Fin. Code § 24000 et seq.*], whether the loans are secured by real property or otherwise [*Civ. Code § 1799.90(a)(5)*], and to lease contracts for motor vehicles [*Civ. Code § 1799.90(a)(6)*; *see Civ. Code § 2985.7(d)* ("lease contract" defined)].

The notice to cosigner must conform to statutory wording, must be in a specified type size, and ordinarily must be in both English and Spanish [*Civ. Code § 1799.91(a)*]. However, if a consumer credit contract is written in a language other than English or Spanish and a notice to cosigner is required, the notice must be in English and the language in which the contract is written [*Civ. Code § 1799.91(b)*]. For a notice to cosigner, see § 45.240.

[2] Notice of Delinquency

A creditor may not provide any adverse information [*see Civ. Code § 1799.101(a)(1)* ("adverse information" defined)] with respect to a cosigner to a consumer credit reporting agency regarding a delinquency on a consumer credit contract

entered into unless the cosigner is given written notice of the delinquency at or before the time the information is provided to the agency [*Civ. Code* § 1799.101(b)]; this notice requirement does not apply to a cosigner whose address, as shown in the creditor's records respecting the consumer credit contract, is the same as that of the primary obligor [*Civ. Code* § 1799.101(d)]. In addition, a creditor may not provide any information regarding the cosigner's obligation on a consumer credit contract to a debt collector until this notice is given to the cosigner [*Civ. Code* § 1799.101(c); see *Civ. Code* § 1788.2(c) ("debt collector" defined)].

Notice requirements are satisfied by mailing a copy of the required notice to the cosigner at his or her address as shown in the creditor's records respecting the consumer credit contract [*Civ. Code* § 1799.101(e)]. If more than one cosigner resides at the same address, as shown in the creditor's records respecting the consumer credit contract, a notice addressed to any cosigner at that address is deemed notice to all cosigners residing at that address [*Civ. Code* § 1799.101(e)].

A cosigner who suffers a loss as a result of a violation of these requirements may bring an action to recover damages and attorneys' fees after proper notice to the creditor of the intended action [*Civ. Code* § 1799.102]. If, within 25 days after the date of receiving the notice, the creditor tenders to the cosigner an amount equal to the loss or otherwise resolves the matter to the cosigner's satisfaction, the cosigner is barred from further recovery of that loss, including reasonable attorneys' fees [*Civ. Code* § 1799.102(b)]. For a form for notice of delinquency to cosigner, see § 45.241. For a notice of a cosigner's action to recover damages, see § 45.242.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law
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§ 45.64 Translations of Contracts

[1] When Required

[a] Languages Subject to Requirement

If a language other than English is the primary language used for negotiations with a consumer, the consumer may have to be provided with a translation of the contract in that other language. For contracts entered into prior to July 1, 2004, this requirement applies only to contracts negotiated primarily in Spanish. On and after July 1, 2004, it is applicable to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [*see Civ. Code § 1632*].

[b] Types of Contracts Subject to Requirement

Generally, any person engaged in a trade or business who negotiates primarily in the other language, orally or in writing, in the course of entering into any consumer contract or agreement, must deliver to the consumer, before the consumer executes the contract or agreement, a translation of the contract or agreement in the other language. This translation must include a translation of every term and condition in that contract or agreement. This requirement specifically applies to the following kinds of contracts *Civ. Code § 1632(b)*:

- A contract or agreement that is subject to any of the following:
 - The Unruh Retail Installment Sales Act [*see Civ. Code § 1801 et seq.*];
 - The Rees-Levering Motor Vehicles Sales and Finance Act [*see Civ. Code § 2981 et seq.*; Ch. 47, *Automotive Financing and Vehicle Leasing*]; or
 - The Vehicle Leasing Act [*see Civ. Code § 2985.7 et seq.*; Ch. 47, *Automotive Financing and Vehicle Leasing*].
- A loan or extension of credit for use primarily for personal, family, or household purposes, when the

loan or extension of credit is subject to either:

- The Industrial Loan Law [*see Fin. Code § 18000 et seq.*]; or
- The California Finance Lenders Law [*see Fin. Code § 22000 et seq.*].
- Any other loan or extension of credit secured otherwise than by real property, or unsecured, for use primarily for personal, family, or household purposes.
- A lease, sublease, rental contract or agreement, or other tenancy contract or agreement, for a period longer than one month, covering a dwelling, an apartment, a mobilehome, or any other dwelling unit normally occupied as a residence.
- A reverse mortgage [*see Civ. Code § 1923 et seq.*].
- A contract or agreement containing a statement of fees or charges, entered into for the purpose of obtaining legal services, when the person with whom the consumer negotiates the contract or agreement is a California-licensed attorney.
- Effective July 1, 2009, a foreclosure consulting contract [*see Civ. Code § 2945 et seq.*; *see also* 2008 Stats., Ch. 278 § 7 (operative date)].

If a loan or extension of credit for use primarily for personal, family, or household purposes, is negotiated by a real estate broker and is subject to the mortgage loan disclosure statement requirements of *Bus. & Prof. Code § 10240 et seq.* [for discussion, *see* Ch. 25, *Real Estate Loans*], the translation requirement technically applies to the resulting contract or agreement when negotiations are conducted primarily in the other language [*see Civ. Code § 1632(b)(4)*], but the broker can comply by delivering the required mortgage loan disclosure statement [*see Bus. & Prof. Code §§ 10240(a), 10241; see* Ch. 25, *Real Estate Loans*, §§ 25.250, 25.251] in the other language *Civ. Code § 1632(c)*].

At the time and place where a lease, sublease, or rental contract or agreement described above is executed, notice in the other language in which the contract or agreement was negotiated must be provided to the lessee or tenant [*Civ. Code § 1632(d)*].

[c] Ancillary Documents

Generally, "contract or agreement" in *Civ. Code § 1632* means the document creating the rights and obligations of the parties and includes any subsequent document making substantial changes in the rights and obligations of the parties [*Civ. Code § 1632(g)*]; *but see* [d], *below* (periodic statements, sales slips, invoices, and other similar documents excluded)]. For example, a notice of repossession and deficiency of a motor vehicle under *Civ. Code § 2983.2* is a document that substantially affects the borrower's rights under the contract; therefore, the borrower is entitled to a translation of the notice [*Reyes v. Superior Court (1981) 118 Cal. App. 3d 159, 162, 173 Cal. Rptr. 267*] .

[d] Matters Excluded from Requirement

The term "contract or agreement" does not include any of the following [*Civ. Code § 1632(g)*]:

- Matters ordinarily incorporated by reference in a residential lease, sublease, rental contract or agreement, or other tenancy contract or agreement, including but not limited to rules and regulations governing a tenancy and inventories of furnishings to be provided by the lessor or other person in the position of a lessor.

- Any subsequent documents authorized or contemplated by the original document such as periodic statements, sales slips or invoices representing purchases made pursuant to a credit card agreement, a retail installment contract or account or other revolving sales or loan account, memoranda of purchases in an add-on sale, or refinancing of a purchase as provided by, or pursuant to, the original document.

- A home improvement contract, as defined in *Bus. & Prof. Code* §§ 7151.2 and 7159, or plans, specifications, description of work to be done and materials to be used, or collateral security taken or to be taken for the retail buyer's obligation contained in a contract for the installation of goods by a contractor licensed under the Contractors State License Law, if the home improvement or installation contract is otherwise a part of a contract subject to *Civ. Code* § 1632.

[e] Elements of Contract Not Required to Be Translated

The other-language version of a contract or agreement may retain the following elements of the executed English contract or agreement without translation: names and titles of individuals and other persons, addresses, brand names, trade names, trademarks, registered service marks, full or abbreviated designations of the make and model of goods or services, alphanumeric codes, numerals, dollar amounts expressed in numerals, dates, and individual words or expressions having no generally acceptable translation into English. It is permissible, but not required, that the other-language version be signed [*Civ. Code* § 1632(i)].

[2] Compliance by Supervised Financial Organization

A translation of disclosures required by federal Regulation M on consumer leasing or Regulation Z on truth in lending [see 12 C.F.R. §§ 213.1 et seq., 226.1 et seq.] or by the Industrial Loan Law or the California Finance Lenders Law [see *Fin. Code* §§ 18000 et seq., 22000 et seq.], can be provided to the consumer by a supervised lender, before the execution of the contract, and that will be deemed compliance with *Civ. Code* § 1632. Supervised lenders include banks, savings and loan associations, credit unions, and the holding companies, affiliates, and subsidiaries of any of them; real estate brokers when subject to *Bus. & Prof. Code* § 10240 et seq.; and lenders subject to the Industrial Loan Law or the California Finance Lenders Law [*Civ. Code* § 1632(e)].

[3] Requirements Inapplicable When Interpreter Negotiates Contract

Civ. Code § 1632 does not apply to any person engaged in a trade or business who negotiates primarily in the other language [see [1], above], if the party with whom he or she is negotiating is a buyer of goods or services, or receives a loan or extension of credit, or enters an agreement obligating himself or herself as a tenant, lessee, or sublessee, or similarly obligates himself or herself by contract or lease, and that party negotiates the terms of the contract, lease, or other obligation through his or her own interpreter who is not a minor, is able to speak fluently and read with full understanding both English and the other language, and is neither employed by nor made available through the person that negotiates with the consumer [*Civ. Code* § 1632(h)].

[4] Notice of Right to Translation

At the time and place for entering into a contract or agreement that is subject to the Unruh Retail Installment Sales Act, the Rees-Levering Motor Vehicles Sales and Finance Act, or the Vehicle Leasing Act [see *Civ. Code* §§ 1801 et seq., 2981 et seq., 2985.7 et seq.], or that is for a loan or extension of credit secured otherwise than by real property, or unsecured, for use primarily for personal, family, or household purposes [see [1], above], a notice in the other language must be conspicuously displayed, to the effect that the person with whom the consumer is negotiating is required to provide a contract or agreement, or a translation of the disclosures required by law, in the other language in which the contract or agreement was negotiated [*Civ. Code* § 1632(f)].

It is reversible error for a court to render a deficiency judgment in favor of a finance company if the borrower is unable to understand English and there is no evidence that the finance company did or did not post a notice in the other language pursuant to *Civ. Code § 1632* at the location of the loan negotiations [*Reyes v. Superior Court (1981) 118 Cal. App. 3d 159, 162, 173 Cal. Rptr. 267*] .

[5] Evidentiary Use of Translation

The terms of the contract or agreement that is executed in English determines the rights and obligations of the parties. The other-language translation of the contract or the disclosures can be admitted into evidence only to show that no contract was entered into because of the substantial difference in the material terms and conditions of the contract and the translation [*Civ. Code § 1632(j)*].

[6] Rescission for Noncompliance

In the event of noncompliance with the requirements of *Civ. Code § 1632*, the consumer may rescind the contract or agreement. When a contract for a consumer credit sale or consumer lease that has been sold and assigned to a financial institution is rescinded, the consumer must make restitution to, and have restitution made by, the person with whom he or she made the contract, and must give notice of rescission to the assignee. Notwithstanding that the contract was assigned without recourse, the assignment must be deemed rescinded, and the assignor must promptly repurchase the contract from the assignee [*Civ. Code § 1632(k)*].

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§ 45.65 Restrictions on Computation of Interest

A consumer loan made to a natural person primarily for personal, family, or household purposes may not provide for the payment of precomputed interest if the date on which the final installment is due is more than 62 months after the date of the loan [*Civ. Code § 1799.5(b), (e)*]. "Precomputed interest" is interest [*see 15 U.S.C. § 1605(a)* (definition)] on a loan that is (1) computed by multiplying the original loan balance by a rate and multiplying the product by the number of payment periods scheduled for repayment of the loan, and (2) then either added to the original principal balance of the loan in advance, or subtracted from the loan proceeds [*Civ. Code § 1799.5(a)*]. The restriction does not apply to the forbearance of a debt arising from a sale or lease of property, or to any loan arising under an open-end credit plan [*Civ. Code § 1799.5(d)*].

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§ 45.66 Restrictions on Computation of Finance Charges

A consumer contract entered into on or after January 1, 1983, may not provide for the payment of a precomputed finance charge if the date on which the final installment is due is more than 62 months after the date of the contract [Civ. Code § 1799.8(c), (e)]. A "precomputed finance charge" is a finance charge that is (1) computed by multiplying the original contract balance by a rate and multiplying the product by the number of payment periods scheduled for repayment of the contract, and (2) then either added to the original contract balance in advance, or subtracted from the contract balance [Civ. Code § 1799.8(a)]. This restriction applies to contracts in which the purchaser is a natural person who enters the agreement primarily for personal, family, or household purposes, and the contract provides for the construction, sale, or construction and sale of an entire residence, or for the sale of real property [Civ. Code § 1799.8(b)].

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§ 45.67 Limitations on Use of Household Goods, Personal Property, and Religious Items as Collateral

No person may take a security interest in any household goods in connection with a consumer credit contract or other credit obligation incurred primarily for personal, family, or household purposes unless the creditor takes possession of the goods, or the purchase price of the goods was financed through the consumer credit contract or credit obligation [Civ. Code § 1799.100(a); see Civ. Code § 1799.100(g)(1) ("household goods" defined)]. A consumer credit contract may not provide for a security interest in any religious books, religious artifacts, or religious materials, valued at less than \$500, unless those objects are specifically pledged as collateral [Civ. Code § 1799.97(a)]. Any contract provision in violation of this prohibition is void and unenforceable [Civ. Code § 1799.97(b)].

An agreement or other document creating a nonpossessory security interest in personal property in connection with a consumer credit contract or other credit obligation incurred primarily for personal, family, or household purposes must contain a statement, reviewed and signed by the borrower, describing each specific item of personal property in which the security interest is taken [Civ. Code § 1799.100(b); see Civ. Code § 1799.100(d) (covered personal property)]. Consumer credit contracts or other credit obligations subject to the Unruh Act are deemed to meet this requirement if they comply with specified Unruh Act disclosure requirements [Civ. Code § 1799.100(b); see Civ. Code §§ 1803.3(a), 1810.1(f) (required disclosures); see also §§ 45.124, 45.125]. Generally, any security interest taken in violation of these requirements is void and unenforceable [see Civ. Code § 1799.100(e)].

A security interest in personal property (except for certain vessels and motor vehicles) taken in connection with a consumer credit contract or other credit obligation incurred primarily for personal, family, or household purposes may only be enforced by judicial action unless the borrower has abandoned, or freely and voluntarily surrendered, the property [Civ. Code § 1799.100(c); see Veh. Code §§ 415 (motor vehicles), 9840(a) (vessels)]. Any person injured by a violation of Civ. Code § 1799.100 may bring a civil action for the recovery of damages, equitable relief, and attorneys' fees and costs [Civ. Code § 1799.100(f)].

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[Reserved]

§§ 45.68[Reserved]



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§ 45.80 Purpose and Effect of Credit Disability Insurance Statute

The limitations on creditor's remedies and the disclosure requirements concerning credit disability insurance implement the legislature's finding that it is unfair for a creditor who has directly participated in, arranged, or received compensation for the sale of credit disability insurance to a debtor, or that creditor's successor in interest, to invoke a creditor's remedy because the debtor fails to pay any sum that becomes due during a period of disability until a reasonable time has passed for the disability insurance claim to be filed, verified, and processed [*Civ. Code § 1812.400*]. Because the statute establishes a three-month claim moratorium period [*see § 45.83*], it effectively discourages creditors who are unwilling to defer collection efforts for that period of time from selling credit disability insurance or procuring it for debtors. This is because the moratorium period and the other statutory requirements do not apply if a creditor does not arrange or participate in the sale or receive a commission or other compensation for the sale of credit disability insurance to the debtor [*Civ. Code § 1812.404*].

The statute does not affect or defeat an interest in a debtor's property that has been acquired by a bona fide purchaser or encumbrancer for value after the creditor invokes a creditor's remedy in violation of the statute if that purchaser or encumbrancer did not have notice of the facts that constituted the violation [*Civ. Code § 1812.409*].

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§ 45.81 Limitations on Creditor's Remedies

A creditor who has directly participated in or received any compensation for the sale of credit disability insurance to a debtor may not invoke any creditor's remedy against a debtor because of the debtor's nonpayment of any sum that becomes due during any disability claim period, and for which credit disability insurance coverage is provided [*Civ. Code § 1812.402(a)*; see *Civ. Code § 1812.401* (definitions)]. However, a creditor may invoke collection procedures or any other creditor's remedy during or after the claim period for the debtor's nonpayment of any sum due prior to the claim period, including any interest, finance charge, or late charge accruing on that sum, whether or not the nonpayment is related to the debtor's claimed disability [*Civ. Code § 1812.402(c)*]. Further, a creditor may foreclose a lien on any property to protect that creditor's security interest if a senior lienholder on the property is foreclosing [*Civ. Code § 1812.402(d)*].

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§ 45.82 Credit Disability Insurance Disclosure Requirements

[1] In General

The limitations on a creditor's remedies [*see* § 45.81] must be disclosed to the debtor by the creditor when the insurance is sold to the debtor [*see Civ. Code* § 1812.402(f)]. The insurer must disclose the claim procedure to the debtor when it sends claims forms to the debtor [*see Civ. Code* § 1812.402(f); *see McManis v. San Diego Postal Credit Union* (1998) 61 Cal. App. 4th 547, 557-558, 71 Cal. Rptr. 2d 617 (credit union failed to meet its burden on summary judgment to negate consumer's breach of contract claim because it did not establish compliance with *Civ. Code* § 1812.400 *et seq.*, including *Civ. Code* § 1812.402(f), before repossession)]. For a form containing the statutory disclosure of the claim procedure, see § 45.250.

[2] Applicability of Credit Disability Insurance Disclosure Requirement

The disclosure requirements under the credit disability insurance statute apply to "creditors" and "debtors" [*see Civ. Code* §§ 1812.402(f), 1812.404]. A "creditor" is a lender of money or a seller or lessor of goods, services, or rights, for which payment is arranged through a credit transaction, who has directly participated in, arranged, or received compensation for the sale of credit disability insurance to the debtor. The term also includes any successor to the right, title, or interest of the original creditor [*Civ. Code* § 1812.401(b); *see Civ. Code* § 1812.404]. A "debtor" is a borrower of money or a purchaser or lessee of goods, services, property, or rights for which payment is arranged through a credit transaction [*Civ. Code* § 1812.401(c)].

The disclosure requirement and the other limitations on creditors' remedies do not apply to credit disability insurance covering a key person if the creditor requires that insurance as a condition to making a loan of at least \$25,000 to be used in the operation of a business in which the key person is employed or has an ownership interest. For these purposes, a "key person" is one who the creditor and the debtor mutually agree must be involved in the operation of the business to assure its success [*Civ. Code* § 1812.406(a)].

These requirements are also inapplicable to most credit transactions of more than 10 years duration that are secured by a mortgage or deed of trust. However, they do apply to those transactions if the principal purpose of the transaction is to

finance improvements to residential real property consisting of four or fewer residential units and the accompanying documentation or the course of dealing between the creditor and a contractor or supplier would indicate that purpose [*Civ. Code* § 1812.406(b)].

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§ 45.83 Creditor's Rights Regarding Credit Disability Insurance

[1] Moratorium on Collection

A creditor may not invoke any creditor's remedies because of the debtor's nonpayment of any sum that becomes due during any disability claim period when there is credit disability insurance coverage [*Civ. Code § 1812.402(a)*]. The disability claim period begins on the due date of the first payment the debtor fails to pay when the debtor claims that the credit disability coverage applies, and continues until three calendar months thereafter or until the insurer pays or rejects the claim, whichever occurs sooner [*Civ. Code § 1812.401(e)*]. Thus, a creditor may be precluded from taking any collection action for up to three months if credit disability insurance is in effect. Further, even if the insurer rejects the claim within the disability claim period, the debtor still has an additional 35-day grace period to pay the amount that became due during the claims period before the creditor may invoke any creditor's remedy [*Civ. Code § 1812.402(e)*].

For discussion of a creditor's rights when it invokes its remedies without knowledge of the debtor's disability, see [2], *below*.

[2] Remedies Invoked Before Notice of Disability

When the creditor invokes creditor's remedies for nonpayment after having sent the debtor a delinquency notice, the following rules apply. On receipt of notice of the debtor's disability claim, the creditor must refrain from invoking any further creditor's remedies during the remainder of the claim period or the 35-day period after the insurer either rejects the debtor's claim or allows only partial payment [*see § 45.84*], and must rescind every remedy that it has already invoked (except that it need not restore property legally sold to any unrelated party) [*Civ. Code § 1812.402(g)(1), (2)*]. The debtor, however, will be liable for the costs and expenses actually incurred in either invoking or rescinding any creditor's remedy [*Civ. Code § 1812.402(g)(3)*]. The notice that must be given by the debtor to the creditor is defined as written notice deposited in the mail, postage prepaid, addressed to the creditor at the location where payments are normally to be sent, or any other specified location. However, the creditor may waive its requirement for written notice and accept oral notice [*Civ. Code § 1812.401(f)*].

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§ 45.84 Duties of Parties on Receipt of Disability Notice

When the creditor receives notice [*see Civ. Code § 1812.401(f)*] that the debtor claims disability as a ground for nonpayment, the creditor must send the debtor notice of the name, address, and telephone number of the insurer or the insurance representative from whom claim forms can be obtained [*Civ. Code § 1812.402(b)*]. However, the creditor's successor in interest need not comply with these requirements if it is not related to the creditor by common ownership or control and does not know the name, address, and telephone number of the insurer or its representative [*Civ. Code § 1812.402(b)*].

When the insurer receives the claim, it must send the necessary claim forms to the debtor [*Civ. Code § 1812.402(b)*]. It must also send the debtor a disclosure in substantially the form specified by the statute [*see Civ. Code § 1812.402(f)(2)*] (not reproduced in this chapter). The debtor must then submit the claim to the insurer and notify the creditor that the claim has been submitted [*Civ. Code § 1812.402(b)*].

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§ 45.85 Effect on Creditor of Payment or Rejection of Disability Claim by Insurer

If the insurer pays the claim within the disability claim period, the creditor must treat any payment made by the insurer as timely payment by the debtor [*Civ. Code § 1812.402(e)*]. If the insurer rejects the claim within that period or makes only partial disability payments, the debtor will have the opportunity to pay the balance without being subject to any creditor's remedy other than late charges for 35 days after the insurer sends notice of rejection or partial payment [*Civ. Code § 1812.402(e)*]. If the debtor has not paid the balance due within the 35-day period, the creditor may then invoke any creditor's remedy [*Civ. Code § 1812.402(e)*; see *McManis v. San Diego Postal Credit Union* (1998) 61 Cal. App. 4th 547, 557-558, 71 Cal. Rptr. 2d 617 (credit union failed to meet its burden on summary judgment to negate consumer's breach of contract claim because it did not establish compliance with *Civ. Code § 1812.400 et seq.*, including *Civ. Code § 1812.402(e)*, before repossession)]. If the insurer ceases making payments on a debtor's disability claim because the debtor failed to make timely submission of forms required by the insurer for recertification of a temporary disability, the creditor may invoke its remedies 15 days after receiving notice that the insurer has ceased making payments [*Civ. Code § 1812.403*].

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DIVISION III: COMMERCIAL TRANSACTIONS
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PART II. LEGAL BACKGROUND
F. Credit Disability Insurance

19-45 California Legal Forms--Transaction Guide § 45.86

§ 45.86 Other Rights of Debtors

A debtor may bring an action for damages, equitable relief, or other relief for any violation of the credit disability insurance law by a creditor [*Civ. Code § 1812.402(i)*]. However, a creditor will not be in violation or liable if, having invoked its remedies before notice of the disability claim, it receives notice of the claim and then both refrains from invoking further remedies during the remainder of the claim period or the 35-day period after the insurer either rejects the debtor's claim or allows only partial payment, and rescinds previously invoked remedies [*Civ. Code § 1812.402(g)(1), (2), (4)*]. The debtors' rights and remedies afforded by *Civ. Code §§ 1812.400-1812.410* are cumulative to each other and to all other debtors' rights under other laws [*Civ. Code § 1812.402(h)*]. Any waiver by a debtor of those provisions is void and unenforceable [*Civ. Code § 1812.408*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawLife InsuranceCredit Life



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19-45 California Legal Forms--Transaction Guide §§ 45.87-45.99

[Reserved]

§§ 45.87[Reserved]



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A. Client Interview--Facts and Documents

19-45 California Legal Forms--Transaction Guide § 45.100

§ 45.100 Facts

1. Identity of consumer:

a. Name, address, and telephone number.

b. If consumer has spouse or ex-spouse with ownership interest in any collateral or whose income will be relied on to obtain credit, name and address of that person.

2. Identity of creditor:

a. Name, address, and telephone number.

b. Legal status of creditor, such as:

(1) Corporation.

(2) Partnership.

(3) Trustee or other fiduciary.

(4) Other entity (*e.g.*, limited liability company or limited liability partnership).

(5) Individual.

c. If creditor is corporation:

(1) Date and state of incorporation.

(2) Name, title, and telephone number of officer or employee who will handle transaction.

d. If creditor is partnership, names of partners.

e. If creditor is another type of entity (*e.g.*, a limited liability company):

(1) Date and state of registration.

(2) Name, title, and telephone number of manager or employee who will handle transaction.

f. Business or occupation of creditor, such as:

(1) Commercial lender.

(2) Other business enterprise.

(3) Real Estate Broker.

NOTE:

For discussion of consumer loans secured by real property, see § 45.13.

(4) Private individual.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law
Debtor & Creditor Relations



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19-45 California Legal Forms--Transaction Guide § 45.101

§ 45.101 Documents

1. If creditor is corporation:
 - a. Certified copy of certificate of incorporation and current bylaws.
 - b. Certified copy of directors' resolution, if any, authorizing transaction [*see, e.g., Corp. Code §§ 315, 1001; see Ch. 5, Directors' Meetings, Actions, and Resolutions*].
 - c. Certified copy of shareholders' resolution, if any, approving transaction [*see, e.g., Corp. Code §§ 315, 1001; see also Ch. 8A, Shareholders' Meetings, Voting, and Agreements*].
2. If creditor is partnership, copy of partnership agreement.
3. If creditor is trustee or other fiduciary, copy of trust instrument, will, or other document specifying terms of trust or other fiduciary relationship.
4. If creditor is another type of entity, articles of incorporation, operating agreement, or other documentation, as appropriate.
5. If client is dealer applying for bank financing of consumer installment paper:
 - a. Financing contract for continuous line of credit or for single loan.
 - b. Security agreement conveying security interest in installment paper; may be included in body of financing contract.

c. Promissory note.

d. Financing statement if bank is not in possession of installment paper assigned as collateral [*see* Ch. 42, *Secured Transactions*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDebtor & Creditor Relations



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19-45 California Legal Forms--Transaction Guide §§ 45.102-45.109

[Reserved]

§§ 45.102[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
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B. Preliminary Determinations

19-45 California Legal Forms--Transaction Guide § 45.110

§ 45.110 Direct Loan--Application of Client to Bank

1. Determine if Equal Credit Opportunity Act [15 U.S.C. § 1691 *et seq.*] applies to transaction because creditor is person who [12 C.F.R. § 202.2(l)]:

- a. In ordinary course of business, regularly participates in decision of whether or not to extend credit;
- b. In ordinary course of business, regularly refers applicants or prospective applicants to creditors; or
- c. Selects or offers to select creditors to whom requests for credit may be made.

NOTE:

The Equal Credit Opportunity Act prohibits creditor discrimination on the basis of race, color, religion, national origin, sex, marital status, or age (provided applicant has capacity to contract) [12 C.F.R. § 202.1(b)]. While these types of discrimination are prohibited in all credit transactions, some regulatory provisions of the Act are not applied to incidental extensions of credit or to nonconsumer transactions [*see* 12 C.F.R. § 202.3(c)]. An "incidental extension of credit" is one not made pursuant to credit card account, on which no finance charge is imposed, and which is not payable in more than four installments [12 C.F.R. § 202.3(c)(1)].

2. Determine if Truth in Lending Act [15 U.S.C. § 1601 *et seq.*] applies to transaction; in other words, whether transaction meets following criteria [12 C.F.R. §§ 226.1(c)(1), 226.2(a)(17)]:

- a. Credit is offered or extended to consumers;

b. Credit is offered or extended regularly;

NOTE:

A lender "regularly" extends credit under the Truth in Lending Act (TILA) only if it extended credit more than 25 times (or more than five times for transactions secured by dwelling) in the preceding or current calendar year [12 C.F.R. § 226.2(a)(17) n.3].

c. Credit is either:

(1) Subject to finance charge; or

(2) Payable by written agreement in more than four installments; and

d. Credit is primarily for personal, family, or household purposes.

NOTE:

Extensions of credit for agricultural purposes are exempt, as are those involving amounts over \$25,000 if not secured by real property or the consumer's dwelling, those regulated by agencies supervising actions of public utilities or commodities or securities brokers, and home fuel budget plans in which no finance charge is imposed [15 U.S.C. § 1603; 12 C.F.R. § 226.3]. Certain student loans are also exempt from TILA requirements [15 U.S.C. § 1603(6); 12 C.F.R. § 226.3(f)].

3. Determine if Unruh Act [*Civ. Code* §§ 1801-1812.20] applies to transaction:

a. Contract is retail installment contract for [*Civ. Code* §§ 1802.5, 1802.6]:

(1) Retail sale of goods [*Civ. Code* § 1802.1]; or

(2) Retail furnishing of services [*Civ. Code* § 1802.2];

b. Contract is entered or performed in California [*Civ. Code* § 1802.6];

c. Seller is retail seller [*Civ. Code* § 1802.3]; and

d. Buyer is retail buyer [*Civ. Code* § 1802.4].

NOTE:

The Unruh Act is a disclosure act similar to the federal Truth in Lending Act (TILA). The Unruh Act is modeled on TILA and requires many of the same disclosures that must be given under Regulation Z, which implements the federal act [*see Civ. Code* §§ 1801.5, 1803.3(b)].

4. Determine whether *Fin. Code* § 4970 et seq., governing consumer loans secured by real property, applies to contemplated transaction.

NOTE:

Fin. Code § 4970 et seq. imposes requirements on regulated lenders (banks, savings associations, credit unions, finance lenders, residential mortgage lenders) and real estate brokers, with respect to the making of consumer loans that are secured by real property. These requirements affect covered loans for which applications are made after June 2002 [Stats. 2001, Ch. 732, § 3]. For further discussion of the various requirements and prohibited acts, see § 45.13.

5. Determine whether lender will require credit disability insurance and, if so, will lender:

- a. Sell it to debtor?
- b. Arrange for its sale to debtor?
- c. Receive commission or other compensation for its sale to debtor?

NOTE:

If lender takes any of these actions, it cannot impose late charges, accelerate the due date, collect a credit balance, or enforce a security interest in any manner until three calendar months after the first missed payment is due or the insurer pays or rejects debtor's claim, whichever is first [*Civ. Code* § 1812.402(a); **see** *Civ. Code* §§ 1812.401(d), (e), 1812.403-1812.407]. The creditor must disclose this to the debtor when the creditor sells insurance to the debtor [**see** *Civ. Code* § 1812.402(f)(1); **see also** § 45.250].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionEqual Credit OpportunityGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview



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19-45 California Legal Forms--Transaction Guide § 45.111

§ 45.111 Client Dealer

NOTE:

Credit sales include any transaction in which a dealer also provides credit. Typically, banks that finance clients' credit sales will provide forms and will follow procedures in compliance with various credit regulations and laws. However, if a dealer is the sole creditor, the dealer cannot rely on bank for compliance with applicable laws.

[1] Client Has Existing Arrangement for Bank Financing of Credit Sales

1. Determine applicability of Equal Credit Opportunity Act [*15 U.S.C. §§ 1691-1691f; see §§ 45.20, 45.110 P 1*].
2. Determine applicability of Truth in Lending Act [*15 U.S.C. §§ 1601-1667e; see § 45.110 P 2*].
3. Determine applicability of Unruh Act [*Civ. Code §§ 1801-1812.20; see §§ 45.34, 45.110 P 3*].
4. Determine applicability of *Fin. Code § 4970 et seq.*, which governs consumer loans secured by real property [*see § 45.13*].

NOTE:

Fin. Code § 4970 et seq. imposes requirements on regulated lenders (banks, savings associations, credit unions, finance lenders, residential mortgage lenders) and real estate brokers, with respect to the making of consumer loans that are secured by real property. These requirements affect covered loans for which applications are made after June 2002 [*Stats. 2001, Ch. 732, § 3*]. For further discussion of the various requirements and prohibited acts, see *§ 45.13*.

5. If more than one creditor is involved, determine which creditor will ensure compliance with applicable credit regulations.

6. Consider applicability of credit disability insurance [see §§ 45.80-45.86, 45.110 P 4].

[2] Client Seeks Bank Financing of Credit Sales

NOTE:

See Ch. 43, **Commercial Loans**, for further coverage of bank financing of credit sales.

1. Advise client that goods or services must be of type bank considers appropriate for financing.
2. Advise client that selling techniques, merchandise, and service must be acceptable to bank.
3. Advise client that character and business must meet bank requirements and that bank will examine:
 - a. Dun & Bradstreet credit report on client.
 - b. Client's financial and operating statements.
 - c. Local retail credit reports on business.
 - d. Retail credit reports on principals of client's business.
 - e. Any other information that bears on these factors.
4. Determine whether client's installment paper is to be purchased or whether client will be lent money secured by installment paper:
 - a. If installment paper is to be collateral for loan, advise client that bank's determination whether to lend on this basis will involve credit investigation of client and evaluation of whether client's volume and collection practices merit loan.
 - b. If paper is to be purchased, resolve following terms:
 - (1) Purchase with or without recourse, or in conjunction with repurchase agreement.
 - (2) Bank's purchase rate, that is, its discount or what it charges to purchase paper.
 - (3) Requirements for reserve accounts, their maintenance, and disbursement.
 - (4) Agreement as to direct or indirect collections from consumer.
 - (5) Client warranties regarding paper and collateral circumstances.
 - (6) What constitutes default on part of client.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionEqual Credit
OpportunityGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview



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19-45 California Legal Forms--Transaction Guide §§ 45.112-45.119

[Reserved]

§§ 45.112[Reserved]



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C. Procedural Guide

19-45 California Legal Forms--Transaction Guide § 45.120

§ 45.120 Loan Application of Client Retail Customer to Bank

[1] Application of Equal Credit Opportunity Act

NOTE:

See § 45.110 to determine whether a transaction is covered by the Equal Credit Opportunity Act.

1. Advise client (applicant) that lender may not treat client less favorably than others, in any aspect of credit transaction, on basis of race, color, religion, national origin, sex, marital status, age, receipt of public assistance income, or because of client's good faith exercise of rights under specified consumer protection laws [15 U.S.C. § 1691(a); see 12 C.F.R. § 202.7(a); Civ. Code § 1812.30].

2. Advise client that, when advertising or extending credit, lender may not make any statement that would discourage client on prohibited basis, when advertising or discussing credit [12 C.F.R. § 202.5(a)].

3. Advise client that following information may not be requested by lender [12 C.F.R. § 202.5(c), (d); see § 45.200]:

a. Information about former spouse, unless applicant is relying on payments from former spouse as basis for repayment of credit.

b. Marital status in terms other than "married," "unmarried," and "separated."

NOTE:

A creditor may explain to an applicant that the term "unmarried" includes single, divorced, and widowed [12 C.F.R. § 202.5(d)(1)].

c. Whether any income stated in application is derived from alimony, child support, or separate maintenance payments, unless creditor discloses that such income need not be revealed if applicant does not desire creditor to consider such income in determining creditworthiness.

d. Sex, race, color, religion, or national origin of applicant.

NOTE:

An application form may ask an applicant to designate title (such as Mr. or Mrs.) only if the form discloses that designation of title is optional [12 C.F.R. § 202.5(d)(3)].

e. Birth control practices of applicant or applicant's intentions concerning bearing or rearing of children.

4. Advise client that lender has duty to include on application clear statement that married applicant may apply for separate account [Civ. Code § 1812.30(j)].

5. Advise client that following factors may not be taken into account in determining creditworthiness:

a. Factors that may not be reason for discrimination [see (1), above], except as noted in (6), below [15 U.S.C. § 1691(a); 12 C.F.R. § 202.6(b)(1)].

b. Assumptions or statistics relating to likelihood that any group of persons will bear or rear children [12 C.F.R. § 202.6(b)(3)].

c. Telephone listing in name of applicant [12 C.F.R. § 202.6(b)(4)].

d. Fact that income comes from part-time employment, retirement funds, or alimony, absent evidence of unreliability of income source [12 C.F.R. § 202.6(b)(5)].

6. Advise client that following factors may be taken into account in determining creditworthiness:

a. Applicant's age, but only [12 C.F.R. § 202.6(b)(2)]:

(1) To determine applicant's capacity to contract.

(2) In demonstrable and statistically sound, empirically derived credit system, in which advanced age is not assigned negative value.

(3) To determine pertinent element of creditworthiness.

NOTE:

The term "pertinent element of creditworthiness" refers, in relation to a judgmental system of evaluating applicants, to any information about applicants that a creditor obtains and considers and that has a demonstrable relationship to a determination of creditworthiness [12 C.F.R. § 202.2(y)].

(4) If age is used to favor elderly applicants [12 C.F.R. § 202.6(b)(2)].

b. Public assistance as income source, but only to determine pertinent element of creditworthiness [12 C.F.R. § 202.6(b)(2)].

c. Credit history, if creditor also considers [12 C.F.R. § 202.6(b)(6)]:

(1) History of accounts that both applicant and spouse are permitted to use, or for which both are contractually liable.

(2) Any information applicant presents tending to indicate inaccuracy of credit history.

(3) On applicant's request, any account reported in name of applicant's spouse, or former spouse, that applicant can demonstrate accurately reflects applicant's creditworthiness.

d. Whether applicant is permanent resident of United States [12 C.F.R. § 202.6(b)(7)].

e. State property laws [12 C.F.R. § 202.6(c)].

7. Advise client that lender cannot prohibit client from maintaining account in birth-given first name and birth-given surname, spouse's surname, or combined surname [12 C.F.R. § 202.7(b)].

8. Advise client that lender may not require signature of applicant's spouse or other person, other than joint applicant, on any credit instrument if applicant qualifies under lender's standards of creditworthiness [12 C.F.R. § 202.7(d)(1)].

NOTE:

A requirement that an otherwise qualifying married woman have her spouse sign loan documents constitutes discrimination in violation of the Equal Credit Opportunity Act [Anderson v. United Finance Co. (9th Cir. [Or.] 1982) 666 F.2d 1274, 1276] .

9. Advise client that lender must notify credit applicant of action taken on application within 30 days of receipt of application [12 C.F.R. § 202.9(a)(1)(i); see Civ. Code § 1787.2; see also § 45.210].

NOTE:

Notification to an applicant against whom adverse action is taken must be in writing and must contain a statement of the action taken, a statutory notice (or one substantially similar), and one of the following: (1) a statement of the specific reasons for the action taken, or (2) a disclosure of the applicant's right to a statement of reasons within 30 days after receipt by the lender of a request therefor made within 60 days after receipt of the notice. The latter disclosure must include the name, address, and telephone number of a person or office from which a statement may be obtained [12 C.F.R. § 202.9; see Civ. Code § 1787.2]. Notification must also include the name and address of the creditor and the name and address of the federal agency that administers compliance with respect to the creditor [12 C.F.R. § 202.9(a)(2)].

If the lender states reasons orally, notification must also include disclosure of the applicant's right to have any oral statement of reasons confirmed in writing within 30 days after a written request for confirmation is received by the lender [12 C.F.R. § 202.9(a)(2)(ii)]. See § 45.210 for an adverse action notice meeting all federal and state requirements.

[2] Application of Truth in Lending Act

NOTE:

See § 45.110, Paragraph 2, to determine whether a transaction is covered by the Truth in Lending Act (TILA). A transaction subject to TILA is also likely to be subject to the Unruh Act. The Unruh Act

imposes disclosure requirements similar to those required by TILA [*see Civ. Code §§ 1801.5, 1803.3(b)*]. To determine whether a transaction is subject to the Unruh Act, see § 45.110, Paragraph 3. For discussion of both TILA and the Unruh Act, see §§ 45.30-45.36.

1. Advise client that lender is prohibited from advertising specific credit terms other than those that are actually available [12 C.F.R. § 226.24(a)] that the following terms require additional disclosures [see 12 C.F.R. § 226.24(d)(1),(2)]:

- a. Amount or percentage of any downpayment.
- b. Terms of repayment.
- c. Annual percentage rate.
- d. Whether annual percentage rate may be increased after consummation.

NOTE:

If a catalog or other multiple-page advertisement, or an electronic advertisement (for example, an advertisement appearing on an Internet Web site), gives information in a table or schedule in sufficient detail to permit determination of the disclosures required by 12 C.F.R. § 226.24(d)(2) [*see* § 45.54], it will be considered a single advertisement if (1) the table or schedule is clearly and conspicuously set forth; and (2) any statement of the credit terms [*see* 12 C.F.R. § 226.24(d)(1); § 45.54] appearing anywhere else in the catalog or advertisement clearly refers to the page or location where the table or schedule begins [12 C.F.R. § 226.24(e)(1)].

A catalog or other multiple-page advertisement or an electronic advertisement complies with 12 C.F.R. § 226.24(d)(2) [*see* § 45.54] if the table or schedule of terms includes all appropriate disclosures for a representative scale of amounts up to the level of the more commonly sold higher-priced property or services offered [12 C.F.R. § 226.24(e)(2)]. Required disclosures may be provided in electronic form [12 §§ 226.17(a)(1), 226.31(b)].

2. Advise client that lender must use annual percentage rate for any advertised rate of finance charge [12 C.F.R. § 226.24(c)]; if that rate may be increased after consummation, lender must disclose possibility of increase [12 C.F.R. § 226.24(c)].

NOTE:

If an advertisement is for credit not secured by a dwelling, the advertisement may not state any other rate, with the exception of a simple annual rate or periodic rate that is applied to an unpaid balance, stated in conjunction with, but not more conspicuously than, the annual percentage rate [12 C.F.R. § 226.24(c)]. This rule, and its exception, also apply to an advertisement for credit secured by a dwelling [*see* 12 C.F.R. § 226.24(c)].

3. Advise client that, generally, lender's oral responses to inquiries about cost of credit may state only annual percentage rate [12 C.F.R. § 226.26(b)].

4. Review documents for compliance with Truth in Lending Act disclosure requirements [see § 45.123].

5. Advise client that required disclosures may be made in language other than English, provided that disclosures are

made available in English on consumer's request [12 C.F.R. § 226.27].

NOTE:

This requirement for providing English disclosures on request does not apply to catalogs and other multiple page advertisements or electronic advertisements subject to 12 C.F.R. § 226.16 (governing advertisements for open end credit plans) and 12 C.F.R. § 226.24 (governing advertisements for closed-end credit) [12 C.F.R. § 226.27].

6. Advise client that, for unsecured loan, client will receive Truth in Lending Act disclosure statement, sign promissory note, and then may receive loan funds directly.

7. Advise client that, for secured loan, client will receive Truth in Lending Act disclosure statement and then sign security agreement and promissory note; funds may be distributed directly to seller of secured goods.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionEqual Credit OpportunityGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview



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19-45 California Legal Forms--Transaction Guide § 45.121

§ 45.121 Consumer's Credit Application--Dealer With Bank Financing

1. Dealer has consumer fill out application for installment loan on form provided by bank financing credit sales [see § 45.200].
2. Dealer submits application to bank.
3. Bank evaluates application, verifies information provided, and checks applicant's credit [see Ch. 43, *Commercial Loans*].
4. Bank notifies dealer, and dealer notifies consumer, of action on application.

NOTE:

The Dealer must notify the applicant of its action within 30 days of receipt of the application [12 C.F.R. § 202.9(a)(1); *see* § 45.210 (notice of adverse action)].

5. Consumer receives disclosure documents under Truth in Lending Act and Unruh Act, if applicable.

NOTE:

If a transaction is subject to the Unruh Act, the entire agreement between the parties, including any notes, security agreements, or other evidence of indebtedness, must be contained in a single document [Civ. Code § 1803.2(a)].

6. Dealer and consumer execute sale document, either security agreement or retail installment sales contract [see § 45.225].
7. Dealer assigns consumer's obligation on form provided by bank.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewBanking LawConsumer ProtectionGeneral OverviewContracts
LawTypes of ContractsInstallment Contracts



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19-45 California Legal Forms--Transaction Guide § 45.122

§ 45.122 Bank Financing of Consumer Installment Paper--Operation of Transaction

1. Installment paper is assigned.
2. Bank takes possession of paper or, if bank is not to be in actual possession, banks stamps its security interest on face of each contract, and, in case of chattel paper, files financing statement [see Ch. 42, *Secured Transactions*].
3. Bank advances funds.
4. Bank verifies authenticity of installment paper by contacting consumer.
5. Dealer collects from consumer and remits to bank.
6. Bank maintains continuous watch over value of collateral.
7. If lender's risk is covered by disability insurance policy, bank must notify insurer of its risk of any claim communicated to it by debtor.

NOTE:

A lender has a statutory duty to notify the insurer promptly after receiving notice from the borrower of a disability claim [*Ins. Code* § 779.19; *10 Cal. Code Reg.* § 2248.5(a); *Wilson v. Household Finance Corp.* (1982) 131 Cal. App. 3d 649, 654, 182 Cal. Rptr. 590] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)General
Overview



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19-45 California Legal Forms--Transaction Guide § 45.123

§ 45.123 Compliance With Truth in Lending Act

[1] Form of Closed-End Credit Disclosure Statements

1. Ascertain that required disclosures [*see* [2], *below*] are made clearly and conspicuously in writing and in form consumer may keep [12 C.F.R. § 226.17(a)(1)].
2. Ascertain that disclosures are grouped together and conspicuously segregated from all other information provided in connection with credit transactions [15 U.S.C. § 1638(b)(1); 12 C.F.R. § 226.17(a)(1)].

NOTE:

Disclosures may be made either in a conspicuously segregated location in the contract document or in a separate disclosure statement; a single document should be used if the Unruh Act applies to the transaction [*see* § 45.124 Note]. The disclosure section may include, in addition to the mandatory items, acknowledgment of the consumer's receipt of disclosures, the date of the transaction, and the consumer's name, address, and credit account number. The creditor's identity, a variable rate example, insurance disclosures, and disclosure of certain security interest charges may be disclosed elsewhere than in a segregated disclosure section [12 C.F.R. § 226.17(a)(1) nn.37, 38; *but see* 15 U.S.C. § 1638(b)(1)]. Segregation may be accomplished by outlining in a box, bold-print dividing lines, a different color background, or a different type style [12 C.F.R. pt. 226, supp. I, § 226.17(a)(2)]. Required disclosures may be provided in electronic form [12 C.F.R. §§ 226.17(a)(1), 226.31(b); *see* § 45.220[1][c].

3. Ascertain that any itemization of amount financed is separate from other required disclosures [12 C.F.R. § 226.17(a)(1)].

4. Ascertain that "finance charge" and "annual percentage rate," when used with figures, are printed more conspicuously than other disclosures (except creditor's identity) [12 C.F.R. § 226.17(a)(2); *see* *Dixey v. Idaho First Nat. Bank* (9th Cir. 1982) 677 F.2d 749, 752, 753 (example of violation)].
5. Ascertain that if lack of information forces creditor to supply estimate for required disclosure, disclosure is based on best information reasonably available and is identified as estimate [12 C.F.R. § 226.17(c)(2)(i)].
6. Ascertain that disclosures are given before date of consummation of transaction and that if they become inaccurate creditor will disclose changed terms before consummation if [12 C.F.R. § 226.17(f)].

[2] Checklist of Required Disclosures

NOTE:

The following disclosures are potentially applicable to any transaction covered by this chapter and are to be made together in a segregated disclosure statement [*see* 15 U.S.C. § 1638(b)(1); 12 C.F.R. § 226.17(a)(1); *see also* Ch. 25, **Real Estate Loans** (additional requirements for security interest in dwelling)].

1. Identity of creditor [15 U.S.C. § 1638(a)(1); 12 C.F.R. § 226.18(a)].

NOTE:

Only the identity of the creditor making the disclosure must be disclosed [*see* 12 C.F.R. § 226.18(a)]. If the transaction involves more than one creditor, only one set of disclosures need be given; creditors may agree among themselves which creditor must comply with the disclosure requirement [12 C.F.R. § 226.17(d)].

2. Amount financed, using that term, and brief description such as "the amount of credit provided to you or on your behalf" [15 U.S.C. § 1638(a)(2)(A); 12 C.F.R. § 226.18(b)].
3. Separate written itemization of amount financed, including [12 C.F.R. § 226.18(c)(1)]:

NOTE:

Itemization of the amount financed need not be provided if the disclosure statement contains a statement of the consumer's right to itemization, together with space for the consumer to indicate whether or not it is desired [15 U.S.C. § 1638(a)(2)(B); 12 C.F.R. § 226.18(c)(2)]. Itemization, whether provided routinely or on request, must be provided separately from the disclosures that are grouped together in a segregated statement [15 U.S.C. § 1638(b)(1); 12 C.F.R. § 226.17(a)(1)].

- a. Amount of any proceeds distributed directly to consumer.
- b. Amount credited to consumer's account with creditor.
- c. Any amount paid to other persons on consumer's behalf, with identification of those persons.

NOTE:

Public officials and agencies, credit reporting agencies, appraisers, and insurance companies may be described in generic terms [12 C.F.R. § 226.18(c)(1) n. 41].

d. Prepaid finance charge.

NOTE:

A prepaid finance charge is subtracted from the total of (a) through (c), **above**, to obtain the amount financed [15 U.S.C. § 1638(a)(2)(A); 12 C.F.R. § 226.18(b)]. A "prepaid finance charge" is any finance charge paid separately in cash or by check before or at consummation of the transaction, or withheld from the proceeds of the credit at any time [12 C.F.R. § 226.2(a)(23); *see* 12 C.F.R. § 226.4].

4. Finance charge, using that term, and brief description such as "the dollar amount the credit will cost you" [15 U.S.C. § 1638(a)(3); 12 C.F.R. § 226.18(d)].

NOTE:

See § 45.51 for further discussion of finance charges.

5. Annual percentage rate, using that term, and brief explanation such as "the cost of your credit as a yearly rate" [15 U.S.C. § 1638(a)(4); 12 C.F.R. § 226.18(e)].

NOTE:

The annual percentage rate need not be disclosed if the finance charge does not exceed \$5 on an amount financed of \$75 or less, or if the finance charge does not exceed \$7.50 on an amount financed of more than \$75 [15 U.S.C. § 1638(a)(4); 12 C.F.R. § 226.18(e) n.42].

6. If annual percentage rate may increase after consummation of transaction, all of following [12 C.F.R. § 226.18(f)]:

- a. Circumstances under which rate may increase.
- b. Any limitations on increase.
- c. Effect of increase.
- d. Example of payment terms that would result from increase.

7. Payment schedule, including number, amounts, and timing of payments, or one of following, if applicable [15 U.S.C. § 1638(a)(6); 12 C.F.R. § 226.18(g)]:

- a. For demand obligation with no alternate maturity date, due dates of any scheduled interest payments for first year.
- b. If payments vary because finance charge is applied to unpaid balance, dollar amounts of largest and smallest payments in series and reference to variations in other payments in series.

8. Total of payments, using that term and descriptive explanation such as "the amount you will have paid when you have made all scheduled payments" [15 U.S.C. § 1638(a)(5); 12 C.F.R. § 226.18(h)].

9. If obligation has demand feature, statement of that fact including, if applicable, assumed one-year maturity as basis of

disclosures [12 C.F.R. § 226.18(i); see 12 C.F.R. § 226.17(c)(5) (assumed maturity of one year)].

10. For credit sales, total sale price, using that term, and descriptive explanation such as "the total price of your purchase on credit, including your downpayment of \$_____"; explanation must set forth amount of any downpayment including value of property traded in [15 U.S.C. § 1638(a)(7), (8); 12 C.F.R. §§ 226.2(a)(18), 226.18(j)].

11. Statement indicating whether or not penalty may be imposed, or whether or not consumer will be entitled to rebate, if obligation is prepaid in full [15 U.S.C. § 1638(a)(11); 12 C.F.R. § 226.18(k)].

NOTE:

A statement regarding prepayment penalty is required only if a finance charge is computed from time to time by application of a rate to the unpaid principal balance. A statement regarding rebate is required only if the obligation involves a precomputed finance charge [15 U.S.C. § 1638(a)(11), (b)(1); 12 C.F.R. § 226.18(k)].

12. Any dollar or percentage amount imposed for late payments [15 U.S.C. § 1638(a)(10); 12 C.F.R. § 226.18(l)].

13. If credit is secured, statement that security has been taken in either [15 U.S.C. § 1638(a)(9); 12 C.F.R. § 226.18(m)]:

- a. Property purchased as part of transaction.
- b. Other property, identified by type or item.

14. For credit life, health, or disability insurance [15 U.S.C. §§ 1605(b), 1638(b)(1); 12 C.F.R. §§ 226.4(d)(1), 226.18(n)]:

NOTE:

These items may be omitted from the disclosures; if omitted, insurance premiums must be included in the calculation of the finance charge [12 C.F.R. § 226.4(d)(1)].

- a. Statement that coverage is not required.
- b. Premium for initial term of insurance if consumer chooses to insure.
- c. Term of insurance, if term is less than that of transaction.
- d. Statement indicating that consumer desires coverage, with place for consumer's signature or initials.

15. For property damage or liability insurance [15 U.S.C. §§ 1605(c), 1638(b)(1); 12 C.F.R. §§ 226.4(d)(2), 226.18(n)]:

NOTE:

These items may be omitted from the disclosures; but if omitted, insurance premiums must be included in the calculation of the finance charge [12 C.F.R. § 226.4(d)(2)].

- a. Statement that coverage may be obtained from anyone consumer chooses.
- b. If coverage is obtained through creditor:

(1) Premium for initial term of insurance.

(2) Term of insurance, if term is less than that of transaction.

16. For voluntary debt cancellation fees [*see* 12 C.F.R. § 226.4(d)(3)(ii) (types of fees covered)]:

NOTE:

Charges or premiums paid for debt cancellation coverage may be omitted from disclosures but if omitted must be included in the computation of the finance charge [*see* 12 C.F.R. § 226.4(d)(3)(i)].

a. Statement that debt cancellation agreement or coverage is not required.

b. Premium for initial term of insurance if consumer chooses to insure.

c. Term of insurance, if term is less than that of the transaction.

d. Statement that consumer desires coverage, with place for consumer's signature or initials.

17. If security interest is being taken, taxes or fees to public officials for protecting or determining existence of interest, or premium for insurance in lieu of perfecting interest [15 U.S.C. §§ 1605(d), 1638(b)(1); 12 C.F.R. §§ 226.4(e), 226.18(o)].

NOTE:

These items may be omitted from the disclosures; but if omitted, the sums involved must be included in the calculation of the finance charge [*see* 15 U.S.C. § 1605(d); 12 C.F.R. § 226.4(e)]. Premiums are excludable from the finance charge only up to amounts that would otherwise be payable as taxes or fees [15 U.S.C. § 1605(d); 12 C.F.R. § 226.4(e)].

18. Statement that consumer should consult appropriate contract document for information about nonpayment, default, acceleration of maturity, and prepayment rebates and penalties; creditor has option to include referral to contract for further information about security interests [15 U.S.C. § 1638(a)(12); 12 C.F.R. § 226.18(p)].

19. If creditor requires that consumer maintain deposit as condition of credit, statement that annual percentage rate does not reflect effect of required deposit [12 C.F.R. § 226.18(r)].

20. In case of consumer credit transaction that is secured by principal dwelling of consumer, in which extension of credit may exceed fair market value of dwelling [15 U.S.C. § 1638(a)(15)]; *see* 15 U.S.C. § 1638(b)(3) (timing of disclosure)]:

a. Clear and conspicuous statement that interest on portion of credit extension that is greater than fair market value of dwelling is not tax deductible for federal income tax purposes.

b. Clear and conspicuous statement that consumer should consult tax adviser for further information regarding deductibility of interest and charges.

NOTE:

This disclosure must be made to the consumer at the time of application for the extension of credit [15 U.S.C. § 1638(b)(3)]. This requirement takes effect 12 months after publication of final regulations to implement it [*see* Pub. L. No. 109-8, § 1302(c)(2) (Apr. 20, 2005)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosure



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California Legal Forms--Transaction Guide

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 CHAPTER 45 CONSUMER INSTALLMENT LOANS AND CREDIT SALES
 PART III. TRANSACTION GUIDE
 C. Procedural Guide

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§ 45.124 Compliance With Unruh Act: Required Form of Disclosure and Notices

NOTE:

Provided that the contract must always disclose "itemization of the amount financed," all Unruh Act disclosures may be made in language required or permitted in implementation of the Truth in Lending Act (TILA) [*Civ. Code* §§ 1801.5, 1802.18]. While TILA disclosures can be made either in a separate document or in a clearly segregated portion of the contract, Unruh Act disclosures must be terms of the contract document itself [*see Civ. Code* §§ 1803.2, 1803.3, 1803.5]. Therefore, so that identical disclosures need not be made twice, the attorney should segregate the disclosures and group TILA disclosures and set them apart from additional Unruh Act information and from any additional terms and conditions of the contract [*15 U.S.C. § 1638(b)(1); 12 C.F.R. § 226.17(a)(1); see § 45.123*]. To coordinate disclosure requirements of both acts into a single document, see *Section 45.125*. For an example of a single form coordinating all requirements of the two statutes, see *Section 45.225*.

1. Agreement must be dated and in writing, with printed portions in at least 8-point type [*Civ. Code* § 1803.1].

NOTE:

At the time of signing, the seller must deliver to the buyer a legible copy of the contract or of any other document that the buyer has signed at seller's request [*Civ. Code* § 1803.7]. Any acknowledgment by the buyer of delivery of such documents must be printed or written in at least 10-point bold type. If contained in the contract itself, the acknowledgment must appear directly above the space reserved for the buyer's signature [*Civ. Code* § 1803.7].

2. Entire agreement between parties must be in one document [*Civ. Code* § 1803.2(a)], specifying:

- a. Cost.
- b. Terms of payment.
- c. Any promissory notes or other evidences of indebtedness between parties relating to transaction.

3. If contract gives seller security interest in any goods or realty, include words "Security Agreement" in at least 12-point bold type at top of contract [*Civ. Code § 1803.2(b)(1)*].

NOTE:

The term "security interest" refers only to an interest created by contract, not to a mechanics' lien or other interest arising by operation of law [*Civ. Code § 1803.2(b)*].

4. If no security interest is retained by seller, include words "Retail Installment Contract" in at least 12-point bold type at top of contract [*Civ. Code § 1803.2(b)(2)*].

5. If finance charge is determined on precomputed basis:

a. If unearned portion of finance charge to be refunded on full prepayment of contract is to be determined by other than actuarial method, include following notice in at least 10-point bold type: "Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time and obtain a partial refund of the finance charge if it is \$1 or more. Because of the way the amount of this refund will be figured, the time when you prepay could increase the ultimate cost of credit under this agreement. (4) If you desire to pay off in advance the full amount due, the amount of the refund you are entitled to, if any, will be furnished upon request" [*Civ. Code § 1803.2(c)*].

b. If unearned portion of finance charge to be refunded on prepayment is to be determined by actuarial method, include following notice in at least 10-point bold type: "Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time and obtain a partial refund of the finance charge if it is \$1 or more. (4) If you desire to pay off in advance the full amount due, the amount of the refund you are entitled to, if any, will be furnished upon request" [*Civ. Code § 1803.2(d)*].

6. If contract provides for finance charge determined on simple-interest basis [*see Civ. Code § 1802.20*], include following notice in at least 10-point bold type: "Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time. (4) If you desire to pay off in advance the full amount due, the amount which is outstanding will be furnished upon request" [*Civ. Code § 1803.2(e)*].

7. If contract for goods or services provides for security interest in real property, include following notices in at least 14-point bold type, written in same language as is used in contract: "WARNING TO BUYER: IF YOU SIGN THIS CONTRACT, YOU WILL BE PUTTING UP YOUR HOME AS SECURITY. THIS MEANS THAT YOUR HOME COULD BE SOLD WITHOUT YOUR

PERMISSION AND WITHOUT ANY COURT ACTION IF YOU MISS ANY PAYMENT AS REQUIRED BY THIS CONTRACT" [*Civ. Code* § 1803.2(b)(3)].

NOTE:

This notice must be set apart from rest of contract by a border and must appear directly above the space reserved for the signature of the buyer. A security interest created in this type of contract that does not provide this notice is void and unenforceable [*Civ. Code* § 1803.2(b)(3)].

8. If any payment other than deferred downpayment is more than twice amount of otherwise regularly scheduled equal payment ("balloon payment"), contract must contain following provision: "The payment schedule contained in this contract requires that you make a balloon payment of \$_____ (Amount of balloon payment) which is a payment more than double the amount of the regular payments. You have an absolute right to obtain a new payment schedule if you default in the payment of any balloon payment" [*Civ. Code* § 1807.3(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosure



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19-45 California Legal Forms--Transaction Guide § 45.125

§ 45.125 Unruh Act Checklist

[1] Required Contents

NOTE:

A contract meeting the requirements listed below will also comply with the federal Truth in Lending Act (TILA). This is because every contract subject to the Unruh Act must contain the disclosures required by Regulation Z (the implementing regulation for TILA), whether or not Regulation Z applies to the transaction [*Civ. Code § 1803.3(b)*]; **see** *Civ. Code § 1801.5*. Except where specifically noted, required disclosures and other information need not be stated in any particular sequence [*Civ. Code § 1803.3(b)*]. The requirements listed here cover only contracts for initial purchases. For disclosure requirements for add-on sales, see [2], Paragraph 5, **below**.

1. Names of seller and buyer [*Civ. Code § 1803.3(a)*].
2. Seller's place of business [*Civ. Code § 1803.3(a)*].
3. Buyer's residence or place of business [*Civ. Code § 1803.3(a)*].
4. Description of goods or services sold, sufficient to identify them [*Civ. Code § 1803.3(a)*].

NOTE:

Services or multiple items of goods may be described in general terms and may be described in detail sufficient to identify them in a separate writing [*Civ. Code § 1803.3(a)*].

5. All disclosures required by Regulation Z [*Civ. Code § 1803.3(b)*].

NOTE:

All contracts subject to the Unruh Act must contain the disclosures required by federal Regulation Z (implementing regulations for Truth in Lending Act (TILA)) [12 C.F.R. pt. 226], whether or not Regulation Z applies to transaction [*Civ. Code* § 1803.3(b)]. To incorporate Unruh Act and TILA requirements into a single document, the TILA disclosures must be segregated into a special section of the document, separate from additional Unruh Act information [12 C.F.R. § 226.17(a)(1)]. For discussion of TILA requirements and format, see *Section 45.123*.

If payment of all or a portion of the downpayment is to be deferred, the Unruh Act requires that the deferred payment be reflected in the payment schedule disclosed pursuant to Regulation Z [*Civ. Code* § 1803.3(d); *see* § 45.123[2], P 7].

6. Following items, as applicable, labeled "itemization of the amount financed" [*Civ. Code* § 1803.3(c)]:

NOTE:

The Unruh Act requires that itemization of the amount financed be made in one place and in the sequence set forth below [*Civ. Code* § 1803.3(b)]. TILA also requires disclosure and itemization of the amount financed [12 C.F.R. § 226.18(c)(1); *see* § 45.123 [2], P 3] or, in lieu of itemization, disclosure of the right to itemization [12 C.F.R. § 226.18(c)(2)]. However, the Unruh Act specifically eliminates the option of disclosing the right to itemization of the amount financed rather than simply providing itemization [*Civ. Code* § 1801.5], and the Unruh Act itemization must be more detailed [*see Civ. Code* § 1803.3(c)]. There will be no conflict between requirements of two statutes if more detailed Unruh Act itemization is included in the body of contract and not in the segregated portion of agreement containing TILA disclosures. TILA preemption provisions permit the use of more detailed state requirements [*see* 12 C.F.R. § 226.28]. Moreover, state-required itemization will also be sufficient for Regulation Z compliance, as long as it is made clearly and conspicuously [*see* 12 C.F.R. §§ 226.18(c) (federal itemization requirement), 226.17(a)(1) (federal amount financed itemization must appear separate from basic federal disclosure statement); 12 C.F.R. pt. 226, supp. I, § 226.18(c)(2) (federal itemization may include, in addition to required terms, other information explaining composition of amount financed)].

a. Cash price, exclusive of taxes imposed on sale [*Civ. Code* § 1803.3(c)(1)(A)].

b. Taxes imposed on sale [*Civ. Code* § 1803.3(c)(1)(B)].

c. Total of above two items [*Civ. Code* § 1803.3(c)(1)(C)].

d. Itemization of amount to be paid to any public officer for official fees [*Civ. Code* § 1803.3(c)(2)].

e. Aggregate amount of any insurance premiums included in contract, exclusive of any such premiums included in finance charge [*Civ. Code* § 1803.3(c)(3)].

f. Subtotal of Paragraphs c, d, and e, *above* [*Civ. Code* § 1803.3(c)(4)].

g. Amount of buyer's downpayment, not including any administrative finance charge set

forth as "prepaid finance charge" [see P h, *below*], itemized to show following [Civ. Code § 1803.3(c)(5)]:

(1) Net agreed value of any property being traded in.

(2) Amount of any portion of downpayment to be deferred until not later than due date of second regularly scheduled installment under contract, and which is not subject to finance charge.

(3) Amount of any manufacturer's rebate applied or to be applied to downpayment.

(4) Remaining amount paid or to be paid by buyer as downpayment.

h. Amount of any administrative finance charge, labeled "prepaid finance charge" [Civ. Code § 1803.3(c)(6)].

i. Amount financed, labeled as such, consisting of difference between Paragraph f, *above*, and sum of Paragraphs g and h, *above* [Civ. Code § 1803.3(c)(7)].

7. Brief description of any property being traded in as downpayment [Civ. Code § 1803.3(e)].

8. If contract includes finance charge determined on precomputed basis, contract must both [Civ. Code § 1803.3(f)(1)]:

a. Identify method of computing unearned portion of finance charge in event buyer's obligation is prepaid in full.

b. Contain statement of amount or method of computation of any charge that may be deducted from amount of any such unearned finance charge in computing amount that will be credited to obligation or refunded to buyer.

NOTE:

Reference to the Rule of 78's, the sum of the digits, the sum of the periodic time balances, or the actuarial method constitutes sufficient identification of the method of computation [Civ. Code § 1803.3(f)(1)].

9. If contract includes finance charge determined on simple-interest basis, but provides for minimum finance charge in event of prepayment in full, contract must specify that fact and must state amount of minimum finance charge or method of its calculation [Civ. Code § 1803.3(f)(2)].

10. Itemization of any insurance included as part of amount financed [see Civ. Code § 1803.3(c)(3); see also P 6e, *above*], and any insurance included as part of finance charge, including following information [Civ. Code § 1803.3(g)]:

NOTE:

The Truth in Lending Act requires these and other disclosures if the creditor wants to exclude premiums from the finance charge [see 12 C.F.R. § 226.4(d); see § 45.123 [2], PP 14, 15], and federal disclosures, if made, may therefore be used to satisfy both requirements [see, e.g., § 45.225; see also Civ. Code § 1803.3(b) (Unruh Act disclosures may be combined or interspersed with other provisions of contract)].

a. Type of insurance coverage.

b. Amount of premium.

c. If insurance will expire before date of last scheduled installment included in repayment schedule, term of insurance.

[2] Permissible Provisions

1. Delinquency charges.

NOTE:

Delinquency charges may be imposed if an installment is in default for a period of not less than 10 days and in an amount not over \$10 [*Civ. Code* § 1803.6]. Only one charge is collectible per installment, no matter how long overdue, and a charge may not be imposed on payments timely received by the seller under a written extension or deferral agreement [*Civ. Code* § 1803.6].

2. Payment of actual and reasonable collection costs caused by [*Civ. Code* § 1803.6]:

a. Removal of goods from state without written permission of holder.

b. Failure of buyer to notify holder of change of residence.

c. Failure of buyer to communicate with holder for period of 45 days after any default in making payments.

3. Finance charge [*see Civ. Code* § 1805.1].

NOTE:

There is no maximum dollar limitation on finance charges levied on sales of goods and services under a retail installment contract. However, finance charges are limited, with minor exceptions, to the amount disclosed in the contract, and annual fees are prohibited [*see Civ. Code* §§ 1803.3(b), 1805.1].

4. Installments payable on monthly, semi-monthly, or weekly basis [*Civ. Code* § 1805.2].

5. Seller's option to add subsequent purchases made by buyer to contract in one of following ways [*see Civ. Code* §§ 1808.2, 1808.3]:

a. Financed portion of purchase price in new transaction is consolidated with original outstanding balance, less unearned finance charges, with new finance charge to be computed on consolidated balance, based on original percentage rate [*Civ. Code* §§ 1808.1, 1808.2, 1808.5].

b. If certain conditions are met, amount financed plus finance charge for new sale may be added to existing outstanding balance [*see Civ. Code* § 1808.3].

NOTE:

In either case, specified disclosures appropriate to the transaction are required and the seller may retain a security interest in earlier-acquired property only until that property is

paid for [*Civ. Code* §§ 1808.1-1808.3]. The method of allocating payments to various purchases varies according to the alternative chosen [*see Civ. Code* §§ 1808.2, 1808.3].

Delivery of disclosures can take place any time before the first payment on a new transaction is due [*Civ. Code* §§ 1808.2, 1808.3]. However, because of different methods of allocating payments, only add-on transactions structured to comply with *Civil Code Section 1808.3* also meet the conditions of federal regulations permitting Truth in Lending disclosures to be delayed until the due date of the first payment reflecting the add-on sale [*see Civ. Code* §§ 1808.2, 1808.3; 12 C.F.R. § 226.17(h)]. The choice facing the seller is whether to credit all payments to the first-purchased item until it is fully paid for [*see Civ. Code* § 1808.3], or to maintain a security interest in more items of property for a longer period [*see Civ. Code* § 1808.2] on condition of making at least the federal disclosures before the consumer becomes contractually obligated on the new transaction [*see* 12 C.F.R. §§ 226.2(a)(13), 226.17(b), (h)].

[3] Prohibited Provisions

1. Buyer's waiver of any provision of Unruh Act [*Civ. Code* § 1801.1].
2. Buyer's agreement not to assert against seller or seller's assignee claim or defense arising out of sale, other than as provided in *Civ. Code* § 1804.2 [*Civ. Code* § 1804.1(a)].
3. Holder's right to accelerate maturity of part or all of amount owing, in absence of buyer's default in performance of any obligation [*Civ. Code* § 1804.1(b)].
4. Power of attorney to confess judgment in California, or assignment of wages [*Civ. Code* § 1804.1(c)].

NOTE:

This restriction does not prohibit the giving of an assignment of wages contained in a separate instrument executed pursuant to *Lab. Code* § 300 [*Civ. Code* § 1804.1(c)].

5. Authority for anyone to enter on buyer's premises unlawfully or to commit any breach of peace in repossession of goods [*Civ. Code* § 1804.1(d)].
6. Buyer's waiver of any right of action against seller, holder of contract, or other person acting on seller's or holder's behalf, for any illegal act committed in collection of payments under contract or in repossession of goods [*Civ. Code* § 1804.1(e)].
7. Power of attorney appointing seller, holder of contract, or other person acting on seller's or holder's behalf as buyer's agent in collecting payments under contract or in repossessing goods [*Civ. Code* § 1804.1(f)].
8. Waiver of seller's liability for any legal remedies that buyer may have against seller under contract or any separate instrument executed in connection with contract [*Civ. Code* § 1804.1(g)].
9. Buyer's agreement to payment of any charge for exercising right to rescind or avoid contract [*Civ. Code* § 1804.1(h)].

10. Provision giving seller or holder of contract right to commence an action on contract in county other than [Civ. Code § 1804.1(i)]:

- a. County in which contract was signed by buyer.
- b. County in which buyer resides when action is commenced.
- c. County where buyer resided when contract was entered into.
- d. County in which goods have been affixed to real property.

11. Provision giving seller security interest, other than mechanics lien, in buyer's real property that is buyer's primary residence, if [Civ. Code § 1804.1(j)]:

- a. Buyer is 65 years or older; and
- b. Contract is for home improvement [see Bus. & Prof. Code § 7151.2 ("home improvement" defined)].

12. If contract is for sale of goods:

- a. Provision for security interest in any goods fully paid for or that have not been sold by seller [Civ. Code § 1804.3(a)].
- b. Provision for security interest in real property if primary goods are not to be attached to real property [Civ. Code § 1804.3(b)].

[4] Prohibited Practices

1. Obtaining buyer's signature to contract when it contains blank spaces to be filled in [Civ. Code § 1803.4].

2. Charging more for insurance than rates fixed by insurer [Civ. Code § 1803.5(b)].

3. Inducing person to enter into retail installment sales contract by offering rebate, discount, commission, or other consideration, on condition that buyer facilitates future sales by seller of same or related goods [Civ. Code § 1803.10].

4. Accepting charge or fee not properly included in finance charge [Civ. Code § 1805.4].

NOTE:

A finance charge may include charges for investigating and making the contract and for extending credit. The seller or contract holder may charge a separate fee for each dishonored payment instrument submitted by the buyer. No fee, expense, or other charge may be taken by the seller or contract holder except as provided in the Unruh Act [Civ. Code § 1805.4].

5. If seller does not intend to sell retail installment contract to financing agency or other assignee,

advertising to solicit buyers to enter into retail installment contracts without clearly stating annual percentage rate or range of annual percentage rates that will be used to determine finance charge [*Civ. Code* § 1803.11].

6. Contracting for calculation of finance charge on basis other than simple-interest basis, if term of contract exceeds 62 months [*Civ. Code* § 1805.7; *see Civ. Code* § 1802.20 ("simple-interest basis" defined)].

7. Imposing finance charge at rate greater than annual percentage rate disclosed as part of original contract, on amounts advanced by holder subsequent to execution of contract for insurance, repairs to or preservation of goods, or preservation of holder's security interest [*Civ. Code* § 1805.8].

8. Providing for finance charge that is determined in part by precomputed basis and in part by simple-interest basis, except for any finance charge on amounts subsequently advanced by holder as in Paragraph 7, *above* [*Civ. Code* § 1805.9].

NOTE:

This provision is fairly straightforward under the Unruh Act definition of "finance charge" [*Civ. Code* § 1802.10]. However, because the "finance charge" that must be disclosed to the consumer is that defined by the federal Truth in Lending Act, it can be argued that the federal definition, not the California definition, should apply for the purposes of *Civil Code Section 1805.9*. Certain insurance premiums are part of the finance charge under federal law only [*see 15 U.S.C. § 1605(b)*; *12 C.F.R. § 226.4(b), (d)*; § 45.123 [2] PP 14, 15; *but see Civ. Code* § 1802.10]. Some insurance premiums are calculated as a proportion of the original purchase price. If the premium is a finance charge, it is one calculated on a precomputed basis [*see Civ. Code* § 1802.21]. Therefore, combining those premiums with interest computed on a simple-interest basis [*see Civ. Code* § 1802.20] would violate the Unruh Act provision summarized in Paragraph 8, *above*. This problem arises only if the federal definition of "finance charge" is applied to the state prohibition on combining methods of computing that charge.

9. Requiring penalty for prepayment, or if finance charge was determined on precomputed basis, failing to credit buyer who prepays or otherwise satisfies obligation (for example, through surrender or repossession of collateral) with unearned finance charges [*Civ. Code* § 1806.3].

NOTE:

The Unruh Act provides a formula for computing the minimum acceptable unearned finance charge rebate [*Civ. Code* § 1806.3(a)(1)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview



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19-45 California Legal Forms--Transaction Guide § 45.126

§ 45.126 Procedure for Handling Closed-End Credit Transaction Disclosures

1. Ensure that timing requirements are met.

NOTE:

Generally, disclosures must be made before the transaction is consummated, that is, before the consumer becomes contractually obligated [12 C.F.R. §§ 226.17(b), 226.2(a)(13); *see* 15 U.S.C. § 1638(b)(1) (disclosure required before credit is extended)]. However, different rules apply to certain mail or telephone orders and to sales made pursuant to an agreement providing that subsequent sales may be added to an existing outstanding balance [*see* 15 U.S.C. § 1638(c), (d); 12 C.F.R. § 226.17(g), (h)].

2. Ensure that refinancings are treated as new transactions [12 C.F.R. § 226.20].
3. Ensure that transactions involving multiple creditors or multiple consumers are handled correctly.

NOTE:

If the transaction involves more than one creditor, only one set of disclosures need be given; the creditors must agree among themselves which creditor is responsible for disclosure compliance [12 C.F.R. § 226.17(d)]. If the transaction involves more than one consumer, disclosures may be made to any consumer primarily liable on the obligation [12 C.F.R. § 226.17(d); *see* 12 C.F.R. § 226.23(a), (f) (additional requirements for security interest in dwelling)].

4. Ensure creditor knows that following factors may be disregarded in making calculations [12 C.F.R. § 226.17(c)(3)]:
 - a. That payments must be collectable in whole cents.

b. That dates of scheduled payments and advances may be changed if scheduled day is not business day.

c. That months have different numbers of days.

d. That a particular year is a leap year.

5. Ensure creditor knows that in making calculations, creditor may disregard any irregularity in first period falling within prescribed limits, and any payment irregularity resulting from irregular first period [12 C.F.R. § 226.17(c)(4)].

6. Ensure creditor knows of and complies with following method of calculating amount financed [15 U.S.C. § 1638(a)(2)(A); 12 C.F.R. § 226.18(b)(1)-(3)]:

a. Determine principal loan amount or cash price (less any downpayment);

b. Add any amounts financed by creditor and not part of finance charge; and

c. Subtract any prepaid finance charge.

7. Ensure creditor complies with requirement of assumed maturity of one year for calculating disclosures if obligation is payable on demand [12 C.F.R. § 226.17(c)(5)].

8. Ensure creditor knows of and complies with following method of calculating finance charge:

NOTE:

The finance charge is the cost of consumer credit. It includes any charge payable by the consumer and imposed by the creditor as an incident to or condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction [12 C.F.R. § 226.4(a)].

a. Include following and comparable types of charges [12 C.F.R. § 226.4(b)]:

(1) Interest, time price differential, and any amount payable under an add-on or discount system of additional charges.

(2) Service, transaction, activity, and carrying charges.

(3) Points, loan fees, assumption fees, finder's fees, and similar charges.

(4) Appraisal, investigation, and credit report fees.

(5) Premiums or other charges for any guarantee or insurance protecting creditor against consumer's default.

(6) Charges imposed on creditor by another person for purchasing or accepting consumer's obligation, if consumer must pay charges.

(7) Premiums or other charges for credit life, accident, health, or loss-of-income

insurance, written in connection with credit transaction unless properly disclosed [see § 45.123[2], P 14].

(8) Premiums or other charges for insurance against loss or damage to property, or against liability arising out of property ownership, written in connection with credit transaction unless properly discussed [see § 45.123[2], P 15].

(9) Discounts to induce payment by means other than use of credit.

NOTE:

The fact that a price discount is available for a cash transaction is an indicator that more is being charged for a credit transaction--thus, the discount, functionally, is a finance charge. A rebate available to a cash buyer after completion of the sale transaction is not a discount (since the price to be paid is not reduced), nor is it a "charge" of any kind--a charge is a request for payment; a rebate is a reduction of the amount paid--and a rebate need not be accounted for, either in computing the finance charge or in making related disclosures [*Virachack v. University Ford* (9th Cir. 2005) 410 F.3d 579, 581-582] .

b. Exclude following types of charges [12 C.F.R. § 226.4(c)]:

(1) Application fees charged to all applicants whether or not credit is extended.

(2) Charges for late payments, for exceeding credit limits, or for delinquency or default.

(3) Charges imposed by institution for paying items that overdraw account, unless payment of such items and imposition of charge previously agreed on.

(4) Credit plan participation fees.

(5) Seller's points.

(6) Interest forfeited as result of interest reduction required by law on time deposit used as security for extension of credit.

(7) Specified real estate fees.

(8) Discounts offered to induce payment for purchase by check, cash, or other specified means.

9. Ensure creditor knows of and complies with prohibition on deducting interest, dividends or other income received by consumer on deposits or investments from disclosed finance charge [12 C.F.R. § 226.4(f)].

10. Ensure proper calculation of annual percentage rate [see § 45.53].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral Overview



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19-45 California Legal Forms--Transaction Guide § 45.127

§ 45.127 Consumer Loan Secured by Real Property

NOTE:

The special procedures discussed in this section apply when *Fin. Code § 4970 et seq.* are applicable to the transaction. *Fin. Code § 4970 et seq.* impose requirements on regulated lenders (banks, savings associations, credit unions, finance lenders, residential mortgage lenders) and real estate brokers, with respect to the making of consumer loans--that is, consumer credit transactions secured by real property located in California used, or intended to be used or occupied, as the principal dwelling of the consumer, and improved by a one-to-four residential unit [*Fin. Code § 4970(d)* (definition); *see § 45.13[2][b]* for detailed definition]. These requirements affect "covered loans" (consumer loans in which original balance does not exceed \$250,000 and that meet other specified requirements) [*Fin. Code § 4970(b)* (definition); *see § 45.13[2][c]*] for which applications are made after June 2002 [Stats. 2001, ch. 732, § 3; *see American Financial Services Association v. City of Oakland* (2003) 111 Cal. App. 4th 1435, 1463, 4 Cal. Rptr. 3d 745 (reviewing history of legislation and holding that it did not preempt city's lending ordinance)]]].

For further discussion of the threshold requirements for application of these provisions, see § 45.13. For discussion of the penalties for noncompliance with these provisions, see § 45.13[6].

[1] Terms and Conditions

1. Observe following rules with respect to prepayment fees:

- a. Do not provide for prepayment fee or penalty after first 36 months after date of consummation of loan [*Fin. Code § 4973(a)(1)*].
- b. Provide for prepayment fee or penalty up to first 36 months after date of consummation of the loan, if desired, only if following conditions are satisfied [*Fin. Code*

§ 4973(a)(2):

(1) Person who originates loan has also offered consumer a choice of another product without a prepayment fee or penalty.

(2) Person who originates loan has disclosed in writing to consumer at least three business days prior to loan consummation:

(a) Terms of prepayment fee or penalty to consumer for accepting a covered loan with the prepayment penalty; and

(b) Rates, points, and fees that would be available to consumer for accepting covered loan without a prepayment penalty.

(3) Person who originates loan has limited amount of prepayment fee or penalty to an amount not to exceed payment of six months advance interest, at contract rate of interest then in effect, on amount prepaid in any 12-month period in excess of 20 percent of original principal amount.

(4) Prepayment fee or penalty will not be imposed if covered loan is accelerated as a result of default.

(5) Person who originates loan will not finance a prepayment penalty through a new loan that is originated by same person.

2. Comply with following requirements relating to payment schedule:

a. If term of loan is five years or less, do not provide at origination for a payment schedule with regular periodic payments that, when aggregated, do not fully amortize principal balance as of maturity date of loan [*Fin. Code* § 4973(b)(1)].

b. If payment schedule is adjusted to account for seasonal or irregular income of consumer, total installments in any year must not exceed amount of one year's worth of payments on loan [*Fin. Code* § 4973(b)(2)].

NOTE:

The limitation noted in 2(b), **above**, does not apply to a "bridge loan"; that is, a loan with a maturity of less than 18 months that only requires payments of interest until the time when the entire unpaid balance is due and payable [*Fin. Code* § 4973(b)(2)].

3. Do not include provision for negative amortization such that payment schedule for regular monthly payments causes principal balance to increase, unless covered loan is a first mortgage and licensed person discloses to consumer that loan contains a negative amortization provision that may add principal to loan balance [*Fin. Code* § 4973(c)].

4. Do not include terms under which periodic payments required under loan are consolidated and paid in advance from loan proceeds [*Fin. Code* § 4973(d)].

5. Do not include provision that increases interest rate as a result of a default [*Fin. Code* § 4973(e)].

NOTE:

The limitation noted in 2(e), **above**, does not apply to interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan documents, provided the change in the interest rate is not triggered by the event of default or the acceleration for the indebtedness [*Fin. Code* § 4973(e)].

6. Do not include "call" provision that permits lender, in its sole discretion, to accelerate the indebtedness, except in accordance with loan documents in the following situations [*Fin. Code § 4973(i)*]:

- a. As a result of the consumer's default;
- b. Pursuant to a due-on-sale provision; or
- c. Due to fraud or material misrepresentation by consumer in connection with loan or value of security for loan.

[2] Procedural Requirements and Limitations

1. Instruct person who originates (arranges, negotiates, or makes) [*see Fin. Code § 4970(h)* (definition)] covered loan to inform any employee who originates covered loans on person's behalf regarding administrative, civil, and criminal penalties for violation of *Fin. Code § 4970 et seq.* [*Fin. Code § 4978.6*].

NOTE:

The penalties for violation of the statutory provisions governing consumer loans secured by real property are significant [*see Fin. Code §§ 4974-4978*]. For discussion of the penalties for noncompliance with these provisions, see § 45.13[6].

2. Instruct person who will originate covered loans not to make or arrange a loan unless, at time loan is consummated, person reasonably believes that consumer (or consumers, when considered collectively in the case of multiple consumers), will be able to make the scheduled payments to repay obligation based on consideration of their current and expected income, current obligations, employment status, and other financial resources other than consumer's equity in dwelling that secures repayment of loan [*Fin. Code § 4973(f)(1)*].

a. If loan is structured to increase to a specific designated rate, stated as a number or formula, at a specific predetermined date not exceeding 37 months from date of application, above evaluation must be based on fully indexed rate of loan calculated at time of application.

b. Consumer will be presumed to be able to make scheduled payments to repay obligation if, at time loan is consummated, consumer's total monthly debts, including amounts owed under loan, do not exceed 55 percent of consumer's monthly gross income, as verified by credit application, consumer's financial statement, a credit report, financial information provided to person originating loan by or on behalf of consumer, or any other reasonable means.

NOTE:

No presumption of *inability* to make scheduled payments to repay the obligation will arise solely from the fact that at the time the loan is consummated, the consumer's total monthly debts, including amounts owed under the loan, exceed 55 percent of the consumer's monthly gross income [*Fin. Code § 4973(f)(2)*].

c. In the case of a stated income loan, reasonable belief requirement may be based on income stated by

the consumer, and other information in possession of person originating loan after solicitation of all information that person customarily solicits in connection with loans of this type [*Fin. Code* § 4973(f)(3)].

NOTE:

A loan may not be knowingly or willfully originated as a stated income loan with the intent of effect of evading the above requirement [*Fin. Code* § 4973(f)(3)].

3. Instruct person who originates loan not to make covered loan that finances points and fees [*see Fin. Code* § 4970(c) (definition); § 45.13[2][h]] in excess of \$1,000 or 6 percent of original principal balance, exclusive of points and fees, whichever is greater [*Fin. Code* § 4979.6].
4. Instruct person who originates loan not to pay any contractor under a home improvement contract [*see* Ch. 89, *Home Improvement Contracts*] from proceeds of covered loan, except as follows [*Fin. Code* § 4973(g)]:
 - a. Instrument is made payable to consumer or jointly to consumer and contractor.
 - b. At consumer's election, instrument is made payable to a third-party escrow agent for benefit of contractor in accordance with terms and conditions established in a written escrow agreement signed by consumer, person who originates loan, and contractor prior to disbursement of funds.
 - c. If payment is being made to an escrow account or jointly to consumer and contractor, person who originates loan has been presented with signed and dated completion certificate by consumer showing that home improvement contract was completed to consumer's satisfaction (except in the case of progress payments for home improvement work that consumer certifies is completed).
5. Instruct person who originates loan not to recommend or encourage consumer to default on an existing consumer loan or other debt in connection with solicitation or making of covered loan that refinances all or any portion of existing consumer loan or debt [*Fin. Code* § 4973(h)].
6. Instruct licensed person (broker, bank, savings association, credit union, finance lender, or residential mortgage broker) [*see Fin. Code* § 4970(g) (definition); § 45.13[d]] not to refinance or arrange for refinancing of a consumer loan such that new loan is a covered loan that is made for purpose of refinancing, debt consolidation, or cash out, that does not result in identifiable benefit to consumer, considering consumer's stated purpose for seeking loan, fees, interest rates, finance charges, and points [*Fin. Code* § 4973(i)].
7. Instruct person who originates loan not to steer, counsel, or direct any prospective consumer to accept a loan product with a risk grade less favorable than risk grade that consumer would qualify for based on person's then current underwriting guidelines, prudently applied, considering information available to that person, including information provided by consumer [*Fin. Code* § 4973(m)(1)].

NOTE:

A person will not be deemed to have violated the above requirement if the risk grade determination applied to a consumer is reasonably based on the person's underwriting guidelines if it is an appropriate risk grade category for which the consumer qualifies with the person [*Fin. Code* § 4973(m)(1)].

8. If a broker will originate loan, instruct broker not to steer, counsel, or direct any prospective consumer to accept a loan product at a higher cost than that for which consumer could qualify based on loan products offered by persons with whom broker regularly does business [*Fin. Code* § 4973(m)(1)].

9. Instruct person who originates a covered loan not to attempt to avoid application of *Fin. Code § 4970 et seq.* by doing any of the following [*Fin. Code § 4973(n)*]:

- a. Structuring loan transaction as an open-end credit plan for purpose of evading *Fin. Code § 4970 et seq.* when loan would have been a covered loan if loan had been structured as a closed end loan.
- b. Dividing any loan transaction into separate parts for purpose of evading *Fin. Code § 4970 et seq.*

10. Instruct person originating loan to do the following:

- a. Provide statutory disclosure notice [*see § 45.229 (form)*] to consumer no later than three business days *prior to* signing of loan documents [*Fin. Code § 4973(j)(1)*].
- b. Obtain signed acknowledgment of receipt of a copy of disclosure notice from consumer [*see Fin. Code § 4973(j)(2)*].

NOTE:

An acknowledgment of receipt of a copy of the notice, signed by the consumer, creates a rebuttable presumption that a licensed person has met its obligation to provide this disclosure [*Fin. Code § 4973(j)(2)*].

11. Instruct person who originates loan not to finance, on and after July 1, 2002, directly or indirectly, into a consumer loan transaction, or finance to same borrower within 30 days of a consumer loan transaction, any of following [*Fin. Code § 4979.7*]:

NOTE:

Insurance premiums, debt cancellation, or suspension fees calculated and paid on a monthly basis will not be considered financed by the person originating the loan. For purposes of these requirements, "credit insurance" does not include a contract issued by a government agency or private mortgage insurance company to insure the lender against loss caused by a mortgagor's default [*Fin. Code § 4979.7*].

- a. Credit life insurance premiums.
- b. Credit disability insurance premiums.
- c. Credit property insurance premiums.
- d. Credit unemployment insurance premiums.
- e. Debt cancellation or suspension agreement or contract fees.

12. Instruct person who originates covered loan to provide to consumer or licencing agency [*see Fin. Code § 4970(f)* (definition); § 45.13[e]], upon request and at no cost, documentation regarding loan that clearly demonstrates whether loan is a covered loan, including but not limited to, full disclosure of the following [*Fin. Code § 4979*; *see Fin. Code § 4971* (definitions)]:

- a. Original principal balance.
- b. Annual percentage rate.

c. Total points and fees.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewReal Property LawFinancingGeneral OverviewReal Property
LawFinancingState Regulation



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19-45 California Legal Forms--Transaction Guide §§ 45.128-45.139

[Reserved]

§§ 45.128[Reserved]



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19-45 California Legal Forms--Transaction Guide § 45.140

§ 45.140 Truth in Lending Act Compliance

1. Ensure that seller does one of following [*Civ. Code § 1799.202(a)*; see *Civ. Code § 1799.200 et seq.* (Consumer Contract Awareness Act of 1990)]:

- a. Delivers copy of contract to consumer at time contract is executed, if contract was executed at seller's place of business; or
- b. Mails or delivers copy of contract to consumer within 10 days after seller receives contract, if contract was executed other than at seller's place of business and seller has not provided copy of contract for consumer to keep.

NOTE:

If the seller is a financial institution, it is not required to deliver a writing incorporated by reference in the consumer contract if the writing was already delivered to the consumer or the writing was not prepared by the seller [*Civ. Code § 1799.202(b)*]. If the consumer contract is contained on a customer identification card (or other writing used for identification for financial services) and the contract contains information that could be used by a third party to cause loss to the consumer or financial institution, the copy of contract given to the consumer may omit the consumer's signature or identifying information relating to financial services [*Civ. Code § 1799.202(c)*].

2. Advise client that if consumer makes written request, copy of consumer's completed consumer credit application must be mailed within reasonable time to address indicated in request [*Civ. Code § 1799.202(d)*].
3. Inform client of creditor's duty to give new disclosure statement if obligation is refinanced [*12 C.F.R. § 226.20(a)*].

NOTE:

Refinancing occurs when an existing obligation is satisfied and replaced by a new obligation, undertaken by the same consumer. Refinancing does not include a renewal of a single payment obligation with no change in the original terms, a reduction in the annual percentage rate, an agreement involving court proceeding, a change in the payment schedule as a result of the consumer's default or delinquency (unless the rate is increased or a new amount financed exceeds the unpaid balance plus the earned finance charge and premiums for continuation of certain kinds of insurance), or the renewal of optional insurance [12 C.F.R. § 226.20(a)].

4. Inform client that if credit balance in excess of \$1 is created in connection with credit transaction, creditor must [12 C.F.R. § 226.21]:

- a. Credit amount of credit balance to consumer's account.
- b. Refund any part of remaining credit balance, on consumer's written request.
- c. Make good faith effort to refund any credit balance remaining in account for more than six months.

5. Inform client that creditor must retain evidence of Truth in Lending Act compliance (other than advertising requirements) for at least two years after disclosures are required to be made [12 C.F.R. § 226.25(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral Overview



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19-45 California Legal Forms--Transaction Guide § 45.141

§ 45.141 Execution of Retail Installment Contract

1. Have buyer read contract [*see Civ. Code § 1803.2(c)*].

NOTE:

If a language other than English is the primary language used for negotiations with a consumer, the consumer (and any other party to the contract) may have to be provided with a translation of the contract in that other language. For contracts entered into prior to July 1, 2004, this requirement is applicable only to contracts negotiated primarily in Spanish. On and after July 1, 2004, it is applicable to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [*see Civ. Code § 1632*]. For detailed discussion of these requirements, see § 45.64.

2. Have buyer verify that contract contains no blank space to be filled in [*see Civ. Code § 1803.4*].
3. Have buyer sign contract.
4. Have seller furnish details of agreement to buyer as follows:
 - a. For most contracts, have seller deliver, at time of buyer's signature, legible copy of retail installment contract or other document seller has required or requested buyer to sign and that buyer has signed [*Civ. Code §§ 1803.7, 1799.202(a)*]; *but see Civ. Code §§ 1799.202(b), 1799.203(b)* (exceptions)]:
 - (1) If consumer signs at seller's place of business, have seller deliver copy of contract to consumer at time of signing.
 - (2) If consumer does not sign at seller's place of business and seller has not provided copy of contract for consumer to keep, have seller mail or deliver copy of contract to

consumer within 10 days after seller receives contract.

b. If sale is by mail or telephone without personal solicitation by seller and seller's terms are set forth in catalog, have seller furnish, within 15 days after shipping goods, written statement of items inserted in any blank spaces left in contract by buyer [*Civ. Code § 1803.8*].

c. If sale is add-on sale, have seller deliver memorandum of transaction before due date of first installment [*Civ. Code §§ 1808.2, 1808.3*].

d. If consumer makes written request, mail copy of consumer's completed consumer credit application within reasonable time to address indicated in request [*Civ. Code § 1799.202(d)*].

5. Have seller deliver notification of insurance arranged by seller, if applicable [*Civ. Code § 1803.5(c)*].

NOTE:

If, under the contract, a charge is made for insurance that the seller or holder is to procure, the seller or holder has 45 days to mail insurance notices, certificates, or policies to the buyer [*Civ. Code § 1803.5(c)*].

6. Have seller ensure that any extension, deferral, or refinancing agreement complies with applicable restrictions [*see Civ. Code §§ 1807.1-1807.3*].

7. On buyer's demand, have holder of contract deliver instruments necessary to acknowledge payment in full and to release all security interests, after buyer pays entire obligation [*Civ. Code § 1806.4*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsInstallment Contracts



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19-45 California Legal Forms--Transaction Guide § 45.142

§ 45.142 Collection of Installments When Bank Finances Paper

1. Dealer receives money for consumer contract from bank, as determined by dealer financing agreement.
2. If direct collection, bank sends consumer payment booklet of coupons and notice of assignment of consumer's contract and consumer pays bank directly.
3. If indirect collection, dealer collects payments from consumer and remits payments to bank, per terms of agreement with bank; bank verifies status and existence of consumer's obligations by direct inquiries to consumer.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewContracts LawTypes of ContractsInstallment Contracts



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19-45 California Legal Forms--Transaction Guide §§ 45.143-45.199

[Reserved]

§§ 45.143[Reserved]



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 PART IV. FORMS
 A. Application for Credit

19-45 California Legal Forms--Transaction Guide § 45.200

§ 45.200 Consumer Installment Loan Application

[1] Comment

[a] Use of Form

This form is an application for a consumer installment loan adapted from the model community property credit application promulgated by the Federal Reserve Board [*see* 12 C.F.R. pt. 202, app. B]. Whether information is gathered by oral interview or written application, a creditor subject to the Equal Credit Opportunity Act (ECOA) must comply with the applicable regulations [*see* § 45.120 [1] (application of ECOA)]. Use of this form ensures compliance with the ECOA [15 U.S.C. §§ 1691-1691f] and its implementing regulation, Regulation B [12 C.F.R. pt. 202], for creditors in a community property state, such as California. If the credit applicant does not reside in a community property state, some of the information on this form cannot be requested [*see* 12 C.F.R. pt. 202, app. B].

Use of this form is not mandatory. A creditor need not even use written applications, unless the application is for credit to buy or refinance what is or will be the applicant's principal residence and the loan is to be secured by the residence [12 C.F.R. § 202.5(e); *see* 12 C.F.R. § 202.13(a)]. The written application may request additional information not prohibited by the ECOA, delete questions, or rearrange the format of the application without changing the substance of the inquiries; however, if any of these changes is made, the appropriate notices regarding the optional nature of courtesy titles, the option to disclose alimony, child support, or separate maintenance, and the limitation concerning marital status inquiries must be included in the appropriate places if the items to which they relate appear on the creditor's form [12 C.F.R. pt. 202, app. B].

[b] Credit Application Requirements Under California Law

No person may be denied credit in his or her own name, regardless of marital status, if that person is otherwise creditworthy [Civ. Code § 1812.30(a)]. To inform married persons of their right to a separate account, every credit application for the acquisition of money, goods, services, or labor must specify that the applicant may apply for a separate account [Civ. Code § 1812.30(j)]. This form complies with this requirement; this addition does not violate or conflict with the ECOA [*see* 12 C.F.R. pt. 202, app. B].

[2] FORM**Consumer Installment Loan Application****CREDIT APPLICATION****IMPORTANT: Read these Directions before completing this Application.**

Check Appropriate Box

☐ If you are applying for individual credit in your own name, are not married, and are not relying on alimony, child support, or separate maintenance payments or on the income or assets of another person as the basis for repayment of the credit requested, complete only Sections A and D. If the requested credit is to be secured, also complete Section E.

☐ In all other situations, complete all Sections except E, providing information in B about your spouse, a joint applicant or user, or the person on whose alimony, support, or maintenance payments or income or assets you are relying. If the requested credit is to be secured, also complete Section E.

YOU MAY APPLY FOR A SEPARATE ACCOUNT EVEN IF YOU ARE MARRIED._____
Amount Requested: \$_____

Payment Date Desired: _____

Proceeds of Credit to Be Used for: _____
_____**SECTION A--INFORMATION REGARDING APPLICANT**

Full Name (Last, First, Middle): _____

Birthdate: _____

Present Street Address: _____

City: _____ State: _____ Zip: _____

Years there: _____

Telephone: _____

Social Security No.: _____

Driver's License No.: _____

Previous Address: _____ Years there: _____

Present Employer: _____ Years there: _____

Employer's Telephone: _____

Position or Title: _____ Name of Supervisor: _____

Employer's Address: _____

Previous Employer: _____ Years there: _____

Previous Employer's Address: _____

Present net salary or commission: \$ _____ per _____

No. Dependents: _____ Ages: _____

Alimony, child support, or separate maintenance income need not be revealed if you do not wish to have it considered as a basis for repaying this obligation.

Alimony, child support, separate maintenance received under:

Court Order ☐ Written Agreement ☐

Oral Understanding ☐

Other income: \$ _____ per _____

Sources of other income: _____

Is any income listed in this section likely to be reduced in the next two years or before the credit requested is paid off?

☐ Yes (Explain in detail on separate sheet.) ☐ No

Have you ever received credit from us? _____

When? _____

Office: _____

Checking Account No.: _____

Institution and Branch: _____

Savings Account No.: _____

Institution and Branch: _____

Name of nearest relative not living with you: _____

Relationship: _____ Telephone: _____

Address: _____

SECTION B--INFORMATION REGARDING SPOUSE, JOINT APPLICANT, USER, OR OTHER PARTY (Use separate sheets if necessary.)

Full Name (Last, First, Middle): _____

Birthdate: _____

Relationship to Applicant (if any): _____

Present Street Address: _____

City: _____ State: _____ Zip: _____

Years there: _____ Telephone: _____

Social Security No.: _____

Driver's License No.: _____

Present Employer: _____ Years there: _____

Telephone: _____

Position or Title: _____

Name of Supervisor: _____

Employer's Address: _____

Previous Employer: _____ Years there: _____

Previous Employer's Address: _____

Present net salary or commission: \$ _____ per _____ No. Dependents: _____
Ages: _____

Alimony, child support, or separate maintenance income need not be revealed if you do not wish to have it considered as a basis for repaying this obligation.

Alimony, child support, separate maintenance received under:

Court Order ☐ Written Agreement ☐

Oral Understanding ☐

Other income: \$ _____ per _____

Source(s) of other income: _____

Is any income listed in this section likely to be reduced in the next two years or before the credit requested is paid off?

☐ Yes (Explain in detail on separate sheet.) ☐ No

Checking Account No: _____

Institution and Branch: _____

Savings Account No.: _____

Institution and Branch: _____

Name of nearest relative not living with Spouse, Joint Applicant, User, or Other Party: _____

Relationship: _____ Telephone: _____

Address: _____

SECTION C--MARITAL STATUS

Applicant: ☐ Married ☐ Separated ☐ Unmarried

Other Party: ☐ Married ☐ Separated ☐ Unmarried

(Unmarried includes single, divorced, and widowed.)

SECTION D--ASSET AND DEBT INFORMATION

(If Section B has been completed, this Section should be completed by giving information about both the Applicant and Spouse, Joint Applicant, User, or Other Person. Please mark Applicant-related information with an "A." If Section B was not completed, only give information about the Applicant in this Section.)

ASSETS OWNED (Use separate sheets if necessary.)

Description of Assets	Value	Subject to Debt? Yes/No	Name(s) of Owner(s)
Cash	\$		
Automobiles (Make, Model, Year)			
Cash Value of Life Insurance (Issuer, Face Value)			
Real Estate (Location, Date Acquired)			
Marketable Securities (Issuer, Type, No. of Shares)			
Other (List)			
_____	_____		
Total Assets	\$		
_____	_____		

OUTSTANDING DEBTS

(Include charge accounts, installment contracts, credit cards, rent, mortgages, etc. Use separate sheets if necessary.)

Name of Creditor	Type of Debt or Acct.	Name in Which Acct. Carried	Original Debt	Present Balance	Monthly Payments	Past Due? Yes/ No

No.

1. (Landlord or Mortgage Holder) ☐ Rent ☐ Mortgage \$ (Omit rent) \$ (Omit rent)

2.

3.

Total Debts \$ _____ \$ _____ \$ _____

Credit References Date Paid

1. \$ _____

2. \$ _____

Are you a co-maker, endorser, or guarantor on any loan or contract? ☐ Yes ☐ No

If "yes," for whom? _____ To whom? _____

Are there any unsatisfied judgments against you?

☐ Yes ☐ No

If "yes," to whom: _____ Amount: \$ _____

Have you been declared bankrupt in the last 14 years?

☐ Yes ☐ No

If "yes," where? _____ Year _____

Other obligations--(E.g., liability to pay alimony, child support, separate maintenance. Use separate sheets if necessary.)

SECTION E--SECURED CREDIT

(Complete only if credit is to be secured.)

Briefly describe the property to be given as security:

and list names and addresses of all co-owners of the property:

Name

Address

Everything that I have stated in this application is correct to the best of my knowledge. I understand that you will retain this application whether or not it is approved. You are authorized to check my credit and employment history and to answer questions about your credit experience with me.

Applicant's signature: _____ Date: _____

Other signature (where applicable): _____

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionEqual Credit
OpportunityGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 45 CONSUMER INSTALLMENT LOANS AND CREDIT SALES
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A. Application for Credit

19-45 California Legal Forms--Transaction Guide §§ 45.201-45.209

[Reserved]

§§ 45.201[Reserved]



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B. Denial of Credit

19-45 California Legal Forms--Transaction Guide § 45.210

§ 45.210 Notification of Credit Denial, Termination, or Change

[1] Comment

[a] Use of Form

This form is a notice that credit has been denied, terminated, or otherwise changed and is based on sample Form C-1 promulgated by the Federal Reserve Board [*see* 12 C.F.R. pt. 202, app. C, Form C-1]. This form fulfills the notification requirements of the Fair Credit Reporting Act [15 U.S.C. § 1681m(a), (b); 12 C.F.R. § 202.9(a)(1); *see* 15 U.S.C. §§ 1691-1691f (Equal Credit Opportunity Act); *see also* § 45.23 [2]] as well as certain California disclosure requirements [*see Civ. Code* §§ 1787.2(c), 1785.20].

A creditor who did not receive more than 150 applications during the calendar year immediately preceding the calendar year when business is being conducted may give all notifications orally [12 C.F.R. § 202.9(d)]. This exception does not apply under California law [*see Civ. Code* § 1787.2].

[b] Notice Requirement

Within 30 days after receiving a completed credit application, a creditor must notify the applicant of its action on the application [15 U.S.C. § 1691(d)(1); *Civ. Code* § 1787.2]. Notification must also be given within 30 days after terminating or unfavorably changing the terms of an existing account or refusing an increase in credit available [12 C.F.R. §§ 202.2(c)(1)(ii), 202.9(a)(1)(iii)]. Notification of adverse action must be in writing [12 C.F.R. § 202.9(a)(2); *Civ. Code* § 1787.2(b)]. Every applicant denied credit is entitled to a statement of the specific reasons for the denial. The creditor's notification must either state the specific reasons for the action taken or disclose the applicant's right to the statement [12 C.F.R. § 202.9(a)(2); *Civ. Code* § 1787.2(b), (c); *see* § 45.214 (notice of right to specific reasons for credit denial)].

If a credit application is incomplete, the creditor may either notify the applicant of action taken, as explained above, or notify the applicant that the application is incomplete [12 C.F.R. § 202.9(c)(1); *see* § 45.215 (notice alternatives for incomplete applications)].

[2] FORM**Notification of Credit Denial, Termination, or Change****STATEMENT OF CREDIT DENIAL, TERMINATION, OR CHANGE**

Date: _____

Applicant's Name: _____

Applicant's Address: _____

Description of Account, Transaction, or Requested Credit:

Description of Action Taken: _____

PART I**PRINCIPAL REASON(S) FOR CREDIT DENIAL, TERMINATION, OR OTHER ACTION TAKEN
CONCERNING CREDIT****This section must be completed in all instances.**

- ☐ Credit application incomplete
- ☐ Insufficient number of credit references provided
- ☐ Unacceptable type of credit references provided
- ☐ Unable to verify credit references
- ☐ Temporary or irregular employment
- ☐ Unable to verify employment
- ☐ Length of employment
- ☐ Income insufficient for amount of credit requested
- ☐ Excessive obligations in relation to income
- ☐ Unable to verify income

- ☐ Length of residence
- ☐ Temporary residence
- ☐ Unable to verify residence
- ☐ No credit file
- ☐ Limited credit experience
- ☐ Poor credit performance with us
- ☐ Delinquent past or present credit obligations with others
- ☐ Garnishment, attachment, foreclosure, repossession, collection action, or judgment
- ☐ Bankruptcy
- ☐ Value or type of collateral not sufficient
- ☐ Other (specify): _____

PART II**DISCLOSURE OF USE OF INFORMATION OBTAINED FROM AN OUTSIDE SOURCE**

This section should be completed if the credit decision was based in whole or in part on information that has been obtained from an outside source.

- ☐ Our credit decision was based in whole or in part on information obtained in a report from the consumer reporting agency listed below. You have a right under the Fair Credit Reporting Act to know the information contained in your credit file at the consumer reporting agency. The reporting agency played no part in our decision and is unable to supply specific reasons why we have denied credit to you.

Name: _____

Address: _____

Telephone Number: _____

- ☐ Our credit decision was based in whole or in part on information obtained from an outside source other than a

consumer reporting agency. Under the Fair Credit Reporting Act, you have the right to make a written request, no later than 60 days after you receive this notice, for disclosure of the nature of this information.

If you have any questions regarding this notice, you should contact:

Creditor's Name: _____

Address: _____

Telephone Number: _____

NOTICE

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or a part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is _____ [name and address of appropriate agency as found in 12 C.F.R. pt. 202, app. A].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking Law Consumer Protection Fair Credit Reporting General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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19-45 California Legal Forms--Transaction Guide § 45.211

§ 45.211 Notice of Action Taken and Statement of Reasons--Alternative Form**[1] Comment--Use of Form**

This form is a notice of action taken on a credit application and a statement of reasons for that action. It is based on sample Form C-2 promulgated by the Federal Reserve Board [see 12 C.F.R. pt. 202, app. C, Form C-2]. This form satisfies the disclosure requirements of the Equal Credit Opportunity Act [12 C.F.R. § 202.9(a); see 15 U.S.C. §§ 1691-1691f; see also §§ 45.210, 45.212, 45.213]. Refer to Sections 45.21 and 45.210 [1] for further discussion of notification requirements of the Equal Credit Opportunity Act.

[2] FORM**Notice of Action Taken and Statement of Reasons--Alternative Form**

NOTICE OF ACTION TAKEN
 AND STATEMENT OF REASONS

Date: _____

Dear Applicant:

Thank you for your recent application. Your request for [a loan or an increase in your credit limit] was carefully considered, and we regret that we are unable to approve your application at this time, for the following reason(s):

YOUR INCOME:

☐ is below our minimum requirement.

☐ is insufficient to sustain payments on the amount of credit requested.

☐ could not be verified.

YOUR EMPLOYMENT:

☐ is not of sufficient length to qualify.

☐ could not be verified.

YOUR CREDIT HISTORY:

☐ of making payments on time was not satisfactory.

☐ could not be verified.

YOUR APPLICATION:

☐ lacks a sufficient number of credit references.

☐ lacks acceptable types of credit references.

☐ reveals that current obligations are excessive in relation to income.

OTHER: _____

The consumer reporting agency contacted that provided information that influenced our decision in whole or in part was _____[*name, address, and telephone number of the reporting agency*]. The reporting agency is unable to supply specific reasons why we have denied credit to you. You do, however, have a right under the Fair Credit Reporting Act to know the information contained in your credit file. Any questions regarding such information should be directed to [*consumer reporting agency*].

If you have any questions regarding this letter, you should contact us at _____[*creditor's name, address, and telephone number*].

NOTICE:

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or a part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is _____ [*name and address of appropriate agency as found in 12 C.F.R. pt. 202, app. A*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionEqual Credit OpportunityGeneral Overview



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19-45 California Legal Forms--Transaction Guide § 45.212

§ 45.212 Notice of Action Taken and Statement of Reasons--Credit Scoring

[1] Comment--Use of Form

This form is a notice of action taken on a credit application and a statement of reasons for that action. It is based on sample Form C-3 promulgated by the Federal Reserve Board [see 12 C.F.R. pt. 202, app. C], and satisfies the disclosure requirements of the federal Equal Credit Opportunity Act [12 C.F.R. § 202.9(a); see 15 U.S.C. §§ 1691-1691f].

This notice should be used if the application involved was processed on a credit scoring system. This notice is an alternative to the notices in Sections 45.210, 45.211, and 45.213. Refer to Sections 45.21 and 45.210 [1] for further discussion of notification requirements of the Equal Credit Opportunity Act.

[2] FORM

Notice of Action Taken and Statement of Reasons--Credit Scoring

NOTICE OF ACTION TAKEN
AND STATEMENT OF REASONS
(CREDIT SCORING)

Date: _____

Dear Applicant:

Thank you for your recent application for _____. We regret that we are unable to approve your request.

Your application was processed by a credit scoring system that assigns a numerical value to the various items of information we consider in evaluating an application. These numerical values are based upon the results of analyses of repayment histories of large numbers of customers.

The information you provided in your application did not score a sufficient number of points for approval of the application. The reasons why you did not score well compared to other applicants were:

- * Insufficient bank references
- * Type of occupation
- * Insufficient credit experience

In evaluating your application the consumer reporting agency listed below provided us with information that in whole or in part influenced our decision. The reporting agency played no part in our decision other than providing us with credit information about you. Under the Fair Credit Reporting Act, you have the right to know the information provided to us. It can be obtained by contacting _____ [name, address, and telephone number of consumer reporting agency].

If you have any questions regarding this letter, you should contact us at:

Creditor's name: _____
Address: _____
Telephone number: _____
Sincerely,
_____ [signature]
[typed name and title]

NOTICE:

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or a part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is _____ [name and address of appropriate agency as found in 12 C.F.R. pt. 202, app. A].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Equal Credit Opportunity General Overview



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19-45 California Legal Forms--Transaction Guide § 45.213

§ 45.213 Notice of Action Taken, Statement of Reasons, and Counteroffer**[1] Comment--Use of Form**

This form is a notice of action taken on a credit application and a statement of reasons for that action, with an added counteroffer. It is based on sample Form C-4 promulgated by the Federal Reserve Board [see 12 C.F.R. pt. 202, app. C], and satisfies the disclosure requirements of the Equal Credit Opportunity Act [12 C.F.R. § 202.9(a), (b); see 15 U.S.C. §§ 1691-1691f]. This notice differs from other credit notices [see §§ 45.210-45.212] by including a counteroffer to provide credit on other terms. Refer to Sections 45.21 and 45.210 [1] for further discussion of notification requirements of the Equal Credit Opportunity Act.

[2] FORM**Notice of Action Taken, Statement of Reasons, and Counteroffer**

NOTICE OF ACTION TAKEN, STATEMENT OF REASONS, AND COUNTEROFFER

Date: _____

Dear Applicant:

Thank you for your application for _____. We are unable to offer you credit on the terms that you requested for the following reason(s): _____.

We can, however, offer you credit on the following terms: _____. If this offer is acceptable to you, please notify us within [amount of time] at the following address: _____.

Our credit decision on your application was based in whole or in part on information obtained in a report from _____ [name, address, and telephone number of consumer reporting agency]. You have a right under the Fair Credit Reporting Act to know the information contained in your credit file at the consumer reporting agency.

You should know that the federal Equal Credit Opportunity Act prohibits creditors, such as ourselves, from discriminating against credit applicants on the basis of their race, color, religion, national origin, sex, marital status, age, because they receive income from a public assistance program, or because they may have exercised their rights under the Consumer Credit Protection Act. If you believe there has been discrimination in handling your application, you should contact the _____[*name and address of appropriate agency as listed in 12 C.F.R. pt. 202, app. A*].

Sincerely,

_____ [*signature*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionEqual Credit OpportunityGeneral Overview



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B. Denial of Credit

19-45 California Legal Forms--Transaction Guide § 45.214

§ 45.214 Disclosure of Right to Request Specific Reasons for Credit Denial

[1] Comment

[a] Use of Form

This form is a notice to a credit applicant disclosing the right to request specific reasons for the denial of credit. It is based on sample Form C-5 promulgated by the Federal Reserve Board [*see* 12 C.F.R. pt. 202, app. C], and satisfies the disclosure requirement of the Equal Credit Opportunity Act [*see* 12 C.F.R. § 202.9(a); *see* 15 U.S.C. §§ 1691-1691f]. This form should be used when the creditor wishes to send notice of the right to request specific reasons for credit denial, rather than sending a statement of the actual reasons [*see* 12 C.F.R. § 202.9(a)(2)(ii); *see also* [b], *below*]. For forms of notice specifying the reasons for denial of credit, *see Sections 45.210 through 45.213*.

A creditor who did not receive more than 150 applications during the calendar year immediately preceding the calendar year when business is being conducted may give all notifications orally, including the statement of specific reasons [12 C.F.R. § 202.9(d)].

[b] Alternative Manner of Notification

Rather than delivering the statement of specific reasons for a credit denial, the creditor may notify the applicant of his or her right to that statement [*see* 12 C.F.R. § 202.9(a)(2)(ii)]. The notification must inform the applicant that he or she will receive a statement of reasons within 30 days after a request, if the request is made within 60 days. The notification must also contain the name, address, and telephone number of the person or office from which the statement can be obtained [12 C.F.R. § 202.9(a)(2)(ii)]. The creditor may provide the statement of reasons orally, but only if the written notification of adverse action discloses the applicant's right to have any oral statement of reasons confirmed in writing within 30 days of the creditor's receipt of a written request for confirmation [12 C.F.R. § 202.9(a)(2)(ii)].

Under California law, the Holden Credit Denial Disclosure Act of 1976 [*Civ. Code* §§ 1787.1-1787.3] imposes similar requirements on creditors [*see Civ. Code* § 1787.2]. For discussion of the Act, *see Section 45.21*.

[2] FORM**Disclosure of Right to Request Specific Reasons for Credit Denial**

DISCLOSURE OF RIGHT TO REQUEST SPECIFIC REASONS FOR CREDIT DENIAL

Date: _____

Dear Applicant:

Thank you for applying to us for _____.

After carefully reviewing your application, we are sorry to advise you that we cannot [open an account for you *or* grant a loan to you *or* increase your credit limit] at this time.

If you would like a statement of specific reasons why your application was denied, please contact _____ [our credit manager *or specify name*], as shown below, within 60 days of the date of this letter. We will provide you with the statement of reasons within 30 days after receiving your request.

Creditor's name: _____

Address: _____

Telephone number: _____

If we obtained information from a consumer reporting agency as part of our consideration of your application, its name, address, and telephone number are shown below. You can find out about the information contained in your file (if one was used) by contacting:

Consumer reporting agency's name: _____

Address: _____

Telephone number: _____

Sincerely,

_____ [signature]

[typed name and title]

NOTICE

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or a part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is _____ [name and address of appropriate agency as found in 12 C.F.R. pt. 202, app. A].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionEqual Credit
OpportunityGeneral Overview



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19-45 California Legal Forms--Transaction Guide § 45.215

§ 45.215 Notice of Incomplete Application and Request for Additional Information**[1] Comment--Use of Form**

This form is a notice is to be sent to a credit applicant when the application submitted is incomplete. It is based on sample Form C-6 promulgated by the Federal Reserve Board [see 12 C.F.R. pt. 202, app. C], and satisfies the disclosure requirement of the Equal Credit Opportunity Act [12 C.F.R. § 202.9(a); see 15 U.S.C. §§ 1691-1691f]. If a credit application is incomplete, the creditor may either notify the applicant of the action taken [see 12 C.F.R. § 202.9(b); see also § 45.210 (notice of action taken)] or notify the applicant that the application is incomplete [12 C.F.R. § 202.9(c)(1)].

The notice must be written; it must specify the information needed, designate a reasonable period for the applicant to provide the information, and inform the applicant that failure to provide the information requested will cause the application to be dismissed without further consideration [12 C.F.R. § 202.9(c)(2)]. If the applicant does not respond within the designated time, the creditor has no further obligation [12 C.F.R. § 202.9(c)(2)]. If the applicant supplies the requested information within the time set, the creditor must act on the application and notify the applicant of that action [see 12 C.F.R. § 202.9(a), (c)(2)].

[2] FORM**Notice of Incomplete Application and Request for Additional Information**

NOTICE OF INCOMPLETE APPLICATION AND
 REQUEST FOR ADDITIONAL INFORMATION

Creditor's name: _____
 Address: _____
 Telephone number: _____
 Date: _____

Dear Applicant:

Thank you for your application for credit. The following information is needed to make a decision on your application: _____ . We need to receive this information by _____ [date]. If we do not receive it by that date, we will regrettably be unable to give further consideration to your credit request.

Sincerely,

_____ [signature]
[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Equal Credit Opportunity General Overview



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19-45 California Legal Forms--Transaction Guide §§ 45.216-45.219

[Reserved]

§§ 45.216[Reserved]



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 C. Truth in Lending Act Disclosures

19-45 California Legal Forms--Transaction Guide § 45.220

§ 45.220 Model Disclosure Statement for Direct Loans, Modifiable for Credit Sales

[1] Comment

[a] Use of Form

This form is a model loan disclosure statement. It is an illustration of model Form H-2, promulgated by the Federal Reserve Board for use in a closed-end, direct loan transaction [12 C.F.R. pt. 226, app. H]. While use of this form is not mandatory, if it is used properly, the creditor is deemed to be in compliance with the disclosure provisions of the Truth in Lending Act (TILA) [15 U.S.C. §§ 1601-1667e] and its implementing regulation, Regulation Z [15 U.S.C. § 1604(b); see 12 C.F.R. pt. 226]. Moreover, considerable revision is permissible without losing the presumption of compliance, as long as the revised form is substantially similar to the model form [see 12 C.F.R. pt. 226, supp. I (examples of acceptable revisions); see also 15 U.S.C. § 1640(f)].

This form contains only the disclosures required by TILA [see § 45.123 (TILA required disclosures)]. Other items must be added to the form for particular kinds of transactions [see [c], [d], *below*].

The TILA disclosure statement may be either a document separate from the contract between the parties, or a conspicuously segregated portion of that contract [see 15 U.S.C. § 1638(b); 12 C.F.R. § 226.17(a)]. However, the California Unruh Act requires that Regulation Z disclosures must be included in the contract [Civ. Code §§ 1803.2, 1803.3(b)]. Therefore, this form does not comply with the Unruh Act. For a retail installment contract complying with both TILA and Unruh Act disclosures requirements, see § 45.225.

For rules governing the electronic delivery of disclosures, see 12 C.F.R. § 226.17, discussed in [c], *below*.

[b] Disclosure Requirement

Before consummating a closed-end credit transaction, a creditor subject to TILA must provide the consumer with a written document containing the disclosures enumerated in TILA and in Regulation Z [12 C.F.R. § 226.17(a), (b)]. For a checklist of required disclosures, see § 45.123[2]. The disclosure document may contain other information, but the

required disclosures must be grouped together and segregated from everything else [12 C.F.R. § 226.17(a)]. Although it is a required disclosure, the creditor's identity does not appear in the model form, apparently because it may be made separately from the other required disclosures [12 C.F.R. § 226.17(a) n. 38]. The creditor's name and address may be printed above the disclosures shown at the top of the form [see 12 C.F.R. pt. 226, app. H, Forms H-10-H-15]. The consumer's name, address, and account number, and the date of the transaction, though not required disclosures, may similarly be added to the form [12 C.F.R. § 226.17(a) n. 37]. Finally, an acknowledgment of receipt to be signed by the consumer may be added to provide the protection against subsequent claims of nondisclosure [see 12 C.F.R. § 226.17(a) n. 37; see also 15 U.S.C. § 1641(b)].

[c] Electronic Delivery of Disclosures

The required disclosures for closed-end credit under Regulation Z may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 et seq.) [12 C.F.R. § 226.17(a)(1)]. Consistent with the requirements of the E-Sign Act, creditors generally must obtain the consumer's affirmative consent to provide disclosures electronically [see 15 U.S.C. § 7001(c)(1)]. However, the disclosures required by 12 C.F.R. § 226.17(g) (mail or telephone orders), 12 C.F.R. § 226.19(b) (variable rate transactions secured by principal dwelling), and 226.24 (advertisements for closed-end credit) may be provided to the consumer in electronic form without regard to the consumer consent or other provisions of the E-Sign Act, as specified [see 12 C.F.R. §§ 226.17(g), 226.19(b), 226.24(d)].

[d] Modification of Form for Credit Sales

In any credit sale transaction covered by TILA, the creditor must disclose the "total sale price," which is the sum of the cash price, the finance charge, and any other amounts financed [12 C.F.R. § 226.18(j)]. The Credit Sale Model Form [12 C.F.R. pt. 226, app. H, Form H-1] is intended to be used in credit sale transactions. Form H-1 is identical to the loan form illustrated here (Form H-2), with an additional box at the top of the form entitled "Total Sale Price," accompanied by the description "The total cost of your purchase on credit, including your downpayment of \$_____." The typeface and other indicia of prominence are the same as for the "Total of Payments" in this form.

[e] Additional Disclosures for Some Transactions

Additional disclosures are required if the consumer checks the box requesting an itemization of the amount financed [see 12 C.F.R. § 226.18(c); see also § 45.221 (form)]. Alternatively, the itemization may be provided routinely (but separately from the other disclosures), and the portions of the statement regarding the right to request an authorization disclosure may be omitted [12 C.F.R. § 226.18(c); see 12 C.F.R. § 226.17(a)(1)]. If the annual percentage rate may increase after consummation, variable rate disclosures are required [see 12 C.F.R. § 226.18(f); see also § 45.222 (form)]. If the obligation has a demand feature, that fact must be disclosed [12 C.F.R. § 226.18(i); see § 45.223 (form)]. An additional disclosure may be required if the creditor requires the consumer to maintain a deposit [see 12 C.F.R. § 226.18(r); see also § 45.224 (form)]. If insurance is provided but will not cover the full term of the credit transaction, the term of the insurance must be disclosed [12 C.F.R. § 226.4(d)(1)(ii); see 12 C.F.R. § 226.4(d) (additional insurance disclosures)].

In the case of consumer credit transaction that is secured by principal dwelling of consumer, in which extension of credit may exceed fair market value of dwelling, there must be (1) a clear and conspicuous statement that interest on portion of credit extension that is greater than fair market value of dwelling is not tax deductible for federal income tax purposes; and (2) a clear and conspicuous statement that consumer should consult tax adviser for further information regarding deductibility of interest and charges [15 U.S.C. § 1638(a)(15)]. This disclosure must be made to the consumer at the time of application for the extension of credit [15 U.S.C. § 1638(b)(3)]. This requirement takes effect 12 months

after publication of final regulations to implement it [see Pub. L. No. 109-8, § 1302(c)(2) (Apr. 20, 2005)].

[f] Completing the Form

The "When Payments Are Due" portion of the payment schedule may be filled out by using either due dates or an expression such as "monthly beginning May 1, 1994" [see 12 C.F.R. pt. 226, app. H, Form H-11].

The requirement to pay premiums for credit life and credit disability insurance need not be made voluntary, as in the form. If they are required by the creditor, however, the premiums must be included in the finance charge rather than separately disclosed [12 C.F.R. § 226.4(d)(1)]. If credit life and credit disability insurance are not mandatory, that fact must be disclosed [12 C.F.R. § 226.4(d)(1)(i)].

The reference to filing fees and nonfiling insurance in the form is to cover taxes or fees to be paid to public officials for determining the existence of, or for perfecting, releasing, or satisfying a security interest, or the premium for insurance in lieu of perfecting a security interest [12 C.F.R. § 226.4(e)(1)]. If the insurance premium would exceed the official fees that would otherwise be payable, the premium must be included in the finance charge rather than separately disclosed [12 C.F.R. § 226.4(e)(2)]. In addition, if the payment of any taxes levied on security instruments or on documents evidencing indebtedness is a requirement for recording the instrument securing the evidence of indebtedness, the payment must be included in the finance charge rather than separately disclosed [15 U.S.C. § 1605(d)(3); 12 C.F.R. § 226.4(e)(3)]. At the creditor's option, both the security interest charges and the disclosures regarding insurance may be made separately from the other required disclosures [12 C.F.R. § 226.17(a)(1) n. 38]. No disclosures regarding security interest charges need to be made if there are no charges.

The statement in the form regarding a prepayment penalty is to be made only if a finance charge is computed from time to time by application of a rate to the unpaid principal balance. The statement regarding a rebate is to be made only if there is some other kind of finance charge [15 U.S.C. § 1638(a)(11), (b)(1); 12 C.F.R. §§ 226.18(k), 226.17(a)(1)]. In transactions in which there are both kinds of finance charges (for example, simple-interest loans with loan guarantee insurance, when insurance premiums are not computed strictly by application of a rate to a declining balance), both disclosures must be made [see 46 Fed. Reg. 28560, 28596 (1981)] .

[2] FORM

Model Disclosure Statement for Direct Loans, Modifiable for Credit Sales

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosure



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19-45 California Legal Forms--Transaction Guide § 45.221

§ 45.221 Itemization of Amount Financed for Truth in Lending Disclosures

[1] Comment--Use of Form

This form is an itemization of the amount financed under an installment loan. It is based on model Form H-3, promulgated by the Federal Reserve Board under Regulation Z [12 C.F.R. pt. 226, app. H]. This form is used to provide an itemization of the amount financed in a loan transaction to a customer who requests the itemization [12 C.F.R. § 226.18(c)(2)]. Use of this form will be deemed to be compliance with the Truth in Lending Act (TILA) if the figures disclosed are accurate [15 U.S.C. § 1604(b)].

TILA requires an itemization of the amount financed only if the consumer requests the itemization [15 U.S.C. § 1638(a)(2)(B); 12 C.F.R. § 226.18(c)(2)], although the creditor may provide an itemization routinely in each transaction if it so chooses. In either case, the itemization must be separate from the other TILA disclosures [15 U.S.C. § 1638(b)(1); 12 C.F.R. § 226.18(c); see § 45.123[2] P 3 (contents of itemization)].

[2] FORM

Itemization of Amount Financed for Truth in Lending Disclosures

ITEMIZATION OF AMOUNT FINANCED

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\$_____ Amount given to you directly

\$_____ Amount paid on your account

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half

\$_____ to _____ [public officials *or* credit bureau *or* appraiser *or*
_____ insurance company]

\$_____ to _____ [*name of another creditor*]

\$_____ to _____ [*other*]

\$_____ Prepaid finance charge

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosure



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19-45 California Legal Forms--Transaction Guide § 45.222

§ 45.222 Variable-Rate Model Clauses for Truth in Lending Disclosures

[1] Comment--Use of Form

This form is a disclosure concerning variable interest rates. It is based on model Form H-4, promulgated by the Federal Reserve Board under Regulation Z [12 C.F.R. pt. 226, app. H]. This form is used to inform a consumer if the annual percentage rate may change after consummation of an installment loan. Use of this form will be deemed compliance with the Truth in Lending Act (TILA) if the information actually disclosed is accurate [*see 15 U.S.C. § 1604(b)*].

The Truth in Lending Act requires these additional disclosures if the annual percentage rate on a loan may increase after consummation. In a transaction not secured by the consumer's principal dwelling or a transaction secured by the consumer's principal dwelling with a term of one year or less, the required variable-rate disclosures are (1) the circumstances under which the rate may increase, (2) any limitations on the increase, (3) the effect of an increase, and (4) an example of the payment terms that would result from an increase [12 C.F.R. § 226.18(f)(1)]. Different disclosures are required if the transaction is secured by the consumer's principal dwelling with a term of greater than one year [*see 12 C.F.R. § 226.18(f)(2)*].

Information provided in accordance with variable-rate regulations of other federal agencies may be substituted for these disclosures [*see 12 C.F.R. §§ 226.18(f)(1) n.43, 226.19(b) n.45a*]. Except for the example of increased terms, the variable-rate disclosures are to be made with the main body of TILA disclosures, in a statement segregated from all other terms or information [15 U.S.C. § 1638(b)(1); 12 C.F.R. § 226.17(a)(1) n.38]. The example may be given with the other disclosures or elsewhere [12 C.F.R. § 226.17(a)(1)].

When a creditor permits the consumer to consummate a closed-end transaction on-line, the consumer must be required to access the disclosures required under 12 C.F.R. § 226.18 before becoming obligated [*see 12 C.F.R. § 226.18; see also 12 C.F.R. pt. 226, supp. I, comment 36(b)-3* (electronic delivery does not affect timing of disclosures)]. A link to the disclosures satisfies the timing rule if the consumer cannot bypass the disclosures before becoming obligated. In the alternative, the disclosures in this example must automatically appear on the screen, even if multiple screens are required to view the entire disclosure [*see 12 C.F.R. pt. 226, supp. I, comment 36(b)-3*]. For further discussion of the

electronic delivery of disclosures, see § 45.220[1][c].

[2] FORM

Variable-Rate Model Clauses for Truth in Lending Disclosures

The annual percentage rate may increase during the term of this transaction if: _____

[Choose one or more of the following:]

[the prime interest rate of _____ (creditor) increases].

[the balance in your deposit account falls below \$_____].

[you terminate your employment with _____ (employer)].

[Continue with the following:]

The increase of the annual percentage rate is subject to the following limitations:

[Choose one or more of the following:]

The interest rate will not increase above _____ percent.

[AND/OR]

The maximum interest rate increase at one time will be _____ percent.

[AND/OR]

The rate will not increase more than once every [time period].

[Continue with one of the following:]

[If any increase will result in higher payment amounts:]

Any increase will take the form of higher payment amounts. If the interest rate increases by _____ percent in [time period], your regular payments would increase to \$_____.

If your loan were for \$_____ at _____ percent for [term] and the rate increased to _____ percent in [time period], your regular payments would increase by \$_____.

[OR]

[If any increase will result in additional payments:]

Any increase will take the form of more payments of the same amount. If the interest rate increases by _____ percent in *[time period]*, you will have to make _____ additional payments.

If your loan were for \$_____ at _____ percent for *[term]* and the rate increased to _____ percent in *[time period]*, you would have to make _____ additional payments.

[OR]

[If any increase will result in larger final payment:]

Any increase will take the form of a larger amount due at maturity. If the interest rate increases by _____ percent in *[time period]*, your final payment will increase to \$_____.

If your loan were for \$_____ at _____ percent for *[term]* and the rate increased to _____ percent in *[time period]*, your final payment would increase by \$_____.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosure



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19-45 California Legal Forms--Transaction Guide § 45.223

§ 45.223 Demand Feature Model Clauses for Truth in Lending Disclosures

[1] Comment--Use of Form

This form is a disclosure of a demand feature in an installment loan. It is based on model Form H-5, promulgated by the Federal Reserve Board under Regulation Z [12 C.F.R. pt. 226, app. H]. This form is used to inform a consumer of a demand feature in an installment loan [see 12 C.F.R. § 226.18(i)]. Proper use of this form will be deemed to be compliance with applicable requirements of the Truth in Lending Act [see 15 U.S.C. § 1604(b)].

If a credit obligation subject to the Truth in Lending Act has a demand feature, that feature must be disclosed to the consumer [12 C.F.R. § 226.18(i)]. The disclosure requirement is triggered only by a demand feature contemplated by the parties as part of the agreement. Transactions that convert to demand status after a stated period are subject to the disclosure; those that convert to demand status as a result of the consumer's default are not subject to the disclosure [12 C.F.R. pt. 226, supp. I, § 226.18(i)]. An assumption of maturity in one year is used to calculate the annual percentage rate and other disclosures, unless the obligation has an alternate maturity date, in which case the disclosures must be based on that date [12 C.F.R. § 226.17(c)(5)]. If the disclosures are based on an assumed maturity of one year, that fact must also be disclosed [12 C.F.R. § 226.18(i)].

For discussion of the electronic delivery of disclosures, see § 45.220[1][c].

[2] FORM

Demand Feature Model Clauses for Truth in Lending Disclosures

This obligation [is payable on demand or has a demand feature]. [If appropriate, add: All disclosures are based on an assumed maturity of one year.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in
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19-45 California Legal Forms--Transaction Guide § 45.224

§ 45.224 Required Deposit Model Clause for Truth in Lending Disclosures

[1] Comment

[a] Use of Form

This form is a disclosure of a required deposit in an installment loan. It is based on model Form H-7, promulgated by the Federal Reserve Board under Regulation Z [12 C.F.R. pt. 226, app. H]. This form is used to inform a consumer that the annual percentage rate does not reflect the effect of a required deposit in an installment loan [see 12 C.F.R. § 226.18(r)]. Proper use of this form will be deemed to be compliance with applicable requirements of the Truth in Lending Act [see 15 U.S.C. § 1604(b)].

If, in a credit transaction subject to the Truth in Lending Act (TILA), the creditor requires the consumer to maintain a deposit as a condition of the specific transaction, the TILA disclosure statement [see § 45.220] must contain an additional disclosure that the annual percentage rate does not reflect the effect of the required deposit [12 C.F.R. § 226.18(r)].

For discussion of the electronic delivery of disclosures, refer to § 45.220[1][c].

[b] Required Deposits

Certain deposits are not required deposits triggering the disclosure requirement. The term "required deposit" does not include (1) an escrow account for items such as taxes, insurance, or repairs, (2) a deposit that earns 5 percent or more interest annually, (3) or payments under a Morris Plan (under which a deposit balance will be wholly applied toward satisfaction of the consumer's obligation) [12 C.F.R. § 226.18(r) n. 45; see 12 C.F.R. pt. 226, supp. I, § 226.18(r)].

[2] FORM

Required Deposit Model Clause for Truth in Lending Disclosures

The annual percentage rate does not take into account your required deposit.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosure



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19-45 California Legal Forms--Transaction Guide § 45.225

§ 45.225 Retail Installment Contract With Truth in Lending Act and Unruh Act Disclosures

[1] Comment

[a] Use of Form

[i] In General

This form is a retail installment contract that includes the disclosures required under the federal Truth in Lending Act (TILA) [15 U.S.C. § 1601 *et seq.*] and the California Unruh Act [Civ. Code § 1801 *et seq.*]. It is applicable to retail installment contracts and accounts [see Civ. Code §§ 1802.6, 1802.7].

This form does not provide for a security interest to be retained by the seller. For coverage of the headings, disclosures, and warnings that are required if a security interest is to be retained by the seller [see Civ. Code § 1803.2(b)], see § 45.124.

To determine whether TILA and the Unruh Act apply to a transaction, see §§ 45.32 through 45.34. To determine whether TILA and the Unruh Act have been complied with, see the checklists in §§ 45.123 through 45.125. Portions of the federal disclosure statement noted as optional (the references to security, filing fees, and prepayment penalties) should be used only if the other provisions of the contract are modified in a manner that will make the optional disclosures applicable.

For discussion of the electronic delivery of disclosures, see § 45.220[1][c].

[ii] Modifications for Certain Types of Payments

If some payments on the contract will be larger than others or will be paid at different intervals, the format of the "Payment Schedule" contained in the form will require modification. A tabular format is suitable [see § 45.220 [2]]. The Unruh Act additionally requires that any deferred downpayment must be reflected in the Regulation Z payment schedule [Civ. Code § 1803.3(d)]. If the agreement requires any payment (other than a deferred downpayment) that is

more than twice the amount of the usual regularly scheduled payment, the payment is a "balloon payment" for purposes of the Unruh Act and special language set out in the form must be included [*Civ. Code* § 1807.3(a)].

[iii] Modification of Insurance Disclosures

The federal disclosures in this form pertaining to insurance meet TILA requirements permitting insurance premiums to be excluded from the itemization of finance charge [*see* 12 C.F.R. § 226.4(d)(1)]. If insurance premiums are included in the finance charge for TILA purposes, these disclosures are not required under federal law. In any event, transactions subject to the Unruh Act must contain a disclosure of the type of insurance and the premium charged [*Civ. Code* § 1803.3(g)]. If any insurance will expire before the date of the last regularly scheduled installment, the disclosures in this form must be modified to specify that fact [12 C.F.R. § 226.4(d)(1)(ii); *Civ. Code* § 1803.3(g)].

[b] Grouping of Disclosures

The federal disclosures in this form are grouped together and set apart from the rest of the contract provisions. This format is required by TILA [15 U.S.C. § 1638(b)(1); 12 C.F.R. § 226.17(a)]. While TILA also permits the federal disclosures to be made in a separate document [15 U.S.C. § 1638(b)(1); 12 C.F.R. § 226.17(a)], the Unruh Act requires that every contract contain the Regulation Z disclosures [*Civ. Code* § 1803.3(b)] and further specifies that all terms and conditions be contained in the contract itself [*Civ. Code* § 1803.2(a)]. For this reason, use of a separate document for the federal disclosures in transactions in which the Unruh Act is applicable would result in unnecessary duplication.

TILA provides that the contract must contain either an itemization of the amount financed or a statement of the purchaser's right to receive such an itemization [12 C.F.R. § 226.18(c)(2)]. The Unruh Act, however, specifically provides that the latter option is unavailable [*Civ. Code* § 1801.5], and further provides that the amount financed must be itemized in the prescribed sequence in the contract itself [*Civ. Code* § 1803.3(b), (c)]. This form contains both a statement of the purchaser's right to receive an itemization of the amount financed, which appears in the portion of the form containing the federal disclosures, and a detailed itemization of the amount financed, which appears following the federal disclosures in the body of the agreement. If the Unruh Act does not apply to the transaction, the statement of the purchaser's right to an itemization should be included and the detailed itemization may be omitted [*see* § 45.221]. If the Unruh Act is applicable, the statement of the purchaser's right to an itemization should be deleted and the detailed itemization should be included. Substitution of the more detailed Unruh Act itemization for the itemization specified in TILA [*see* § 45.221] is permissible and will not jeopardize compliance with the federal requirements, provided the itemization of the amount financed is kept segregated from the other federal disclosures [*see* 12 C.F.R. pt. 226, supp. I, § 226.18(c)]. Refer to Section 45.220 [1] for discussion of additional disclosures required in some transactions.

[c] Type Size

To comply with the Unruh Act, printed portions of the contract must be in at least 8-point type [*Civ. Code* § 1803.1]. The heading ("Retail Installment Contract") must be in at least 12-point bold type [*Civ. Code* § 1803.2(b)(2)]. TILA imposes no type-size requirements [*but see* 16 C.F.R. § 433.2 (type-size requirements for notice of preservation of debtor's rights)].

[d] Related Forms

If the seller's business "affects interstate commerce" (with that phrase broadly defined), a notice of the consumer's rights against subsequent holders of the contract [*see* § 45.226] must also be included in the agreement [16 C.F.R. § 433.2]. A notice of cosigner's liability [*see* § 45.240] is required when more than one person will be obligating themselves to the credit contract, except when the debtors are a married couple [*see Civ. Code* § 1799.90 *et seq.*].

[2] FORM

Retail Installment Contract With Truth in Lending Act and Unruh Act Disclosures**RETAIL INSTALLMENT CONTRACT**

[Choose one of the following paragraphs, each of which must be printed in at least 10-point bold type:]

[If the finance charge is determined on the precomputed basis and the unearned portion of the finance charge to be refunded on full prepayment is to be determined by other than the actuarial method, use:]

Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount under this agreement at any time and obtain a partial refund of the finance charge if it is \$1 or more. Because of the way the amount of this refund will be figured, the time when you prepay could increase the ultimate cost of credit under this agreement. (4) If you desire to pay off in advance the full amount due, the amount of the refund you are entitled to, if any, will be furnished upon request.

[OR]

[If the refund upon prepayment in full of the unearned portion of a precomputed finance charge will be computed by the actuarial method, use:]

Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time and obtain a partial refund of the finance charge if it is \$1 or more. (4) If you desire to pay off in advance the full amount due, the amount of the refund you are entitled to, if any, will be furnished upon request.

[OR]

[If the finance charge is determined on the simple-interest basis, use:]

Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time. (4) If you desire to pay off in advance the full amount due, the amount which is outstanding will be furnished upon request.

[Continue with the following:]

Seller, _____[name], _____[business address], California, sells, and Buyer _____[name], _____[address of residence or place of business], California, buys, subject to the terms, conditions, and disclosures set forth in this contract, the following described goods or services, or both.

FULL DESCRIPTION OF GOODS AND SERVICES: _____ PRICE: \$_____

FEDERAL DISCLOSURES

AN _____ %
 NU-
 AL
 PE
 RC
 EN-
 TA
 GE
 RA
 TE

The cost of your credit as a yearly rate.

FIN \$ _____
 AN
 CE
 CH
 AR
 GE

The dollar amount the credit will cost you.

Am \$ _____
 ount
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The amount of credit provided to you or on your behalf.

Tota \$ _____
 l of
 Pay-
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The amount you will have paid after you have made all payments as scheduled.

Tota \$ _____
 l
 Sale
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The total cost of your purchase on credit, including your downpayment of \$_____.

You have the right to receive at this time an itemization of the Amount Financed.

☐ I want an itemization.

☐ I do not want an itemization.

Payment Schedule

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Insurance

Credit life insurance and credit disability insurance are not required to obtain credit, and will not be provided unless you sign and agree to pay the additional cost.

Credit Life Premium \$_____

☐ I want credit life insurance. _____

[Signature]

Credit Disability Premium \$_____

☐ I want credit disability insurance. _____

[Signature]

Credit Life and Disability Premium \$_____

☐ I want credit life and disability insurance. _____

[Signature]

You may obtain property insurance from anyone you want that is acceptable to _____ [creditor's name]. If you get the insurance from _____ [creditor's name], you will pay \$_____.

Prepayment

If you pay off early, you [may or will not] have to pay a penalty. If you pay off early, you [may or will not] be entitled to a refund of part of the finance charge.

Late Charge

If a payment is more than [number] days late, you will be charged [\$_____ or _____ percent] of the payment.

See the text of this agreement for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

ITEMIZATION OF THE AMOUNT FINANCED

1.	Cash Price of Item	\$_____
2.	Taxes Imposed on Sale	\$_____
3.	TOTAL OF ITEMS 1 AND 2 ABOVE	\$_____
4.	Official Fees: _____ [itemize]	\$_____
5.	Total Insurance Premiums [do not include any premiums included in finance charge]	\$_____
6.	TOTAL OF ITEMS 3, 4, AND 5	\$_____
7.	Amount of Buyer's Downpayment	\$_____
8.	Net Agreed Value of Property Traded In	\$_____
9.	Amount of Downpayment Deferred	\$_____
10.	Manufacturer's Rebate Applied to Downpayment	\$_____
11.	Remaining Downpayment to Be Paid by Buyer (Item 7 less total of items 8, 9, and 10)	\$_____
12.	Prepaid Finance Charge	\$_____
13.	AMOUNT FINANCED (Item 6 less the total of items 7 and 12)	\$_____

[If trade-in property is used to satisfy all or part of the downpayment, add:]

DESCRIPTION OF TRADE-IN PROPERTY

The trade-in property being applied to Buyer's downpayment, as indicated above in Item 8 of "Itemization of the Amount Financed," consists of [describe property being traded in].

[Continue with the following:]

A. PAYMENT SCHEDULES: Buyer promises to pay Seller or any assignee according to the payment schedule set out above.

[If buyer will be required to make a balloon payment, add:]

BUYER: The payment schedule contained in this contract requires that you make a balloon payment of \$*[amount of balloon payment]*, which is a payment more than double the amount of the regular payments. You have an absolute right to obtain a new payment schedule if you default in the payment of any balloon payment.

[Choose one of the following paragraphs:]

[If finance charge is determined on the precomputed basis, use:]

If Buyer prepays this obligation in full, the unearned finance charge that will be refunded or credited to Buyer's account will be computed by *[the Rule of 78's or the sum of the digits or the sum of the periodic time balances or the actuarial method]*.

[OR]

[If finance charge is determined on the simple-interest basis, but provides for a minimum finance charge in the event of prepayment in full, use:]

The finance charge will be computed on the simple-interest basis. If Buyer prepays this obligation in full, there will be a minimum finance charge of *[\$_____ or specify method by which it will be calculated]*.

[Continue with the following:]

B. DELINQUENCY CHARGE: Buyer promises to pay Seller on demand a delinquency charge on any payment in default for 10 days or more in an amount equal to 5 percent of the payment, except that the charge will not exceed \$5 or be less than \$1.

C. OTHER TERMS AND CONDITIONS: Buyer promises to pay Seller all other amounts as provided in this contract and agrees to all other terms and conditions of this contract, which includes those additional terms and conditions set forth on the reverse side.

[Print following clause in at least 10-point bold type:]

BUYER ACKNOWLEDGES THAT, (1) PRIOR TO SIGNING THIS CONTRACT BUYER READ AND RECEIVED A LEGIBLE, EXACT, AND COMPLETELY FILLED-IN COPY OF THIS CONTRACT, AND THAT UPON SIGNING, SUCH COPY WAS ALSO SIGNED BY ALL THE PARTIES HERETO, AND (2) BUYER HAS RECEIVED A COPY OF EVERY OTHER DOCUMENT BUYER SIGNED DURING THE

CONTRACT NEGOTIATIONS.

Dated: _____

BUYER

_____ [signature of buyer]

[typed name]

SELLER

[name of seller]

By _____ [signature]

[typed name and title]

[Reverse Side]

TERMS AND CONDITIONS**1. Buyer agrees:**

(a) To pay to Seller on demand all actual costs of collection occasioned by Buyer's failure to notify Seller of any change of residence or to communicate with Seller for a period of 45 days after any default in making payments due under this contract.

(b) In the event of any assignment of Seller's interest under this contract, the Assignee will be entitled to all the rights and privileges of Seller.

2. If Buyer defaults in the payment of any installment when due or if Buyer fails to perform or observe any of Buyer's agreements under this contract, Seller may at its option, without demand or notice to Buyer, declare the entire amount unpaid immediately due and payable.

3. Time and exactitude of each of the terms and conditions of this contract are of the essence of this contract. Seller may accept past due payments without modifying the terms of this contract, and without waiving any further rights of Seller under the contract. The obligations of Buyer are joint and several.

4. BUYER WARRANTS THAT THERE HAS BEEN AND WILL BE NO EXTENSION OF CREDIT IN CONNECTION WITH THIS TRANSACTION OTHER THAN THAT REPRESENTED BY THIS CONTRACT AND THAT THERE EXISTS NO PROMISE TO COMPENSATE BUYER FOR REFERRING CUSTOMERS TO SELLER OR REFERRING SELLER TO PROSPECTIVE CUSTOMERS.

[If seller is assigning contract to bank, add:]

Assignment and Guaranty of Contract

The undersigned sells, assigns, and transfers to _____ [name of bank], its successors, or assigns, the within contract. The undersigned guarantees payment of within contract in accordance with its terms and agrees to pay all costs and reasonable attorney's fees incurred in enforcing the obligations of the undersigned under this agreement.

The Assignee and the Buyer may make extensions of time of said contract, and the Assignee may otherwise deal with

the Buyer as it may elect, without affecting the liability of the undersigned. On any default of the Buyer, the Assignee may, at its option, proceed directly, without notice, against the undersigned to collect and recover the amount hereby guaranteed, without proceeding against the Buyer or any other person, or foreclosing on, selling, or otherwise disposing of any property securing said contract. The undersigned hereby waives the pleading of any statute of limitations as a defense to the obligations in this agreement.

Dated: _____

[*name of seller*]

By _____ [*signature*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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 PART IV. FORMS
 C. Truth in Lending Act Disclosures

19-45 California Legal Forms--Transaction Guide § 45.226

§ 45.226 Required Notice Preserving Consumers' Claims and Defenses in Consumer Credit Contracts

[1] Comment

[a] Use of Form

This form is a notice required to be contained in any consumer credit contract entered into in connection with a sale or lease of goods or services to consumers in or affecting interstate commerce as that term is defined in the Federal Trade Commission Act [see 16 C.F.R. § 433.2; 15 U.S.C. §§ 41-58]. The term "interstate commerce" is broadly defined to include commerce involving more than a single state [see 15 U.S.C. § 44] and includes the activities of businesses located solely in California that use media advertising that extends to other states [*F.T.C. v. Simeon Management Corporation* (N.D. Cal. 1975) 391 F. Supp. 697, 703] .

Under the Federal Trade Commission Act, unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are unlawful [15 U.S.C. § 45(a)(1)]. It is an unfair or deceptive act or practice within the meaning of the Act for a seller, directly or indirectly in connection with any sale or lease of goods or services to consumers, in or affecting commerce (as that term is defined in the Act) to (1) take or receive a consumer credit contract that fails to contain the prescribed notice in at least 10-point boldface type, or (2) accept, as full or partial payment for a sale or lease, the proceeds of any purchase money loan (as defined by the regulations), unless the consumer credit contract made in connection with the purchase money loan contains the prescribed notice in at least 10-point boldface type [16 C.F.R. § 433.2].

The California Legislature has specifically adopted the protections afforded consumers under Title 16, Part 433, of the Code of Federal Regulations. These protections take precedence over the holder-in-due-course provisions of the Uniform Commercial Code [see Stats. 1989, ch. 1462, § 4; see also vol. 10A, Ch. 55, *Negotiable Instruments*].

[b] Definitions

For purposes of the required notices, a "consumer credit contract" is any instrument that evidences or embodies a debt arising from a purchase money loan or a financed sale [16 C.F.R. § 433.1(i)]. A "purchase money loan" is a cash

advance received by a consumer in return for a finance charge (within the meaning of the Truth in Lending Act (TILA) and Regulation Z) that is applied, in whole or substantial part, to a purchase of goods or services from a seller who refers consumers to the creditor or is affiliated with the creditor by common control, contract, or business arrangement [16 C.F.R. § 433.1(d)]. A "financed sale" is an extension of credit to a consumer in connection with a credit sale within the meaning of TILA and Regulation Z [16 C.F.R. § 433.1(e)].

[2] FORM

Required Notice Preserving Consumers' Claims and Defenses in Consumer Credit Contracts

PRESERVATION OF CONSUMERS' CLAIMS
AND DEFENSES

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED [If *financed sale*, add: PURSUANT HERETO OR] WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Federal Trade Commission Act General Overview Banking Law Consumer Protection Truth in Lending General Overview



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19-45 California Legal Forms--Transaction Guide §§ 45.227-45.228

[Reserved]

§§ 45.227[Reserved]



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PART IV. FORMS

D. Consumer Loans Secured by Real Property

19-45 California Legal Forms--Transaction Guide § 45.229

§ 45.229 Disclosure for Consumer Loans Secured by Real Property

[1] Comment

[a] Use of Form

This form is the required disclosure for transactions involving consumer loans secured by specified real property (defined as a "covered loan" [see [c], *below*]). This disclosure, and the statutory requirements discussed in this comment, affect covered loans for which applications are made after June 2002 [Stats. 2001, ch. 732, § 3].

For additional discussion of *Fin. Code § 4970 et seq.*, see § 45.13. For a guide to the rules that should be observed in preparing loan agreements for a consumer loan secured by real property, and in conducting the transaction, see § 45.127.

[b] Governing Statutes

Fin. Code § 4970 et seq. imposes requirements on regulated lenders (banks, savings associations, credit unions, finance lenders, residential mortgage lenders) and real estate brokers, with respect to the making of consumer loans that are secured by real property. The law prohibits various acts in making covered loans, including:

- Failing to consider the financial ability of a borrower to repay the loan [*Fin. Code § 4973(f)(1)*]; see § 45.13[5][a]].
- Financing specified types of credit insurance into a consumer loan transaction [*Fin. Code § 4979.7*; see § 45.13[4][g]].
- Recommending or encouraging a consumer to default on an existing consumer loan in order to solicit or make a covered loan that refinances the consumer loan [*Fin. Code § 4973(h)*]; see § 45.13[4][h]].
- Making a covered loan without providing the consumer a specified disclosure [*Fin. Code §*

4973(j)(1); see [2], below].

Violators are subject to a civil penalty [see *Fin. Code* § 4977(b); see also § 45.13[6][d]]. For further discussion of these issues, see § 45.13.

[c] Definitions

"Consumer loan" means a consumer credit transaction that is secured by real property located in California used, or intended to be used or occupied, as the principal dwelling of the consumer that is improved by a one-to-four residential unit. "Consumer loan" does not include a reverse mortgage, an open line of credit as defined in Regulation Z [see 12 C.F.R. § 226.1 *et seq.*], or a consumer credit transaction that is secured by rental property or second homes. "Consumer loan" does not include a bridge loan with a maturity of less than one year if the purpose of the loan is a bridge loan connected with the acquisition or construction of a dwelling intended to become the consumer's principal dwelling [*Fin. Code* § 4970(d)].

A "covered loan" is a consumer loan in which the original principal balance of the loan does not exceed the most current conforming loan limit for a single-family first mortgage loan established by the Federal National Mortgage Association, in the case of a mortgage or deed of trust, and with respect to which one of the following conditions is met:

- For a mortgage or deed of trust, the annual percentage rate at consummation of the transaction will exceed by more than eight percentage points the yield on U.S. Treasury securities having comparable periods of maturity on the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor [*Fin. Code* § 4970(b)(1)].
- The total points and fees payable by the consumer at or before closing for a mortgage or deed of trust will exceed 6 percent of the total loan amount [*Fin. Code* § 4970(b)(2); see *Wolski v. Fremont Investment & Loan* (2005) 127 Cal. App. 4th 347, 350, 25 Cal. Rptr. 3d 500 (yield spread premium (YSP) paid in connection with residential mortgage loan was not included in definition of points and fees payable by borrower at or before closing under *Fin. Code* § 4970(b)(1)(B); transaction was not "covered loan" when total points and fees exceeded six percent only if YSP was included)].

For discussion of other relevant definitions, see § 45.13[2].

[d] Timing of Disclosure

A covered loan may not be made unless the specified disclosure has been provided to the consumer no later than three business days prior to signing of the loan documents of the transaction [*Fin. Code* § 4973(j)(1)].

[e] Format and Language of Disclosure

A covered loan may not be made unless the disclosure is written in 12-point font or larger [*Fin. Code* § 4973(j)(1)]. The disclosure must be in the form provided by statute [see *Fin. Code* § 4973(j)(1)], as set forth below.

[f] Rebuttable Presumption

There is a rebuttable presumption that a licensed person [see *Fin. Code* § 4970(g) (definition); § 45.13[2][d]] has met the obligation to provide this disclosure if the consumer provides the licensed person with a signed acknowledgment of receipt of a copy of the disclosure notice [*Fin. Code* § 4973(j)(2)].

[2] FORM

Disclosure for Consumer Loans Secured by Real Property**CONSUMER CAUTION AND HOME OWNERSHIP COUNSELING NOTICE**

If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan.

Mortgage loan rates and closing costs and fees vary based on many other factors, including your particular credit and financial circumstances, your earnings history, the loan-to-value requested, and the type of property that will secure your loan. Higher rates and fees may be justified depending on the individual circumstances of a particular consumer's application. You should shop around and compare loan rates and fees.

This particular loan may have a higher rate and total points and fees than other mortgage loans and is, or may be, subject to the additional disclosure and substantive protections under Division 1.6 (commencing with *Section 4970*) of the *Financial Code*. You should consider consulting a qualified independent credit counselor or other experienced financial adviser regarding the rate, fees, and provisions of this mortgage loan before you proceed. For information on contacting a qualified credit counselor, ask your lender or call the United States Department of Housing and Urban Development's counseling hotline at 1-888-466-3487 or go to www.hud.gov/fha/sfh/hcc for a list of counselors.

You are not required to complete any loan agreement merely because you have received these disclosures or have signed a loan application.

If you proceed with this mortgage loan, you should also remember that you may face serious financial risks if you use this loan to pay off credit card debts and other debts in connection with this transaction and then subsequently incur significant new credit card charges or other debts. If you continue to accumulate debt after this loan is closed and then experience financial difficulties, you could lose your home and any equity you have in it if you do not meet your mortgage loan obligations.

Property taxes and homeowner's insurance are your responsibility. Not all lenders provide escrow services for these payments. You should ask your lender about these services.

Your payments on existing debts contribute to your credit ratings. You should not accept any advice to ignore your regular payments to your existing creditors.

I ACKNOWLEDGE THAT I HAVE RECEIVED A COPY OF THIS DISCLOSURE NOTICE.

[Repeat as required:]

_____ [signature of consumer]
_____ [date]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection General Overview Real Property Law Financing General Overview



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E. Consumer Reporting Agency Reports

19-45 California Legal Forms--Transaction Guide § 45.230

§ 45.230 Request for Disclosure of Consumer Reporting Agency Record

[1] Comment--Use of Form

This form is a request for disclosure of consumer reporting agency information. It is used by a consumer to request disclosure of information a consumer reporting agency may have about the consumer.

On request and proper identification of any consumer, every consumer reporting agency is required by the Fair Credit Reporting Act [15 U.S.C. § 1681 *et seq.*] to clearly and accurately disclose to the consumer the following information [15 U.S.C. § 1681g(a)]:

- All information in the consumer's file at the time of the request, with the exception of credit scores, any other risk scores, or predictors relating to the consumer.
- The sources of the information, excluding sources of information acquired solely for use in preparing an investigative consumer report [see § 45.23[2][b][ii]] and actually used for no other purpose, with limited exceptions relating to discovery in the event that an action is brought under the Fair Credit Reporting Act.
- The identification of each person (including each end user identified under 15 U.S.C. § 1681e(e)(1), relating to consumer reports for resale) that procured a consumer report for employment purposes, during the two-year period preceding the date the request is made, or for any other purpose, during the one-year period preceding the date the request is made [see 15 U.S.C. § 1681g(a)(3)(C) (exception for government agencies and departments for security clearances)].
- The dates, original payees, and amounts of any checks showing any adverse characterization of the consumer.
- A record of all inquiries received by the agency during the one-year period preceding the request that

identified the consumer in connection with a credit or insurance transaction that was not initiated by the consumer.

- If the consumer requests the credit file and not the credit score, a statement that the consumer may request and obtain a credit score.

A consumer reporting agency must also provide the consumer, along with each written disclosure under 15 U.S.C. § 1681g [15 U.S.C. § 1681g(c)(2)]:

- A written summary of the consumer's rights prepared by the FTC [see 15 U.S.C. § 1681g(c)(1) (specific items required to be disclosed)].
- A toll-free telephone number for any nationwide credit reporting agency.
- A list, with telephone numbers, of federal agencies responsible for enforcing the FCRA [see 15 U.S.C. § 1681g(c)(2)(C)].
- A statement that the consumer may have additional rights under state law and may wish to contact a state or local consumer protection agency or a state attorney general to learn those rights.
- A statement that a consumer reporting agency is not required to remove accurate derogatory information from a consumer's file, unless the information is outdated [see 15 U.S.C. § 1681c] or cannot be verified.

Additional required disclosures cover:

- A summary of rights of identity theft victims [see 15 U.S.C. § 1681g(d); [4][c], below].
- For identity theft victims, and for any federal, state, or local government law enforcement agency, copies of an identity thief's application and business transaction records [15 U.S.C. § 1681g(e)(1); see 15 U.S.C. § 1681g(e)(2), (3), (5) (procedures to request information; exceptions)].
- An explanation of the factors that went into deriving the credit score [see 15 U.S.C. § 1681g(f); see also 15 U.S.C. § 1681g(g) (disclosure of credit scores by certain mortgage lenders)].

The form may also be used to convey to the agency notice of a dispute by the consumer concerning the completeness and accuracy of any item of information contained in the file. If the consumer notifies the consumer reporting agency directly, or indirectly through a reseller, of any dispute about either the completeness or the accuracy of any item of information contained in the consumer's file, the agency must then investigate free of charge and record the current status of that information in accordance with specified procedures [see 15 U.S.C. § 1681i(a)] before the end of the 30-day period beginning on the date the agency receives notice of the dispute by the consumer [15 U.S.C. § 1681i(a)(1)(A); see 15 U.S.C. § 1681i(a)(1)(B), (C) (extension of period to investigate; limitations on extension)]. See § 45.23 for further discussion of the Fair Credit Reporting Act.

For detailed coverage of the Fair Credit Reporting Act, see *Ch. 92, Service Contracts*, § 92.80.

The California Consumer Credit Reporting Agencies Act [Civ. Code §§ 1785.1-1785.35] sets forth similar disclosure and dispute resolution requirements [see Civ. Code § 1785.10; see also Civ. Code § 1785.15(a)]. In addition to the information contained in the first four items in the list above [see Civ. Code § 1785.10(c), (d)], the California act requires that a consumer credit reporting agency disclose all of the following:

- The consumer's credit score and an explanation of the credit score, and the key factors, as defined and required in *Civ. Code* § 1785.15.1 [*Civ. Code* § 1785.10(b); see Stats. 2000, ch. 978, §§ 1, 7 (effective July 1, 2001)]. For discussion of this requirement, see *Ch. 92, Service Contracts*, § 92.80[2](t).
- A record of all inquiries received by the agency in the 12-month period preceding the request that identified the consumer in connection with a credit transaction not initiated by the consumer [*Civ. Code* § 1785.10(e)]. After 2003, the record of inquiries must include the address, and, if provided by the recipient, the telephone number for customer service [*Civ. Code* § 1785.10(e); Stats. 2002, ch. 9, § 2; see also *Civ. Code* § 1785.10(f) (exemption for agency that is subject to *Civ. Code* § 1785.22)].
- The names and addresses of the sources of information [*Civ. Code* § 1785.10(c)]. After 2003, the agency must also disclose telephone numbers identified for consumer service, if provided by the sources of information [*Civ. Code* § 1785.10(c); Stats. 2001, ch. 236, §§ 2, 3; but see Stats. 2002, ch. 9, § 2; see also *Civ. Code* § 1785.10(f) (exemption for agency that is subject to *Civ. Code* § 1785.22)].
- The name of the recipient of any consumer credit report on the consumer, or, if applicable, the recipient's fictitious business name. After 2003, the agency must also disclose the address of the recipient, whether or not requested by the consumer, as well as telephone numbers identified for consumer service, if provided by the recipient [*Civ. Code* § 1785.10(d)(2); Stats. 2002, ch. 9, § 2; see also *Civ. Code* § 1785.10(f), (g) (exemptions for agency subject to *Civ. Code* § 1785.22)].

Certain items of information may not be included in a consumer credit report [see *Civ. Code* § 1785.13; see *Ch. 92, Service Contracts*, § 92.80[2](j), [3](e)]. This form complies with the disclosure requirements of the Consumer Credit Reporting Agencies Act.

For further discussion of the Consumer Credit Reporting Agencies Act, in general, see *Ch. 92, Service Contracts*, § 92.80[2].

[2] FORM

Request for Disclosure of Consumer Reporting Agency Record

Date: _____

_____[Credit agency's name]
 _____[Credit agency's address]

Re: File on _____[consumer's name], further identified below.

I request disclosure of the nature and substance of all information on me in your files, including the sources of the information and names and addresses of the recipients of all reports furnished within the last 12 months (or the last two years if furnished for employment purposes).

I further request a record of all inquiries, by recipient, that resulted in your providing information concerning me in connection with a credit transaction not initiated by me and that were received by you in the 12-month period immediately preceding this request.

[I have been turned down for [credit or employment or insurance or a rental dwelling] within the 60 days immediately

preceding this request, as follows: _____.]

I am identified as follows:]

Name: _____

Telephone: (business) _____ (home) _____

Present Address: _____

Former Address: _____

Marital Status: _____

Age: _____ Soc. Sec. No.: _____

Employment: _____

I understand I will be advised of any charges before they are incurred.

[Add, if consumer is notifying agency of dispute concerning information in file:]

I am further notifying you that I dispute the completeness and accuracy of the following item of information contained in my file: *[describe disputed item]*.

My dispute with this item is based on the following facts: *[facts forming basis of dispute]*.

I am the person named above and I understand that federal law provides that a person who obtains information from a consumer reporting agency under false pretenses is subject to substantial penalties.

_____ *[signature]*

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionFair Credit ReportingGeneral Overview



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19-45 California Legal Forms--Transaction Guide § 45.231

§ 45.231 Summary of Consumer's Rights Under Consumer Credit Reporting Agencies Act

[1] Comment--Use of Form

This form is a summary of a consumer's rights under the Consumer Credit Reporting Agencies Act [*Civ. Code § 1785.1 et seq.*]. It must be included in any written disclosure a consumer credit reporting agency makes to a consumer pursuant to *Civ. Code § 1785.15* [*Civ. Code § 1785.15(f)*]. The disclosure requirement is satisfied if the summary of rights is in substantially the form provided in the statute [*see Civ. Code § 1785.15*]. The language of this form fulfills the requirements of the statute.

If a consumer credit reporting agency compiles and maintains consumer credit reports on a nationwide basis, it must also provide a toll-free telephone number that consumers can use to communicate with the agency [*Civ. Code § 1785.15(f)*].

In addition to any other rights the consumer may have under the Consumer Credit Reporting Agencies Act, every consumer credit reporting agency, after being contacted by telephone, mail, or in person by any consumer who has reason to believe he or she may be a victim of identity theft, must promptly provide the consumer with a statement, written in a clear and conspicuous manner, describing the statutory rights of victims of identity theft under the Act [*Civ. Code § 1785.15.3(a)*; *see Civ. Code § 1785.15.3(c)* (exception for certain consumer credit reporting agencies that act only as resellers of credit information collected from other credit reporting agencies)]. Further, every consumer credit reporting agency, on the receipt from a victim of identity theft of a police report prepared in accordance with *Penal Code § 530.6*, or a valid investigative report made by a Department of Motor Vehicles investigator with peace officer status regarding the public offenses described in *Penal Code § 530.5*, must provide the victim, free of charge and on request, with up to 12 copies of his or her file during a consecutive 12-month period, not to exceed one copy per month, following the date of the police report [*Civ. Code § 1785.15.3(b)*].

For more detailed discussion of the Consumer Credit Reporting Agencies Act, see *Ch. 92, Service Contracts*, § 92.80[2].

[2] FORM

Summary of Consumer's Rights Under Consumer Credit Reporting Agencies Act

You have a right to obtain a copy of your credit file from a consumer credit reporting agency. You may be charged a reasonable fee not exceeding eight dollars (\$8). There is no fee, however, if you have been turned down for credit, employment, insurance, or a rental dwelling because of information in your credit report within the preceding 60 days. The consumer credit reporting agency must provide someone to help you interpret the information in your credit file.

You have a right to dispute inaccurate information by contacting the consumer credit reporting agency directly. However, neither you nor any credit repair company or credit service organization has the right to have accurate, current, and verifiable information removed from your credit report. Under the Federal Fair Credit Reporting Act, the consumer credit reporting agency must remove accurate, negative information from your report only if it is over seven years old. Bankruptcy information can be reported for 10 years.

If you have notified a consumer credit reporting agency in writing that you dispute the accuracy of information in your file, the consumer credit reporting agency must then, within 30 business days, reinvestigate and modify or remove inaccurate information. The consumer credit reporting agency may not charge a fee for this service. Any pertinent information and copies of all documents you have concerning an error should be given to the consumer credit reporting agency.

If reinvestigation does not resolve the dispute to your satisfaction, you may send a brief statement to the consumer credit reporting agency to keep in your file, explaining why you think the record is inaccurate. The consumer credit reporting agency must include your statement about disputed information in a report it issues about you.

You have a right to receive a record of all inquiries relating to a credit transaction initiated in the 12 months preceding your request. This record shall include the recipients of any consumer credit report.

You may request in writing that the information contained in your file not be provided to a third party for marketing purposes.

You have a right to place a "security alert" in your credit report, which will warn anyone who receives information in your credit report that your identity may have been used without your consent. Recipients of your credit report are required to take reasonable steps, including contacting you at the telephone number you may provide with your security alert, to verify your identity prior to lending money, extending credit, or completing the purchase, lease, or rental of goods or services. The security alert may prevent credit, loans, and services from being approved in your name without your consent. However, you should be aware that taking advantage of this right may delay or interfere with the timely approval of any subsequent request or application you make regarding a new loan, credit, mortgage, or cellular phone or other new account, including an extension of credit at point of sale. If you place a security alert on your credit report, you have a right to obtain a free copy of your credit report at the time the 90-day security alert period expires. A security alert may be requested by calling the following toll-free telephone number: *[insert applicable toll-free telephone number]*. California consumers also have the right to obtain a "security freeze."

You have a right to place a "security freeze" on your credit report, which will prohibit a consumer credit reporting agency from releasing any information in your credit report without your express authorization. A security freeze must be requested in writing by certified mail. The security freeze is designed to prevent credit, loans, and services from being approved in your name without your consent. However, you should be aware that using a security freeze to take control over who gets access to the personal and financial information in your credit report may delay, interfere with, or prohibit the timely approval of any subsequent request or application you make regarding a new loan, credit, mortgage, or cellular phone or other new account, including an extension of credit at point of sale. When you place a security freeze on your credit report, you will be provided a personal identification number or password to use if you choose to remove the freeze on your credit report or authorize the release of your credit report for a specific party or period of

time after the freeze is in place. To provide that authorization you must contact the consumer credit reporting agency and provide all of the following:

- (1) The personal identification number or password.
- (2) Proper identification to verify your identity.
- (3) The proper information regarding the third party who is to receive the credit report or the period of time for which the report shall be available to users of the credit report.

A consumer credit reporting agency must authorize the release of your credit report no later than three business days after receiving the above information.

A security freeze does not apply when you have an existing account and a copy of your report is requested by your existing creditor or its agents or affiliates for certain types of account review, collection, fraud control, or similar activities.

If you are actively seeking credit, you should understand that the procedures involved in lifting a security freeze may slow your application for credit. You should plan ahead and lift a freeze, either completely if you are shopping around, or specifically for a certain creditor, before applying for new credit.

A consumer credit reporting agency may not charge a fee to a consumer for placing or removing a security freeze if the consumer is a victim of identity theft and submits a copy of a valid police report or valid Department of Motor Vehicles investigative report. A person 65 years of age or older with proper identification may be charged a fee of no more than \$5 for placing, lifting, or removing a security freeze. All other consumers may be charged a fee of no more than \$10 for each of these steps.

You have a right to bring a civil action against anyone, including a consumer credit reporting agency, who improperly obtains access to a file, knowingly or willfully misuses file data, or fails to correct inaccurate file data.

If you are a victim of identity theft and provide to a consumer credit reporting agency a copy of a valid police report or a valid investigative report made by a Department of Motor Vehicles investigator with peace officer status describing your circumstances, the following shall apply:

- (1) You have a right to have any information you list on the report as allegedly fraudulent promptly blocked so that the information cannot be reported. The information will be unblocked only if (A) the information you provide is a material misrepresentation of the facts, (B) you agree that the information is blocked in error, or (C) you knowingly obtained possession of goods, services, or moneys as result of the blocked transactions. If blocked information is unblocked you will be promptly notified.
- (2) Beginning July 1, 2003, you have a right to receive, free of charge and upon request, one copy of your credit report each month for up to 12 consecutive months.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionGeneral Overview



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E. Consumer Reporting Agency Reports

19-45 California Legal Forms--Transaction Guide §§ 45.232-45.239

[Reserved]

§§ 45.232[Reserved]



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F. Cosigner Liability

19-45 California Legal Forms--Transaction Guide § 45.240

§ 45.240 Notice of Liability of Cosigner or Guarantor of Consumer Credit Contract

[1] Comment

[a] Use of Form

This form is a notice, in the form required by statute, of the liability of a cosigner or guarantor of a consumer credit contract [see [b], *below* (definition)]. Except when the cosigners are married to each other, the creditor must deliver this notice to the cosigner (that is, the person who does not in fact receive any of the money, property, or services that are the subject of the contract) before the cosigner becomes obligated on the contract [*Civ. Code § 1799.91(a)*; see § 45.63].

This form is not required when there are joint applicants or when a creditor offers or extends an open-end credit plan as defined under federal law [see Ch. 46, *Credit Card and Other Open-End Credit Transactions*] if both of the following criteria apply. First, the application or agreement signed by each applicant must clearly and conspicuously disclose that, after credit approval, each applicant has the right to use the plan and may be liable for all amounts extended to any joint applicant [*Civ. Code § 1799.91(c)(1)*]. Second, after credit approval, the creditor must issue a credit card or other device to each applicant and send it to the address specified in the application or deliver it in accordance with the application or agreement. This second requirement does not apply if the creditor in question does not issue credit cards or other credit devices to be used to obtain credit under the creditor's open-end credit plan [*Civ. Code § 1799.91(c)(2)*].

[b] Definitions

A "consumer credit contract" is an obligation to pay money on a deferred payment basis if the money, property, services, or other consideration that is the subject matter of the contract is primarily for personal, family, or household purposes. Included in this category are retail installment contracts [see *Civ. Code § 1802.6*], retail installment accounts [see *Civ. Code § 1802.7*], conditional sales contracts [see *Civ. Code § 2981(a)*], loans or extensions of credit secured by other than real property, or unsecured loans for use primarily for personal, family, or household purposes, and lease contracts for motor vehicles [*Civ. Code § 1799.90(a)*].

A "creditor" is any entity or individual who enters into or arranges for consumer credit contracts in the ordinary course

of business [*Civ. Code § 1799.90(b)*].

[c] Language Requirements

If the contract is written in either English or Spanish, this notice must be in both English and Spanish [*Civ. Code § 1799.91(a)*]. If the contract is written in another language, the notice must be in English and, in addition to or in lieu of Spanish, in the language in which the contract is written [*Civ. Code § 1799.91(b)*].

[d] Placement, Signature, and Type Size Requirements

If this notice is included in a consumer credit contract or any other document establishing the cosigner's liability, it must appear immediately above the space reserved for his or her signature or above or adjacent to any other notices required by law to be placed above the signature block and it must appear within a box formed by a heavy line [*Civ. Code § 1799.92(a)*]. If this notice is not included in the consumer credit contract, it must be on a separate sheet of paper that contains no other text except that necessary to identify the creditor and the contract to which it refers. That sheet must include the date and the cosigner's acknowledgment of receipt of the notice [*Civ. Code § 1799.92(b)*]. In any case, the notice must be printed in at least 10-point type [*Civ. Code § 1799.91(a)*].

The word "your" in the last sentence of the third paragraph of the notice in English must be italicized [*Civ. Code § 1799.91(f)*; see *Civ. Code § 1799.91(a), (d)*].

[e] Creditor's Obligation to Cosigner

A creditor may not obtain the signature of a cosigner who is entitled to this notice if the consumer credit contract contains blank spaces to be filled in later [*Civ. Code § 1799.93(a)*]. The creditor must give each cosigner a copy of the underlying debt instrument and security agreement or deed of trust, if any, that constitutes the consumer credit contract and, if this notice is separate from the consumer credit contract, a copy of this notice must also be given to the cosigner along with a copy of the document evidencing his or her obligation [*Civ. Code § 1799.93(b)*].

[f] Rights and Obligations of the Parties

This notice does not alter or affect the rights and obligations of the parties to a consumer credit contract [see *Civ. Code § 1799.94*]. If the underlying consumer credit contract does not comply with the statutory requirements governing it (including the requirement for this notice) [*Civ. Code § 1799.90 et seq.*], the creditor may not sue a cosigner or enforce a security interest against that party [*Civ. Code § 1799.95*]. However, the rights of a bona fide purchaser for value of property sold after enforcement of a security interest are unaffected if the purchase was made without notice of the facts constituting a violation of those requirements [*Civ. Code § 1799.95*].

The law governing consumer credit contracts does not operate to make applicable, affect, or waive the law governing sureties [see *Civ. Code § 2787 et seq.*] or the law governing marital relations [*Civ. Code § 1799.98(a)*; see *Fam. Code §§ 700 et seq., 4301, 4302*]. The delivery of this form is not evidence that the cosigner acted or did not act as a surety [*Civ. Code § 1799.98(b)*].

[2] FORM

Notice of Liability of Cosigner or Guarantor of Consumer Credit Contract

NOTICE TO COSIGNER (Traducci'on en Ingl'es Se Requiere
Por La Ley)

You are being asked to guarantee this debt. Think
carefully before you do. If the borrower doesn't pay
the debt, you will have to. Be sure you can afford to

pay if you have to, and that you want to accept this responsibility.

You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase this amount.

The creditor can collect this debt from you without first trying to collect from the borrower. The creditor can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, etc. If this debt is ever in default, that fact may become a part of *your* credit record.

This notice is not the contract that makes you liable for the debt.

AVISO PARA EL FIADOR (Spanish Translation Required By Law)

Se le est'a pidiendo que garantice esta deuda. Pi'enselo con cuidado antes de ponerse de acuerdo. Si la persona que ha pedido este pr'estamo no paga la deuda, usted tendr'a que pagarla. Est'e seguro de que usted podr'a pagar si sea obligado a pagarla y de que usted desea aceptar la responsabilidad.

Si la persona que ha pedido el pr'estamo no paga la deuda, es posible que usted tenga que pagar la suma total de la deuda, mas los cargos por tardarse en el pago o el costo de cobranza, lo cual aumenta el total de esta suma.

El acreedor (financiero) puede cobrarle a usted sin, primeramente, tratar de cobrarle al deudor. Los mismos metodos de cobranza que pueden usarse contra el deudor, podran usarse contra usted, tales como presentar una demanda en corte, quitar parte de su sueldo, etc. Si alguna vez no se cumpla con la obligaci'on de pagar esta deuda, se puede incluir esa informaci'on en la historia de credito de usted.

Este aviso no es el contrato mismo en que se le echa a usted la responsabilidad de la deuda.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection General Overview Contracts Law Debtor & Creditor Relations



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19-45 California Legal Forms--Transaction Guide § 45.241

§ 45.241 Notice of Delinquency to Cosigner of Credit Contract

[1] Comment

[a] Use of Form

This form is a notice of a delinquency on a consumer credit contract. A creditor must give this notice to a cosigner of such a contract if the creditor provides any adverse information with respect to that cosigner to a consumer credit reporting agency regarding the delinquency [*Civ. Code § 1799.101(b)*]. The creditor must provide this notice either at or before the time the adverse information is provided [*Civ. Code § 1799.101(b)*]. A creditor is also required to give a notice of delinquency to a cosigner before providing a debt collector with any information regarding the cosigner's obligation on a consumer credit contract [*Civ. Code § 1799.101(c)*; see *Civ. Code § 1788.2(c)* (definition of "debt collector")]. Refer to Section 45.63 [2] for further discussion of the notice of delinquency.

This form may be adapted as necessary to reflect the circumstances of a given situation. No particular form or language is required by statute for a notice of delinquency [*Civ. Code § 1799.101(f)*].

[b] Definitions

A "cosigner" is a natural person, other than the primary obligor of the spouse of the primary obligor, who renders himself or herself liable for the obligation on a consumer credit contract without compensation. The term includes a person whose signature is requested by a creditor as a condition to granting credit to another person. A person is a cosigner whether or not he or she is designated as such on the consumer credit contract or other document. A joint applicant for open-end credit is not a cosigner [*Civ. Code § 1799.101(a)(3)*; see *Civ. Code § 1799.91*].

A "delinquency" is a failure to make timely payment to the creditor of all or a portion of any installment under a consumer credit contract [*Civ. Code § 1799.101(a)(4)*].

[2] FORM

Notice of Delinquency to Cosigner of Credit Contract

NOTICE OF DELINQUENCY

_____ [date]
[name of cosigner]
[address of cosigner]

Dear Sir or Madam:

This notice, pursuant to *Section 1799.101 of the Civil Code*, is to inform you as cosigner of [describe consumer credit contract] entered into by _____ [name of primary obligor] on _____ [date], that the account is now delinquent. "Delinquent" means that there has been a failure to make timely payment of an installment under the consumer credit contract.

Because of this delinquency, we are now entitled to provide adverse information regarding your obligation as cosigner to a credit reporting agency or to a debt collector. [If appropriate, add: However, if payment in the amount of \$_____ (amount due, including late charges, if any) is received at this office by _____ (reasonable date), adverse information will not be released regarding your obligation as cosigner.]

_____ [name of creditor]
By _____ [signature]
_____ [typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection General Overview Contracts Law Debtor & Creditor Relations



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19-45 California Legal Forms--Transaction Guide § 45.242

§ 45.242 Notice of Cosigner's Action to Recover Damages**[1] Comment--Use of Form**

This form is a notice of a cosigner's intention to bring an action against a creditor for damages suffered as a result of the creditor's failure to meet statutory notice requirements regarding reporting of a delinquency on a consumer credit contract [*Civ. Code § 1799.102(a)*; see *Civ. Code § 1799.101*; see also § 45.241 [1]]. A cosigner who suffers damage from a violation of those requirements may bring an action against the creditor to recover actual damages or \$250, whichever is greater, plus reasonable attorneys' fees [*Civ. Code § 1799.102(a)*].

The cosigner must notify the creditor of his or her intention to bring the action not less than 30 days before bringing the action; the notice must include a statement of the specific evidence that proves the loss suffered by the cosigner [*Civ. Code § 1799.102(b)*]. If, within 25 days after the date of receiving the notice, the creditor tenders to the cosigner an amount equal to the loss or otherwise resolves the matter to the cosigner's satisfaction, the cosigner is barred from further recovery of that loss, including reasonable attorneys' fees [*Civ. Code § 1799.102(b)*].

[2] FORM**Notice of Cosigner's Action to Recover Damages**

NOTICE OF INTENTION TO BRING ACTION

_____[date]
 _____[name of creditor]
 _____[address of creditor]

Dear Sir or Madam:

I am a cosigner on your consumer credit contract [type of account and account number], of _____[date], whose primary obligor is _____[name of primary obligor]. This is

notice of my intention to file an action pursuant to *Section 1799.102 of the Civil Code* alleging _____*[statement of specific evidence proving loss]*. Your violation of *Section 1799.101 of the Civil Code* resulted in a loss of \$*[greater of actual damages or 250]* to me.

You have until _____*[date 25 days after creditor receives notice]* to tender an amount equal to my loss as stated above or otherwise resolve this matter to my satisfaction. If you fail to resolve this matter to my satisfaction, I am entitled and intend to file an action against you on or after _____*[date 30 days after creditor receives notice]*.

_____*[signature of cosigner]*
_____*[typed name of cosigner]*
_____*[address of cosigner]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor Relations



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19-45 California Legal Forms--Transaction Guide §§ 45.243-45.249

[Reserved]

§§ 45.243[Reserved]



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G. Credit Disability Insurance Disclosures

19-45 California Legal Forms--Transaction Guide § 45.250

§ 45.250 Credit Disability Insurance Claims Disclosures

[1] Comment

[a] Use of Form

This form contains disclosures that must be made by a creditor to a debtor if the creditor sells credit disability insurance to the debtor in any type of credit transaction; this disclosure must be made at the time of the sale. The disclosure may be included in the credit agreement, any separate document under which the insurance is sold, or on a separate page; the statute requires only that the disclosure be printed in at least 10-point type and that it be substantially the same as the statutory language reproduced in this form [*Civ. Code § 1812.402(f)(1)*].

[b] Applicability of Disclosure Requirement

The disclosure requirement and the other statutory provisions discussed in this comment [*Civ. Code §§ 1812.400-1812.410*] do not apply to credit disability insurance covering a key person if the creditor requires that insurance as a condition to making a loan of at least \$25,000 to be used in the operation of a business in which the key person is employed or has an ownership interest. For these purposes, a "key person" is one who the creditor and the debtor mutually agree must be involved in the operation of the business to assure its success [*Civ. Code § 1812.406(a)*]. These requirements are inapplicable to most credit transactions of more than 10 years' duration that are secured by a mortgage or deed of trust. However, they do apply to those transactions if the principal purpose of the transaction is to finance improvements to residential real property consisting of four or fewer residential units and the accompanying documentation or the course of dealing between the creditor and a contractor or supplier would indicate that purpose [*Civ. Code § 1812.406(b)*].

[c] Purpose and Effect of Statute

This form and the underlying substantive provisions of the law implement the California Legislature's finding that it is unfair for a creditor who has directly participated in, arranged, or received compensation for the sale of credit disability insurance to a debtor, or that creditor's successor in interest, to invoke a creditor's remedy because the debtor fails to pay

any sum that becomes due during a period of disability until a reasonable time has passed for the disability insurance claim to be filed, verified, and processed [*Civ. Code* § 1812.400]. Because the statute establishes a three-month claim moratorium period [see [e][i], *below*], it effectively discourages creditors who are unwilling to defer collection efforts for that period of time from selling credit disability insurance or procuring it for debtors. This is because the moratorium period and the other statutory requirements do not apply if a creditor does not arrange or participate in the sale or receive a commission or other compensation for the sale of credit disability insurance to the debtor [*Civ. Code* § 1812.404].

The statute does not affect or defeat an interest in a debtor's property that has been acquired by a bona fide purchaser or encumbrancer for value after the creditor invokes a creditor's remedy in violation of the statute if that purchaser or encumbrancer did not have notice of the facts that constituted the violation [see *Civ. Code* § 1812.409].

[d] "Creditor" and "Debtor" Defined

A "creditor" can be either a lender of money or the seller or lessor of goods, services, or rights, for which payment is arranged through a credit transaction, who has directly participated in, arranged, or received compensation for the sale of credit disability insurance to a debtor. The term also includes any successor to the right, title, or interest of the original creditor [*Civ. Code* § 1812.401(b); see *Civ. Code* § 1812.404]. A "debtor" is a borrower of money or a purchaser or lessee of goods, services, property, or rights for which payment is made through a credit transaction [*Civ. Code* § 1812.401(c)].

[e] Creditor's Rights

[i] Moratorium on Collection

A creditor may not invoke any creditor's remedies because of the debtor's nonpayment of any sum that becomes due during any disability claim period when there is credit disability insurance coverage [*Civ. Code* § 1812.402(a)]. The disability claim period begins on the due date for any payment the debtor fails to pay when the debtor claims that the credit disability coverage applies, and continues until three calendar months thereafter or until the insurer pays or rejects the claim, whichever occurs sooner [*Civ. Code* § 1812.401(e)]. Thus, a creditor may be precluded from taking any collection action for up to three months if credit disability insurance is in effect. Further, even if the insurer rejects the claim within the disability claim period, the debtor still has an additional 35-day grace period to pay the amount that became due during the claims period before the creditor may invoke any creditor's remedy [*Civ. Code* § 1812.402(e); see [g], *below*].

For discussion of the creditor's rights when it invokes its remedies without knowledge of the debtor's disability, see [iii], *below*.

[ii] Other Remedies Continue

A creditor may invoke any remedy during the disability claim period for delinquencies due prior to that claim period, even if nonpayment is related to the claimed disability, and for nonpayment of any interest, finance charge, or late charge accruing during the claim period on any sum that became due prior to that period [*Civ. Code* § 1812.402(c)]. A creditor may also foreclose a lien on any property to protect its security interest if a senior lienholder on that property has initiated foreclosure of its lien, is not prohibited from continuing foreclosure by law or court order, or will not otherwise suspend or delay foreclosure until after the disability claim period [*Civ. Code* § 1812.402(d)].

[iii] Remedies Invoked Before Notice of Disability

When the creditor invokes creditor's remedies for nonpayment after having sent the debtor a delinquency notice, the following rules apply. On receipt of notice of the debtor's disability claim, the creditor must refrain from invoking any

further creditor's remedies during the remainder of the claim period or the 35-day period after the insurer either rejects the debtor's claim or allows only partial payment [see [g], *below*] and rescind every remedy that it has already invoked (except that it need not restore property legally sold to any unrelated party) [Civ. Code § 1812.402(g)(1), (2)]. The debtor, however, will be liable for the costs and expenses actually incurred in either invoking or rescinding any creditor's remedy [Civ. Code § 1812.402(g)(3)]. The notice that must be given by the debtor to the creditor is defined as written notice deposited in the mail, postage prepaid, addressed to the creditor at the location where payments are normally to be sent or any other specified location. However, the creditor may waive its requirement for written notice and accept oral notice [Civ. Code § 1812.401(f)].

[iv] Open-End Credit Plans

If the plan is an open-end credit plan, a creditor may invoke its remedies when a debtor fails to make payments when due unless the nonpayment is related to an insured disability. However, termination of the open-end credit plan on the ground that the debtor does not meet the creditor's customary credit standards at the time the debtor notifies the creditor of the disability claim is not a "creditor's remedy." An "open-end credit plan" is credit extended when repeated transactions are contemplated, a finance charge is imposed on an outstanding unpaid balance, and the amount set by the creditor as the credit limit is available to the extent that any outstanding balance is repaid [Civ. Code § 1812.405; see vol. 9A, Ch. 46, *Credit Card and Other Open-End Credit Transactions*].

[f] Duties of Parties Upon Receipt of Disability Notice

When the creditor receives notice that the debtor claims disability as a ground for nonpayment, the creditor must send the debtor notice of the name, address, and telephone number of the insurer or the insurance representative from whom claim forms can be obtained. The creditor's successor in interest need not comply with these requirements if it is not related to the creditor by common ownership or control and does not know the name, address, and telephone number of the insurer or its representative [Civ. Code § 1812.402(b)].

When the insurer receives the claim, it must send the necessary claim forms to the debtor [Civ. Code § 1812.402(b)]. It must also send the debtor a disclosure in substantially the form specified by the statute [see Civ. Code § 1812.402(f)(2) (not reproduced here)]. The debtor must then submit the claim to the insurer and notify the creditor that the claim has been submitted [Civ. Code § 1812.402(b)].

[g] Payment or Rejection of Claim by Insurer

If the insurer pays the claim within the disability claim period, the creditor must treat any payment made by the insurer as timely payment by the debtor. If the insurer rejects the claim within that period or makes partial disability payments only, the debtor will have the opportunity to pay the balance without being subject to any creditor's remedy other than late charges for 35 days after the insurer sends notice of rejection or partial payment. If the debtor has not paid the balance due within the 35-day period, the creditor may then invoke any creditor's remedy [Civ. Code § 1812.402(e)]. If the insurer ceases making payments on a debtor's disability claim because the debtor failed to make timely submission of forms required by the insurer for recertification of a temporary disability, the creditor may invoke its remedies 15 days after receiving notice that the insurer has ceased making payments [Civ. Code § 1812.403].

[h] Other Rights of Debtors

The debtor may seek damages, equitable relief, or other relief for any violation of the statute by the creditor [Civ. Code § 1812.402(i)], although the creditor will not be in violation or liable if, having invoked its remedies before notice of the disability claim, it receives notice of the claim and then refrains from invoking further remedies during the remainder of the claim period or the 35-day period after the insurer either rejects the debtor's claim or allows only partial payment and rescinds previously invoked remedies [Civ. Code § 1812.402(g)(1), (2), (4)]. The rights and remedies given by the statutory provisions discussed in this Comment are cumulative to each other and all other debtors' rights under other

laws [Civ. Code § 1812.402(h)]. Any waiver by the debtor of the provisions of *Civil Code Sections 1812.400 through 1812.410* is void and unenforceable [Civ. Code § 1812.408].

[i] Insurance Provisions

A credit disability insurance policy or group certificate may exclude only certain diseases or conditions from coverage. Any preexisting disease or physical condition may be excluded, if the disease or condition is named or specifically described in the policy or certificate. If a disease or condition is not named or specifically described, the only diseases or conditions that may be excluded are those preexisting illnesses, diseases, and physical conditions for which the debtor actually received medical advice, consultation, or treatment within six months before or six months after the effective date of the coverage and which result in disability commencing within two years of that date [Ins. Code § 779.30(a)].

For revolving accounts, any preexisting condition provision may be applied separately to each charge or advance. If a preexisting condition provision is applied separately, the time period is measured from the date of each separate charge or advance. If a preexisting condition provision is applied to a subsequent charge or advance on a revolving account, the insurer must give the consumer a statutory notice at least annually regarding exclusions from coverage [see Ins. Code § 779.30(d)]. Applications, policies, and certificates must disclose, in bold capital letters, the preexisting health conditions that will render the coverage void [Ins. Code § 10127.5]. The debtor has the right to terminate credit life or disability insurance at any time for any reason on notice to the creditor. Refunds must be paid and if paid to the creditor, the creditor must credit the debtor's account with the refund and any interest or finance charge adjustment provided for in the credit agreement [Ins. Code § 779.31; see Ins. Code § 779.14 (provision for payment of refunds)].

[2] FORM

Credit Disability Insurance Claims Disclosures

CLAIM PROCEDURE

If you become disabled, tell us (your creditor) right away. (We advise you to send this information to the same address to which you are normally required to send your payments, unless a different address or telephone number is given to you in writing by us as the location where we would like to be notified.) We will tell you where to get claim forms. Send in the completed form to the insurance company as soon as possible and tell us as soon as you do.

If your disability insurance covers all of your missed payment, WE CANNOT TRY TO COLLECT WHAT YOU OWE OR FORECLOSE UPON OR REPOSSESS ANY COLLATERAL UNTIL THREE CALENDAR MONTHS AFTER your first missed payment is due or until the insurance company pays or rejects your claim, whichever comes first. We can, however, try to collect, foreclose, or repossess if you have money due and owing us or are otherwise in default when your disability claim is made or if a senior mortgage or lien holder is foreclosing.

If the insurance company pays the claim within the three calendar months, we must accept the money as though you paid on time. If the insurance company rejects the claim within the three calendar months or accepts the claim within the three calendar months as a partial disability and pays less than for a total disability, you will have 35 days from the date that the rejection or the acceptance of the partial disability claim is sent to pay past due payments, or the difference between past due payments and what the insurance company pays for the partial disability, plus late charges. You can contact us, and we will tell you how much you owe. After that time, we can take action to collect or foreclose or repossess any collateral you may have given.

If the insurance company accepts your claim but requires that you send in additional forms to remain eligible for continued payments, you should send in these completed additional forms no later than required. If you do not send in these forms on time, the insurance company may stop paying, and we will then be able to take action to collect or

foreclose or repossess any collateral you may have given.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDebtor & Creditor RelationsInsurance LawLife InsuranceCredit Life



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[b] "Retail Installment Account" Defined

[c] Charges Permitted by Unruh Act

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 - [i] In General
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[b] When Notice Must be Given

[c] Contents of Notice

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Cardholder's Demand on Retailer for Satisfactory Resolution of Dispute

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Cardholder's Notice to Card Issuer of Claims and Defenses Against Retailer

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[a] Use of Form

[b] Billing Error Rights Independent of Right to Assert Claims and Defenses

[c] "Billing Error" Defined

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[1] Comment

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Notice of Loss or Theft of Credit Card and Possible Unauthorized Use

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Notice to Consumer Regarding Choice With Respect to Sharing of Nonpublic Personal Information



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Scope

Scope

This chapter covers government regulation of consumer open-end credit. It begins with a discussion of open-end credit arrangements, including credit cards and retail installment agreements, which are the two main types of open-end financing. This discussion includes an introduction to the operation of credit card transactions and other open-end or revolving credit accounts.

The Truth in Lending Act and its implementing regulation, Federal Reserve Board Regulation Z, as they apply to open-end credit, are also discussed. Under California law, the Unruh Act, the Song-Beverly Credit Card Act of 1971, and Areias-Robbins Credit Card Full Disclosure Act of 1986 requirements for credit cards and retail installment agreements are also explored, and coordinated with the federal regulations. This chapter also deals with equal credit rights and fair credit billing on both the state and federal levels, claims and defenses of cardholders, cardholder and cosigner liability, credit disability insurance, and California laws relating to identity theft in the consumer credit context.

Government regulation of closed-end credit plans, including the Truth in Lending Act and Unruh Act requirements, can be found in Ch. 45, *Consumer Installment Loans and Credit Sales*. That chapter also provides definitions of credit-related terms used in the Truth in Lending Act, a more detailed discussion of equal credit rights, and coverage of the regulation of consumer reporting agencies.

If the credit involves the purchase or lease of an automobile, see Ch. 47, *Automotive Financing and Vehicle Leasing*. If credit involves the purchase of real estate, see Ch. 25, *Real Estate Loans*. If an extension of credit is secured by an interest in the consumer's dwelling, see Ch. 25A, *Security Instruments for Real Estate Financing*, and use only those portions of this chapter that expressly discuss the right to rescind the open-end credit contract for transactions creating a lien on the consumer's dwelling.

With the exception of coverage of federal and state law governing the issuance and liability for unauthorized use of business credit cards, this chapter covers only consumer credit transactions. For a discussion of credit extensions to businesses, see Ch. 42, *Secured Transactions*, Ch. 43, *Commercial Loans*, and Ch. 44, *Accounts Receivable Financing and Factoring*. Electronic and other types of fund transfers, including those effected by the use of credit cards, are covered in Ch. 56, *Letters of Credit and Electronic Fund Transfers*.



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§ 46.01 California Statutes

Consumer credit advertising: required disclosures. *Bus. & Prof. Code § 17538.7.*

Right to translation of contract negotiated in Spanish, Tagalog, Vietnamese, or Korean, in language in which contract was negotiated. *Civ. Code § 1632.*

Song-Beverly Credit Card Act of 1971. *Civ. Code § 1747 et seq.*

Definitions. *Civ. Code § 1747.02.*

Waiver of Act's provisions contrary to public policy and unenforceable. *Civ. Code § 1747.04.*

Limitations on issuance of card. *Civ. Code § 1747.05.*

Unauthorized use of card. *Civ. Code §§ 1747.10, 1747.20.*

Lost or stolen card. *Civ. Code § 1747.10.*

Prohibited acts; remedies. *Civ. Code § 1747.70.*

Name on card issued to married woman. *Civ. Code § 1747.81.*

Notice to cardholder of intention to cancel card. *Civ. Code § 1747.85.*

Subjection of issuer to defenses available to holder against retailer. *Civ. Code § 1747.90.*

Prohibition of cash discounts invalid. *Civ. Code § 1748.*

Annual statement. *Civ. Code § 1748.5.*

Areias Credit Card Full Disclosure Act of 1986. *Civ. Code § 1748.10 et seq.*

Mailed solicitation: disclosure requirements. *Civ. Code § 1748.11.*

Disclosure of marketing information. *Civ. Code § 1748.12.*

Disclosures regarding length of time required, at various payment rates, to pay off balance due on open-end credit card account. *Civ. Code § 1748.13.*

Waiver of Act's provisions contrary to public policy and unenforceable. *Civ. Code § 1748.14.*

Areias-Robbins Charge Card Full Disclosure Act of 1986. *Civ. Code § 1748.20 et seq.*

Mailed solicitation: disclosure requirements. *Civ. Code § 1748.22.*

Waiver of Act's provisions contrary to public policy and unenforceable. *Civ. Code § 1748.23.*

Consumer Credit Reporting Agencies Act. *Civ. Code § 1785.1 et seq.*

Waiver of Act's provisions contrary to public policy and unenforceable. *Civ. Code § 1748.36.*

Protection of personal information in customer records. *Civ. Code § 1798.80 et seq.*

Unruh Act, regulation of retail installment sales. *Civ. Code § 1801 et seq.*

Fees, expenses, charges permitted. *Civ. Code § 1810.4.*

Definitions. *Civ. Code §§ 1802-1802.21.*

Open-end credit. *Civ. Code §§ 1810.1-1812.20.*

Delinquency and collection charges. *Civ. Code § 1810.12.*

Areias Retail Installment Account Full Disclosure Act of 1986. *Civ. Code §§ 1810.20, 1810.21.*

Penalties for noncompliance. *Civ. Code §§ 1812.6-1812.9.*

Creditor's remedies: credit disability insurance. *Civ. Code § 1812.402 et seq.*

Student Financial Responsibility Act; regulation of on-campus marketing of credit cards to college students. *Educ. Code § 99030.*

Suspension of certain civil obligations and liabilities of national guard and military reserve members during qualifying periods of military service after September 11, 2001. *Mil. & Vet. Code § 400 et seq.*

Misdemeanor to make adverse report relating to creditworthiness of military service member by or to any person or entity engaged in practice of assembling or evaluating consumer credit information,

after service member has applied for or received a stay, postponement, or suspension of payment of any tax, fine, penalty, insurance premium, or other civil obligation or liability. *Mil. & Vet. Code § 401(a)(3), (c)*; see *Mil. & Vet. Code § 400* (applicability).



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§ 46.02 Federal Sources

[1] Statutes

Truth in Lending Act. *15 U.S.C. § 1601 et seq.*

Open-end credit provisions. *15 U.S.C. §§ 1602(i), 1637, 1642-1645, 1666-1666j.*

Penalties for noncompliance. *15 U.S.C. §§ 1607, 1611, 1640, 1641.*

Fair Credit Reporting Act. *15 U.S.C. § 1681 et seq.*

Equal Credit Opportunity Act. *15 U.S.C. § 1691 et seq.*

Electronic Fund Transfer Act. *15 U.S.C. § 1693 et seq.*

Gramm-Leach-Bliley Act restricting rights of financial institutions to disclose consumers' nonpublic personal information to nonaffiliated third parties; statutory notice requirements. *15 U.S.C. § 6801 et seq.*

Electronic Signatures in Global and National Commerce Act (E-Sign Act). *15 U.S.C. § 7001 et seq.*

Servicemembers Civil Relief Act. *50 U.S.C. App. § 501 et seq.*

[2] Regulations

Equal credit opportunity (Regulation B). 12 C.F.R. pt. 202.

Truth in lending (Regulation Z). 12 C.F.R. pt. 226.

Definitions. *12 C.F.R. § 226.2.*

Exempt transactions. *12 C.F.R. § 226.3.*

Open-end credit provisions. *12 C.F.R. §§ 226.2(a)(20), 226.5-226.16.*

Finance charge. *12 C.F.R. § 226.4.*

General disclosure requirements, including electronic delivery. *12 C.F.R. § 226.5.*

Applications and Solicitations, including those accessed in electronic form. *12 C.F.R. § 226.5a.*

Initial disclosure statement. *12 C.F.R. § 226.6.*

Periodic statement. *12 C.F.R. § 226.7.*

Identification of transactions. *12 C.F.R. § 226.8.*

Subsequent disclosure requirements. *12 C.F.R. § 226.9.*

Prompt crediting of payments. *12 C.F.R. § 226.10.*

Treatment of credit balances. *12 C.F.R. § 226.11.*

Billing error resolution. *12 C.F.R. § 226.13.*

Annual percentage rate. *12 C.F.R. § 226.14.*

Right of rescission. *12 C.F.R. § 226.15.*

Advertising. *12 C.F.R. § 226.16.*

Electronic fund transfers (Regulation E). *12 C.F.R. pt. 205.*

Dissemination of consumers' nonpublic personal information. *16 C.F.R. pt. 313.*



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§ 46.05 Law Reviews

Juzwiak, *Mr. Micawber Revisited: A Critique of the Credit Practices Rule*, 64 S. Cal. L. Rev. 417 (Jan. 1991).

Fischer, *Consumer Credit: An Overview of New Credit and Charge Card Disclosure Requirements*, 23 U.C.C. L.J. 3 (Summer 1990).

Rabin and Brownlie, *Usury Law in California: A Guide Through the Maze*, 20 U.C. Davis L. Rev. 397 (1987).

Mair, *Unconscionability and the Enforcement of Standardized Contracts in Commercial Transactions*, 16 Pac. L.J. 247 (1984).



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§ 46.06 Annotations

Annot., Bank's Liability, Under State Law, for Disclosing Financial Information Concerning Depositor or Customer, 81 A.L.R.4th 377 (1990) .



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20-46 California Legal Forms--Transaction Guide § 46.07

§ 46.07 Text References

[1] Matthew Bender Sources

California Forms of Pleading & Practice(Matthew Bender).

Ch. 127, *Consumer Contracts and Loans* .

Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Transactions* .

Ch. 129, *Consumer Credit Reporting* .

California Legal Forms(Matthew Bender).

Ch. 42, *Secured Transactions* .

Ch. 43, *Commercial Loans* .

Ch. 44, *Accounts Receivable Financing and Factoring* .

Ch. 45, *Consumer Installment Loans and Credit Sales* .

Ch. 47, *Automotive Financing and Vehicle Leasing* .

Ch. 56, *Letters of Credit and Electronic Fund Transfers* .

Rabkin & Johnson, Current Legal Forms, Ch. 6, *Credit and Finance* (Matthew Bender).

[2] Additional Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments* (10th ed. 2005).



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A. Open-End Credit

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§ 46.10 Open-End or Revolving Credit

Open-end or revolving credit is consumer credit extended pursuant to a plan under which the creditor reasonably contemplates repeated transactions, a finance charge may be imposed from time to time on any outstanding unpaid balance, and further credit is generally made available to the consumer to the extent that any outstanding balance is repaid [15 U.S.C. § 1602(i); 12 C.F.R. § 226.2(a)(20)]. An open-end credit arrangement typically involves a credit card or revolving account.

Closed-end credit, on the other hand, generally refers to a single extension of credit that usually takes the form of the loan of a fixed amount or a single purchase credit transaction. Under Regulation Z [12 C.F.R. pt. 226], closed-end credit is defined by exclusion: it includes any consumer credit other than open-end credit [12 C.F.R. § 226.2(a)(10)]. The most common closed-end credit arrangements are direct loans and credit sales. See Ch. 45, *Consumer Installment Loan and Credit Sales*, for detailed discussion of closed-end credit.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law
Debtor & Creditor Relations



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A. Open-End Credit

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§ 46.11 Revolving Accounts

Revolving accounts are typically checking account overdraft protection plans: the customer may overdraw his or her checking account and the bank will cover the overdraft by automatically depositing funds in the account, generally in multiples of \$100. A revolving credit agreement may also provide for a transfer of funds to the customer's account at the customer's request. The bank sends a monthly statement to the customer, who is required to make a minimum monthly payment. Such an agreement generally provides for a transfer fee, as well as interest on the outstanding balance. The federal Truth in Lending Act imposes certain disclosure requirements on these agreements [see 15 U.S.C. § 1637(a); 12 C.F.R. § 226.6] and the monthly billing statements, [see 15 U.S.C. § 1637(b); 12 C.F.R. § 226.7].

A creditor extending any type of open-end credit must make certain disclosures to the consumer before the first use of the credit plan [15 U.S.C. §§ 1637(a), 1643(a)(1); 12 C.F.R. §§ 226.5(b)(1), 226.12(b)(2); see Civ. Code § 1810.1]. See §§ 46.212 and 46.215 for discussion of these disclosures.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview



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20-46 California Legal Forms--Transaction Guide § 46.12

§ 46.12 Credit Cards

The Truth in Lending Act (TILA) [15 U.S.C. § 1601 *et seq.*] defines a "credit card" as any device used to obtain money, property, labor, or services on credit [15 U.S.C. § 1602(k); *see* 12 C.F.R. § 226.2(a)(15)]. The term includes a check guarantee card if it has overdraft protection or otherwise provides direct access to a line of credit. However, the term does not extend to a check guarantee card that has no credit feature, even if the creditor occasionally honors an inadvertent overdraft [12 C.F.R. pt. 226, supp. I, § 226.2(a)(15)].

The Song-Beverly Credit Card Act [Civ. Code § 1747 *et seq.*] defines a "credit card" as a device used to obtain money, property, labor, or services on credit, but specifically excludes telephone credit cards (to which TILA is also inapplicable [15 U.S.C. § 1603(4); 12 C.F.R. § 226.3(c)]), electronic fund transfer arrangements between consumers and financial institutions containing an overdraft protection feature, and keys or card keys used to purchase petroleum products at an automated dispensing outlet primarily for business purposes [*see* Civ. Code § 1747.02(a)(1)-(3); *see also* 12 C.F.R. § 226.3 (exempt transactions); 15 U.S.C. § 1603 (exempt transactions)].

The Student Financial Responsibility Act [Educ. Code § 99030] governs the on-campus marketing of credit cards to college students [*see* Civ. Code § 1747.02(m) ("student credit card" defined for purposes of Student Financial Responsibility Act)].

Credit cards are issued by commercial banks, retailers, travel and entertainment companies, and others.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Banking Law Consumer Protection Credit Card Agreements General Overview



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20-46 California Legal Forms--Transaction Guide § 46.13

§ 46.13 Charge Cards

Under the Truth in Lending Act (TILA), a "charge card" is a credit card on an account for which no periodic rate is used to compute a finance charge. Certain provisions of TILA apply to charge cards [12 C.F.R. § 226.2(a)(15); see §§ 46.40, 46.214].

Under the Areias-Robbins Charge Card Full Disclosure Act of 1986, a "charge card" is a card, plate, or other credit device pursuant to which a charge card issuer extends credit to the charge card holder when (1) the credit extended does not subject the charge card holder to a finance charge and (2) the charge card holder cannot automatically access credit that is repayable in installments. The credit must be extended primarily for personal, family, or household purposes [Civ. Code § 1748.21(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionCredit Card AgreementsGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview



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20-46 California Legal Forms--Transaction Guide § 46.14

§ 46.14 Operation of Credit Card Systems

[1] Bank Credit Cards

A bank credit card system typically involves four parties and is administered by an inter-bank credit card clearinghouse owned jointly by member banks. The parties include the cardholder bank, the cardholding customer, the retailer accepting the credit card as payment for merchandise or services, and the merchant bank that has agreed to purchase credit card transaction slips from the retailer. A customer makes a credit card purchase from a retailer who deposits the purchase transaction slip in its account at the merchant bank. The merchant bank credits the retailer's account with the cash value of the transaction, as shown by the transaction slip, less a stated discount, and sends the transaction slip and a processing fee to the inter-bank credit card clearinghouse. The credit card clearinghouse retains the processing fee, credits the merchant bank's account with the amount shown on the transaction slip, debits the cardholder bank's account for that amount, and forwards the slip to the cardholder bank which, in turn, bills the customer [*Western States Bankcard Assn. v. City and County of San Francisco* (1977) 19 Cal. 3d 208, 211, 137 Cal. Rptr. 183, 561 P.2d 273] .

Bank credit card plans are not subject to the Franchise Investment Law [*Corp. Code § 31103*; see *Corp. Code § 31000 et seq.*]. For purposes of this law, "bank credit card plans" are those in which the issuers of credit cards are banks (or persons controlling these banks) regulated by or under the supervision of the following institutions: the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Comptroller of the Currency of the United States, or the Superintendent of Banks of the State of California, provided that the assets of these banks or controlling persons represent a majority of the assets on a consolidated basis of any holding company system of which the card issuers may be a party [*Corp. Code § 31103*]. See Ch. 51A, *Franchise Registration* , for detailed discussion of the franchise regulatory scheme.

[2] Retail Credit Cards

Rather than obtaining a credit card from a bank, a customer may arrange for credit through a retailer. A "retail installment account," also known as an installment or revolving account, is an arrangement whereby a buyer, using a retail credit card, promises to pay to a retail seller the outstanding balance incurred in a retail installment sale [*Civ. Code § 1802.7*]. A "retail installment sale" is a sale of goods or services by a retail seller to a retail buyer for a deferred price

payable in installments [*Civ. Code* §§ 1802.5, 1802.7]. Such an agreement provides for interest on the outstanding balance [*Civ. Code* § 1802.7]. A retail installment account is distinguished from a retail installment contract [*see Civ. Code* § 1802.6] by the fact that its finance charge is expressed as a percent of the periodic balance rather than as a stated dollar amount or as a capitalized item [*see Civ. Code* § 1802.7].

The retailer either carries customer purchases on its own accounts and bills the buyers directly for payment, or sells its accounts to private factors.

[3] Travel and Entertainment Credit Cards

A travel and entertainment ("T and E") card combines the characteristics of the bank and retail card systems. Certain travel and entertainment credit card issuers act solely in an administrative and financing capacity, while others include their own merchandising operation. An issuer may also sign up merchants to honor their cards. Under this arrangement, the merchant is compensated directly by the issuer, which deducts a percentage from the merchant's price as its service charge.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionCredit Card AgreementsGeneral OverviewContracts LawTypes of ContractsInstallment Contracts



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[Reserved]

§§ 46.15[Reserved]



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B. Equal Credit Rights and Credit Information Reporting

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§ 46.20 Equal Credit Opportunity

[1] Federal Law

The Equal Credit Opportunity Act [15 U.S.C. § 1691 *et seq.*] prohibits discrimination against any credit applicant in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, or age [15 U.S.C. § 1691(a)]. Further, a creditor may not discriminate against an applicant because all or part of the applicant's income derives from public assistance or because the applicant has exercised any right under the consumer protection laws [15 U.S.C. § 1691(a)].

A detailed set of regulations (Regulation B) implements the Act [see 12 C.F.R. pt. 202]. These regulations control the information that may be requested in credit applications [12 C.F.R. § 202.5], the factors that may be considered in evaluating credit worthiness [12 C.F.R. § 202.6], and, to some extent, the types and forms of credit extensions and accounts [12 C.F.R. § 202.7].

[2] California Law

California has similar but less extensive legislation concerning the rights of credit applicants [see *Civ. Code* § 1812.30 *et seq.*]. California law requires that credit applicants who control similar amounts of property and earnings be treated equally in credit transactions, regardless of sex or marital status. Additionally, no person may be denied credit in his or her own name on the basis of sex or marital status [*Civ. Code* § 1812.30(a)-(d)]. Violation of either law may result in civil liability for actual and punitive damages [15 U.S.C. § 1691e; *Civ. Code* § 1812.31].

For further discussion of equal credit opportunity under federal and state law, see § 46.120 and Ch. 45, *Consumer Installment Loans and Credit Sales*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection General Overview Banking Law Consumer Protection Equal Credit

OpportunityGeneral Overview



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§ 46.21 Credit Information Reporting

Credit information reporting is regulated at the state level by the Consumer Credit Reporting Agencies Act [*Civ. Code § 1785.1 et seq.*] and at the federal level by the Fair Credit Reporting Act [*15 U.S.C. § 1681 et seq.*]. These acts require credit information agencies to adopt reasonable credit procedures, place limits on the uses that can be made of consumer credit information, and impose disclosure requirements regarding consumer credit information. For further coverage of consumer credit reporting, see Ch. 45, *Consumer Installment Loans and Credit Sales*, and Ch. 92, *Service Contracts*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionFair Credit ReportingGeneral OverviewBanking LawConsumer ProtectionState LawGeneral Overview



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[Reserved]

§§ 46.22[Reserved]



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§ 46.30 Coordination of Federal and California Requirements

Two principal statutes govern consumer credit in California. At the federal level, the Truth in Lending Act (TILA) [15 U.S.C. § 1601 *et seq.*] is designed to foster the informed use of consumer credit through uniform disclosure of credit terms and cost. The Act is administered under regulations (Regulation Z) issued by the Board of Governors of the Federal Reserve System [12 C.F.R. pt. 226]. Under California law, the Unruh Act [Civ. Code § 1801 *et seq.*] provides consumer protection from abusive credit practices in the area of retail installment sales. The implementing feature of both acts is a detailed disclosure document.

While there are differences in coverage and application, the two laws are similar in purpose and contain many of the same disclosure requirements. Both acts can, and frequently do, apply to the same credit transaction. TILA preempts any inconsistent provisions of the Unruh Act [15 U.S.C. § 1610(a)]. The Unruh Act permits the required disclosures to be made in any manner or terminology required or permitted by Regulation Z, provided that any additional requirements imposed by the Unruh act are complied with and further provided that a creditor always furnish, in the disclosure document, a separate written itemization of the amount financed [Civ. Code § 1801.5 (Regulation Z disclosures); *see Civ. Code § 1803.3(b); 12 C.F.R. § 226.18(c)*]. There are no inconsistencies between the two statutes that could make compliance with both difficult; in fact, all contracts subject to the Unruh Act must contain the disclosures required by Regulation Z, whether or not Regulation Z is applicable to the transaction [Civ. Code § 1803.3(b)]. Thus, the different disclosure requirements can be coordinated in those credit transactions to which both acts apply [*see Civ. Code § 1801.5; 15 U.S.C. § 1637* (disclosures by open-end creditors); 12 C.F.R. §§ 226.5 (disclosures by open-end creditors), 226.28 (effect on state laws)].

In addition, in California, three acts govern the specific disclosure requirements relating to credit cards and charge cards: the Song-Beverly Credit Card Act of 1971 [Civ. Code § 1747 *et seq.*], the Areias Credit Card Full Disclosure Act of 1986 [Civ. Code § 1748.10 *et seq.*], and the Areias-Robbins Charge Card Full Disclosure Act of 1986 [Civ. Code § 1748.20 *et seq.*]. These acts are intended to conform to TILA and any rule, regulation, or interpretation by the Federal Reserve System [Civ. Code § 1747.01; *see Civ. Code §§ 1748.11(a)(2), (c), (e), 1748.22(d)*]. TILA preempts any inconsistent provisions of any of these California acts [15 U.S.C. § 1610(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 46.31 Making Use of Disclosures

Different banks and other credit card issuers legitimately use different methods for computing and stating interest rates. Even when two issuers use the same method and offer the same rate, one might impose a fee not required by the other. The federal and California disclosures standardize cost-of-credit calculations to permit accurate comparisons between different credit or charge cards. Thus, while the interest rate stated in one contract may not be comparable to that stated in another, the annual percentage rate (which along with the other Truth in Lending Act information must be conspicuously segregated from other contract terms [*see 15 U.S.C. § 1638(b)(1)*]), will be directly comparable. Similarly, the finance charge will be a comprehensive dollar total of all items that make up the cost of credit, permitting the consumer to see at a glance what it will cost him or her to borrow money or to purchase an item on an installment basis, regardless of how the lender denominates the items that constitute that cost.

See Ch. 45, *Consumer Installment Loans and Credit Sales*, for definitions of these credit-related terms and detailed discussion of all disclosure requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Truth in Lending General Overview



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§ 46.32 Transactions Covered by Truth in Lending and Unruh Acts

[1] In General

The Truth in Lending Act (TILA) and Unruh Act apply only to consumer credit transactions, and only to those involving specified creditors [see [3], *below*]. A "consumer credit transaction" is one in which the credit extended, or the goods purchased, are primarily for personal, family, or household purposes [15 U.S.C. § 1602(h); 12 C.F.R. § 226.2(a)(12); Civ. Code § 1802.1].

The Truth in Lending Act and Unruh Act regulate both open-end and closed-end credit. See Ch. 45, *Consumer Installment Loans and Credit Sales*, for detailed discussion of closed-end credit and related Truth in Lending Act and Unruh Act provisions.

[2] Limitations on Application of Truth in Lending Act

The Truth in Lending Act (TILA) is not applicable to all consumer credit transactions. Credit extensions in excess of \$25,000 are not covered unless they are secured by real property or a dwelling [12 C.F.R. § 226.3(b)]. Additionally, TILA applies only if the credit is subject to a finance charge, or is payable by written agreement in more than four installments [12 C.F.R. § 226.1(c)]. However, certain regulations apply to all credit card transactions, whether for business or consumer purposes, even if the credit is not subject to a finance charge and is not payable in more than four installments [12 C.F.R. § 226.1(c)(2); see §§ 46.41[1] (no issuance except as renewal or in response to request), 46.213 (liability for unauthorized use)].

[3] Limitations on Application of Unruh Act

[a] Applicable Only to Retail Installment Sales

The Unruh Act applies only to retail installment sales of consumer goods or services. A "retail installment sale" is a sale by a person engaged in the business of selling consumer goods or services to a consumer, not principally for the purpose of resale, with payment in installments [Civ. Code § 1802.5; see Civ. Code §§ 1802.1-1802.6].

[b] Contract Must be Entered or Performed in California

The Unruh Act applies to retail installment contracts entered into or performed in California [*see Civ. Code §§ 1802.6, 1802.7*]. A contract will be deemed to have been made in California if either the seller offers or agrees in California to sell to a buyer who is a resident of California, or if a buyer who is a resident of California accepts or makes the offer in California to buy, regardless of the situs of the contract as specified in it [*Civ. Code § 1802.19(a)*]. Any solicitation or communication to sell, whether oral or written, that originates outside of California but that is forwarded to, and received in California by, a buyer who is a resident of California, will be deemed to be an offer or agreement to sell in California [*Civ. Code § 1802.19(b)*]. Any solicitation or communication to buy, whether oral or written, that originates within California, from a buyer who is a California resident, that is forwarded to, and received by, a retail seller outside of California, is deemed to be an acceptance or offer to buy in California [*Civ. Code § 1802.19(c)*].

[c] Unruh Act Inapplicable to Contracts for Certain Sales and Services

The Unruh Act does not apply to contracts for the construction, sale, or construction and sale of an entire residence, mobilehome, or commercial or industrial structure [*Civ. Code § 1801.4(a)*]. In addition, contracts for the sale of real property are not covered by the Act [*Civ. Code § 1801.4(b)*]; *but see Bus. & Prof. Code § 10240 et seq.* (real property loans); *see also* Ch. 25, *Real Estate Loans*]. The Unruh Act also does not apply to contracts for the sale of certain aircraft, or certain vessels having a value over \$25,000 [*Civ. Code § 1801.4(c), (d)*].

Motor vehicles are not treated as goods under the Unruh Act, nor are any goods sold with a motor vehicle under a contract governed by the Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 1802.1*; *see Civ. Code § 2981 et seq.*] or leased with a motor vehicle under a contract governed by the Vehicle Leasing Act [*see Civ. Code §§ 2985.7-2990*; *see also* Ch. 47, *Automotive Financing and Vehicle Leasing*]. However, the term "goods" does include a trailer that is sold in conjunction with a vessel unless the cash price of the vessel, including all accessories and equipment sold with it, exceeds \$25,000 [*Civ. Code §§ 1801.4, 1802.1*; *see Veh. Code § 9840(a)*].

While certain services furnished in connection with the sale or repair of goods [*see Civ. Code § 1802.1* (definition)] are covered by the Unruh Act, the services of physicians and dentists and services subject to federal tariffs are outside coverage of the Act [*Civ. Code § 1802.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection State Law General Overview Banking Law Consumer Protection Truth in Lending General Overview



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§ 46.33 Creditors Covered by Truth in Lending and Unruh Acts

[1] Truth in Lending Act

Under the Truth in Lending Act, a covered "creditor" is any person who regularly extends consumer credit payable by agreement in more than four installments, or for which a finance charge may be imposed. The term also includes credit card issuers, whether or not the amount due is payable in more than four installments or a finance charge is required [15 U.S.C. § 1602(f); 12 C.F.R. § 226.2(a)(17)]. Under the implementing guidelines of Regulation Z [12 C.F.R. pt. 226], TILA applies to individuals and businesses that offer or extend credit when (1) the credit is offered or extended to consumers, (2) the offering or extension is done regularly, (3) the credit is subject to a finance charge or is payable by a written agreement in more than four installment, and (4) the credit is primarily for personal, family, or household purposes [12 C.F.R. § 226.1(c)(1)].

A person "regularly extends consumer credit" only if it is extended more than 25 times, or more than five times for transactions secured by a dwelling, in the preceding or current calendar year [12 C.F.R. § 226.2(a)(17) n.3]. Only a creditor to whom an obligation is initially payable is required to make disclosures as a creditor [15 U.S.C. § 1602(f); 12 C.F.R. § 226.2(a)(17)], although certain disclosure requirements apply to persons who are not creditors but who provide applications for home equity plans to consumers [12 C.F.R. § 226.1(c)(3); see 12 C.F.R. § 226.5b(d) (required disclosures); see Ch. 25, *Real Estate Loans*]. However, assignees of the initial creditor are liable for disclosure violations which are apparent on the face of the disclosure statement [15 U.S.C. § 1641(a)].

[2] Unruh Act

The Unruh Act applies only to persons or entities engaged in the retail sale of consumer goods or services [Civ. Code § 1802.3]. Financial institutions that provide purchase-money loans can be subject to the Unruh Act, but only if they are joint venturers with, or are related by common ownership and control to, the actual seller of the goods or services financed [Civ. Code § 1801.6(b)]. The Unruh Act is applicable only to credit sales, and then only to those credit sales that also meet the definition of a "retail installment contract" [see Civ. Code §§ 1802.6, 1802.7]. The Truth in Lending Act is generally applicable to those same retail transactions, as well as to other credit sales and direct loans [see 15 U.S.C. § 1602(g); 12 C.F.R. § 226.2(a)(16)]. Unlike the Truth in Lending Act, the Unruh Act contains no exemption for

creditors handling fewer than 25 annual transactions [*see Civ. Code § 1802.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 46.34 Disclosure Documents

[1] Truth in Lending Act Transactions

The disclosure document for open-end credit transactions under the Truth in Lending Act need not take any particular form. It must, however, be in writing, in a form the consumer may keep, and the disclosures must be clear and conspicuous [12 C.F.R. § 226.5(a); see 12 C.F.R. 226.5(a)(1) nn.7-8, (2) n.9 (exceptions)]. The required disclosures may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. § 7001 *et seq.*). The disclosures required by 12 C.F.R. § 226.5a (credit and charge card applications and solicitations), 12 C.F.R. § 226.5b (home equity plans), and 12 C.F.R. § 226.16 (open-end credit advertising) may be provided to the consumer in electronic form without regard to the consumer consent or other provisions of the E-Sign Act in the circumstances, as specified [12 C.F.R. § 226.5(a)(1)].

See Ch. 45, *Consumer Installment Loans and Credit Sales*, for discussion of the consequences of failing to comply with the Truth in Lending Act.

[2] Unruh Act Transactions

The required disclosure document for transactions under the Unruh Act must be in the form of a written contract [Civ. Code § 1803.1]. The entire agreement between the parties must be contained in a single document [Civ. Code § 1803.2(a)]. The contract must be dated [Civ. Code § 1803.1] and executed by the consumer, and a legible copy must be delivered to the consumer at the time of execution [Civ. Code §§ 1803.7, 1799.202].

The required contents need not be stated in any particular sequence, with the exception of the mandatory itemization of the amount financed [Civ. Code § 1803.3(b); see Civ. Code § 1803.3(c) ("itemization of the amount financed" explained)]. Information other than the required disclosures may be included in the contract, unless the provisions are specifically prohibited by the Unruh Act [see Civ. Code § 1804.1 (prohibited contractual provisions)].

Neither the Areias Credit Card Full Disclosure Act of 1986, the Areias-Robbins Charge Card Full Disclosure Act of

1986, nor the Areias Retail Installment Account Full Disclosure Act of 1986 require that their disclosures use any particular form, nor do they prohibit a creditor from disclosing additional terms or information [*Civ. Code* §§ 1748.11(b), (d), 1748.22(c), 1810.21(c), (e)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview



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§ 46.35 Credit Card Accountability Responsibility and Disclosure Act of 2009

[1] Effective Dates of Credit Card Act

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit Card Act) was signed into law on May 22, 2009 *see* P.L. 111-24, 123 Stat. 1734 (2009)]. It primarily amends the Truth in Lending Act, Section 127 [15 U.S.C. § 1637] and establishes new substantive and disclosure requirements to establish "fair and transparent practices pertaining to open-end consumer credit plans" [74 Fed. Reg. 36077 (July 22, 2009)] .

The requirements of the Credit Card Act that pertain to credit cards or other open-end credit become effective in three stages. First, provisions generally requiring that consumers receive 45 days' advance notice of interest rate increases and significant changes in terms [new TILA § 127(i), 15 U.S.C. § 1637(i)] and provisions regarding the amount of time consumers have to make payments [revised TILA § 163, 15 U.S.C. § 1666b] became effective August 20, 2009 (90 days after enactment of the Credit Card Act) [P.L. 111-24, Title I, § 106(b)(2), 123 Stat. 1742]. A majority of the requirements under the Credit Card Act, including provisions limiting interest rate increases on outstanding balances [revised TILA § 171, 15 U.S.C. § 1666 *et seq.*], over-the-limit transactions [new TILA § 127(k), 15 U.S.C. § 1637(k)], and student cards [new TILA §§ 127(c)(8), 127(p), and 140(f); 15 U.S.C. §§ 1637(c)(8), (p), 1650(f)] become effective on February 22, 2010 (nine months after enactment) [see 15 USCS § 1602 note].

Finally, two provisions of the Credit Card Act addressing the reasonableness and proportionality of penalty fees and charges [new TILA § 149, 15 U.S.C. § 1665d] and re-evaluation by creditors of rate increases [new TILA § 148, 15 U.S.C. § 1665c] are effective on August 22, 2010 (15 months after enactment) [15 U.S.C. §§ 1665d(b), 1665c(b)]. For these provisions to become effective on August 22, 2010, the Board of Governors of the Federal Reserve Board must issue final rules no later than February 22, 2010 [15 U.S.C. 1665c(d); 74 Fed. Reg. 36078 (July 22, 2009)] . However, while 15 U.S.C. § 1665c is not effective until August 22, 2010, it applies to rate increases that have occurred since January 1, 2009 [see 15 U.S.C. § 1665c(b)(2)].

[2] Implementing Regulations

In finalizing amendments, and drafting future amendments, to Regulation Z, the Board of Governors of the Federal

Reserve Board "intends to use its January 2009 rules and the underlying rationale as the basis for its rulemakings under the [Act]." Accordingly, the Board has not withdrawn any provisions of the January 2009 rulemaking under Regulation Z or Regulation AA [Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* implementing regulation] (except as overruled by the Act) [*see 74 Fed. Reg. 36078 (July 22, 2009)*] .

Further, the Board's proposed clarifications to the January 2009 rules, issued in May, will be finalized during the Board's rulemaking in 2010. The Board intends to consider comments on proposed clarifications and technical amendments published on May 5, 2009 and to incorporate those changes, as appropriate [*74 Fed. Reg. 36077 (July 22, 2009)*] . These amendments and additions will be incorporated into this chapter when they have been finalized.



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§ 46.36 Consumer Protection Under Credit Card Act

[1] Advance Notice of Rate Increases Required

Credit card issuers must notify credit card holders of a rate increase, or any other significant change in credit card account terms, at least 45 days in advance of the effective date [15 U.S.C. § 1637(i)(1), (2)]. The notice must be clear and conspicuous and give the credit card holder the right to close the account [15 U.S.C. § 1637(i)(3)].

[2] Freeze on Interest Rate Terms and Fees on Canceled Cards

Closure or cancellation of an account by the credit card issuer will not constitute a default under an existing cardholder agreement, and will not trigger an obligation to immediately repay the obligation in full or through a method that is less beneficial to the obligor than one of the methods described in 15 U.S.C. § 1666i-1(c)(2), or the imposition of any other penalty or fee [15 U.S.C. § 1637(i)(4)].

[3] Limits on Fees and Interest Charges

Except as specified, a credit card issuer may not impose interest charges on any portion of a balance that is paid by the due date [see 15 U.S.C. § 1637(j)(1) (prohibits double-cycle billing); 15 U.S.C. § 1637(j)(2) (exceptions)].

Credit card holders must be given the option of having a fixed credit limit that cannot be exceeded, and card companies cannot charge over-limit fees on cardholders with fixed limits [15 U.S.C. § 1637(k)(1)]. Credit card holders may elect to prohibit the creditor from completing over-limit transactions that will result in a fee or constitute a default under the credit agreement [15 U.S.C. § 1637(k)(1)]. Over-limit charges can only be charged when an extension of credit, rather than a fee or interest charge, causes the credit limit to be exceeded. Over-limit charges can only be applied once during a billing cycle [15 U.S.C. § 1637(k)(7)].

[4] Limits on Charging Certain Fees

Credit card issuers are prohibited from charging a fee to allow a credit card holder to pay a credit card debt, whether

payment is by mail, telephone, electronic transfer, or other means, unless the payment involves expedited service by a service representative of the credit card holder [15 U.S.C. § 1637(l)]. Required fees must be reasonably related to cost [see 15 U.S.C. § 1665d(b)].

[5] Application of Credit Card Payments

Payments in excess of the minimum payment are to be applied as follows [15 U.S.C. § 1666c(b)(1); see 15 U.S.C. § 1666c(b)(2) (exception in case of balance on which interest is deferred)]:

- First to the card balance with the highest interest;
- Then to each successive balance bearing the next highest rate of interest, until the payment is exhausted.



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§ 46.37 Enhanced Consumer Disclosures Under Credit Card Act

[1] Payoff Timing Disclosures

Credit card issuers must provide individual consumer account information and disclose the period of time it will take the credit card holder to pay off the card balance if only minimum monthly payments are made [15 U.S.C. § 1637(b)(11)(A), (B)]. Card issuers must also disclose the total amount of interest the cardholder will pay to pay off the card balance if only minimum monthly payments are made [15 U.S.C. § 1637(b)(11)(B)(ii)].

[2] Requirements Related to Late Payment Deadlines and Penalties

Credit card issuers must provide full disclosure in billing statements of required payment due dates and applicable late payment penalties [15 U.S.C. § 1637(b)(12)(A)]. If one of more late payments may result in an increase in the annual percentage rate applicable to the account, the card issuer must provide a conspicuous notice of that fact, together with the applicable penalty annual percentage rate [see 15 U.S.C. § 1637(b)(12)(B)]. Payment made by a card holder at local branches must be credited that same day, for purposes of determining whether a late fee or charge may be imposed [see 15 U.S.C. § 1637(b)(12)(C)].

[3] Renewal Disclosures

Credit card issuers must provide account disclosures to consumer on card renewal when the terms of the card have changed [15 U.S.C. § 1637(d)(3)].

[4] Internet Posting of Credit Card Agreements

A credit card issuer must establish and maintain an Internet site on which the creditor will post the written agreement between the issuer and the consumer for each credit account under an open-end consumer credit plan [15 U.S.C. § 1532(d)(1); see 15 U.S.C. § 1532(d)(4) (exceptions)].

[5] Prevention of Deceptive Marketing of Credit Reports

Any advertisement for a free credit report must prominently disclose that free credit reports are available under federal law at annualcreditreport.com [15 U.S.C. § 1681j(g)(1)].



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§ 46.38 Protection of Young Consumers

[1] Extensions of Credit to Underage Consumers

Credit card issuers must, when soliciting to persons under the age of 21, obtain an application that contains either: (1) the signature of a parent, guardian, other qualified individual willing to take financial responsibility for the debt; or (2) information indicating an independent means of repaying any credit extended [*see 15 U.S.C. § 1637(c)(8)*].

[2] Restrictions on Affinity Cards for College Students

A "college affinity card" is a credit card issued under an open end consumer credit plan in conjunction with an agreement between the issuer and an institution of higher education, or an alumni association, or affiliated foundation that meets certain requirements [*see 15 U.S.C. § 1637(r)(1)(A)*].

A credit card issuer may not offer a student at an institution of higher learning any tangible item to induce the student to apply for, or participate in, any open end consumer credit plan offered by the issuer if the offer is made on the campus, or near the campus of the institution of higher learning, or at an event sponsored by the institution [*15 U.S.C. § 1650(f)(2)*].



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[Reserved]

§ 46.39[Reserved]



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§ 46.40 Direct Mail Solicitations

[1] Truth in Lending Act

The Truth in Lending Act requires that issuers of credit cards and charge cards must make specified disclosures when soliciting the opening of a credit card or charge card account [*see 15 U.S.C. § 1637(a); 12 C.F.R. § 226.5a(a)*]. For example, preapproved applications, "Take One" applications, and telephone solicitations trigger the mandatory disclosures [*see 54 Fed. Reg. 13855-13857 (1989)*]. The required disclosures include information relating to annual percentage rates, related fees, and any applicable grace period [*see 12 C.F.R. § 226.5a(b); see also § 46.214*].

These disclosure requirements do not apply to home equity plans that are subject to the disclosure requirements of 12 C.F.R. § 226.5a and are accessible by a credit or charge card [*12 C.F.R. § 226.5a(a)(3); see Ch. 25, Real Estate Loans*].

[2] Areias Credit Card Full Disclosure Act of 1986: Unsecured Credit Cards

Under the Areias Credit Card Full Disclosure Act of 1986 [*see Civ. Code § 1748.10 et seq.*], any application form or preapproved written solicitation for an open-end credit card account to be used for personal, family, or household purposes, that is mailed to a California consumer, by or on behalf of a creditor, must contain or be accompanied by specified disclosures [*Civ. Code § 1748.11(a)*]. However, this rule does not apply to application forms or solicitations included in magazines, newspapers, or other publications distributed by someone other than the creditor [*Civ. Code § 1748.11(a)*], or to application forms or written advertisements of open-end credit card accounts when the credit to be extended is secured by liens on real and/or personal property [*Civ. Code § 1748.11(h); see [3], below*]. Further, this rule does not apply to retail sellers subject to the Areias Retail Installment Account Full Disclosure Act of 1986 [*Civ. Code § 1748.11(i); see Civ. Code §§ 1810.20, 1810.21; see also [5], below*].

The application form, solicitation, or accompanying statement must include a disclosure statement that satisfies the requirements of Regulation Z [*Civ. Code § 1748.11(a)(2), (c), (e); see Civ. Code § 1802.18; 12 C.F.R. § 226.1; see also § 46.214*], or a disclosure of each of the following, if applicable [*Civ. Code § 1748.11(a)(1)*]:

- Any periodic rate or rates that may be applied to the account, expressed as an annual percentage rate

or rates [see *Civ. Code* § 1748.11(a)(1)(A) (disclosures for variable rates)].

- Any membership or participation fee that may be imposed for availability of a credit card, expressed as an annualized amount.
- Any per-transaction fee that may be imposed on purchases, expressed as an amount or as a percentage of the transaction.
- Any "free period" during which the consumer may repay the full balance without the imposition of additional finance charges.

In addition, all applications for an open-end credit card account distributed in California other than by mail must either make the preceding disclosures or include a statutory statement about how to obtain the disclosures [*Civ. Code* § 1748.11(g)]. Further, any waiver of the provisions of this act is contrary to public policy and is unenforceable [*Civ. Code* § 1748.14].

[3] Song-Beverly Credit Card Act of 1971: Secured Credit Cards

The disclosures discussed in [2], *above* [see *Civ. Code* § 1748.11], do not apply to application forms or written advertisements for a secured credit card, if the credit to be extended is secured by a lien on real property, personal property, or both [*Civ. Code* § 1748.11(h); see *Civ. Code* § 1747.02(l) ("secured credit card" defined)]. However, an issuer of a secured credit card, in every advertisement or solicitation to prospective cardholders, must expressly identify the credit instrument offered as a "secured credit card" [*Civ. Code* § 1747.94(a)]. Further, the issuer must prominently disclose that the credit extended under the card is secured and describe the security by item or type [*Civ. Code* § 1747.94(a); see *Civ. Code* § 1747.94(b) (disclosure rules for deeds of trust executed in connection with secured credit card)]. Issuers of secured credit cards need not make these disclosures if (1) the credit card is issued under an agreement or other instrument creating a purchase money security interest in property purchased with the credit card, but which does not pledge, hypothecate, or place a lien on other property of the cardholder or a co-obligor, or (2) the loan or extension of credit is subject to the Federal Home Equity Loan Consumer Protection Act of 1988 [*Civ. Code* § 1747.94(c)]. Any waiver of the provisions of the Song-Beverly Credit Card Act is contrary to public policy and is unenforceable [*Civ. Code* § 1748.04].

[4] Areias-Robbins Charge Card Full Disclosure Act of 1986

Under the Areias-Robbins Charge Card Full Disclosure Act of 1986 [see *Civ. Code* § 1748.20 *et seq.*], any application form or preapproved written solicitation for a charge card account that is mailed to a California consumer, by a charge card issuer, whether or not the issuer is located in California, must contain or be accompanied by specified disclosures [*Civ. Code* § 1748.22(a)]. However, this rule does not apply to application forms or solicitations included in magazines, newspapers, or other publications distributed by someone other than the charge card issuer [*Civ. Code* § 1748.22(a)].

The application form or preapproved written solicitation must contain the following information [*Civ. Code* § 1748.22(a)(1)]:

- Any fee or charge assessed for or that may be assessed for issuing or renewing the charge card, expressed as an annualized amount, and denominated as an "annual fee."
- The charge card does not permit the charge card holder to defer payment of charges incurred by the use of the charge card on receipt of a periodic statement of charges.
- Any fee that may be assessed for an extension of credit to a charge card holder if the extension of

credit is made by the charge card issuer, denominated as a "cash advance fee."

A charge card issuer will be conclusively presumed to have complied with these disclosure requirements if it provides a suitably revised statutory table as part of the application or written solicitation [*see Civ. Code § 1748.11(b)*] to a person invited to apply for a charge card [*Civ. Code § 1748.22(b)*].

All charge card applications distributed in California other than by mail must either make the preceding disclosures or include a statutory statement about how to obtain the disclosures [*Civ. Code § 1748.22(e)*].

If the charge card issuer offers to a charge card holder a program or service under which the charge card holder may elect to access open-end credit, the issuer must also provide the charge card holder with the initial disclosure statement required by Regulation Z before the charge card holder has the right to access that credit [*Civ. Code § 1748.22(d)*; *see Civ. Code § 1748.11(c)*; 12 C.F.R. § 226.6; *see also* § 46.212 (form for initial disclosure)].

Any waiver of the provisions of this act is contrary to public policy and is unenforceable [*Civ. Code § 1748.23*].

A charge card issuer is free to disclose additional terms, conditions, or information with the required disclosures [*Civ. Code § 1748.22(c)*].

For a form containing these disclosures, *see* § 46.214[2].

[5] Areias Retail Installment Account Full Disclosure Act of 1986

Under the Areias Retail Installment Account Full Disclosure Act of 1986 [*see Civ. Code § 1810.20 et seq.*], any application form or preapproved written solicitation for a credit card account issued in connection with a retail installment account that is mailed to a California consumer, by or on behalf of a retail seller, whether or not the seller is located in California, must contain or be accompanied by specified disclosures [*Civ. Code § 1810.21(a)*]. However, this rule does not apply to application forms or solicitations included in magazines, newspapers, or other publications distributed by someone other than the retailer [*Civ. Code § 1810.21(a)*], or to application forms or preapproved written solicitations for a retail installment account credit card when the credit to be extended is secured by liens on real and/or personal property [*Civ. Code § 1810.21(h)*; *see* [3], *above*]. Further, this rule does not apply to application forms or solicitations included as part of a catalog in order to facilitate the credit sale of goods offered in the catalog or to application forms or solicitations included in a magazine, newspaper or other publication distributed in more than one state by someone other than the creditor [*Civ. Code § 1810.21(h)*].

The application form, solicitation, or accompanying statement must include a disclosure statement that satisfies the requirements of Regulation Z [*Civ. Code § 1810.21(a)(2)*; *see Civ. Code § 1802.18*; 12 C.F.R. § 226.1; *see also* § 46.214], or a disclosure of each of the following, if applicable [*Civ. Code § 1810.21(a)(1)*]:

- Any periodic rate or rates that will be used to determine the finance charge applied to the account, expressed as an annual percentage rate or rates.
- Any membership or participation fee that may be imposed for availability of a retail installment account in connection with which a credit card is issued, expressed as an annualized amount.
- Any "free period" during which the consumer may repay the full balance without the imposition of additional finance charges. If the retailer provides no such period for purchases, the disclosure must so indicate.

All retail installment applications or agreements distributed in California other than by mail must either make the

preceding disclosures or include a statutory statement about how to obtain the disclosures [*see Civ. Code § 1810.21(g)*].

[6] Credit Extended Through Use of Preprinted Check or Draft

A credit card issuer that extends credit to a cardholder through the use of a preprinted check or draft must disclose all of the following information in clear and conspicuous language [*Civ. Code § 1748.9*]:

- That "use of the check or draft constitutes a charge against your credit account."
- The annual percentage rate and calculation of finance charges associated with the use of the attached check or draft [*see 12 C.F.R. § 226.16* (required disclosures)].
- Whether the finance charges are triggered immediately on the use of the check or draft.

This disclosure must be on the front of an attachment affixed by perforation or other means to the preprinted check or draft [*Civ. Code § 1748.9*].

The Ninth Circuit holds that the National Bank Act [*12 U.S.C. § 21 et seq.*] preempts the disclosure requirements of *Civ. Code § 1748.9*, insofar as those requirements apply to national banks [*Rose v. Chase Bank USA (9th Cir. 2008)* 513 F.3d 1032, 1038] .

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 46.41 Issuance of Credit Cards

[1] Truth in Lending Act

The Truth in Lending Act provides that no credit card may be issued except in response to an oral or written request, or as a renewal of or substitute for an accepted credit card [15 U.S.C. § 1642; 12 C.F.R. § 226.12(a)]. An "accepted credit card" is any card that the cardholder has requested and received or has signed, used, or authorized another to use [15 U.S.C. § 1602(l); 12 C.F.R. § 226.12(a)(2) n.21]. Thus, a card issuer may not send unsolicited credit cards to potential users. This rule applies to all credit cards, not just those issued for consumer credit purposes [12 C.F.R. § 226.2(a)(8)].

[2] Song-Beverly Credit Card Act of 1971

Like the Truth in Lending Act, the Song-Beverly Credit Card Act of 1971 [Civ. Code § 1747 *et seq.*] provides that no credit card may be issued except in response to an oral or written request, or as a renewal of or substitute for an accepted credit card [Civ. Code § 1747.05(a)]. A credit card issued in substitution for an accepted credit card may be issued only if the card issuer provides an activation process whereby the cardholder is required to contact the card issuer to activate the card before its first use in a credit transaction [Civ. Code § 1747.05(b); *see* Civ. Code § 1747.05(c) (statute does not prohibit overdraft protection advance or recurring-charge transaction previously authorized by cardholder on accepted credit card)].

An "accepted credit card" is any card that the cardholder has requested and received or has signed, used, or authorized another to use [Civ. Code § 1747.02(b)]. Thus, a card issuer may not send unsolicited credit cards to potential users. This rule applies to all credit cards, not just those issued for consumer credit purposes [Civ. Code § 1747.02(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 46.42 Disclosures to Credit Card Users

[1] Truth in Lending Act

A creditor extending any type of open-end credit must make certain disclosures to the consumer before the first use of the credit plan [15 U.S.C. § 1637(a); 12 C.F.R. § 226.6], with each billing cycle [15 U.S.C. § 1637(b); 12 C.F.R. § 226.7], annually [12 C.F.R. § 226.9(a)], and whenever certain credit terms are changed [12 C.F.R. § 226.9(b), (c); see, e.g., *DeMando v. Morris*, 206 F.3d 1300, 1303 (issuer's notice of rate increase to credit card customer violated 12 C.F.R. § 226.5(c), which requires that all disclosures issued in conjunction with open-ended credit arrangements reflect terms of legal obligation of the parties)].

The creditor must furnish the initial disclosure statement before the first transaction [15 U.S.C. § 1637(a); 12 C.F.R. § 226.5(b)(1)]. The statement must include the amount of the finance charge, detailed information on its calculation, any other charges under the plan, disclosure of any security interests, and a statement of the consumer's billing rights [see 15 U.S.C. § 1637(a); 12 C.F.R. § 226.6]. For a form containing the required initial disclosures, see § 46.212.

For each billing cycle during which a finance charge has been imposed or for which the account has a debit or credit balance of more than \$1, the creditor must provide the consumer with a periodic statement [12 C.F.R. § 226.5(b)(2)(i)]. If the periodic statement is not mailed or delivered at least 14 days before the date on which additional finance charges accrue, the creditor may not collect those additional charges [12 C.F.R. § 226.5(b)(2)(ii)]. The periodic statement discloses in detail the previous and new balances, new credits and debits to the account, periodic and annual percentage rates, finance and other charges, billing dates, and billing error information [see 15 U.S.C. § 1637(b); 12 C.F.R. § 226.7]. See § 46.215 for further discussion of these required disclosures and a form for a periodic statement. See § 46.140 for discussion of other notice requirements.

[2] Unruh Act

Like the Truth in Lending Act, the Unruh Act provides that a retail seller extending credit under a retail installment or revolving account must provide the consumer with a disclosure statement before the first transaction on the account [Civ. Code § 1810.1; see Civ. Code § 1799.203(a); see also Civ. Code § 1799.200 et seq. (Consumer Contract

Awareness Act of 1990)]. The statement must include the conditions under which the finance charge may be imposed, the method of determining the balance on which the finance charge is imposed, the amount of the finance charge, detailed information on its calculation, the minimum periodic payment required, any other charges under the plan, and disclosure of the conditions under which a creditor may retain or acquire any security interest [*Civ. Code* § 1810.1(a)-(g)]. See § 46.212 for further discussion of these required disclosures and a form for an initial disclosure. Until the retailer delivers the initial disclosure statement, the consumer is obligated to pay only the cash price of the goods [*Civ. Code* § 1810.1(g)].

The Unruh Act also has periodic statement requirements comparable to those imposed by federal law [*see Civ. Code* § 1810.3(a); *see also* [1], *above* (federal requirements)]. For each billing cycle during which a finance charge has been imposed or for which the account has a debit balance of more than \$1, the creditor must provide the consumer with a periodic statement [*Civ. Code* § 1810.3(a)]. If the periodic statement is not mailed or delivered at least 14 days before the date on which additional finance charges accrue, the creditor may not collect those additional charges [*Civ. Code* § 1810.3(b); *but see Civ. Code* § 1810.12(c) (notwithstanding *Civ. Code* § 1810.3(b) retail installment account holder must provide minimum of 20 days between monthly billing date and date minimum payment is due)]. The periodic statement discloses in detail the previous and new balances, new credits and debits to the account, periodic and annual percentage rates, finance and other charges, billing dates, and billing error information [*see Civ. Code* § 1810.3(a)]. See § 46.215 for further discussion of these required disclosures and a form for a periodic statement. See § 46.140 for discussion of other notice requirements.

Additional disclosures are required if any change is made to the terms of a retail installment account [*Civ. Code* § 1810.3(d); *see* § 46.140] or if an account has an outstanding credit balance in excess of \$1 [*Civ. Code* § 1810.3(e); *see* § 46.215].

[3] Areias Credit Card Full Disclosure Act of 1986

Under the Areias Credit Card Full Disclosure Act of 1986 [*Civ. Code* § 1748.10 *et seq.*], credit card issuers must provide to the cardholder, in each billing statement, various statements regarding the length of time it will take, at various payment rates, to pay off the balance due on an open-end credit card account [*see Civ. Code* § 1748.13(a); *see also Civ. Code* § 1748.13(b) (definitions); Stats. 2001, ch. 711, § 3 (effective dates)]. In addition, if the cardholder has not paid more than the minimum payment for six consecutive months, the credit card issuer must provide the cardholder with referrals or, in the alternative, the toll-free telephone number of the National Foundation for Credit Counseling through which the cardholder can be referred, to credit counseling services in, or closest to, the cardholder's county of residence [*see Civ. Code* § 1748.13(a)(2)(B)]. Waiver of any of these provisions is against public policy and is unenforceable [*see Civ. Code* § 1748.14]. These requirements do not apply in any billing cycle in which the account agreement requires a minimum payment of at least 10 percent of the outstanding balance, or in which finance charges are not imposed [*Civ. Code* § 1748.13(c)]. For further discussion of this "minimum payment warning" and related disclosure requirements, see § 46.215.

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 46.43 Advertising Open-End Credit

[1] Truth in Lending Act

Advertisements for open-end accounts may specify credit terms only when those terms are actually arranged or offered by the creditor [15 U.S.C. § 1662; 12 C.F.R. § 226.16(a)]. If credit terms are specified, the advertisement must disclose (1) any minimum or fixed amount that could be imposed, (2) the periodic rates expressed as annual percentages in any case in which the periodic rates may be used to compute the finance charge, and (3) any membership or participation fee that could be imposed [15 U.S.C. § 1663; 12 C.F.R. § 226.16]. See § 46.122 for further discussion of these required disclosures.

[2] California Law

A seller may not advertise any method of payment for goods, property, or services purchased through the use of consumer credit under an open-end credit plan accepted for purchases by more than one seller unless certain clear and conspicuous disclosures are made [Bus. & Prof. Code § 17538.7(a)]. These disclosures include the price and downpayment, payment details, finance charge data, any other charges, the name of the creditor if not the seller, and whether the advertised terms are available to the purchaser only after the creditor's approval [Bus. & Prof. Code § 17538.7(a)(1)-(6)]. Further, the cash price must be clearly and conspicuously stated next to the payment terms [Bus. & Prof. Code § 17538.7(c)], and "bait" terms may not be advertised [see Bus. & Prof. Code § 17538.7(d)]. Catalogs or multi-page advertisements may make these disclosures in a clear and conspicuous table [Bus. & Prof. Code § 17538.7(b)]. For further discussion of these required disclosures, see § 46.122.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection State Law General Overview Banking Law Consumer Protection Truth in Lending General Overview



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§ 46.44 Truth in Lending Act: Oral Disclosures of Open-End Credit Cost

In an oral response to an inquiry about the cost of open-end credit, only the annual percentage rate or rates and the periodic rate or rates may be stated [15 U.S.C. § 1665a; 12 C.F.R. § 226.26(a)]. If the annual rate cannot be determined in advance because there are finance charges other than a periodic rate, the annual percentage rate corresponding to the periodic rate must be stated, and other cost information may be given [15 U.S.C. § 1665a; 12 C.F.R. § 226.26(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosure



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§ 46.45 Truth in Lending Act: Right of Rescission for Transactions Creating Lien on Dwelling

In any open-end credit transaction that gives the creditor a lien on property in which the consumer resides, a consumer with an interest in the dwelling has a right to rescind the transaction unless the transaction finances acquisition of the dwelling [15 U.S.C. § 1635(a), (e)(1); 12 C.F.R. § 226.23(a), (f)(1)]. Each affected consumer also has the right to rescind each addition to the security under the plan and any increase in the credit limit [12 C.F.R. § 226.15(a)(1)(i); see 15 U.S.C. § 1635(a)]. The consumer may rescind the transaction until midnight of the third business day following consummation, delivery of a required notice of rescission rights, or delivery of all material Truth in Lending disclosures, whichever occurs last [12 C.F.R. § 226.23(a)(3)].

The failure of a creditor to properly complete the rescission disclosure form [15 U.S.C. § 1635(a); 12 C.F.R. §§ 226.15(b), 226.23(b)], including the failure to fill in the expiration date of the right to rescind, automatically violates the Truth in Lending Act and extends the rescission period until three days after the disclosures are correctly made. A disclosure statement that does not adequately disclose the extent of the security interest also violates the Act [*Williamson v. Lafferty* (5th Cir. 1983) 698 F.2d 767, 768-769] .

The right to rescind, a form for giving the required notice, and procedures for exercising this right are discussed in Ch. 25, *Real Estate Loans* .

An obligor who exercises the right to rescind is not liable for any finance or other charge, and any security interest given becomes void [15 U.S.C. § 1635(b)]. The creditor must take any action necessary to reflect termination of the security interest, and must return to the obligor any money or property received within 20 days after receipt of the notice of rescission [15 U.S.C. § 1635(b)]. After the creditor has performed these statutory responsibilities, the obligor must tender the property back to the creditor, but if the creditor does not take possession of the property within 20 days after tender, the obligor may keep it [15 U.S.C. § 1635(b)]. However, because rescission is an equitable remedy, a court may condition the granting of rescission on repayment of the principal amount of the underlying loan to the creditor [*Brown v. Nat. Permanent Fed. Sav. & Loan Ass'n* (D.C. Cir. 1982) 683 F.2d 444, 447] .

A borrower's right of rescission expires three years after the date of consummation of the transaction or on the sale of

the property, whichever occurs first, even if the required disclosures have never been made [15 U.S.C. § 1635(f)]. The United States Supreme Court has held that a borrower may not assert the right to rescind as an affirmative defense in a collection action brought by the lender more than three years after the consummation of the transaction. Because 15 U.S.C. § 1635(f) completely extinguishes the right of rescission at the end of the three-year period, it is not a statute of limitations and the mortgagors cannot assert the right to rescind as a recoupment defense beyond the expiration period [*Beach v. Ocwen Federal Bank* (1998) 523 U.S. 410, 417-418, 118 S. Ct. 1408, 140 L. Ed. 2d 566] . For further discussion of these rescission rights, refer to Ch. 25, *Real Estate Loans*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionTruth in LendingGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview



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§ 46.46 Unruh Act: Regulation of Finance or Service Charges

[1] Interest Rate Limitations

Private individuals and corporations in California are prohibited from taking more than 10 percent simple interest per annum on loans that are primarily for personal, family, or household purposes [*Cal. Const. art. XV, § 1*]. However, banks and certain other regulated financial institutions are entirely exempt from this usury provision. Moreover, sellers of consumer goods or services who impose a service or finance charge that is added to the cost of the goods or services are not within the usury prohibition. Setting a time-price on the sale of goods or services (that is, creating a contract of sale with deferred payments) is not considered to involve a "loan" [*Boerner v. Colwell Co. (1978) 21 Cal. 3d 37, 45, 145 Cal. Rptr. 380, 577 P.2d 200* ; see *Southwest Concrete Products v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 705, 274 Cal. Rptr. 404, 798 P.2d 1247*] .

Finance charges on revolving charge accounts are subject to this "time-price" doctrine and, therefore, are not subject to the usury laws, regardless of whether the account is a direct arrangement with the seller of the goods or a tripartite arrangement, such as that operated by oil companies, in which the purchases are made from participating independent retail dealers [*Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 881-882, 156 Cal. Rptr. 893*] .

[2] Regulation of Finance or Service Charge

Sellers or holders of retail installment accounts may charge and collect a finance charge as disclosed to the buyer in the statement of the account [*Civ. Code § 1810.2*; see *Civ. Code § 1810.3*]. The finance charge must include all charges incident to investigating and making the retail installment account [*Civ. Code § 1810.4*]. When a credit card is issued in connection with a retail installment account, the seller or holder of the account may assess fees for annual membership, if so provided in the sales agreement or by proper notice to the buyer [*Civ. Code § 1810.4*]. The seller or holder may also assess fees for delinquent payments [*Civ. Code § 1810.12*] and charge and collect a fee for returned checks [*Civ. Code § 1810.4*]. Further, if the buyer agrees in writing and is given a copy of the agreement, the sales agreement may include provisions for payment of attorneys' fees and costs [*Civ. Code § 1810.4*, see *Civ. Code § 1811.1* (award of reasonable attorneys' fees to prevailing party)]. For further discussion of finance charges and fees, see § 46.211[1].

Supervised financial organizations and charge card issuers [see *Fin. Code* § 4000(a) (definitions)] may charge up to maximum specified fees as late payment charges and other charges. Disclosure requirements may also apply [*Fin. Code* § 4001].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 46.47 Notice Regarding Marketing Information

Under the Areias Credit Card Full Disclosure Act of 1986 [*Civ. Code § 1748.10 et seq.*], before disclosing marketing information concerning a consumer-cardholder, a credit card issuer must provide written notice to the cardholder of the right to prohibit disclosure of marketing information concerning the cardholder that discloses the cardholder's identity [*Civ. Code § 1748.12(b)*]. For further discussion and a form for giving the required notice, see § 46.216.

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 46.48 Notice Regarding Change of Address Request

Any credit card issuer that receives a change of address request, other than for a correction of a typographical error, from a cardholder who orders a replacement credit card within 60 days before or after that request is received, must send to that cardholder a change of address notification that is addressed to the cardholder at the cardholder's previous address of record [*Civ. Code § 1799.1b(a)*; see *Civ. Code § 1799.1b(e)(1)* ("credit account" means "credit card," as defined in *Civ. Code § 1747.02(a)*); § 46.12]. If the replacement credit card is requested before the effective date of the change of address, the notification must be sent within 30 days of the change of address request [*Civ. Code § 1799.1b(a)*]. If the replacement credit card is requested after the effective date of the change of address, the notification must be sent within 30 days of the request for the replacement credit card [*Civ. Code § 1799.1b(a)*].

In addition, any business entity that provides telephone accounts [see *Civ. Code § 1799.1b(e)(2)* ("telephone account" defined)] that receives a change of address request, other than for a correction of a typographical error, from an account holder who orders new service, must send to that account holder a change of address notification that is addressed to the account holder at the account holder's previous address of record. This notification must be sent within 30 days of the request for new service [*Civ. Code § 1799.1b(b)*].

The required notice may be given by telephone or e-mail communication, if the credit card issuer or business entity that provides telephone accounts reasonably believes that it has the current telephone number or e-mail address for the account holder or cardholder who has requested a change of address [*Civ. Code § 1799.1b(c)*]. If the notification is in writing, it may not contain the consumer's account number, social security number, or other personal identifying information. However, the notification may contain the consumer's name, previous address, and new address of record [*Civ. Code § 1799.1b(c)*]. For business entities that provide telephone accounts [see *Civ. Code § 1799.1b(b)*], the notification may also contain the account holder's telephone number [*Civ. Code § 1799.1b(c)*].

A credit card issuer or a business entity that provides telephone accounts is not required to send a change of address notification when a change of address request is made in person by a consumer who has presented valid identification, or is made by telephone and the requester has provided a unique alphanumeric password [*Civ. Code § 1799.1b(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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[Reserved]

§§ 46.49[Reserved]



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§ 46.60 Coordination of Truth in Lending Act and Song-Beverly Credit Card Act of 1971

The notification and correction of billing errors are governed by the fair credit billing provisions of the federal Truth in Lending Act [15 U.S.C. § 1666] and by California's Song-Beverly Credit Card Act of 1971 [*Civ. Code § 1747 et seq.*]. There are no inconsistencies between the two statutes that could make compliance with both difficult. In fact, the California legislature intended that provisions of the Song-Beverly Credit Card Act of 1971 be construed to conform to the Truth in Lending Act, Regulation Z, and any other rules, regulations, and interpretations promulgated by the Federal Reserve Board [*Civ. Code § 1747.01*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 46.61 Fair Credit Billing Inapplicable to Business Credit Cards

Because a business credit card is not an extension of consumer credit, the fair credit billing provisions of the Truth in Lending Act do not apply to business credit cards transactions [*American Express Co. v. Koerner* (1981) 452 U.S. 233, 241-244, 101 S. Ct. 2281, 68 L. Ed. 2d 803 ; see 15 U.S.C. § 1603(1)]. Further, Regulation Z and the Song-Beverly Credit Card Act of 1971 define "cardholder" to exclude business credit cards, except for purposes of specific provisions governing issuance and liability for unauthorized use [12 C.F.R. § 226.2(a)(8); Civ. Code § 1747.02(d); see 12 C.F.R. § 226.12(a) (issuance), (b) (liability for unauthorized use); Civ. Code §§ 1747.05 (issuance), 1747.10 (liability for unauthorized use); see also § 46.213 (liability)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 46.62 Billing Errors

Before the first use of credit, and at least once a year thereafter, a card issuer must disclose to the cardholder his or her right (1) to complain of billing errors free from the threat of an adverse credit report to third parties by the card issuer, and (2) to withhold payment to the issuer if the goods or services charged prove faulty [15 U.S.C. § 1637(a)(7); 12 C.F.R. §§ 226.6(d), 226.9(a); see 15 U.S.C. §§ 1666 (correction of billing errors), 1666i (assertions and limitations of cardholder's claims and defenses against issuer); see also 12 C.F.R. pt. 226, app. G-3 (form); § 46.212].

To come within the fair credit billing provisions of the Truth in Lending Act and the Song-Beverly Credit Card Act of 1971, a cardholder must notify the card issuer of a billing error no later than 60 days after receiving the first periodic statement reflecting the error [15 U.S.C. § 1666(a); Civ. Code §§ 1747.50(a), 1747.02(g); see 12 C.F.R. § 226.13(a) ("billing error" defined); Civ. Code § 1747.02(j) ("billing error" defined); see also § 46.233 (form for notice of billing error)]. The cardholder's notice must contain sufficient information to identify the account [15 U.S.C. § 1666(a)(1); 12 C.F.R. § 226.13(b)(2); Civ. Code § 1747.02(g)(1)]. It must also state the amount of the error and explain why the cardholder believes the statement to be erroneous [15 U.S.C. § 1666(a)(2), (3); 12 C.F.R. § 226.13(b)(3); Civ. Code § 1747.02(g)(2), (3)].

The Truth in Lending Act requires the issuer to provide the card holder with a written acknowledgment of receipt of the notice within 30 days after receipt, unless the issuer determines within that time that a billing error did not occur [15 U.S.C. § 1666(a)(3)(A), (B)(ii); 12 C.F.R. § 226.13(c)(1)]. The creditor must resolve the matter within two complete billing cycles, but in no event later than 90 days, after receipt of the notice [15 U.S.C. § 1666(a)(3)(B); 12 C.F.R. § 226.13(c)(2); see Civ. Code §§ 1747.02(i), 1747.50(a)].

The Truth in Lending Act prohibits the card issuer from restricting or closing the cardholder's account solely because of the cardholder's failure to pay the disputed amount until the issuer provides a written explanation or clarification of the claimed billing error and copies of documentary evidence of the cardholder's indebtedness [15 U.S.C. § 1666(d); see 15 U.S.C. § 1666(a)(3)(B)(ii) (written explanation required)]. The issuer may not, directly or indirectly, threaten to report to any person adversely on the cardholder's credit rating because the cardholder failed to pay the disputed amount and may not report that amount as delinquent until it has given the cardholder its explanation and allowed the cardholder

time to make payment [15 U.S.C. § 1666a(a); 12 C.F.R. § 226.13(d)(2)].

The Song-Beverly Credit Card Act of 1971 provides remedies against issuers who fail to give a timely response to an inquiry [*Civ. Code* § 1747.40 (no right to interest or charges on failure to respond)] and against both issuers and retailers who fail to correct billing errors during the prescribed period, including treble damage for willful failure to correct billing errors and reasonable attorneys' fees and costs [*Civ. Code* §§ 1747.50(b), (c), 1747.60(b), (c); *see also* § 46.233].

See § 46.233 for further discussion of the federal and state provisions governing billing errors and a notice of billing error. See § 46.212 for provisions relating to initial disclosures of billing rights, and § 46.215 for forms relating to subsequent disclosure requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 46.63 Claims and Defenses of Cardholders

Under the fair credit billing provisions of the Truth in Lending Act and the Song-Beverly Credit Card Act of 1971, the cardholder may assert against the card issuer all claims and defenses arising out of a credit transaction, except tort claims, provided that (1) the cardholder has made a good-faith attempt to arrive at a satisfactory settlement of the disagreement with the person who honored the card, and (2) the amount of the initial transaction exceeded \$50, and the transaction occurred in the same state as the cardholder's mailing address, or, if it occurred in another state, within 100 miles of that address [15 U.S.C. § 1666i(a); see 12 C.F.R. § 226.12(c)(1), (3); Civ. Code § 1747.90(a)(1) (transaction must have occurred within California or within 100 miles of cardholder's current designated address in California)]. However, the \$50 minimum and the geographical restrictions are inapplicable if the person honoring the card is also the card issuer, is controlled by the issuer, is under direct or indirect common control with the issuer, is a franchised dealer of the issuer's products or services, or has obtained the order for the transaction through a mail solicitation made, or participated in, by the issuer [15 U.S.C. § 1666i(a); see 12 C.F.R. § 226.12(c)(3) n.26; Civ. Code § 1747.90(a)(2)]. These provisions are applicable to all credit cards, even those issued for extensions of credit that are exempt from coverage of the Truth in Lending Act [12 C.F.R. § 226.3 n.4].

The amount of claims and defenses asserted by the cardholder cannot exceed the amount of credit outstanding with respect to the transaction at the time the cardholder first notifies the card issuer or the person that honored the card of the claim or defense [15 U.S.C. § 1666i(b); see 12 C.F.R. § 226.12(c)(1); Civ. Code § 1747.90(b)].

The provisions of both the Truth in Lending Act and the Song-Beverly Credit Card Act of 1971 relating to assertion of claims and defenses are applicable only to consumer credit transactions [15 U.S.C. § 1666i(a); Civ. Code § 1747.90(a)]. Thus, such provisions are inapplicable to transactions on credit cards issued for business use [see 15 U.S.C. § 1603(1); 12 C.F.R. § 226.2(a)(8); Civ. Code § 1747.02(d)].

The Federal Trade Commission rule preserving consumers' claims and defenses on assignment of indebtedness does not apply to credit card transactions [16 C.F.R. §§ 433.1, 433.2; see 40 Fed. Reg. 53506 (11/18/75)] .

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 46.64 Cardholder Liability for Lost or Stolen Cards

The federal Truth in Lending Act [15 U.S.C. § 1601 *et seq.*] and the California Song-Beverly Credit Card Act of 1971 [Civ. Code § 1747 *et seq.*] govern cardholder liability for lost or stolen cards. A cardholder is liable for unauthorized use only if all of the following conditions exist [15 U.S.C. § 1643(a)(1); 12 C.F.R. § 226.12(b)(2); Civ. Code § 1747.10]:

- The card is an accepted credit card [see 15 U.S.C. § 1602(l) ("accepted credit card" defined); Civ. Code § 1747.02(b) ("accepted credit card" defined); see also § 46.41];
- The card issuer gives the cardholder adequate notice of potential liability;
- The card issuer has provided the cardholder with a description of the procedure for notifying the card issuer of loss or theft of the card;
- The unauthorized use occurs before the card issuer has been notified; and
- The card issuer has provided a method for identifying the user of the card as the person authorized to use it.

The liability of a cardholder for unauthorized use of a credit card may not exceed \$50 [15 U.S.C. § 1643(a)(1)(B); 12 C.F.R. § 226.12(b)(1); Civ. Code § 1747.10(b)].

For purposes of the rules set out above, "unauthorized use" does not include the use of a credit card by a person who has been given authority by the cardholder to use it [15 U.S.C. § 1643(d); Civ. Code § 1747.02(f); see 15 U.S.C. § 1602(o) ("unauthorized use" defined)].

The provisions of the Truth in Lending Act and the Song-Beverly Credit Card Act of 1971 governing unauthorized use of credit cards apply to all credit cards, not just those issued for consumer credit purposes [12 C.F.R. § 226.2(a)(8); Civ. Code § 1747.02(d)]. However, businesses that have been issued 10 or more credit cards for use by employees may agree

to liability for unauthorized use without regard to the statutory rules, provided that any such agreement does not affect the statutory liability of individual employees [12 C.F.R. § 226.12(b)(5); Civ. Code § 1747.20].

For further discussion of the state and federal provisions relating to unauthorized use, see § 46.213.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionCredit Card AgreementsGeneral OverviewBanking LawConsumer ProtectionCredit Card AgreementsLiabilityBanking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview



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[Reserved]

§§ 46.65[Reserved]



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§ 46.70 Cancellation Notice Requirements

Under California law, a card issuer may cancel a credit card without notice to the cardholder if the following apply [*Civ. Code § 1747.85*];

- The issuer has evidence or a reasonable belief that the cardholder is unable or unwilling to repay obligations incurred with the card or that an unauthorized use of the card may be made;
- The cardholder is or has been in default of payment within the last 90 days; or
- The cardholder requests cancellation.

Otherwise, no card issuer may cancel a credit card without having first given the cardholder 30 days' written notice of its intention to do so. A card issuer may place a cardholder's account on inactive status if the card has not been used for more than 18 months [*Civ. Code § 1747.85*].

Although federal law does not require prior notice of cancellation, the Equal Credit Opportunity Act [*15 U.S.C. § 1691 et seq.*; *12 C.F.R. pt. 202*] provides for written notice within 30 days after terminating or taking any adverse action against an existing consumer credit account [*12 C.F.R. § 202.9(a)(1)(iii)*]. The notice must contain either a statement of the specific reasons for the termination or change or notification of the right to such a statement, a statement of the action taken, the name and address of the creditor, as well as other notices required by law [*12 C.F.R. § 202.9(a)(2)*]. For further discussion of notification of credit termination, see Ch. 45, *Consumer Installment Loans and Credit Sales*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 46.71 Required Notices to Cosigner

[1] Notice of Liability

A creditor who obtains the signature of more than one person on a consumer credit contract, including open-end credit agreements, must deliver to each cosigner a notice concerning his or her liability as a cosigner or guarantor, unless the signing parties are married to each other [*Civ. Code § 1799.91(a)*; see *Civ. Code § 1799.90(a)* ("consumer credit contract" defined)]. The notice must be delivered before the cosigner becomes obligated on the contract [*Civ. Code § 1799.91(a)*]. In this context a "cosigner" is one who does not in fact receive any of the money, property, or services that are the subject matter of the contract [*Civ. Code § 1799.91(a)*]. No action can be brought against the cosigner who did not in fact receive the subject matter of the contract by a creditor or assignee from the creditor unless that notice is included in the contract [*Civ. Code § 1799.95*].

The notice must be in both English and Spanish [*Civ. Code § 1799.91(a)*], unless the contract is written in a language other than English or Spanish. In that case, the notice must be in English and, in addition to or in lieu of Spanish, in the other language [*Civ. Code § 1799.91(b)*]. For further discussion and an illustration of the notice, see Ch. 45, *Consumer Installment Loans and Credit Sales*.

[2] Notice of Delinquency

A creditor may not provide any adverse information [see *Civ. Code § 1799.101(a)(1)* ("adverse information" defined)] with respect to a cosigner to a consumer credit reporting agency regarding a delinquency on a consumer credit contract entered into on or after July 1, 1992, unless the cosigner is given written notice of the delinquency at or before the time the information is provided to the agency [*Civ. Code § 1799.101(b)*]. This notice requirement does not apply to any cosigner whose address, as shown in the creditor's records respecting the consumer credit contract, is the same as that of the primary obligor [*Civ. Code § 1799.101(d)*].

Additionally, a creditor may not provide any information regarding the cosigner's obligation on a consumer credit contract to a debt collector until this notice is given to the cosigner [*Civ. Code § 1799.101(c)*; see *Civ. Code § 1788.2(c)* ("debt collector" defined)].

Notice requirements are satisfied by mailing a copy of the required notice to the cosigner at his or her address as shown in the creditor's records respecting the consumer credit contract [*Civ. Code § 1799.101(e)*]. If more than one cosigner resides at the same address, as shown in the creditor's records respecting the consumer credit contract, a notice addressed to any cosigner at that address is deemed notice to all cosigners residing at that address [*Civ. Code § 1799.101(e)*].

A cosigner who suffers a loss as a result of a violation of these requirements may bring an action to recover damages and attorneys' fees after proper notice to the creditor of the intended action [*Civ. Code § 1799.102*]. If, within 25 days after the date of receiving the notice, the creditor tenders to the cosigner an amount equal to the loss or otherwise resolves the matter to the cosigner's satisfaction, the cosigner is barred from further recovery of that loss, including reasonable attorneys' fees [*Civ. Code § 1799.102(b)*]. For a notice of delinquency to cosigner and a notice of cosigner's action to recover damages, see Ch. 45, *Consumer Installment Loans and Credit Sales* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law
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§ 46.80 Use of Credit Disability Insurance

A retailer or credit card issuer may wish to protect its position through the use of credit disability insurance covering the debtor. However, a creditor who directly participates in or receives any compensation for the sale of credit disability insurance to a debtor is precluded from collecting any credit balance until three calendar months after the first missed payment is due, or the insurer pays or rejects the debtor's claim, whichever is first [*Civ. Code § 1812.402(a)*; see *Civ. Code §§ 1812.400, 1812.401(d), (e)*]. This limitation on a creditor's rights must be disclosed to the debtor by the creditor when the insurance is sold to the debtor [see *Civ. Code § 1812.402(f)(1)*; see also *McManis v. San Diego Postal Credit Union* (1998) 61 Cal. App. 4th 547, 557-558, 71 Cal. Rptr. 2d 617 (credit union failed to meet its burden on summary judgment to negate consumer's breach of contract claim because it did not establish compliance with *Civ. Code § 1812.400 et seq.*, including *Civ. Code § 1812.402(f)*, before repossession)]. The insurer must also disclose the claim procedure to the debtor when it sends claims forms to the debtor [*Civ. Code § 1812.402(f)(2)*]. For a further discussion of credit disability insurance, see Ch. 45, *Consumer Installment Loans and Credit Sales*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawLife InsuranceCredit Life



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§ 46.90 Surcharge for Use of Card Prohibited

A retailer in any sales, service, or lease transaction with a consumer may not impose a surcharge when a credit card holder elects to use the card instead of paying by cash, check, or similar means. The retailer may, however, offer a discount to induce payment by cash or check (or other means not involving use of the card), provided that the discount is offered to all prospective buyers [*Civ. Code § 1748.1(a)*; see *Thrifty Oil Co. v. Superior Court* (2001) 91 Cal. App. 4th 1070, 1076-1079, 111 Cal. Rptr. 2d 253 (retailer's evidence of two-tier pricing based on its costs, offered to all customers, supported motion for summary adjudication; facts established permissible offer of discount under *Civ. Code § 1748.1(a)* and pricing system consistent with legislative intent to encourage discounts under *Civ. Code § 1748.1(e)*); see also *Civ. Code § 1748.1(f)* (exception for charges for payment by credit or debit card to certain electrical, gas, or water corporations)].

If a retailer accepts only credit card payments for orders made by consumers over the telephone, and the same retailer accepts only cash at its public store or other facility, a consumer's use of a credit card for a telephone order is deemed not to be an election in lieu of payment in cash, and thus may be subject to a surcharge [*Civ. Code § 1748.1(c)*]. For these purposes, the definition of "surcharge" includes charges for third-party credit card guarantee services when added to the cash price charged by the retailer [*Civ. Code § 1748.1(d)*].

If a retailer wilfully imposes a surcharge, the cardholder may demand refund of that amount in a letter sent by certified mail. If the retailer refuses to make the refund within 30 days, it may be liable to the cardholder for triple the amount involved [*Civ. Code § 1748.1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law
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§ 46.91 Limitations on Requesting Personal Information in Credit Card Transactions

Persons accepting credit cards in business transactions are subject to restrictions relating to requesting or requiring personal information as a condition of accepting a credit card. In general, no person or business entity that accepts credit cards for the transaction of business may request, or require as a condition to accepting the card, that the cardholder write any personal identification information on the credit card transaction form or elsewhere [*Civ. Code § 1747.08(a)(1)*]. Similarly, a cardholder cannot be requested or required to furnish personal identification information so that the person or business entity accepting the card can write, cause to be written, or otherwise record the information on the credit card transaction form or otherwise [*Civ. Code § 1747.08(a)(2)*]. The word "request" in *Civ. Code § 1747.08(a)* has been judicially construed to prohibit a retailer from making a request for personal identification from the consumer if that request immediately precedes a credit card transaction, even if the consumer's response is voluntary and the request is made only for marketing purposes [*Florez v. Linens'N Things, Inc. (2003) 108 Cal. App. 4th 447, 450-453, 133 Cal. Rptr. 2d 465* (allegation that store improperly requested customer's telephone number held sufficient to state cause of action for violation of *Civ. Code § 1747.08(a)*)].

Further, no person or business entity may use a credit card form that contains pre-printed spaces specifically designated for filling in any personal identification information of the cardholder [*Civ. Code § 1747.08(a)(3)*]. "Personal identification information" means information concerning the cardholder, other than the information set forth on the credit card, including but not limited to the cardholder's telephone number and address [*Civ. Code § 1747.08(b)*]. A cardholder's five-digit zip code is not personal identification information, and the statute does not prohibit asking for it [*Party City Corp. v. Superior Court (2008) 169 Cal. App. 4th 497, 519-520, 86 Cal. Rptr. 3d 721*] .

The prohibition against personal identification information does not apply in any of the following circumstances:

- When the credit card is being used as a deposit to secure payment in the event of default, loss, damage, or other similar occurrence [*Civ. Code § 1747.08(c)(1)*];
- In cash-advance transactions [*Civ. Code § 1747.08(c)(2)*];

- When the entity accepting the credit card is contractually obligated to provide personal identification information to complete the credit card transaction [*Civ. Code* § 1747.08(c)(3)];
- When personal identification information is required for a special purpose incidental but related to the individual credit card transaction, such as information about shipping, delivery, servicing, or installation of the purchased merchandise, or for special orders [*Civ. Code* § 1747.08(c)(4)]; or
- When a customer who bought merchandise using a credit card returns that merchandise and requests reversal of the credit card charge [*Absher v. AutoZone, Inc. (2008) 164 Cal. App. 4th 332, 346, 78 Cal. Rptr. 3d 817*] .

This prohibition does not prevent those accepting credit cards from requiring reasonable forms of positive identification as a condition to accepting the credit card for payment, provided that none of the identifying information is written or recorded on the credit card transaction form or otherwise [*Civ. Code* § 1747.08(d)].

Anyone intentionally violating these prohibitions is subject to civil penalties and injunctions [*Civ. Code* § 1747.08(e)-(g)]. Waiver of any of these provisions is against public policy and is unenforceable [*see Civ. Code* § 1747.04]. For a discussion of limitations on requesting credit card information in negotiable instrument transactions, see Ch. 55, *Negotiable Instruments* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionCredit Card AgreementsGeneral Overview



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§ 46.94 Destruction of Customer Records

A business must take all reasonable steps to dispose, or arrange for the disposal, of a customer's records within its custody or control containing personal information when the records are no longer to be retained by the business [*Civ. Code § 1798.81*]. "Personal information" in this context means any information that identifies, relates to, describes, or is capable of being associated with, a particular individual, including, but not limited to, his or her name, signature, social security number, physical characteristics or description, address, telephone number, passport number, driver's license or state identification card number, insurance policy number, education, employment, employment history, bank account number, credit card number, debit card number, or any other financial information, medical information, or health insurance information [*Civ. Code § 1798.80(e)*]. "Personal information" does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records [*Civ. Code § 1798.80(e)*]. The business may dispose, or arrange for the disposal, of these records by shredding, erasing, or otherwise modifying the personal information in those records to make it unreadable or undecipherable through any means [*Civ. Code § 1798.81*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Debtor & Creditor Relations



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§ 46.95 Theft of Personal Information

[1] Protection of Personal Information Generally

A business (excepting specified entities) that owns or licenses personal information about a California resident must implement and maintain reasonable security procedures and practices to protect personal information from unauthorized access, destruction, use, modification, or disclosure [*Civ. Code § 1798.81.5(b)*; *see Civ. Code § 1798.81.5(e)* (excepted entities)]. The phrase "owns or licenses" in this context includes, but is not limited to, personal information that a business retains as part of internal customer accounts or for the purpose of using that information in transactions with the person to whom the information relates [*Civ. Code § 1798.81.5(a)*].

Further, a business that discloses personal information about a California resident in accordance with a contract with a nonaffiliated third person must require by contract that the third person implement and maintain reasonable security procedures and practices appropriate to the nature of the information, in order to protect the personal information from unauthorized access, destruction, use, modification, or disclosure [*Civ. Code § 1798.81.5(c)*].

"Personal information" in this context means an individual's first name or initial and last name in combination with any one or more of the following, when either the name or one of the following is not encrypted or redacted [*Civ. Code § 1798.81.5(d)(1)*]:

- Social security number.
- Driver's license number or California identification card number.
- Account number, credit card number, or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account.
- Medical information, that is, any individually identifiable information, in electronic or physical form, regarding an individual's medical history, medical treatment, or diagnosis by a health care professional [

see Civ. Code § 1798.81.5(d)(2)].

"Personal information" does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records [*Civ. Code § 1798.81.5(d)(3)*].

A business that is in compliance with other laws providing greater protection to personal information than is provided by this statute is deemed to be in compliance with these requirements [*see Civ. Code § 1798.81.5(e)(5)*].

[2] Protection of Confidential Computerized Personal Information

Credit cards, credit reports, and internet web sites are all sources of personal information that are particularly vulnerable to theft. In response to the increasing problem of identity theft [*see Stats. 2002, ch. 915, § 1 (legislative findings and declaration regarding privacy and financial security)*], state agencies and persons or businesses whose records have been compromised must notify all recordholders potentially affected [*see Civ. Code §§ 1798.29, 1798.82, 1798.84; [2], [3], below*]. This law supersedes and preempt all rules, regulations, codes, statutes, or ordinances of all cities, counties, cities and counties, municipalities, and other local agencies regarding the matters that are expressly covered [*see Stats. 2002, ch. 915, § 6*]. Any waiver of a provision of the law governing consumer records [*Civ. Code § 1798.80 et seq.*] is contrary to public policy and is void and unenforceable [*Civ. Code § 1798.84(a)*].

[3] Disclosure Requirements

A state agency, or a person or business that conducts business in California, that owns or licenses computerized data that includes personal information must disclose, in specified ways, any breach of the security of the data to any resident of California whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person [*Civ. Code §§ 1798.29(a), 1798.82(a); see Civ. Code §§ 1798.29(g), (h) 1798.82(g), (h) (methods of giving notice); § 46.250*]. In addition, a state agency that maintains computerized data that includes personal information that the agency does not own must notify the owner or licensee of the information of any breach of the security of the data immediately following discovery, if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person [*Civ. Code § 1798.29(b)*].

"Personal information" in this context means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either the name or the data elements are not encrypted [*Civ. Code §§ 1798.29(e), 1798.82(e)*]:

- Social security number.
- Driver's license number or California Identification Card number.
- Account number, credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account.
- Medical information [*see Civ. Code §§ 1798.29(f)(2), 1798.82(f)(2) (definition)*].
- Health insurance information [*see Civ. Code §§ 1798.29(f)(3), 1798.82(f)(3) (definition)*].

"Personal information" does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records [*Civ. Code §§ 1798.29(f)(1), 1798.82(f)(1)*].

"Breach of the security system" is unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by the agency, person, or business [*Civ. Code §§*

1798.29(d), 1798.82(d)]. Good faith acquisition of personal information by an employee or agent of the agency for the purposes of the agency is not a breach of the security of the system, provided that the personal information is not used or subject to further unauthorized disclosure [*Civ. Code* §§ 1798.29(d), 1798.82(d)].

Disclosure must be made in the most expedient time possible and without unreasonable delay, consistent with any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system [*Civ. Code* §§ 1798.29(a), 1798.82(a)]. Notifications may be delayed if a law enforcement agency determines that it would impede a criminal investigation [*see Civ. Code* §§ 1798.29(a), (c), 1798.82(a), (c)].

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§ 46.96 Disclosure of Personal Information to Direct Marketers

Civ. Code § 1798.83 provides that with specified exceptions, a business that discloses a customer's personal information, including information relating to income or purchases, to a third party for direct marketing purposes must provide the customer, within 30 days after the customer's request, in writing or by e-mail, the names and addresses of the recipients of that information and specified details regarding the information disclosed [*Civ. Code § 1798.83(a), (b)(1)(C)*; see *Civ. Code § 1798.83(e)(6)* (categories of personal information required to be disclosed), (7) ("personal information" defined); see also *Civ. Code § 1798.83(d)* (disclosures not subject to statute)]. However, a business is not required to respond to more than one request from a customer during any calendar year [*Civ. Code § 1798.83(c)(1)*]. A business must also provide information to customers about its privacy policy and the designated means of making an inquiry about that policy [see *Civ. Code § 1798.83(b)*].

Specified businesses are exempt from these requirements. A business with fewer than 20 employees is not required to comply [*Civ. Code § 1798.83(c)(1)*]. In addition, if a business adopts and discloses to the public a privacy policy stating that it will not disclose personal information to third parties for direct marketing purposes unless the customer affirmatively agrees to disclosure or if the customer has exercised an option to prevent disclosure, the business may comply with this statute by notifying the customer of his or her right to prevent disclosure of personal information and providing the customer a cost-free means to exercise this right [*Civ. Code § 1798.83(c)(2)*]. Disclosures of personal information for direct marketing purposes between affiliated third parties that share the same brand name are also exempt from the disclosure requirements of *Civ. Code § 1798.83(a)*, with specified exceptions [see *Civ. Code § 1798.83(f)*]. Specified financial institutions subject to the Financial Information Privacy Act [*Fin. Code § 4050 et seq.*; see *Fin. Code § 4060* (effective date); see also § 46.98[2] for discussion], are also exempt [see *Civ. Code § 1798.83(h)*].

Remedies under this statute are discussed in § 46.97.

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§ 46.97 Rights and Remedies Under Consumer Records Law

Any customer injured by a violation of the law protecting consumer records [*Civ. Code § 1798.80 et seq.*] may institute a civil action to recover damages [*Civ. Code § 1798.84(b)*]. In addition, a customer may recover a civil penalty of up to \$500 per violation of *Civ. Code § 1798.83* [discussed in § 46.96], or up to \$3,000 per violation if the violation is willful, intentional, or reckless [*Civ. Code § 1798.84(c)*]; *but see Civ. Code § 1798.84(d)* (business that fails to timely provide any information required by *Civ. Code § 1798.83(a)*) may assert complete defense to action by providing the information within 90 days after learning of the failure)].

Any business that violates, proposes to violate, or has violated *Civ. Code § 1798.80 et seq.* may be enjoined [*Civ. Code § 1798.84(e)*].

However, there is no cause of action against a business for disposing of abandoned records containing personal information by shredding, erasing, or otherwise modifying the personal information to make it unreadable or undecipherable through any means [*Civ. Code § 1798.84(f)(1)*].

A prevailing plaintiff in any action commenced under *Civ. Code § 1798.83* [discussed in § 46.96] is entitled to recover reasonable attorneys' fees and costs [*Civ. Code § 1798.84(g)*]. Note that the statutory language refers only to recovery by a prevailing plaintiff and does not include reference to recovery by a prevailing defendant.

The remedies mentioned above are cumulative to each other and to any other rights and remedies that may be otherwise exist [*Civ. Code § 1798.84(h)*].

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§ 46.98 Consumer Financial Information Privacy

[1] Federal Gramm-Leach-Bliley Act

[a] General Prohibitions

Credit cards, credit reports, and Internet web sites are all sources of personal information that is particularly vulnerable to misuse. In 1999, Congress enacted the Gramm-Leach-Bliley Act (GLB Act) [*see 15 U.S.C. § 6801 et seq.*], mandating that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information [*15 U.S.C. § 6801(a)*]. In general, a financial institution may not, directly or through any affiliate, disclose any nonpublic personal information to a nonaffiliated third party, unless the financial institution provides or has provided to the consumer a notice that complies with statutory requirements [*15 U.S.C. § 6802(a)*; *see 15 U.S.C. § 6803*]. More specifically, a financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless [*15 U.S.C. § 6802(b)(1)*; *see 15 U.S.C. § 6802(b)(2)* (exception)]:

- The institution clearly and conspicuously [*see [f], below*] discloses to the consumer, in writing, in electronic form, or other permissible form that the information may be disclosed to the third party.
- The consumer is given the opportunity, before the time that the information is initially disclosed, to direct that the information not be disclosed to the third party.
- The consumer is given an explanation of how the consumer can exercise that nondisclosure option.

Regulations issued in connection with this federal legislation, require each financial institution to notify its individual clients annually of its privacy policy and its practices regarding disclosure of nonpublic personal information [*see 16 C.F.R. §§ 313.4, 313.5 et seq.*].

[b] Definitions

"Nonpublic personal information" in this context means [16 C.F.R. § 313.1(n)(1); see 16 C.F.R. § 313.1(o) ("personally identifiable financial information" defined); see also 16 C.F.R. § 313.1(p) ("publicly available information" defined)]:

- Personally identifiable financial information; and
- Any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information that is not publicly available.

The term does not include publicly available information, except as included on any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without using any personally identifiable financial information that is not publicly available [16 C.F.R. § 313.1(n)(2); see 16 C.F.R. § 313.1(n)(3) (examples)].

"Financial institutions" include, but are not limited to, mortgage lenders, "payday lenders," finance companies, mortgage brokers, account servicers, check cashers, wire transferors, travel agencies operated in connection with financial services, collection agencies, credit counselors and other financial advisors, tax preparation firms, non-federally insured credit unions, and investment advisors that are not required to register with the Securities and Exchange Commission [16 C.F.R. § 313.1(b)]. The term "financial institution" also includes any institution whose business is engaging in financial activities described in 12 U.S.C. § 1843(k). An institution that is significantly engaged in financial activities is a financial institution [16 C.F.R. § 313.3(k)(1)]. The term is subject to numerous specific exclusions [see, e.g., 16 C.F.R. § 313.3(k)(3); see also 16 C.F.R. § 313.3(k)(4)].

[c] Scope of Privacy Protection

The privacy protections governing the treatment of nonpublic personal information about consumers by financial institutions [16 C.F.R. § 313.1(a); see 16 C.F.R. § 313.7 (opt out procedures); see also 16 C.F.R. §§ 313.13-313.15 (exceptions to opt out procedures)]:

- Require financial institutions to provide notice to customers about its privacy policies and practices in specified circumstances.
- Describe the conditions under which a financial institution may disclose nonpublic personal information about consumers to nonaffiliated third parties.
- Provide a method for consumers to prevent a financial institution from disclosing that information to most nonaffiliated third parties by "opting out" of that disclosure.

These protections apply only to nonpublic personal information about individuals who obtain financial products or services primarily for personal, family or household purposes from financial institutions; they do not apply to information about companies or about individuals who obtain financial products or services for business, commercial, or agricultural purposes [16 C.F.R. § 313.1(b)]. These privacy protections also apply to "other persons," that is, third parties that are not financial institutions, but that receive nonpublic personal information from financial institutions with whom they are not affiliated [16 C.F.R. § 313.1(b)].

[d] Initial Privacy Notice Requirements

Financial institutions must provide an initial, clear and conspicuous [see [f], below] privacy notice that accurately reflects their privacy policies and practices to the following [16 C.F.R. § 313.4]:

- New customers, no later than when the entity establishes a customer relationship [16 C.F.R. § 313.4(a)(1); *but see* 16 C.F.R. § 313.4(e)].
- Consumers, before disclosing any nonpublic personal information about the consumer to any nonaffiliated third party [16 C.F.R. § 313.4(a)(2); *but see* 16 C.F.R. §§ 313.14, 313.15 ("opt out" provisions)].
- Existing customers.

However, an initial notice to consumers is not required if the entity will not disclose any nonpublic personal information about the consumer to any nonaffiliated third party, other than under the "opt out" provisions [*see* 16 C.F.R. §§ 313.14, 313.15] and the entity does not have a customer relationship with the consumer [16 C.F.R. § 313.4(b)]. A "customer relationship" is established when the entity and the consumer enter into a continuing relationship. With regard to loans, a "customer relationship" is established with a consumer when the entity originates a loan to the consumer for personal, family, or household purposes. If the servicing rights are subsequently transferred to another financial institution, the customer relationship transfers with the servicing rights [16 C.F.R. § 313.4(c)(1), (2); *see* 16 C.F.R. § 313.4(c)(3) (examples)].

[e] Annual Privacy Notice Requirements

Financial institutions must provide a clear and conspicuous notice [*see* [f], *below*] to customers that accurately reflects the institution's privacy policies and practices not less than annually during the continuation of the customer relationship. Annually means at least once in any period of 12 consecutive months during which that relationship exists. The institution may define the 12-consecutive-month period, but the definition must be applied to the customer on a consistent basis [16 C.F.R. § 313.5(a)(1); *see* 16 C.F.R. § 313.5(a)(2) (examples)]. Notice to former customers is not required [16 C.F.R. § 313.5(b)].

[f] "Clear and Conspicuous" Notice Requirements

A privacy notice is "clear and conspicuous" if the notice is reasonably understandable and designed to call attention to the nature and significance of the information in the notice [16 C.F.R. § 313.3(b)(1)]. A notice is "reasonably understandable" if it does all of the following [16 C.F.R. § 313.3(b)(2)(i)]:

- Presents the information in the notice in clear, concise sentences, paragraphs, and sections.
- Uses short explanatory sentences or bullet lists whenever possible.
- Uses definite, concrete, everyday words and active voice whenever possible.
- Avoids multiple negatives.
- Avoids legal and highly technical business terminology whenever possible.
- Avoids explanations that are imprecise and readily subject to different interpretations.

A notice is "designed to call attention to the nature and significance of the information in the notice" if it does the following [16 C.F.R. § 313.3(b)(2)(ii)]:

- Uses a plain-language heading to call attention to the notice.

- Uses a typeface and type size that are easy to read.
- Provides wide margins and ample line spacing.
- Uses boldface or italics for key words.
- Uses distinctive type size, style, and graphic devices, such as shading or sidebars if the notice is combined with other information.

If a privacy notice is provided on a web page, the notice should be designed to call attention to the nature and significance of the information in it. It should use text or visual cues to encourage scrolling down the page if necessary to view the entire notice, and ensure that other elements on the web site (such as text, graphics, hyperlinks, or sound) do not distract attention from the notice. In addition, either (1) the notice should be placed on a screen that consumers frequently access, such as a page on which transactions are conducted; or (2) a link should be placed on a screen that consumers frequently access, such as a page on which transactions are conducted, that connects directly to the notice and is labeled appropriately to convey the importance, nature, and relevance of the notice [16 C.F.R. § 313.3(b)(2)(iii)].

[g] Preemption

The federal statutes and regulations expressly are not to be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any state, except to the extent that the state statute, regulation, order, or interpretation is inconsistent with federal law provisions, and then only to the extent of the inconsistency [15 U.S.C. § 6807(a); 16 C.F.R. § 313.17(a)]. A state statute, regulation, order, or interpretation is not inconsistent if the protection that it affords any person is greater than the protection provided under federal law [15 U.S.C. § 6807(b); 16 C.F.R. § 313.17(b)].

[2] California Financial Information Privacy Act

[a] Legislative Intent

The California Financial Information Privacy Act [*Fin. Code § 4050 et seq.*] is intended to afford persons greater privacy protections than those provided by the federal Gramm-Leach-Bliley Act (GLB Act) [*Fin. Code § 4051(b)*]. The California Act specifically finds that the "policies intended to protect financial privacy imposed by the Gramm-Leach-Bliley Act are inadequate to meet the privacy concerns of California residents" [*Fin. Code § 4051.5(a)(3)*].

The California Financial Information Privacy Act preempts all local agency ordinances and regulations relating to this subject [*Fin. Code § 4058.5*].

[b] General Prohibitions and Limitations

The California Act generally prohibits a financial institution from sharing, transferring, or otherwise disclosing a consumer's nonpublic personal information to any unaffiliated third parties without the consumer's express prior written consent [see *Fin Code §§ 4052.5, 4053*; see also *Fin Code § 4052(a)* ("nonpublic personal information" defined); *Fin Code § 4052(c)* ("financial institution" defined); *Fin Code § 4052(f)* ("consumer" defined); § 46.251[1]]. The Act also allows a consumer to direct the financial institution not to share the nonpublic personal information with affiliated companies or with nonaffiliated financial companies with which the financial institution has contracted to provide financial products and services [see *Fin. Code §§ 4053(a)(1)*]. However, the Act does not restrict or prohibit the sharing of nonpublic personal information between a financial institution and its wholly owned financial institution subsidiaries or in certain other circumstances if, among other requirements, both entities are regulated by the same functional regulator and are engaged in the same line of business [see *Fin. Code § 4053(c)*].

However, state laws are preempted by provisions of the federal Fair Credit Reporting Act concerning the exchange of information among persons affiliated by common ownership or common corporate control [*15 U.S.C. § 1681t(b)(2)*], and the federal act preempts the Financial Information Privacy Act insofar as the California law attempts to regulate communication between affiliates of consumer-report information as that term is defined in *15 U.S.C. § 1681a(d)(1)* [*American Bankers Ass'n v. Lockyer* (9th Cir. 2008) 541 F.3d 1214, 2008 U.S. App. LEXIS 18861, at *5-*6, *10 (*Fin. Code § 4053(b)(1)* is preempted insofar as it applies to consumer-report information as defined in *15 U.S.C. § 1681a(d)(1)* but is not preempted insofar as it applies to nonconsumer-report information); *American Bankers Ass'n v. Gould* (9th Cir. 2005) 412 F.3d 1081, 1087 (federal act preempts California Financial Information Privacy Act, *Fin. Code § 4050 et seq.*, insofar as California law attempts to regulate inter-affiliate communication of "information," as that term is defined in *15 U.S.C. § 1681a(d)(1)*)].

A financial institution may not discriminate against or deny an otherwise qualified consumer a financial product or service because the consumer has not provided the necessary consent authorizing the financial institution to disclose or share nonpublic personal information [*Fin. Code § 4053(a)(1), (b)(4)*].

The Act provides for disclosure of nonpublic personal information under various circumstances [*see Fin. Code §§ 4053(b)(2), (c), 4054.6, 4056, 4056.5*]. For example, a financial institution may disclose nonpublic personal information to an affiliate or a nonaffiliated third party in order for it to perform certain services on behalf of the financial institution, if specified requirements are met [*see Fin. Code § 4056(b)(1), (2)*]. Nonpublic personal information also may be released in order to identify or locate missing children, witnesses, criminals and fugitives, parties to lawsuits, and missing heirs [*see Fin. Code § 4056(b)(4)-(14)*]. Further, nothing in the Act is intended to change existing law regarding access by law enforcement agencies to information held by financial institutions [*Fin. Code § 4056(c)*].

The Act provides various civil penalties for negligent, or knowing and willful, violations of these provisions [*Fin. Code § 4057*].

[c] Privacy Notice Requirements

To obtain consent to disclose nonpublic personal information to nonaffiliated third parties, the financial institution must use a form, statement, or writing that [*Fin. Code § 4053(a)(2); see Fin. Code § 4053(d)(1)(A)-(L)* (additional requirements)]:

- Is a separate document, not attached to any other document.
- Is dated and signed by the consumer.
- Clearly and conspicuously discloses that by signing, the consumer is consenting to the disclosure to nonaffiliated third parties of nonpublic personal information pertaining to the consumer.
- Clearly and conspicuously discloses (1) that the consent will remain in effect until revoked or modified by the consumer; (2) that the consumer may revoke the consent at any time; and (3) the procedure for the consumer to revoke consent.
- Clearly and conspicuously informs the consumer that (1) the financial institution will maintain the document or a true and correct copy; (2) the consumer is entitled to a copy of the document upon request; and (3) the consumer may want to make a copy of the document for the consumer's records.

The statute sets out a form that is presumed to satisfy the requirements of the law [*see Fin. Code § 4053(d)(2)(A); see § 46.251* for form]. Use of the statutory form is not mandatory, but other forms must satisfy specific statutory

requirements, which are discussed in § 464.251[1][e].

A financial institution is not required to provide this written form to its consumers if the financial institution does not disclose any nonpublic personal information to any nonaffiliated third party or to any affiliate [*Fin. Code* §§ 4053(b)(5), 4054(a)].

The financial institution must comply with the consumer's request regarding nonpublic personal information within 45 days of receipt of the request [*Fin. Code* § 4053(d)(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionState LawFederal
PreemptionBanking LawFederal ActsGramm-Leach-Bliley Act



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DIVISION III: COMMERCIAL TRANSACTIONS
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PART II. LEGAL BACKGROUND
I. Customer Records

20-46 California Legal Forms--Transaction Guide § 46.99

[Reserved]

§ 46.99[Reserved]



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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

20-46 California Legal Forms--Transaction Guide § 46.100

§ 46.100 Client Interview

[1] Facts

1. Identity of consumer:

- a. Name, address, and telephone number of consumer.
- b. If consumer has spouse or ex-spouse with ownership interest in any collateral or whose income will be relied on to obtain credit, name and address of that person.

2. Identity of creditor:

- a. Name, address, and telephone number of creditor.
- b. Legal status of creditor, such as:
 - (1) Corporation.
 - (a) Date and state of incorporation.
 - (b) Name, title, and telephone number of officer or employee to contact regarding this matter.
 - (2) Partnership.
 - (3) Sole proprietorship.

[2] Documents

1. If client is corporation, certified copy of articles of incorporation and current bylaws.
2. If client is partnership, copy of partnership agreement.
3. Copies of all relevant contracts or other documents.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor Relations



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20-46 California Legal Forms--Transaction Guide §§ 46.101-46.109

[Reserved]

§§ 46.101[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
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 PART III. TRANSACTION GUIDE
 B. Preliminary Determinations

20-46 California Legal Forms--Transaction Guide § 46.110

§ 46.110 Credit Card: Application of Client to Bank or Other Financing Institution

1. Determine whether credit card will be consumer card or business card.

NOTE:

Because a business credit card is not an extension of consumer credit, the fair credit billing provisions of the Truth in Lending Act do not apply to business credit card transactions [*American Express Co. v. Koerner* (1981) 452 U.S. 233, 241-244, 101 S. Ct. 2281, 68 L. Ed. 2d 803 ; *see* 15 U.S.C. § 1603(1)]. Further, Regulation Z and the Song-Beverly Credit Card Act of 1971 define "cardholder" to exclude business credit cards, except for purposes of specific provisions governing issuance and liability for unauthorized use [12 C.F.R. § 226.2(a)(8); *Civ. Code* § 1747.02(d); *see* 12 C.F.R. § 226.12(a) (issuance); *Civ. Code* § 1747.05 (issuance); § 46.41[1] (issuance); *see* 12 C.F.R. § 226.12(b) (liability for unauthorized use); *Civ. Code* § 1747.10 (liability for unauthorized use); § 46.213 (liability)].

2. Determine if Equal Credit Opportunity Act [15 U.S.C. § 1691 *et seq.*] applies to transaction because creditor is person who [12 C.F.R. § 202.2(l)]:

- a. In ordinary course of business, regularly participates in decision of whether or not to extend credit;
- b. In ordinary course of business, regularly refers applicants or prospective applicants to creditors; or
- c. Selects or offers to select creditors to whom requests for credit may be made.

NOTE:

The Equal Credit Opportunity Act prohibits creditor discrimination on the basis of race, color, religion, national origin, sex, marital status, or age [12 C.F.R. § 202.1(b)]. While these types of discrimination are prohibited in all credit transactions, some regulatory provisions of the Act are not applied to incidental extensions of credit or to nonconsumer transactions [see 12 C.F.R. § 202.3(c)]. An "incidental extension of credit" is one not made pursuant to credit card account, on which no finance charge is imposed, and which is not payable in more than four installments [12 C.F.R. § 202.3(c)(1)].

3. Determine if Truth in Lending Act [15 U.S.C. § 1601 *et seq.*] applies to transaction [12 C.F.R. §§ 226.1(c)(1), 226.2(a)(17)]:

- a. Credit is offered or extended to consumers;
- b. Credit is offered or extended regularly;
- c. Credit is either:
 - (1) Subject to finance charge; or
 - (2) Payable by written agreement in more than four installments; and
- d. Credit is primarily for personal, family, or household purposes.

NOTE:

A lender "regularly" extends credit under the Truth in Lending Act (TILA) only if it extended credit more than 25 times (or more than five times for transactions secured by dwelling) in the preceding or current calendar year [12 C.F.R. § 226.2(a)(17) n.3]. Extensions of credit for agricultural purposes are exempt, as are those involving amounts over \$25,000 if not secured by real property or the consumer's dwelling, those regulated by agencies supervising actions of public utilities or commodities or securities brokers, and home fuel budget plans in which no finance charge is imposed [15 U.S.C. § 1603; 12 C.F.R. § 226.3]. Certain student loans are also exempt from TILA requirements [15 U.S.C. § 1603(6); 12 C.F.R. § 226.3(f)].

4. Determine if Unruh Act applies [Civ. Code §§ 1801-1812.20] to transaction:

- a. Contract is retail installment contract for [Civ. Code §§ 1802.5, 1802.6]:
 - (1) Retail sale of goods [see Civ. Code § 1802.1 ("goods" defined)]; or
 - (2) Retail furnishing of services [see Civ. Code § 1802.2 ("services" defined)];
- b. Contract is entered into or performed in California [see Civ. Code § 1802.6];
- c. Seller is retail seller [see Civ. Code § 1802.3 (definition)]; and
- d. Buyer is retail buyer [see Civ. Code § 1802.4 (definition)].

NOTE:

The Unruh Act is a disclosure act similar to the federal Truth in Lending Act (TILA). The Unruh Act is modeled on TILA and requires many of the same disclosures that must be given under Regulation Z,

which implements the federal act [*see Civ. Code §§ 1801.5, 1803.3(b)*].

In General, the Unruh Act applies only to retail sellers [*Civ. Code § 1802.3*]. However, financial institutions that provide purchase-money loans can be subject to the Unruh Act if they are joint venturers with, or are related by common ownership and control to, the actual seller of the goods or services financed [*Civ. Code § 1801.6(b)*]. The Unruh Act is applicable only to credit sales, and then only to those credit sales that also meet the definition of a "retail installment contract" [*see Civ. Code §§ 1802.6, 1802.7*]. The Truth in Lending Act is generally applicable to those same retail transactions, as well as to other credit sales and direct loans [*see 15 U.S.C. § 1602(g); 12 C.F.R. § 226.2(a)*]. Unlike the Truth in Lending Act, the Unruh Act contains no exemption for creditors handling fewer than 25 annual transactions [*see Civ. Code § 1802.3*].

5. Determine if Song-Beverly Credit Card Act of 1971 [*Civ. Code § 1747 et seq.*], Areias Credit Card Full Disclosure Act of 1986 [*Civ. Code § 1748.10 et seq.*], or Areias-Robbins Charge Card Full Disclosure Act of 1986 [*Civ. Code § 1748.20 et seq.*] applies to transaction because [*see Civ. Code §§ 1747.02(c), (d), 1748.21(b), (c)*]:

NOTE:

These acts regulate credit cards, including their disclosure requirements. For further discussion, see §§ 46.30-46.46.

a. Client is credit card or charge card issuer, who is:

(1) Person who issues credit card or charge card; or

(2) Agent of person who issues card.

b. Client is cardholder, who is person to whom credit card or charge card is issued.

6. Determine whether credit card will be secured or unsecured.

NOTE:

See § 46.40 for discussion of required disclosures for secured and unsecured cards. See § 46.45 for discussion of the right to rescind transactions creating a lien on the consumer's dwelling.

7. Determine whether lender will require credit disability insurance and, if so, will lender:

a. Sell it to debtor?

b. Arrange for its sale to debtor?

c. Receive commission or other compensation for its sale to debtor?

NOTE:

If the lender does any of these, it cannot impose late charges, accelerate the due date, collect any credit balance, or enforce any security interest in any manner until three calendar months after the first missed payment is due or the insurer pays or rejects the debtor's claim, whichever is first [*Civ. Code § 1812.402(a); see Civ. Code §§ 1812.401(d), (e); see also Civ. Code §§ 1812.403-1812.407*]. The creditor must disclose this to the debtor when the creditor sells insurance to the debtor [*see Civ. Code §*

1812.402(f)(1)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionCredit Card AgreementsGeneral OverviewBanking LawConsumer ProtectionEqual
Credit OpportunityGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewBanking
LawConsumer ProtectionTruth in LendingGeneral Overview



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20-46 California Legal Forms--Transaction Guide § 46.111

§ 46.111 Retail Installment Agreement: Application to Seller

1. Determine applicability of Equal Credit Opportunity Act [*15 U.S.C. § 1691 et seq.; see §§ 46.20, 46.110 P 2*].
2. Determine applicability of Truth in Lending Act [*15 U.S.C. § 1601 et seq.; see §§ 46.32, 46.33, 46.110 P 3*].
3. Determine applicability of Unruh Act [*Civ. Code §§ 1801-1812.20; see § 46.32, 46.33, 46.110 P 4*].
4. If more than one creditor is involved, determine which one will ensure compliance with applicable credit regulations.
5. Determine whether agreement will be secured or unsecured [*see § 46.110 P 6*].
6. Consider applicability of credit disability insurance [*see §§ 46.80, 46.110 P 7*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionEqual Credit OpportunityGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral OverviewContracts LawTypes of ContractsInstallment Contracts



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20-46 California Legal Forms--Transaction Guide §§ 46.112-46.119

[Reserved]

§§ 46.112[Reserved]



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 C. Procedural Guide

20-46 California Legal Forms--Transaction Guide § 46.120

§ 46.120 Issuance of Credit Cards

1. Advise client that credit cards may not be issued except [15 U.S.C. § 1642; 12 C.F.R. § 226.12(a); Civ. Code § 1747.05]:

- a. In response to an oral or written request or application; or
- b. As a renewal or substitute for an accepted credit card.

NOTE:

An "accepted credit card" is any card that the cardholder has requested and received or has signed, used, or authorized another to use [15 U.S.C. § 1602(l); 12 C.F.R. § 226.12(a)(2) n.21; Civ. Code § 1747.02(b)]. Thus, a card issuer may not send unsolicited credit cards to potential users. This rule applies to all credit cards, not just those issued for consumer credit purposes [12 C.F.R. § 226.2(a)(8); Civ. Code § 1747.02(d)].

c. In substitution for accepted credit card, if card issuer provides activation process whereby cardholder is required to contact card issuer to activate card before its first use in credit transaction [see Civ. Code § 1747.05(c) (statute does not prohibit overdraft protection advance or recurring-charge transaction previously authorized by cardholder on accepted credit card)].

2. Advise client that creditor may not discriminate against any applicant:

NOTE:

The federal Equal Credit Opportunity Act and its implementing regulations [15 U.S.C. § 1691 *et seq.*; 12 C.F.R. pt. 202] and California law [Civ. Code § 1747.80] make the discriminatory practices listed below unlawful.

(a) California law: on basis of applicant's [*Civ. Code* § 1747.80(a); see *Civ. Code* § 51(b), (e)]:

- (1) Sex.
- (2) Race.
- (3) Color.
- (4) Religion.
- (5) Ancestry.
- (6) National origin.
- (7) Disability.
- (8) Medical condition.
- (9) Marital status.
- (10) Sexual orientation.

NOTE:

A person may not be denied credit or offered credit on terms less desirable than those offered to a person of the opposite sex if his or her property or earnings are such that a person of the opposite sex having the same amount of property or earnings would receive credit [*Civ. Code* § 1812.30].

b. Federal law: on the basis of applicant's [*15 U.S.C.* § 1691(a)(1)]:

- (1) Age, provided applicant is over age of capacity to contract.

NOTE:

Inquiry may be made regarding the applicant's age to determine the amount and probable continuance of income levels, credit history, or other pertinent element of creditworthiness [*15 U.S.C.* § 1691(b)(2)]. There is no discrimination in the use of an empirically derived credit system that considers age if it is demonstrably and statistically sound, but old age may not be assigned a negative factor [*15 U.S.C.* § 1691(b)(3)]. Nor is it discriminatory to inquire about age when the information is to be used in the applicant's favor [*15 U.S.C.* § 1691(b)(4)].

- (2) Marital status.

NOTE:

Inquiry may be made regarding marital status to ascertain the creditor's rights and remedies, but not to discriminate in a determination of creditworthiness [*15 U.S.C.* § 1691(b)(1)].

c. Because all or part of applicant's income derives from any public assistance program [*15 U.S.C.* § 1691(a)(2)].

NOTE:

It is not discriminatory for a card issuer to inquire about income from public assistance if the inquiry is made to determine the amount and probable continuance of income levels, credit history, or other

pertinent elements of creditworthiness [15 U.S.C. § 1691(b)(2)].

d. Because applicant has in good faith exercised any right under Truth in Lending Act [15 U.S.C. § 1691(a)(3)].

3. Review any consumer credit application for compliance with Equal Credit Opportunity Act [see 12 C.F.R. § 202.5 (permissible inquiries)].

NOTE:

See Paragraph 2, **above**, and § 46.20 for discussion of the Equal Credit Opportunity Act. For further reference, see Ch. 45, **Consumer Installment Loans and Credit Sales**.

4. Advise client that creditor must determine creditworthiness according to guidelines established by Equal Credit Opportunity Act [see 12 C.F.R. § 202.6 (evaluation of applications)].

NOTE:

See Paragraph 2, **above**, and § 46.20 for discussion of the Equal Credit Opportunity Act. For further reference, see Ch. 45, **Consumer Installment Loans and Credit Sales**.

5. Advise client that if creditor furnishes credit to married woman, creditor must open account and issue card in woman's name, as she directs [12 C.F.R. § 202.7(b); Civ. Code § 1747.81(a)]:

- a. In her maiden name;
- b. In her married name; or,
- c. In combination of her maiden and married names.

6. Advise client that if credit is denied, terminated, or changed, creditor must notify applicant in writing within 30 days [see 12 C.F.R. § 202.9; Civ. Code § 1787.2; see also Ch. 45, **Consumer Installment Loans and Credit Sales**].

7. Advise client that creditor may not take adverse action against account holder or applicant because that person asserted rights under Equal Credit Opportunity Act or Song-Beverly Credit Card Act of 1971 [12 C.F.R. §§ 202.4, 202.2(z); Civ. Code § 1747.70(b), (c)].

NOTE:

See §§ 46.40, 46.41, 46.60 for detailed discussion of the Song-Beverly Credit Card Act of 1971 [Civ. Code § 1747 et seq.].

8. Advise client that creditor may not take following actions as result of account holder's change of name or marital status, or retirement [12 C.F.R. § 202.7(c)(1)]:

NOTE:

The creditor may take these otherwise-prohibited actions if there is evidence of unwillingness or inability to pay [12 C.F.R. § 202.7(c)(1)]. If credit was extended on the basis of the former spouse's income, the creditor may require a new application on a change in marital status [12 C.F.R. § 202.7(c)(2)].

- a. Require reapplication.
- b. Change terms of account.

c. Terminate account.

9. Advise client that creditor must make required disclosures of plan terms and consumer's rights before consumer's first credit transaction [15 U.S.C. §§ 1637(a), 1643(a)(1); 12 C.F.R. §§ 226.5(b)(1), 226.12(b)(2); *see Civ. Code* § 1810.1].

NOTE:

See § 46.212 for an initial disclosure statement and detailed discussion of disclosure requirements. See § 46.213 for a notice that must be given if the creditor wishes to impose any liability on the consumer for unauthorized use of the card.

10. If creditor requires credit disability insurance and has directly participated in or received any compensation from sale of credit disability insurance to consumer, advise client that creditor must give consumer notice of credit disability insurance claims procedures [*see Civ. Code* § 1812.402(f)(1); *see also* *McManis v. San Diego Postal Credit Union* (1998) 61 Cal. App. 4th 547, 557-558, 71 Cal. Rptr. 2d 617 (credit union failed to meet its burden on summary judgment to negate consumer's breach of contract claim because it did not establish compliance with *Civ. Code* § 1812.400 *et seq.*, including *Civ. Code* § 1812.402(f), before repossession)].

NOTE:

If the creditor has directly participated in or received any compensation from the sale of credit disability insurance to the consumer, it will be precluded from imposing late charges, accelerating a due date, collecting any credit balance, or enforcing any security interest until three calendar months after the first missed payment is due or the insurer pays or rejects the debtor's claim, whichever is first [*see Civ. Code* § 1812.402(a); *see also* *Civ. Code* §§ 1812.401(d), (e), 1812.403-1812.407]. The creditor must disclose these limitations on its rights to the debtor when the creditor sells the insurance to the debtor [*see Civ. Code* § 1812.402(f)(1)]. The insurer must disclose the claim procedure to the debtor when it sends claim forms to the debtor [*see Civ. Code* § 1812.402(f)(2)]. See Ch. 45, **Consumer Installment Loans and Credit Sales**, for further discussion of the use of credit disability insurance.

11. Advise client that consumer has absolute right to rescind any open-end credit transactions giving creditor lien on property in which consumer resides, unless transaction finances acquisition of dwelling [15 U.S.C. § 1635(a), (e)(1)(A); 12 C.F.R. § 226.23(a), (f)(1)].

NOTE:

The consumer may rescind the transaction until midnight of the third business day following consummation, delivery of a required notice of rescission rights, or delivery of all material Truth in Lending disclosures, whichever occurs last [12 C.F.R. § 226.23(a)(3)]. Each affected consumer also has the right to rescind each addition to the security under the plan and any increase in the credit limit [15 U.S.C. § 1635(a); 12 C.F.R. § 226.15].

The right to rescind expires three years after the date of consummation of the transaction or on the sale of the property, whichever occurs first, even if the required disclosures have never been made [15 U.S.C. § 1635(f)]. A borrower may not assert the right to rescind as an affirmative defense in a collection action brought by the lender more than three years after the consummation of the transaction. Because 15 U.S.C. § 1635(f) completely extinguishes the right of rescission at the end of the three-year period, it is not a statute of limitations and the mortgagors cannot assert the right to rescind as a recoupment defense beyond the expiration period [*Beach v. Ocwen Federal Bank* (1998) 523 U.S. 410, 417-419, 118 S. Ct. 1408, 140 L. Ed. 2d 566] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionCredit Card AgreementsGeneral OverviewBanking LawConsumer ProtectionEqual
Credit OpportunityGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewBanking
LawConsumer ProtectionTruth in LendingGeneral Overview



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20-46 California Legal Forms--Transaction Guide § 46.121

§ 46.121 Billing and Crediting Payments for Open-End Credit Accounts; Cardholder's Liability

1. Advise client that creditor must comply with regulations governing:

NOTE:

See § 46.215 for further discussion of billing provisions.

a. "Free-ride periods" within which payment may be made without imposition of finance charge [*see 15 U.S.C. § 1666b; Civ. Code § 1810.3(a)(7), (b)*].

b. Prompt crediting of payments [*see 15 U.S.C. § 1666c; 12 C.F.R. § 226.10*].

c. Handling of refunds and credit balances [*see 15 U.S.C. § 1666d; 12 C.F.R. §§ 226.11, 226.12(e); Civ. Code § 1810.3(e)-(h)*].

d. Issuance and contents of [*see 15 U.S.C. § 1637(a)(7), (b); 12 C.F.R. §§ 226.7, 226.9(a); Civ. Code §§ 1748.5, 1748.13, 1810.3, 1810.11*]:

(1) Periodic statements.

(2) Notices of billing rights.

(3) Annual statements of finance charges paid.

2. Advise client that credit card issuer may impose liability on cardholder only if following conditions are met [*15 U.S.C. § 1643(a)(1); 12 C.F.R. § 226.12(b)(2); Civ. Code § 1747.10*]:

NOTE:

The rules governing the liability of credit card holders for unauthorized use of their cards [12 C.F.R. § 226.12(b)] apply to all credit cards, even those issued for extensions of credit that are exempt from coverage of the Truth in Lending Act requirements [12 C.F.R. § 226.3 n.4].

- a. Card is "accepted credit card" [see 15 U.S.C. § 1602(l) (definition); Civ. Code § 1747.02(b) (definition); see also § 46.41];
- b. Card issuer gives cardholder adequate notice of potential liability;
- c. Card issuer has provided cardholder with description of method for notifying card issuer of loss or theft of card;

NOTE:

This description may be provided as part of the statement required with each billing cycle [see 15 U.S.C. § 1637(b)] or may be on a separate note accompanying that statement [15 U.S.C. § 1643(a)(1)(D)]. See § 46.213 for detailed discussion of the notification requirements and a sample notice.

- d. Unauthorized use occurs before card issuer has been notified that such a use has occurred or may occur as a result of loss, theft, or otherwise; and
- e. Card issuer has provided a method whereby user of card can be identified as person authorized to use it.

3. Advise client that liability for unauthorized use of credit card may not exceed \$50 [15 U.S.C. § 1643(a)(1)(B); 12 C.F.R. § 226.12(b)(1); Civ. Code § 1747.10(b)].

4. Advise client that creditor must comply with specified procedures when responding to consumer inquiries or notifying consumer of billing errors [see 15 U.S.C. §§ 1666, 1666a; 12 C.F.R. §§ 226.13, 226.28(a)(2)(i); Civ. Code §§ 1747.40-1747.70].

NOTE:

Federal and California laws impose stringent requirements regarding billing errors. See § 46.233 for discussion of these requirements.

5. Advise client of consumers' rights to assert claims and defenses, resulting from conduct of seller of goods and services, against credit card issuer who is not seller [see 15 U.S.C. § 1666i; 12 C.F.R. § 226.12(c); Civ. Code § 1747.90].

NOTE:

See §§ 46.231 and 46.232 for discussion of the right to assert claims and defenses against a third-party issuer. See §§ 46.212 and 46.215 for discussion of the card issuer's initial and subsequent obligations to provide notice of this right.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionCredit Card AgreementsGeneral Overview



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20-46 California Legal Forms--Transaction Guide § 46.122

§ 46.122 Advertisements and Oral Disclosures of Open-End Credit Cost

1. Advise client of following federal restrictions on advertising open-end credit [*see 15 U.S.C. §§ 1662, 1663; 12 C.F.R. § 226.16*].

NOTE:

See Paragraph 3, ***below***, for a discussion of California requirements.

a. If advertisement states specific credit terms, only terms actually arranged or offered by creditor may be stated [*15 U.S.C. § 1662; 12 C.F.R. § 226.16(a)*].

b. If credit terms are specified, advertisement must disclose all of following [*15 U.S.C. § 1663; 12 C.F.R. § 226.16(b); see § 46.212*]:

(1) Any minimum or fixed charge that could be imposed;

(2) Any periodic rates expressed as annual percentage rates if periodic rates are used to compute finance charge; and

(3) Any membership or participation fee that could be imposed.

c. Catalogs or other multiple-page advertisements and electronic advertisements may make required disclosures using single table or schedule, provided that [*15 U.S.C. § 1661; 12 C.F.R. § 226.16(c)*]:

(1) Any required statement of terms in initial disclosure statement clearly refers to page in catalog on which table begins;

(2) Table or schedule is clear and conspicuous;

(3) Table or schedule permits determination of all required disclosures; and

(4) Table or schedule includes disclosures for representative amounts up to level of more commonly sold higher priced property or services.

NOTE:

If an advertisement using electronic communication contains the table or schedule permitted under 12 C.F.R. § 226.16(c)(1), any statement of terms set forth in 12 C.F.R. § 226.6 (initial disclosure statement) [see 46.212] appearing anywhere else in the advertisement must clearly direct the consumer to the location where the table or schedule begins. For example, a term triggering additional disclosures may be accompanied by a link that directly takes the consumer to the additional information [see 12 C.F.R. pt. 226, supp. I, comment 16(c)-1].

2. Advise client of restrictions on oral disclosures of cost of open-end credit.

NOTE:

In an oral response to an inquiry about the cost of open-end credit, only the annual percentage rate or rates and the periodic rate or rates may be stated [15 U.S.C. § 1665a; 12 C.F.R. § 226.26(a)]. If the annual rate cannot be determined in advance because there are finance charges other than a periodic rate (for example, transaction charges), the annual percentage rate corresponding to the periodic rate must be stated, and other cost information may be given [15 U.S.C. § 1665a; 12 C.F.R. § 226.26(a)]. The corresponding annual percentage rate is the product of a periodic rate and the number of periods in a year [see 12 C.F.R. §§ 226.6(a)(2), 226.14(b); see also Ch. 45, *Consumer Installment Loans and Credit Sales*].

3. Advise client that creditor must comply with following California requirements if any method of payment for goods, property, or services to be purchased using open-end consumer credit plan accepted by more than one seller is advertised:

NOTE:

The terms used below have the same meaning as those used in federal Regulation Z [Bus. & Prof. Code § 17538.7(e)].

a. Bait terms may not be used [see Bus. & Prof. Code § 17538.7(d)].

b. Following disclosures must be clear and conspicuous:

(1) Cash price [Bus. & Prof. Code § 17538.7(a)(1)].

NOTE:

The cash price must be clearly and conspicuously stated next to the payment terms [Bus. & Prof. Code § 17538.7(c)].

(2) Amount or percentage of downpayment, if any [Bus. & Prof. Code § 17538.7(a)(1)].

(3) Payment terms [Bus. & Prof. Code § 17538.7(a)(2)]:

(a) Monthly or other periodic payment;

(b) Number of payments or period of repayment; and

(c) Whether payment is calculated on assumption that purchaser has no outstanding balance due under credit plan, if that is so.

(4) Finance charge data [*Bus. & Prof. Code* § 17538.7(a)(3)]:

(a) Amount of finance charge;

(b) Any applicable periodic rate, expressed as annual percentage rate; and

(c) Any applicable variable periodic rate.

c. If catalogs or multi-page advertisements are used, advise client of following disclosure requirements [*Bus. & Prof. Code* § 17538.7(b)]:

(1) Any applicable periodic rate, expressed as annual percentage rate, set forth clearly and conspicuously in a table or schedule; and

(2) Reference to that table wherever payment terms are stated elsewhere.

4. Advise client that any application form or preapproved written solicitation for open-end credit card account to be used for personal, family, or household purposes mailed to California consumers must contain either of following disclosures [*Civ. Code* § 1748.11(a)]:

NOTE:

These disclosure requirements do not apply to application forms or solicitations included in magazines, newspapers, or other publications [*Civ. Code* § 1748.11(a)]. Application forms for an open-end credit card accounts distributed in California, other than by mail, must either make these disclosures or contain a statement in substantially the following form: "If you wish to receive disclosure of the terms of this credit card, pursuant to the Areias Credit Card Full Disclosure Act of 1986, check here and return to the address on this application" [*Civ. Code* § 1748.11(g)]. However, application forms or written advertisements or an open-end credit card accounts where the credit to be extended is secured by a lien on real property, personal property, or both, do not require these disclosures [*Civ. Code* § 1748.11(h); **see** *Civ. Code* § 1747.94 (secured credit card disclosures)]. An advertisement or solicitation for a secured credit card must expressly identify the credit instrument as a secured card, and describe the security by item or type [*Civ. Code* § 1747.94(a); **see** *Civ. Code* § 1747.94(c) (exceptions); **see also** *Civ. Code* § 1747.02(l) ("secured credit card" defined)].

a. Statement that satisfies initial disclosure statement requirements of federal Regulation Z [*Civ. Code* § 1748.11(a)(2), (c), (e); **see** *Civ. Code* § 1802.18; 12 C.F.R. § 226.1; **see also** P 1, above]; or

b. All of following information [*Civ. Code* § 1748.11(a)(1)]:

(1) Any periodic rate or rates, expressed as annual percentage rate or rates;

NOTE:

If the account is subject to a variable rate, the creditor may instead either (1) disclose the rate as of a specific date and indicate that the rate may vary, or (2) identify the index and any amount or percentage added to, or subtracted from, that index and used to determine the rate [*Civ. Code* § 1748.11(a)(1)(A)].

(2) Any membership or participation fee that may be imposed for availability of card, expressed as annualized amount;

(3) Any per transaction fee that may be imposed on purchases, expressed as either an amount or percentage of transaction; and

(4) Any "free period" in which consumer may pay full balance without imposition of additional finance charges.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral Overview



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20-46 California Legal Forms--Transaction Guide § 46.123

§ 46.123 Cancellation Notice Requirements for Credit Card

1. Advise client that under California law, card issuer may cancel credit card without notice to cardholder if [*Civ. Code § 1747.85*]:

- a. Card issuer has evidence or reasonable belief that cardholder is unable or unwilling to repay obligations or that unauthorized use of card may be made;
- b. Cardholder is or has been in default of payment within last 90 days; or
- c. Cardholder requests cancellation.

NOTE:

Otherwise, a card issuer may not cancel a credit card without having first given the cardholder 30 days written notice of its intention to do so [*Civ. Code § 1747.85*].

2. Advise client that Equal Credit Opportunity Act [*15 U.S.C. § 1691 et seq.*; 12 C.F.R. pt. 202] provides for written notice within 30 days after terminating or taking any adverse action against existing consumer credit account [*12 C.F.R. § 202.9(a)(1)(iii)*].

NOTE:

Such a notice must contain either a statement of the specific reasons for the termination or change or notification of the right to such a statement, a statement of the action taken, the name and address of the creditor, as well as other notices required by law [*12 C.F.R. § 202.9(a)(2)*; *see* Ch. 45, **Consumer Installment Loans and Credit Sales**].

Legal Topics:

For related research and practice materials, see the following legal topics:

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20-46 California Legal Forms--Transaction Guide § 46.124

§ 46.124 Limitations on Requesting Personal Information in Credit Card Transactions

1. Advise client that party accepting credit card may not do any of the following:

NOTE:

These prohibitions do not apply (1) when the credit card is being used as a deposit to secure payment in the event of default, loss, damage, or other similar occurrence; (2) to cash advance transactions; (3) when the entity accepting the credit card is contractually obligated to provide personal identification information to complete the credit card transaction; or (4) when personal identification information is required for a special purpose incidental but related to the individual credit card transaction, such as information about shipping, delivery, servicing, or installation of the purchased merchandise, or for special orders [*Civ. Code § 1747.08(c)*]. These prohibitions also do not apply when a customer who bought merchandise using a credit card returns that merchandise and requests reversal of the credit card charge [*Absher v. AutoZone, Inc. (2008) 164 Cal. App. 4th 332, 346, 78 Cal. Rptr. 3d 817*] .

a. Request, or require as condition to accepting card, that cardholder write any personal identification information on credit card transaction form or elsewhere [*Civ. Code § 1747.08(a)(1)*].

b. Request, or require as condition to accepting card, that cardholder furnish personal identification information so that party accepting card can record that information on credit card transaction form or otherwise [*Civ. Code § 1747.08(a)(2)*]; see *Florez v. Linens'N Things, Inc. (2003) 108 Cal. App. 4th 447, 450-453, 133 Cal. Rptr. 2d 465* (word "request" in § 1747.08 bars retailer from making request for personal identification from consumer if it immediately precedes credit card transaction, even if consumer's

response is voluntary and made only for marketing purposes)].

NOTE:

"Personal identification information" means information concerning the cardholder, other than the information set forth on the credit card, including but not limited to, the cardholder's telephone number and address [*Civ. Code § 1747.08(b)*]. A cardholder's five-digit zip code is not personal identification information, and the statute does not prohibit asking for it [*Party City Corp. v. Superior Court (2008) 169 Cal. App. 4th 497, 519-520, 86 Cal. Rptr. 3d 721*] .

c. Utilize credit card form that contains pre-printed spaces specifically designated for filling in any personal identification information [*Civ. Code § 1747.08(a)(3)*].

2. Advise client that party accepting credit card may require reasonable forms of positive identification as condition to accepting credit card, provided that identifying information is not recorded on credit card transaction form or otherwise [*Civ. Code § 1747.08(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionCredit Card AgreementsGeneral Overview



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20-46 California Legal Forms--Transaction Guide § 46.125

§ 46.125 Key Features of Credit Card Systems

1. If issuer offers insurance in connection with its credit card, advise client that such charges:
 - a. For credit life, accident, or health insurance must be included in finance charge disclosed under Truth in Lending Act unless [15 U.S.C. § 1605(b)]:
 - (1) Coverage is not factor in approval of credit extension and that fact is clearly disclosed in writing to applicant; and
 - (2) To obtain insurance, debtor gives specific affirmative written assent after written disclosure of cost.
 - b. For insurance protecting creditor against cardholder's default or other credit loss must be included in finance charge [15 U.S.C. § 1605(a)(5)].
 - c. For insurance against property loss or damage or against liability arising out of ownership or use of property must be included in finance charge unless cardholder is furnished with clear and specific written statement [15 U.S.C. § 1605(c)]:
 - (1) Setting forth cost of insurance if obtained from or through card issuer; and
 - (2) Giving cardholder right to chose person through whom insurance is to be obtained.

NOTE:

Home insurance policies commonly offer or automatically extend riders to their insureds covering all credit card losses up to a specified amount.

2. If cost of any open-end credit account insurance is separately charged to buyer, advise client that California law requires written agreement [*Civ. Code § 1810.5*]:

- a. Stating whether insurance is to be procured by buyer, seller, or holder;
- b. Signed by both buyer and seller; and
- c. Furnished to buyer.

3. If insurance is to be procured by seller or holder, advise client that California law requires that:

- a. Notice of insurance, or copies of any policies, or certificates of insurance be furnished by seller or holder within 45 days after delivery of goods or performance of services [*Civ. Code § 1803.5(c)*].
- b. Charges for insurance not exceed insurer's fixed rate for that insurance [*Civ. Code § 1803.5(b)*].

4. Advise client that credit card issuer should establish method to identify card user as person authorized to use card.

NOTE:

In order for the issuer to collect the cardholder's maximum liability (\$50), the issuer must have established a method to identify the user of the card as the person authorized to use it [*15 U.S.C. § 1643(a)(1)(F)*; *Civ. Code § 1747.10(f)*]. Such methods ordinarily include the cardholder's signature, photograph, fingerprint or voiceprint. See § 46.213 for further discussion of cardholder liability.

5. Advise client to determine whether cardholder will be charged membership fee, either on one-time or annual basis.

NOTE:

A membership fee, when not incident to or a condition of any specific extension of credit, is not part of the finance charge [*12 C.F.R. § 226.4(c)(4)*]. California law authorizes an annual membership fee for retail installment accounts that utilize credit cards [*Civ. Code § 1810.4*].

6. Advise client that cardholders may be charged penalties for late payments as follows:

- a. Lender credit card may charge late fee for genuine, unanticipated default [*12 C.F.R. § 226.4(c)(2)*].

NOTE:

This fee is not required to be included in the finance charge [*12 C.F.R. § 226.4(c)(2)*]. Such a fee ordinarily is applied only to the minimum balance that was supposed to have been paid for the prior billing period.

- b. Retail installment account agreement may provide for late fee in amount not in excess of \$10 for period in default of not less than 10 days, or \$15 for period in default of not less than 15 days [*Civ. Code § 1810.12(a)*].

NOTE:

If the delinquency charge has not been previously disclosed to the buyer in the terms of the retail installment account agreement, the seller must provide notice of the change to the buyer not less than 30 days before the effective date of the change or 30 days before the beginning of the billing cycle within which the change will become effective, whichever is earlier [*Civ. Code § 1810.3(d)*]. A delinquency charge may not be imposed for defaults of payment on payment due before the buyer has been given proper notice

concerning the delinquency charge [*Civ. Code § 1810.12(b)*].

c. Seller, holder, or retail installment account (including retail creditor) may charge fee for returned or dishonored checks [*Civ. Code § 1810.4*].

d. Charge card issuer may charge up to specified amount as late payment charge [*see Fin. Code § 4001(a)*].

7. Advise client to determine whether credit card plan will provide following related credit card services:

a. Cash advances.

b. Overdraft protection.

NOTE:

Overdraft protection permits a bank that issued the card to automatically credit the cardholder's account with specified amounts (usually in multiples of \$100) sufficient to cover the amount of any checking account overdraft. For discussion of the circumstances under which the bank can automatically take an offset against a deposit account in payment of an outstanding balance, see § 46.210.

c. Minimum balance account.

d. Check guarantee privileges at participating merchants.

e. Special installment account providing extended term financing for special goods (normally more expensive items such as appliances), not charged against regular credit limit.

8. Advise client that retail installment account agreement may provide for actual and reasonable costs of collection caused by buyer's [*Civ. Code § 1810.12*]:

a. Removal of goods purchased under agreement from California without written permission of account holder.

b. Failure to notify holder of change of residence.

c. Failure to communicate with holder for period of 45 days after default in making payments due under agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Credit Card Agreements General Overview Banking Law Consumer Protection Truth in Lending General Overview



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20-46 California Legal Forms--Transaction Guide § 46.126

§ 46.126 Responsibilities of Seller Participating in Credit Card Plan

NOTE:

There may be antitrust considerations in any attempt to exclude particular sellers from a credit card plan [*see Bus. & Prof. Code §§ 16600, 16720*].

1. Advise seller-client that it should sign up to participate in credit card plan by specific agreement.
2. Advise seller-client to obtain all forms and equipment necessary for administration of credit card system.
3. Advise seller-client to determine applicable credit limits ("floor limits") on total amount of sale beyond which merchant must obtain clearance from card issuer for extension of credit to customer.
4. Advise seller-client to determine procedure for telephone or computer tie-in to credit authorization facilities to authorize credit in excess of floor limits.
5. Advise seller-client that credit authorization system should be used for each purchase in excess of floor limits.
6. Advise seller-client that card issuers may not prohibit sellers of goods or services from offering discounts for payment by means other than credit card [*15 U.S.C. § 1666f(a); 12 C.F.R. § 226.12(f)(1); Civ. Code § 1748*].

NOTE:

Such a discount may be a finance charge, subjecting the person honoring the card to a disclosure requirement [*see 12 C.F.R. § 226.4(b)(9)*]. See § 46.212 for discussion of this disclosure requirement. However, a rebate available to a cash buyer after completion of

the sale transaction is not a discount (since the price to be paid is not reduced), nor is it a "charge" of any kind--a charge is a request for payment; a rebate is a reduction of the amount paid--and it need not be accounted for, either in computing the finance charge or in making related disclosures [*Virachack v. University Ford* (9th Cir. 2005) 410 F.3d 579, 581-582] .

7. Advise seller-client that card issuer may not require it to purchase additional services in order to participate in credit card plan [15 U.S.C. § 1666g].

NOTE:

Notwithstanding any agreement to the contrary, a card issuer may not require a seller of goods or services, as a condition to participation in the credit card plan, to open an account with or to procure any other service from the card issuer, its subsidiaries, or its agents [15 U.S.C. § 1666g].

8. Advise seller-client that if it allows return of goods or forgiveness of debit for services in credit card sales transaction, it must [15 U.S.C. § 1666e]:

NOTE:

For discussion of a cardholder's rights in case of a dispute between cardholder and the seller, see §§ 46.232 and 46.233.

- a. Credit cardholder's account with correct amount, if seller is card issuer; or
- b. Promptly transmit credit statement to the credit card issuer.

NOTE:

On receipt of the credit statement, the card issuer must credit the cardholder's account for the amount involved [15 U.S.C. § 1666e].

9. If customer exchanges merchandise for goods of same value, advise seller-client that it need make no adjustments to credit card records.

10. If customer exchanges merchandise for goods of greater value, advise seller-client that it should:

- a. Write up new sales slip, including:
 - (1) Credit for amount of previous purchase.
 - (2) Sales tax on remainder of purchase price for new goods.
- b. Obtain credit authorization for amount of purchase differential that exceeds floor limit for present type of sale.

11. If customer exchanges merchandise for goods of lesser value, advise seller-client that it should write up credit memorandum for difference between former and present prices, including:

- a. Corrected sales tax.

b. Corrected portion of any add-on service.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionCredit Card AgreementsGeneral Overview



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20-46 California Legal Forms--Transaction Guide §§ 46.127-46.139

[Reserved]

§§ 46.127[Reserved]



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 D. Related and Subsequent Procedures

20-46 California Legal Forms--Transaction Guide § 46.140

§ 46.140 Subsequent Required Notices

1. Advise client of disclosures required for supplemental credit devices and additional features [*see 12 C.F.R. § 226.9(b)*].

a. If, after 30 days after mailing or delivering initial disclosures for open-end account, creditor adds credit feature or furnishes credit device on same finance charge terms, provide disclosure:

(1) That it is for use in obtaining credit under the terms previously disclosed [*12 C.F.R. § 226.9(b)(1)*].

(2) Clearly and conspicuously in writing, in form that consumer may keep, before consumer uses feature or device for first time [*see 12 C.F.R. §§ 226.9(b)(1), 226.6(a)(1)*].

NOTE:

If a creditor, within 30 days after mailing the initial disclosures for an open-end account, adds a credit feature to the consumer's account or delivers a credit device for which the finance charge terms are the same as those previously disclosed, no additional disclosures are necessary [*12 C.F.R. § 226.9(b)(1)*].

b. If finance charge terms for new feature or device differ from those previously disclosed, following disclosures, as applicable, must be made before the consumer first uses the new feature or device [*12 C.F.R. § 226.9(b)(2); see 12 C.F.R. § 226.6(a)* (initial disclosure statement)]:

(1) Statement of when finance charges begin to accrue and whether there is period within which credit extended may be repaid without incurring a finance charge;

(2) Disclosure of each periodic rate that may be used to compute finance charge, the range of balances

to which it is applicable, corresponding annual percentage rate, and (if different periodic rates apply to different types of transactions) the types of transactions to which the rates apply;

NOTE:

The reference to a periodic rate that "may be" used to compute the finance charge means a rate that the creditor is permitted to use under the credit agreement. In other words, "may" in 12 C.F.R. § 226.9(b)(2) connotes contractual entitlement, not mere possibility. Therefore, a creditor does not violate that disclosure requirement unless the creditor omits to disclose, in the credit agreement, any periodic rate that the agreement permits the creditor to use. The required disclosure can be adequately made by the usual change-in-terms provision (which reserves to the creditor a right to change periodic rates, among other terms, without any limitation on why the creditor could make such a change), provided the change-in-terms provision meets the "clear and conspicuous" test of 12 C.F.R. § 226.5(a)(1) [*Barrer v. Chase Bank U.S. (9th Cir. 2009) 566 F.3d 883, 2009 U.S. App. LEXIS 10913, at *16-*18, *21-*22* (construing 12 C.F.R. § 226.6(a)(2), which is incorporated by reference into 12 C.F.R. § 226.9(b)(2); in this case, change in terms provision was not clear and conspicuous when it appeared "five dense pages after the disclosure of the APR ... buried too deeply in the fine print for a reasonable cardholder to realize that, in addition to the specific grounds for increasing the APR listed in the 'Finance Charges' section, [the creditor] could raise the APR for other reasons")].

(3) Explanation of method used to determine balance on which finance charge may be computed; and

(4) Explanation of how amount of any finance charge will be determined, including description of how any finance charge other than periodic rate will be determined.

2. Advise client of disclosures required when there is change in credit plan terms [12 C.F.R. § 226.9(c)]:

a. Whenever any term required to be disclosed in initial disclosure statement is changed or required minimum periodic payment is increased, provide written notice of change:

(1) To each consumer who may be affected [12 C.F.R. § 226.9(c)(1); see § 46.212 (initial disclosure requirements)].

(2) At least 15 days before effective date of change [12 C.F.R. § 226.9(c)(1)].

NOTE:

No notice is required if the change (1) involves late-payment charges, charges for documentary evidence, or over-the-credit-limit charges; (2) involves a reduction of any component of a finance or other charge; (3) involves suspension of future credit privileges or termination of an account or plan; (4) results from an agreement involving a court proceeding; or (5) results from the consumer's delinquency or default [12 C.F.R. § 226.9(c)(2)].

b. For state-regulated accounts (those maintained by retailers of goods or services for their customers [see *Civ. Code* § 1802.7]), make written disclosure:

(1) Of changes made to any terms that were previously disclosed [*Civ. Code* § 1810.3(d)].

(2) At least 30 days before earlier of:

(a) Effective date of the change; or

(b) Beginning of billing cycle within which the change will become effective [*Civ. Code* § 1810.3(d)].

NOTE:

If the change involves the reduction of any part of a finance charge or other charge previously disclosed to the buyer, the notice is sufficient if it appears on or accompanies the periodic statements sent to the buyers who normally receive them [*Civ. Code* § 1810.3(d)]. If the change involves an increase in any component of a finance charge, the change is effective only on purchases made on or after the effective date of the change [*Civ. Code* § 1810.3(d)].

3. Advise client of disclosures required before renewal of credit or charge card account requiring payment of annual fee [*see 15 U.S.C. § 1637(d); 12 C.F.R. § 226.9(e)*]:

a. Card issuer that imposes annual or other periodic fee to renew credit card or charge card subject to statutory application or solicitation disclosure requirements [*see 12 C.F.R. § 226.5a*], must mail or deliver notice of renewal to cardholder [*12 C.F.R. § 226.9(e)(1)*].

b. Notice must contain [*12 C.F.R. § 226.9(e)(1)*]:

(1) Applicable disclosures required of issuer-initiated applications and solicitations to open credit card account or charge card account [*see 12 C.F.R. § 226.5a(b); see also § 46.214 (form)*]; and

(2) Statement of how and when cardholder may terminate account to avoid paying renewal fee.

c. Notice must be given:

(1) At least 30 days or one billing cycle, whichever is less, before mailing of periodic statement on which renewal fee is initially charged [*12 C.F.R. § 226.9(e)(1)*]; or

(2) On or with periodic statement on which renewal fee is initially charged [*12 C.F.R. § 226.9(e)(3)*].

NOTE:

The issuer must disclose that the cardholder has 30 days from mailing or delivery of the periodic statement to avoid paying the fee or to have the fee credited if he or she chooses to terminate the account, and that the cardholder may use the card during the interim without having to pay the fee [*12 C.F.R. § 226.9(e)(2)*].

4. Advise client to make following required disclosures if change in provider of credit card insurance occurs [*15 U.S.C. § 1637(g); see 12 C.F.R. § 226.9(f)*]:

a. Include in notice mailed to cardholder at least 30 days before change occurs [*12 C.F.R. § 226.9(f)(1)*]:

(1) Any increase in rate that will result from change.

(2) Any substantial decrease in coverage that will result from change [*see* 12 C.F.R. § 226.9(f)(3) ("substantial decrease in coverage" defined)].

(3) Statement that cardholder may discontinue insurance.

b. Include in notice mailed to cardholder no more than 30 days after change occurs [12 C.F.R. § 226.9(f)(2)]:

(1) Name and address of new insurance provider.

(2) Copy of new policy or group certificate containing basic terms of insurance, including rate charged.

(3) Statement that cardholder may discontinue insurance.

NOTE:

The preceding two types of disclosures are required if the issuer plans a change in the provider of insurance for repayment of all or part of the outstanding balance of an open-end credit card account subject to 12 C.F.R. § 226.5a [12 C.F.R. § 226.9(f)]. The two notices may be combined if they are provided to the cardholder no later than 30 days before the change occurs. Notice may be provided on or with a periodic statement [12 C.F.R. § 226.9(f)(4); *see* 12 C.F.R. pt. 226, app. G-13A].

5. Advise client to provide required notice if client is card issuer who intends to disclose marketing information about cardholders [*see* Civ. Code § 1748.12; *see also* § 46.216 (form for disclosure)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionCredit Card AgreementsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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20-46 California Legal Forms--Transaction Guide § 46.141

§ 46.141 Seller Inducements for Use or Nonuse of Cards

1. Advise seller-client that discount for nonuse of card is considered finance charge, unless [15 U.S.C. § 1666f(b); *see* 12 C.F.R. § 226.4(a), (b)(9), (c)(8)]:

- a. Discount is offered to all prospective buyers; and
- b. Availability of discount is disclosed clearly and conspicuously.

NOTE:

Under California law, a seller may offer a discount to induce payment by cash or check (or other means not involving use of the card), provided that the discount is offered to all prospective buyers [*Civ. Code* § 1748.1(a); *see Thrifty Oil Co. v. Superior Court* (2001) 91 Cal. App. 4th 1070, 1076-1079, 111 Cal. Rptr. 2d 253 (retailer's evidence of two-tier pricing based on its costs, offered to all customers, supported motion for summary adjudication; facts established permissible offer of discount under *Civ. Code* § 1748.1(a) and pricing system consistent with legislative intent to encourage discounts under *Civ. Code* § 1748.1(e))].

2. If discount for non-use of credit card is considered finance charge, advise seller-client that at time of honoring credit card, seller must disclose amount of finance charge before its imposition [12 C.F.R. § 226.9(d)].

NOTE:

The finance charge must be disclosed as a dollar amount, and the disclosure may be oral [*see* 12 C.F.R. § 226.9(d); 12 C.F.R. pt. 226, supp. I, § 226.9(d)].

3. Advise seller-client not to impose surcharge when cardholder elects to use the card for any sales, service, or lease transaction instead of paying by cash, check, or similar means [*Civ. Code* § 1748.1(a)].

NOTE:

If a seller willfully imposes a surcharge, the cardholder may demand refund of that amount in a letter sent by certified mail. If the seller refuses to make the refund within 30 days, it will be liable to the cardholder for triple the amount of actual damages assessed, plus reasonable attorneys' fees and costs [*Civ. Code* § 1748.1(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionCredit Card AgreementsGeneral Overview



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20-46 California Legal Forms--Transaction Guide § 46.142

§ 46.142 Repossession Under Retail Installment Account Agreements

1. Advise client that seller may repossess goods on default under retail installment account agreements [*Civ. Code § 1812.2*].
2. Advise client that if goods are repossessed, seller must [*Civ. Code § 1812.2*]:
 - a. Give notice to customer within 10 days that seller intends to sell or retain goods; and
 - b. Give customer 10 days to redeem.
3. Advise client that proceeds of any resale are applied first to expenses of resale, then to expense of retaking and attorneys' fees, then to satisfaction of balance due, and then to customer [*Civ. Code § 1812.4*].
4. Advise client that deficiency judgments are prohibited [*Civ. Code § 1812.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSecured TransactionsInstallment ContractsGeneral OverviewContracts LawTypes of ContractsInstallment Contracts



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20-46 California Legal Forms--Transaction Guide § 46.143

§ 46.143 Notice of Unauthorized Access to Unencrypted Confidential Personal Information Contained in Data Files

NOTE:

A state agency, or a person or business that conducts business in California, that owns or licenses computerized data that includes personal information must disclose, in specified ways, any breach of the security of the data to any resident of California whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person [*Civ. Code* §§ 1798.29(a), 1798.82(a); *see Civ. Code* §§ 1798.29(g), (h) 1798.82(g), (h) (methods of giving notice); § 46.250]. In addition, a state agency that maintains computerized data that includes personal information that the agency does not own must notify the owner or licensee of the information of any breach of the security of the data immediately following discovery, if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person [*Civ. Code* § 1798.29(b)]. For further discussion, see §§ 46.96, 46.250.

1. If unauthorized access to computerized files containing customers' personal information occurs, advise client to provide notice to customers by one of the following methods [*see Civ. Code* §§ 1798.29(g)(1)-(3), 1798.82(g)(1)-(3)]:

- a. Written notice [*see* § 46.250 (form for written notice)].
- b. Electronic notice, if notice provided is consistent with provisions regarding electronic records and signatures set forth in Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 [*see* § 46.212[1][h]].
- c. Substitute notice, if agency, person, or business demonstrates that cost of providing notice would exceed \$250,000, or that affected class of subject persons to be notified exceeds 500,000, or agency, person, or business does not have sufficient contact

information.

2. Advise client using substitute notice [*see* P 1c, *above*] that such notice must consist of all of following [*see Civ. Code §§ 1798.29(g)(3)(A)-(C), 1798.82(g)(3)(A)-(C)*]:

- a. E-mail notice when agency, person, or business has e-mail addresses for subject persons.
- b. Conspicuous posting of notice on Web site page of agency, person, or business, if a Web site page is maintained.
- c. Notification to major statewide media.

3. Advise client that, instead of using procedures discussed in PP 1 and 2, *above*, it may notify affected persons in accordance with its own policies, if [*see Civ. Code §§ 1798.29(h), 1798.82(h)*]:

- a. It maintains its own notification procedures as part of information security policy for treatment of personal information; and
- b. Notification is otherwise consistent with timing requirements of *Civ. Code §§ 1798.29(a)* and *1798.82(a)*.

4. Advise client that notification must be "in the most expedient time possible and without unreasonable delay," consistent with any measures necessary to determine scope of security breach and restore reasonable integrity of data system [*see Civ. Code §§ 1798.29(a), 1798.82(a)*].

NOTE:

Notifications may be delayed if a law enforcement agency determines that it would impede a criminal investigation [*see Civ. Code §§ 1798.29(a), (c), 1798.82(a), (c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law
Debtor & Creditor Relations



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20-46 California Legal Forms--Transaction Guide §§ 46.144-46.199

[Reserved]

§§ 46.144[Reserved]



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20-46 California Legal Forms--Transaction Guide § 46.200

§ 46.200 Corporate Resolution for Cardholder Status

[1] Comment

[a] Use of Form

This form is a corporate resolution approving the corporation's participation in a credit card plan. It is advisable for the board of directors to adopt this type of resolution, since disregard of corporate formalities (such as required directors' meetings and properly documented board resolutions) has been a major factor in piercing the corporate veil [see *Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 838-842, 26 Cal. Rptr. 806*]. Thus, the purpose of this resolution is to document corporate participation in a credit card plan, thereby observing the corporate formalities that would tend to protect the individual cardholders from liability for corporate debts related to the use of the card.

Following the resolution is a form for certification of the secretary of the corporation, declaring that the resolution is a complete and correct copy of the resolution adopted by the board of directors. Although it is not necessary to include such a certification in the minute book with the resolution, the bank or other card issuer may require a copy of the resolution, certified by the corporate secretary, for its records before issuing a corporate card.

[b] Provisions Governing Issuance and Liability for Unauthorized Use of Business Credit Cards

Because a business credit card is not an extension of consumer credit, the fair credit billing provisions of the Truth in Lending Act are inapplicable to business credit cards transactions [*American Express Co. v. Koerner (1981) 452 U.S. 233, 241-244, 101 S. Ct. 2281, 68 L. Ed. 2d 803*; see 15 U.S.C. § 1603(1)]. Further, Regulation Z and the Song-Beverly Credit Card Act of 1971 define "cardholder" to exclude business credit cards, except for purposes of specific provisions governing issuance and liability for unauthorized use [12 C.F.R. § 226.2(a)(8); Civ. Code § 1747.02(d)].

No credit card, including a business credit card, may be issued except as a renewal or in response to an application [15 U.S.C. § 1642; 12 C.F.R. § 226.12(a); Civ. Code § 1747.05(a)]. Under the Song-Beverly Credit Card Act, a credit card issued in substitution for an accepted credit card may be issued only if the card issuer provides an activation process

whereby the cardholder is required to contact the card issuer to activate the card before its first use in a credit transaction [*Civ. Code* § 1747.05(b)]. However, this statutory provision does not prohibit overdraft protection advance or a recurring-charge transaction previously authorized by the cardholder on the accepted credit card [*Civ. Code* § 1747.05(c)].

Further, a cardholder is liable for unauthorized use of any card, including a business credit card, only if (1) the cardholder accepted the card [*see* 15 U.S.C. § 1602(l) ("accepted credit card" defined); *Civ. Code* § 1747.02(b) ("accepted credit card" defined); *see also* § 46.41]; (2) the card issuer gives the cardholder adequate notice of potential liability and provides the cardholder with a description of the procedure for notifying the card issuer of loss or theft of the card; (3) the unauthorized use occurs before the card issuer has been notified; and (4) the card issuer has provided a method for identifying the user of the card as the person authorized to use it [15 U.S.C. § 1643(a)(1); 12 C.F.R. § 226.12(b)(2); *Civ. Code* § 1747.10]. The liability of a cardholder for unauthorized use of a credit card may not exceed \$50 [15 U.S.C. § 1643(a)(1)(B); 12 C.F.R. § 226.12(b)(1); *Civ. Code* § 1747.10(b)].

For purposes of the above rules, "unauthorized use" does not include the use of a credit card by a person who has been given authority by the cardholder to use it [*Civ. Code* § 1747.02(f); *see* 15 U.S.C. § 1602(o) ("unauthorized use" defined)].

In connection with this limited liability for unauthorized use, certain disclosures must be made to the cardholder, whether the cardholder is an individual, business, or other entity. See § 46.213 for further discussion of these disclosures.

[2] FORM

Corporate Resolution for Cardholder Status

RESOLUTION REGARDING CORPORATE PARTICIPATION IN CREDIT CARD PLAN

RESOLVED, that the President, or any Vice President, or the Secretary, or the Treasurer, of this corporation is authorized on behalf of this corporation to enter into any agreement with [issuer] and to take any other action relating to such agreement, as any of the above-mentioned officers deems appropriate in connection with the extension of credit and the issuance of credit or charge cards by [issuer] to this corporation, its officers, employees, or agents.

CERTIFICATION OF RESOLUTION REGARDING CORPORATE PARTICIPATION IN BUSINESS CREDIT CARD PLAN

I, _____ Secretary of _____ [name of corporation], a California corporation, certify that the foregoing is a complete and correct copy of a resolution adopted by the Board of Directors of this corporation and that the resolution is now in full force and effect.

I further certify that the following are the present incumbents of the corporate offices indicated below their names and that the signatures appearing above the names are the signatures of the officers:

[For each officer, use:]

_____ [signature]
 _____ [typed name]
 _____ [title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBusiness & Corporate LawCorporationsDirectors & OfficersScope of AuthorityGeneral OverviewContracts LawDebtor & Creditor Relations



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20-46 California Legal Forms--Transaction Guide § 46.201

§ 46.201 Credit Card Agreement--Business Cardholder

[1] Comment

[a] Use of Form

This form is a credit card agreement used when the cardholder is a business entity.

Because a business credit card is not an extension of consumer credit, the fair credit billing provisions of the Truth in Lending Act are inapplicable to business credit cards transactions [*American Express Co. v. Koerner* (1981) 452 U.S. 233, 241-244, 101 S. Ct. 2281, 68 L. Ed. 2d 803 ; see 15 U.S.C. § 1603(1)]. Further, Regulation Z and the Song-Beverly Credit Card Act of 1971 define "cardholder" to exclude business credit cards, except for purposes of specific provisions governing issuance and liability for unauthorized use [12 C.F.R. § 226.2(a)(8); Civ. Code § 1747.02(d); see 12 C.F.R. § 226.12(a) (issuance), (b) (liability for unauthorized use); Civ. Code §§ 1747.05 (issuance), 1747.10 (liability for unauthorized use); see also § 46.213 (liability)]. Thus, except as noted above, business and other commercial credit cards are not subject to the disclosure and notification requirements of consumer credit card accounts.

In addition, the following provisions of this form, ordinarily included in business credit card agreements, will not be found in consumer credit card agreements: (1) the cardholder's acceptance of the accuracy of all sales drafts, as in commercial accounts, if not contested within the billing cycle; (2) issuer's liability for a retailer's refusal to honor the card is expressly ruled out; and (3) the total unpaid balance at any time is automatically made due and payable with the occurrence of traditional types of commercial default.

[b] Issuance of Business Credit Card

A business credit card, like a consumer credit card, may not be issued except in response to an oral or written request or application or in renewal of, or substitution for, a previously accepted card [15 U.S.C. §§ 1642, 1645; Civ. Code §§ 1747.02(d), 1747.05]. For further discussion of issuance, see *Section 46.41*.

[c] Liability of Credit Card Holder and Employees

The provisions of the federal Truth in Lending Act (TILA) and the California Song-Beverly Credit Card Act of 1971 governing liability for unauthorized use apply to all credit cards, including business credit cards [see 15 U.S.C. §§ 1643, 1645; 12 C.F.R. §§ 226.3 n.4, 226.12(b); Civ. Code §§ 1747.10, 1747.02(d)]. However, businesses that have been issued 10 or more credit cards for use by employees may agree to liability for unauthorized use without regard to the statutory rules, provided that any such agreement does not affect the statutory liability of individual employees [12 C.F.R. § 226.12(b)(5); Civ. Code § 1747.20].

Under TILA and the Song-Beverly Credit Card Act of 1971, a cardholder is not liable for any unauthorized use of a credit card unless he or she received adequate notice of the maximum potential liability and of the means by which the card issuer may be notified if the card is lost or stolen [12 C.F.R. § 226.12(b)(2)(ii); Civ. Code § 1747.10(c), (d)]. "Adequate notice" means a printed notice to a cardholder that sets forth clearly the pertinent facts so that the cardholder may reasonably be expected to notice it and to understand its meaning [12 C.F.R. § 226.12(b)(2)(ii) n.23]. The notice may be given by any means that reasonably assures receipt by the cardholder [12 C.F.R. § 226.12(b)(2)(ii) n.23]. For cards issued to consumers, this notice is generally placed in the initial disclosure statement or on the periodic statements. Because business cardholders need not be provided with such disclosure statements, however, the notice must be furnished to the business in some other manner. The notice is commonly included in the Cardholder Agreement, but it may be given separately or with other information. For further discussion of liability for unauthorized use of a credit card, refer to Section 46.213.

Paragraph 9 of this form sets forth the cardholder's potential liability for unauthorized use of the card. This provision is adapted from a model form issued by the Board of Governors of the Federal Reserve System for compliance with TILA provisions [see 12 C.F.R. pt. 226, app. G-2].

[2] FORM

Credit Card Agreement--Business Cardholder

CARDHOLDER AGREEMENT--BUSINESS

By accepting receipt of the [issuer] Card issued by [issuer] ("Issuer") for use by the person(s) or business entity named on the card, the [person or persons] to whom it was issued (collectively referred to as "Holder") jointly and severally [agrees or agree] as follows:

1. Holder will be bound by all of the terms and conditions contained (a) in this Agreement; (b) on the [issuer] Card; and (c) on all sales and cash advance drafts signed or authorized by Holder or signed by anyone else using the Card before its surrender or notification by Holder that it has been lost or stolen. Issuer may modify these terms and conditions at any time on mailing notice of the modification to Holder at address shown on Issuer's card records.

2. Holder will pay to Issuer within 25 days of the date of Issuer's statement to Holder, and at the place designated by Issuer, either (a) the entire amount then due to Issuer under the terms of this Agreement as shown in Issuer's statement; or (b) at Holder's election, an amount equal to [e.g., 4 1/2] percent of the unpaid balance, with a minimum payment of \$[e.g., 10], payable before the next monthly statement date.

Issuer may charge (1) its regularly established cash advance fee for all cash advances made to Holder; and (2) a monthly service charge of [e.g., 1 1/2] percent on all amounts due to Issuer under any statement and not paid within 25 days, as described above.

3. Holder will effect no card purchase or cash advance transaction if, as a result, the aggregate outstanding balance of Holder's obligations to Issuer under all such transactions will exceed the credit limit that Issuer has established for

Holder.

4. Holder will immediately, on receipt, examine each of Issuer's statements and each of the enclosed sales and cash advance drafts and credit memoranda. Within 25 days from the date of the statement, Holder will deliver to Issuer any draft or credit memorandum reflecting a transaction that Holder disputes, together with a written statement of the reasons for the dispute. Holder will be conclusively bound by all drafts and memoranda not so delivered to Issuer within that 25-day period; and Holder agrees to waive and release Issuer from all defenses, rights, and claims Holder may have against the merchant or other person honoring the Card.

5. Holder will notify Issuer promptly in writing of any loss or theft of the Card.

6. Neither Issuer or [card interchange association] will have any responsibility to Holder for the refusal of any person to recognize and honor the Card.

7. Issuer may at any time, without notice, cause, or liability to Holder, or in any way affecting Holder's obligations to Issuer, cancel all credit available to Holder, revoke the Card and refuse to make any further advances. Holder will surrender the Card on Issuer's demand.

8. In the event of (a) Holder's default in any payment when due; (b) Holder's death, bankruptcy, or insolvency; or (c) attachment or levy against Holder or Holder's property, then, on Issuer's election and without notice, the entire amount of Holder's obligations to Issuer under this Agreement will become immediately due and payable.

9. Except as otherwise stated in this paragraph, Holder will be liable for the unauthorized use of the Card issued pursuant to this Agreement. Holder will not be liable for unauthorized use that occurs after Holder notifies Issuer at _____ [address of bank] or at [telephone number], orally or in writing, of the loss or theft, or possible unauthorized use. In any case, Holder's liability will not exceed \$50.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionCredit Card AgreementsGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview



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20-46 California Legal Forms--Transaction Guide §§ 46.202-46.209

[Reserved]

§§ 46.202[Reserved]



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B. Consumer Credit Card and Retail Installment Accounts

20-46 California Legal Forms--Transaction Guide § 46.210

§ 46.210 Consumer Credit Card Agreement

[1] Comment

[a] Use of Form

This form is a credit card agreement containing the basic rights and duties of the cardholder and card issuer. This type of agreement may be a separate document or may be combined with the initial disclosure statement required by the Truth in Lending Act [*see 15 U.S.C. § 1637(a); 12 C.F.R. § 226.6; see also § 46.212*]. Because this form does not contain the required initial disclosures, it can be used only in conjunction with an initial disclosure statement [*see § 46.212*].

This form incorporates a notice of cardholder liability for charges made on a lost or stolen card [*see 12 C.F.R. § 226.12(b)*]. For discussion of liability for unauthorized use, refer to Section 46.213. This form also incorporates the federal and state restrictions on termination of credit card accounts [*see 12 C.F.R. § 202.7(c); Civ. Code § 1747.85; see also [b], below*].

[b] Termination of Credit Card Accounts

Under federal law, a creditor does not have an unrestricted right to terminate a credit card or other open-end credit account. Unless there is some evidence of inability to repay, a creditor may not terminate an open-end account on the basis of the cardholder's age, retirement, change of marital status, or change of name [*15 U.S.C. § 1691(a); 12 C.F.R. § 202.7(c)(1)*]. A creditor also may not terminate an account prior to its expiration date solely because the consumer has not incurred finance charges on the account; however, a creditor may terminate an account for inactivity in three or more consecutive months [*15 U.S.C. § 1637(h); see Pub. L. No. 109-8, § 1306(b)(2) (Apr. 20, 2005) (provision takes effect 12 months after publication of final regulations to implement it)*]. Changing terms or requiring reapplication for these reasons is also generally prohibited [*12 C.F.R. § 202.7(c)(1)(i), (ii)*].

Under California law, a card issuer may not cancel a credit card account without first giving the cardholder 30 days' written notice, unless (1) the cardholder has been in default or otherwise in violation of the credit card agreement within

the last 90 days, (2) the issuer has evidence or reasonably believes that the cardholder is unable or unwilling to repay the credit, or (3) the issuer has evidence or reasonably believes that an unauthorized use of the credit card may be made [Civ. Code § 1747.85].

Although federal law does not require prior notice of cancellation, the Equal Credit Opportunity Act [15 U.S.C. §§ 1691-1691f; 12 C.F.R. pt. 202] provides for written notice within 30 days after terminating or taking any adverse action against an existing consumer credit account [12 C.F.R. § 202.9(a)(1)(iii)]. The notice must contain either a statement of the specific reasons for the termination or change or notification of the right to such a statement, a statement of the action taken, the name and address of the creditor, as well as other notices required by law [12 C.F.R. § 202.9(a)(2); see also Ch. 45, *Consumer Installment Loans and Credit Sales*].

[c] Cardholder's Rights to Assert Claims and Defenses Against Issuer

A credit card issuer's right to recover any credit extended through use of the card at a retail outlet may be subject to claims and defenses, other than tort claims, that the cardholder has against the retailer [15 U.S.C. § 1666i; 12 C.F.R. § 226.12(c)(1); Civ. Code § 1747.90(a)(1)]. The Truth in Lending Act requires that the cardholder be informed, before the first use of the credit card, of the right to assert such claims and defenses [15 U.S.C. § 1637(a)(7); 12 C.F.R. § 226.6(d)]. See § 46.232[1] for further discussion of this right. A sample disclosure statement informing the cardholder of its right to subject the card issuer to claims and defenses the cardholder has against a retailer is included in the initial disclosure form *found in* § 46.212 and is not repeated in this form.

In some cases in California, class action waivers in consumer contracts of adhesion [see *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 113, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (definition)] are unenforceable, whether the consumer is being asked to waive the right to class-action litigation or the right to class-wide arbitration. When the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent that the obligation at issue is governed by California law, the waiver becomes in practice what is prohibited by statute: the exemption of the stronger party from responsibility for its own fraud, or willful injury to the person or property of another [see Civ. Code § 1668]. Under these circumstances, such waivers are unconscionable under California law and will not be enforced [*Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, 162-163, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 ; *Szetela v. Discover Bank* (2002) 97 Cal. App. 4th 1094, 1099-1102, 118 Cal. Rptr. 2d 862] .

Moreover, the Federal Arbitration Act [9 U.S.C. § 1 *et seq.*; see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*, § 32.24] does not preempt California law in this respect [*Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, 153, 30 Cal. Rptr. 3d 76, 113 P.3d 1100] .

[d] Offsets Against Consumer's Bank Account

In general, a card issuer may not take any action, either before or after the termination of credit card privileges, including the imposition of a "hold," to offset a cardholder's indebtedness on its credit card account against funds of the cardholder held on deposit with the issuer [15 U.S.C. § 1666h(a); 12 C.F.R. § 226.12(d)(1); 12 C.F.R. pt. 226, supp. I, § 226.12(d)(1) (Official Staff Interpretations)].

This limitation does not alter or affect the right of a card issuer to do any of the following with regard to funds of a cardholder held on deposit with the card issuer if the same procedure is constitutionally available to creditors generally [15 U.S.C. § 1666h(b); 12 C.F.R. § 226.12(d)(2)]:

- Obtain or enforce a consensual security interest;

- Attach or otherwise levy upon the funds; or
- Obtain or enforce a court order relating to the funds.

In addition, the credit plan may include a cardholder's written authorization for the issuer to periodically deduct all or part of the cardholder's debt from a deposit account held with the issuer, subject to suspension in the case of billing error inquiries [15 U.S.C. § 1666h(a); 12 C.F.R. §§ 226.12(d)(3), 226.13(d)(1)].

Even if deposit deductions are authorized, a consumer may have a right to prevent such deductions if the sums deposited would be exempt from attachment or execution [see *Kruger v. Wells Fargo Bank* (1974) 11 Cal. 3d 352, 367, 113 Cal. Rptr. 449, 521 P.2d 441] .

[e] Sale of Credit Disability Insurance

A retailer or credit card issuer may wish to protect its position through the use of credit disability insurance covering the debtor [see Civ. Code §§ 1812.400-1812.410]. A creditor who has sold, arranged for the sale, or received a commission for the sale of credit disability insurance to a debtor is precluded from collecting any credit balance until three calendar months after the first missed payment is due or the insurer pays or rejects the debtor's claim, whichever is first [Civ. Code § 1812.402(a); see Civ. Code §§ 1812.400, 1812.401(d), (e)]. Further, the creditor must disclose that fact to the debtor when the creditor sells the insurance to the debtor [Civ. Code § 1812.402(f)(1)]. The insurer must disclose the claim procedure to the debtor when it sends claims forms to the debtor [see Civ. Code § 1812.402(f)(2); see also *McManis v. San Diego Postal Credit Union* (1998) 61 Cal. App. 4th 547, 557-558, 71 Cal. Rptr. 2d 617 (credit union failed to meet its burden on summary judgment to negate consumer's breach of contract claim because it did not establish compliance with Civ. Code § 1812.400 et seq., including Civ. Code § 1812.402(f), before repossession)]. For further discussion of the use of credit disability insurance, see § 46.80 and Ch. 45, *Consumer Installment Loans and Credit Sales* .

[2] FORM

Consumer Credit Card Agreement

CONSUMER CREDIT CARD AGREEMENT

By signing, using, or requesting the _____ [name of issuer] Card (the "Card") of [issuer] (the "Issuer"), the party to whom it was issued (the "Cardholder") agrees to the following terms:

Use

1. Cardholder is responsible for all credit extended by Issuer in connection with the Card (the "Credit") regardless of credit limits and the party using it; except that Cardholder is responsible for any unauthorized use of the Card only as described in Paragraph 2. Cardholder will not transfer the Card. In addition, Cardholder will not use it to obtain credit in excess of Cardholder's credit limit, or if Cardholder is or becomes in default under this Agreement, insolvent, bankrupt, or subject to any bankruptcy, debt adjustment, or moratorium proceeding.

Loss, Theft, or Unauthorized Use

2. Cardholder will promptly notify Issuer if the Card is lost or stolen. Cardholder will not be liable for unauthorized use that occurs after Cardholder notifies Issuer at _____ [address], or at [telephone number], orally or in

writing, of the loss, theft, or unauthorized use of the Card. Moreover, Cardholder will not be responsible for any unauthorized use, before or after notification, if Cardholder notifies Issuer by a reasonable means and within a reasonable time after loss, theft, or unauthorized use of the card. In any case, Cardholder's liability will not exceed \$50 or the amount of any unauthorized extension of credit, whichever is less.

Payment

3. Cardholder will pay Issuer, at the place or places designated by the Issuer, all drafts and obligations evidencing the Credit, and when applicable, all service charges, either:

(a) Within 25 days after Cardholder's current statement date as billed; or

(b) At Cardholder's election, in monthly installments with a service charge, as follows:

[*E.g.*, 4 1/2 %] percent of the unpaid balance, with a minimum payment of \$[*e.g.*, 10], payable before the next monthly statement date and including a monthly service charge of \$[*e.g.*, 1 1/2 %] percent of the previous month's unpaid balance.

Termination of the Account

4. The Card is Issuer's property, and Cardholder will surrender it to Issuer on demand; Issuer may repossess it and terminate any commitment of Issuer under this Agreement, at any time, and without liability, for any reason not prohibited under state or federal law. If Cardholder is in default of payment, or in violation of any provision of this Agreement, Issuer may terminate the account without prior notice. If Issuer has reason to believe that Cardholder is unable or unwilling to repay the credit, the account may be terminated without prior notice. If there is an unauthorized use of the Card, the account will be immediately terminated. In all other cases, Issuer will give Cardholder 30 days' written notice of its intention to terminate the account. If the account is terminated or changed, with or without prior notice, Issuer will deliver to Cardholder a statement of reasons for the termination or change within 30 days after taking the action.

Default

5. On any default or failure to pay as agreed, Cardholder will pay Issuer its collection costs and a reasonable late charge, and attorney's fees, and, at Issuer's option and without notice, any indebtedness owing Issuer or claim against Cardholder will become immediately due and payable.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Credit Card Agreements General Overview Banking Law Consumer Protection Truth in Lending General Overview Contracts Law Debtor & Creditor Relations Contracts Law Secured Transactions Installment Contracts General Overview Insurance Law Life Insurance Credit Life



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 46 CREDIT CARD AND OTHER OPEN-END CREDIT TRANSACTIONS
PART IV. FORMS

B. Consumer Credit Card and Retail Installment Accounts

20-46 California Legal Forms--Transaction Guide § 46.211

§ 46.211 Retail Installment Account Agreement

[1] Comment

[a] Use of Form

This form is a retail installment account agreement. It sets forth the basic rights and duties of the buyer and the retailer. This agreement may be a separate document or may be part of the initial disclosure statement required by the Truth in Lending and the Unruh Acts [see 15 U.S.C. § 1637(a); 12 C.F.R. § 226.6; Civ. Code § 1810.1; see also § 46.212]. This form, which does not contain the required initial disclosures, can be used only in conjunction with a disclosure statement, such as the one illustrated in § 46.212.

[b] "Retail Installment Account" Defined

A "retail installment account" (also known as an "installment account" or a "revolving account") is an account established by an agreement entered into in California under which the buyer promises to pay, in installments, to a retail seller, the outstanding balance incurred in retail installment sales [Civ. Code § 1802.7]. A retail installment account agreement may provide for a security interest retained by the seller, and may provide for a finance charge that is expressed as a percent of the periodic balances that will accrue after the account is opened [Civ. Code § 1802.7].

[c] Charges Permitted by Unruh Act

[i] Finance Charges

The finance charge provided for in a retail installment account agreement may not be capitalized or stated as a dollar amount [Civ. Code § 1802.7]. Sellers and holders of retail installment accounts may charge and collect a finance charge as disclosed to the buyer in a statement of account [Civ. Code § 1810.2]. The finance charge must include all charges incident to investigating the applicant and opening the account [Civ. Code § 1810.4]. See § 46.46[1] for discussion of interest rate limitations.

[ii] Finance Charges on Undelivered Goods

A finance charge may be assessed against the outstanding balance for undelivered goods (1) from the date on which the goods are available for pickup by the buyer, and the buyer is notified of their availability, or (2) from the date of purchase, when the goods are delivered or available for pickup by the buyer within 10 days from the date of purchase [Civ. Code § 1810.10(a), (b)]. A finance charge on a home improvement contract may be assessed against the amount financed from the approximate date of commencement of the work [Civ. Code § 1810.10(a), (c)]. In any other case, notwithstanding any provision of the agreement to the contrary, a retailer may not assess a finance charge against the outstanding balance for goods until they are in the buyer's possession [Civ. Code § 1810.10(a)].

[iii] Attorneys' Fees

If a buyer agrees in writing and is given a copy of the agreement, a retail installment account agreement may provide for the payment of attorneys' fees and costs arising from any action to enforce the agreement [Civ. Code § 1810.4; see Civ. Code § 1811.1 (award of reasonable attorneys' fees to prevailing party)].

[iv] Credit Card Plan Membership Fee

When a credit card is issued in connection with a retail installment account, the seller or holder of the account may assess an annual membership fee, if so provided in the sales agreement or by proper notice to the buyer. That fee is not part of the finance charge [Civ. Code § 1810.4].

[v] Returned Check Fee

The retailer or the holder of a retail installment account may charge and collect a fee for returned checks, orders, or drafts. That fee is not part of the finance charge [Civ. Code § 1810.4].

[vi] Delinquency Charges

Notwithstanding the statutory prohibition against delinquency fees [see Civ. Code § 1810.4], a seller or holder of a retail installment account may require payment of a delinquency charge for each installment in default for a period of 10 days or more [Civ. Code § 1810.12]. If the delinquency charge has not been previously disclosed to the buyer in the terms of the retail installment account agreement, the seller or holder must provide written notice of the change to the buyer not less than 30 days before the effective date of the change or 30 days before the beginning of the billing cycle within which the change will become effective, whichever is earlier [Civ. Code § 1810.3(d)]. A delinquency charge may not be imposed for defaults of any payment due before the buyer has been given proper notice concerning the delinquency charge [Civ. Code § 1810.12; see Civ. Code § 1810.3(d)].

The delinquency charge may not exceed \$10 for a period in default of not less than 10 days, or \$15 for a period in default of not less than 15 days [Civ. Code § 1810.12(a)]. Only one delinquency charge may be collected on any installment regardless of the length of the default [Civ. Code § 1810.12(b)].

[vii] Collection Costs

The agreement may also provide for the payment of actual and reasonable costs of collection arising from the removal of the financed goods from the state without the written permission of the holder, the failure of the buyer to notify the holder of any change of residence, or the failure of the buyer to communicate with the holder for a period of 45 days after any default [Civ. Code § 1810.12(b)].

[d] Cost of Insurance

If the cost of any insurance is to be charged to the buyer, there must be an agreement to that effect, signed by both the buyer and the retailer. A copy of that agreement must be given to the buyer. The insurance agreement must state whether the insurance is to be obtained by the buyer or by the retailer or holder [Civ. Code § 1810.5].

If the insurance is to be obtained by the retailer or holder, the amount charged by the retailer or holder included in the agreement may not exceed the premiums charged by the insurer [Civ. Code § 1803.5(b)]. The retailer or holder must send the buyer a notice or copy of the insurance policy or certificate [Civ. Code § 1803.5(c)].

[e] Allocation of Payments for Goods Covered by Security Interest

If the retail installment account agreement provides for the retention of a security interest in the goods purchased by the buyer, specific rules apply to allocating payments in order to release the security interest in goods purchased on different dates [see Civ. Code § 1810.6]. The goods or services purchased first are deemed paid for first. If goods or services were purchased on the same date, the lowest priced will be deemed paid for first. However, any downpayment must be allocated in its entirety to the item for which it was made [Civ. Code § 1810.6].

[f] Buyer's Right of Action or Defense Against Seller

A retail installment account may not require or involve the execution of any note by the buyer that, when separately negotiated, will cut off as to third parties any right of action or defense the buyer may have against the seller [Civ. Code § 1810.7].

A provision to the effect that the buyer waives the right to class action litigation or the right to class-wide arbitration is unenforceable in California under some circumstances [see *Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, 162-163, 30 Cal. Rptr. 3d 76, 113 P.3d 1100]. For discussion, see § 46.210[1][c].

[g] Sale of Credit Disability Insurance

A retailer or credit card issuer may wish to protect its position through the use of credit disability insurance covering the debtor [see Civ. Code §§ 1812.400-1812.410]. A creditor may not invoke any creditor's remedy against a debtor because of the debtor's nonpayment of any sum that becomes due during a disability claim period, and for which credit disability insurance coverage is provided [Civ. Code § 1812.402(a); see Civ. Code § 1812.402(b) (procedure)]. However, a creditor may invoke remedies during or after the claim period for the debtor's nonpayment for any sum due before that claim period, including any interest, finance charge, or late charge accruing on that sum, whether or not the nonpayment is related to the debtor's claimed disability [Civ. Code § 1812.402(c)]. Further, a creditor may foreclose a lien on any property to protect that creditor's security interest if a senior lienholder on the property is foreclosing [Civ. Code § 1812.402(d)]. These limitations on a creditor's rights must be disclosed to the debtor by the creditor when the insurance is sold to the debtor [Civ. Code § 1812.402(f)(1)]. The insurer must also disclose the claim procedure to the debtor when it sends claims forms to the debtor [Civ. Code § 1812.402(f)(2); see also *McManis v. San Diego Postal Credit Union* (1998) 61 Cal. App. 4th 547, 557-558, 71 Cal. Rptr. 2d 617 (credit union failed to meet its burden on summary judgment to negate consumer's breach of contract claim because it did not establish compliance with Civ. Code § 1812.400 et seq., including Civ. Code § 1812.402(f), before repossession)]. For a further discussion of credit disability insurance, see Ch. 45, *Consumer Installment Loans and Credit Sales*.

[2] FORM

Retail Installment Account Agreement

RETAIL INSTALLMENT ACCOUNT AGREEMENT

All charges made on the account opened under this agreement in Buyer's name by _____ [name of

retailer] ("Retailer") will be governed by the following terms. Buyer agrees to these terms by the use of that account:

1. To pay for all purchases charged to Buyer's account in accordance with the minimum monthly payment schedule and finance schedule in effect from time to time.

The current minimum monthly payment schedule for Retailer's regular retail account is as follows: [set forth payment schedule, e.g., \$20 per month, plus 5 percent of the highest balance on Buyer's account in excess of \$200 (rounded to the next dollar) until the balance is paid in full]. Buyer may pay the full balance at any time.

2. To pay finance charges at the end of any monthly billing cycle in which there is a balance carried forward from the previous month, unless payments and credits during the cycle equal or exceed that previous balance.

The FINANCE CHARGE, if any, is computed by applying to the Balance shown on Buyer's monthly statement periodic rates of [periodic rate, e.g., 1 percent], which are ANNUAL PERCENTAGE RATES of [annual percentage rate, e.g., 12 percent], subject to a minimum charge of \$[minimum charge, e.g., 1] per month. Refer to the Paragraph 3 for an explanation of how we determine the Balance shown on your monthly statement.

Buyer may avoid a finance charge on the account by paying the New Balance shown on Buyer's monthly statement before the next billing cycle closing date.

[Choose one of the following:]

[Use if adjusted balance method is used to compute finance charge:]

3. We figure [add if applicable: a portion of] the finance charge on your account by applying the periodic rate to the amount you owe at the beginning of each billing cycle. We do not subtract any payments or credits received during the billing cycle. The amount of payments and credits to your account this billing cycle was \$_____.

[OR]

[Use if previous balance method is used to compute finance charge:]

3. We figure [add if applicable: a portion of] the finance charge on your account by applying the periodic rate to the amount you owe at the beginning of each billing cycle [add if applicable: minus any unpaid finance charges]. We do not subtract any payments or credits received during the billing cycle. [Add if applicable: The amount of payments and credits to your account this billing cycle was \$_____.]

[OR]

[Use if average daily balance method (excluding current transactions) is used to compute finance charge:]

3. We figure [add if applicable: a portion of] the finance charge on your account by applying the periodic rate to the "average daily balance" of your account (excluding current transactions). To get the "average daily balance," we take the beginning balance of your account each day and subtract any payments or credits [add if applicable: and any unpaid

finance charges]. We do not add in any new [purchases *or* advances *or* loans]. This gives us the daily balance. Then, we add all the daily balances of the billing cycle together and divide the total by number of days in the billing cycle. This gives us the "average daily balance."

[OR]

[Use if average daily balance method (including current transactions) is used to compute finance charge:]

3. We figure [*add if applicable*: a portion of] the finance charge on your account by applying the periodic rate to the "average daily balance" of your account (including current transactions). To get the "average daily balance," we take the beginning balance of your account each day, add any new [purchases *or* advances *or* loans] and subtract any payments or credits [*add if applicable*: and any unpaid finance charges]. This gives us the daily balance. Then, we add all the daily balances of the billing cycle together and divide the total by number of days in the billing cycle. This gives us the "average daily balance."

[OR]

[Use if ending balance method is used to compute finance charge:]

3. We figure [*add if applicable*: a portion of] the finance charge on your account by applying the periodic rate to the amount you owe at the end of each cycle (including new purchases and deducting payments and credits made during the billing cycle).

[Continue with the following:]

4. To pay the entire balance of Buyer's account in full on request if monthly payments become past due, and to pay reasonable attorney's fees if legal action is brought to recover any past due balance. Retailer retains a security interest in all goods purchased until those goods are paid for in full.

5. To pay Retailer a [*add if desired*: single] delinquency charge of \$10 for each installment in default for a period in default of not less than 10 days, or a [*add if desired*: single] delinquency charge of \$15 for each installment in default for a period in default of not less than 15 days, with a minimum charge of \$1.

6. To pay Retailer the actual and reasonable costs of collection arising from the removal from California of the goods financed without the written permission of Retailer, the failure of Buyer to notify Retailer of any change of residence, or the failure of Buyer to communicate with Retailer for a period of 45 days after any default.

7. Retailer is authorized:

(a) To issue a credit card to Buyer that will remain the property of Retailer and be returned to Retailer on demand.

(b) To make such investigation of Buyer's credit record as it may consider necessary.

(c) To establish in its sole discretion a maximum amount of credit that may be extended on Buyer's

account.

(d) To furnish information concerning Buyer's account to consumer credit reporting agencies and others having a legitimate need for that information.

8. Retailer may at any time limit or terminate Buyer's charge privileges or amend this Agreement, subject to the provisions of applicable laws.

NOTICE:

Any holder of this consumer credit agreement is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained under this Agreement. Recovery by the debtor under this Agreement shall not exceed amounts paid by the debtor under this Agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral OverviewContracts LawSecured TransactionsInstallment ContractsGeneral OverviewInsurance LawLife InsuranceCredit Life



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DIVISION III: COMMERCIAL TRANSACTIONS
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B. Consumer Credit Card and Retail Installment Accounts

20-46 California Legal Forms--Transaction Guide § 46.212

§ 46.212 Initial Disclosure Statement; Notices of Rights to Dispute Billing Errors and to Assert Claims or Defenses

[1] Comment

[a] Use of Form

This form is a statement of the initial disclosures that must be furnished to a consumer on an open-end credit plan and an open-end consumer credit plan subject to the federal Truth in Lending Act [15 U.S.C. §§ 1601-1667e] or the California Unruh Act [Civ. Code §§ 1801-1812.20; see 15 U.S.C. § 1637(a); 12 C.F.R. § 226.6; Civ. Code § 1810.1]. An open-end credit plan and an open-end consumer credit plan (also known as "revolving credit") are plans under which (1) the creditor reasonably contemplates repeated transactions, (2) a finance charge may be imposed from time to time on any outstanding unpaid balance, and (3) further credit is generally made available to the consumer to the extent that any outstanding balance is repaid [15 U.S.C. § 1602(i); 12 C.F.R. § 226.2(a)(20); see Civ. Code § 1802.7].

Federal disclosure requirements apply to open-end credit extended (1) by either a credit card issuer or a person who regularly extends credit that is subject to a finance charge or is payable by written agreement in more than four installments; (2) to a natural person; and (3) primarily for personal, family, or household purposes [15 U.S.C. §§ 1637(a), 1602(f), (h), (i); 12 C.F.R. §§ 226.6, 226.2(a)(11), (12), (17); see *American Express Co. v. Koerner* (1981) 452 U.S. 233, 241-244, 101 S. Ct. 2281, 68 L. Ed. 2d 803 (fair credit billing provisions of Truth in Lending Act inapplicable to transactions on business credit cards)].

If the account is one provided by a retailer of goods or services to finance purchases from the retailer and involves a finance charge computed on the basis of a periodic rate, the California Unruh Act provisions apply as well [Civ. Code §§ 1810.1, 1802.7; see 15 U.S.C. § 1610(a)(1); 12 C.F.R. § 226.28(a)(1)]. This form is adapted from model clauses issued by the Board of Governors of the Federal Reserve System [see 12 C.F.R. pt. 226, app. G].

The creditor must furnish the initial disclosure statement before the first transaction [15 U.S.C. § 1637(a); 12 C.F.R. § 226.5(b)(1); Civ. Code § 1810.1]. If the account is a retail installment account subject to the Unruh Act, the buyer is obligated to pay only the cash price of the goods or services purchased until the seller delivers this initial disclosure

statement [*Civ. Code* § 1810.1].

Certain disclosures must be made in issuer- initiated applications or solicitations to open credit or charge card accounts [*see* 15 U.S.C. § 1637(c); 12 C.F.R. § 226.5a]. For discussion of these disclosures and a form containing the required disclosures, see § 46.214.

[b] Form of Disclosures

The required disclosures must be made clearly and conspicuously in writing, in a form the consumer may keep [12 C.F.R. § 226.5(a)(1); *Civ. Code* § 1810.1]. The terminology must be consistent with the terms used in the periodic statements, and the terms "finance charge" and "annual percentage rate," when disclosed with a corresponding figure, must be printed more conspicuously than the other required disclosures [12 C.F.R. §§ 226.5(a)(2), 226.6; *Civ. Code* § 1810.1]. California law requires that all disclosures be contained in a single statement [*Civ. Code* § 1810.1].

The federal requirements that the disclosures be made clearly and conspicuously in writing have been very strictly construed. The Ninth Circuit Court of Appeals has held that the Truth in Lending Act was violated when the terms "finance charge" and "annual percentage rate" were printed in boldface type in upper and lower case letters of approximately the same size as other items printed in an agreement, while other headings on the same page were also in boldface type. A violation was found because the key terms were not more conspicuous than the other disclosures in the agreement [Dixey v. Idaho First Nat. Bank (9th Cir. [Idaho] 1982) 677 F.2d 749, 751-752]. The court further held that this violation was not de minimis and warranted imposition of statutory penalties [Dixey v. Idaho First Nat. Bank (9th Cir. [Idaho] 1982) 677 F.2d 749, 751-752].

Disclosure documents may be delivered electronically [*see* 12 C.F.R. § 226.5(a)(1); [h], *below*]. In addition, required disclosures may be made in a language other than English, provided that the disclosures are made available in English on the consumer's request [12 C.F.R. § 226.27]. This requirement for providing English disclosures on request does not apply to catalogs and other multiple page advertisements or electronic advertisements subject to 12 C.F.R. § 226.16 (governing advertisements for open end credit plans) and 12 C.F.R. § 226.24 (governing advertisements for closed-end credit) [12 C.F.R. § 226.27].

There is no requirement under either the Truth in Lending Act or the Unruh Act that the required disclosures be segregated from other material. The disclosures may appear in the credit contract itself, in promotional material, or in any other document the consumer may keep, as long as they are "clear and conspicuous" [*see* 12 C.F.R. § 226.5(a)].

[c] Required Disclosures

The disclosures enumerated below are required by the Truth in Lending Act [*see* 12 C.F.R. pt. 226] and also by the Unruh Act, if the account is provided by a retailer of goods or services for its customer [*see* *Civ. Code* § 1802.7]. In addition, the Unruh Act imposes additional disclosure requirements; since these disclosure requirements do not conflict with Truth in Lending provisions, they are not preempted by the federal act [*see* 15 U.S.C. § 1610(a)(1); 12 C.F.R. § 226.28(a)(1)].

To the extent each is applicable to the particular plan, the disclosure statement must include the following:

1. Finance Charge. The finance charge is the cost of credit as a dollar amount. It includes any charge imposed directly or indirectly incident to the extension of credit [15 U.S.C. § 1605(a); 12 C.F.R. § 226.4(a)]. For a detailed discussion of the meaning of "finance charge," see Ch. 45, *Consumer Installment Loans and Credit Sales*. The creditor must explain the circumstances under which a finance charge will be imposed and how it will be determined, including [15 U.S.C. § 1637(a)(1)-(4); 12 C.F.R. § 226.6(a)(1)-(4); *Civ. Code* § 1810.1(a)-(d)]:

- When finance charges begin to accrue and whether or not there is a period within which credit extended may be repaid without incurring a finance charge;
- Each periodic rate that may be used to compute the finance charge, the range of balances to which it is applicable, the corresponding annual percentage rate, and, if different periodic rates apply to different types of transactions, the types of transactions to which the rates apply;
- The method used to determine the balance on which the finance charge may be computed; and
- A description of how the amount of any finance charge will be determined, including how any finance charge other than the periodic rate will be determined. See § 46.46 for discussion of finance charge restrictions in a retail installment account.

The reference to a periodic rate that "may be" used to compute the finance charge means a rate that the creditor is permitted to use under the credit agreement. In other words, "may" in 12 C.F.R. § 226.6(a)(2) connotes contractual entitlement, not mere possibility. Therefore, a creditor does not violate that disclosure requirement unless the creditor omits to disclose, in the credit agreement, any periodic rate that the agreement permits the creditor to use. The required disclosure can be adequately made by the usual change-in-terms provision (which reserves to the creditor a right to change periodic rates, among other terms, without any limitation on why the creditor could make such a change), provided the change-in-terms provision meets the "clear and conspicuous" test of 12 C.F.R. § 226.5(a)(1) [*Barrer v. Chase Bank U.S.* (9th Cir. 2009) 566 F.3d 883, 2009 U.S. App. LEXIS 10913, at *16-*18, *21-*22 (change-in-terms provision was not clear and conspicuous when it appeared "five dense pages after the disclosure of the APR ... buried too deeply in the fine print for a reasonable cardholder to realize that, in addition to the specific grounds for increasing the APR listed in the 'Finance Charges' section, [the creditor] could raise the APR for other reasons")].

2. Other Charges. The creditor must disclose the amount of any charge other than a finance charge that may be imposed as part of the plan, or provide an explanation of how the charge will be determined [15 U.S.C. § 1637(a)(5); 12 C.F.R. § 226.6(b); see *Civ. Code* § 1810.1(e)]. Such charges include late payment and over-the-credit-limit charges, among others [see *JRS Products, Inc. v. Matsushita Electric Corporation of America* (2004) 115 Cal. App. 4th 168, 178, 8 Cal. Rptr. 3d 840 (repurchase of inventory is not exclusive remedy for wrongful termination of franchise pursuant to *Bus. & Prof. Code* § 20035); see also discussion below]. The Unruh Act provides that the finance charge for retail installment accounts may include charges for investigating and making the contract and extending credit [*Civ. Code* § 1810.4]. However, the Unruh Act prohibits the imposition of any fee, expense, or other charge other than those specifically permitted [*Civ. Code* § 1810.4]. The seller may charge an annual membership fee if the retail installment account utilizes credit cards, and may impose a fee for returned checks [*Civ. Code* § 1810.4]. Any such additional charges must be disclosed to the buyer in the initial disclosure statement [*Civ. Code* § 1810.1(e)].

3. Security Interests. The creditor must disclose the fact that the creditor has or will acquire a security interest in the property purchased under the plan or in other property identified by item or type [15 U.S.C. § 1637(a)(6); 12 C.F.R. § 226.6(c)]. For an account maintained for a customer by a seller of goods or services, the creditor must also state the conditions under which the creditor may retain or acquire such a security interest and provide a description or identification of the type of the interest [*Civ. Code* § 1810.1(f)].

4. Statement of Billing Rights. The creditor must provide a statement that outlines the consumer's rights and the creditor's responsibilities in billing error resolution [15 U.S.C. § 1637(a)(7); 12 C.F.R. § 226.6(d); see 12 C.F.R. §§ 226.12(c) (cardholder's claims and defenses against issuer), 226.13 (billing error resolution)]. This statement must be substantially similar to a model statement provided by the Federal Reserve Board [12 C.F.R. § 226.6(d); see 12 C.F.R. pt. 226, app. G-3]. See § 46.233 for further discussion of billing error resolution.

5. Minimum Periodic Payment. This state-imposed requirement applies only to accounts issued by a retail supplier of

goods or services for its own customers and requires the creditor to disclose the minimum periodic payment required [Civ. Code § 1810.1(g); see Civ. Code § 1802.7].

[d] Method of Computation

Both the Truth in Lending Act and the Unruh Act require disclosure of the methods used to compute the finance charge and the balance to which the finance charge is applicable [12 C.F.R. § 226.6(a)(3), (4); Civ. Code §§ 1810.1(b), (c)]. This form contains provisions explaining the four balance computation methods: (1) the adjusted balance method, (2) the previous balance method, (3) the average daily balance method (excluding current transactions), and (4) the average daily balance method (including current transactions) [see 12 C.F.R. pt. 226, app. G-1]. The form's clauses are based on the four model computation clauses issued by the Federal Reserve Board in Form G-1 of Appendix G of Regulation Z [see 12 C.F.R. pt. 226, app. G-1].

[e] Right to Rescind Transaction Creating Lien on Dwelling

If any open-end credit transaction involves the creditor's acquisition of a security interest in a consumer's principal dwelling, each consumer with an interest in the dwelling has a right to rescind the transaction, unless the transaction finances acquisition of the dwelling [15 U.S.C. § 1635(a), (e)(1); 12 C.F.R. § 226.23(a), (f)(1)]. Each affected consumer also has the right to rescind each addition to the security under the plan and any increase in the credit limit [12 C.F.R. § 226.15(a)(1)(i); see 15 U.S.C. § 1635(a)].

The consumer may rescind the transaction until midnight of the third business day following consummation, delivery of a required notice of rescission rights, or delivery of all material Truth in Lending disclosures, whichever occurs last [12 C.F.R. § 226.23(a)(3)].

The failure of a creditor to properly complete the rescission disclosure form [15 U.S.C. § 1635(a); 12 C.F.R. §§ 226.15(b), 226.23(b)], including the failure to fill in the expiration date of the right to rescind, automatically violates the Truth in Lending Act and extends the rescission period until three days after the disclosures are correctly made. A disclosure statement that does not adequately disclose the extent of the security interest also violates the Act [Williamson v. Lafferty (5th Cir. [Miss.] 1983) 698 F.2d 767, 768-769].

A borrower's right of rescission expires three years after the date of consummation of the transaction or on the sale of the property, whichever occurs first, even if the required disclosures have never been made [15 U.S.C. § 1635(f)]. The United States Supreme Court has held that a borrower may not assert the right to rescind as an affirmative defense in a collection action brought by the lender more than three years after the consummation of the transaction. Because 15 U.S.C. § 1635(f) completely extinguishes the right of rescission at the end of the three-year period, it is not a statute of limitations and the mortgagors cannot assert the right to rescind as a recoupment defense beyond the expiration period [Beach v. Ocwen Federal Bank (1998) 523 U.S. 410, 414, 118 S. Ct. 1408, 140 L. Ed. 2d 566]. See Ch. 25, *Real Estate Loans*, for a sample disclosure statement and further discussion of the right to rescind.

[f] Notice of Liability for Unauthorized Use

If a credit card issuer intends to hold cardholders responsible for unauthorized charges made before notification of loss or theft of the card, the card issuer must give adequate notice to the cardholder before its attempt to impose liability of the maximum potential liability and of the means to notify the issuer of the loss or theft of the card [15 U.S.C. § 1643(a)(1)(C)-(E); 12 C.F.R. § 226.12(b)(2)(ii); Civ. Code § 1747.10(c)-(e)]. Notice must be given before the attempt to impose liability on the cardholder and may be included as part of the initial disclosure statement [see 15 U.S.C. § 1643(a)(1)(C); 12 C.F.R. § 226.12(b)(2)(ii); Civ. Code § 1747.10(c), (d)]. See § 46.213 for further discussion and a model form, if such a notice is to be included in the initial disclosure statement.

[g] Subsequent Disclosures

If an issuer modifies an open-end credit plan by providing additional features, supplying a new credit device (other than a replacement card), or changing the plan's terms, it must provide additional disclosures [12 C.F.R. § 226.9(b), (c); Civ. Code § 1810.3(d); see, e.g., *DeMando v. Morris*, 206 F.3d 1300, 1303 (issuer's notice of rate increase to credit card customer violated 12 C.F.R. § 226.5(c), which requires that all disclosures issued in conjunction with open-ended credit arrangements reflect terms of legal obligation of the parties)]. See § 46.140 for discussion of these required disclosures.

[h] Electronic Disclosures

The open-end credit disclosures required under Regulation Z may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. § 7001 *et seq.*). The disclosures required by 12 C.F.R. § 226.5a (credit and charge card applications and solicitations), 12 C.F.R. § 226.5b (home equity plans), and 12 C.F.R. § 226.16 (open-end credit advertising) may be provided to the consumer in electronic form without regard to the consumer consent or other provisions of the E-Sign Act in the circumstances, as specified [12 C.F.R. § 226.5(a)(1)].

[2] FORM

Initial Disclosure Statement; Notices of Rights to Dispute Billing Errors and to Assert Claims or Defenses

INITIAL DISCLOSURE STATEMENT

1. During any monthly billing period, no finance charge will be imposed if you pay the full "New Balance" within 25 days after the "Closing Date" as shown on the statement for that period. Otherwise, finance charges accrue from the date we post each new transaction to your account.
2. If you choose to pay less than the full New Balance, a FINANCE CHARGE will be included on your next monthly statement.

[Choose one of the following:]

[Use if adjusted balance method is used to compute finance charge:]

We figure [add if applicable: a portion of] the finance charge on your account by applying the periodic rate to the amount you owe at the beginning of each billing cycle. We do not subtract any payments or credits received during the billing cycle. The amount of payments and credits to your account this billing cycle was \$_____.

[OR]

[Use if previous balance method is used to compute finance charge:]

We figure [add if applicable: a portion of] the finance charge on your account by applying the periodic rate to the amount you owe at the beginning of each billing cycle [add if applicable: minus any unpaid finance charges]. We do not subtract any payments or credits received during the billing cycle. [Add if applicable: The amount of payments and credits to your account this billing cycle was \$_____.]

[OR]

[Use if average daily balance method (excluding current transactions) is used to compute finance charge:]

We figure *[add if applicable: a portion of]* the finance charge on your account by applying the periodic rate to the "average daily balance" of your account (excluding current transactions). To get the "average daily balance," we take the beginning balance of your account each day and subtract any payments or credits *[add if applicable: and any unpaid finance charges]*. We do not add in any new *[purchases advances loans]*. This gives us the daily balance. Then, we add all the daily balances of the billing cycle together and divide the total by number of days in the billing cycle. This gives us the "average daily balance."

[OR]

[Use if average daily balance method (including current transactions) is used to compute finance charge:]

We figure *[add if applicable: a portion of]* the finance charge on your account by applying the periodic rate to the "average daily balance" of your account (including current transactions). To get the "average daily balance," we take the beginning balance of your account each day, add any new *[purchases advances loans]* and subtract any payments or credits *[add if applicable: and any unpaid finance charges]*. This gives us the daily balance. Then, we add all the daily balances of the billing cycle together and divide the total by number of days in the billing cycle. This gives us the "average daily balance."

[OR]

[Use if ending balance method is used to compute finance charge:]

We figure *[add if applicable: a portion of]* the finance charge on your account by applying the periodic rate to the amount you owe at the end of each cycle (including new purchases and deducting payments and credits made during the billing cycle).

[Continue with the following:]

3. The FINANCE CHARGE consists of periodic interest. The periodic interest rate is *[e.g., 1 1/2]* percent per month (which is an ANNUAL PERCENTAGE RATE of *[e.g., 18]* percent).

4. A late charge (\$1 minimum and \$5 maximum) of *[e.g., 5]* percent of the late amount will be imposed on any "Past Due" amount if not paid by the applicable "Payment Due Date," and on any "Current Due" amount when not paid within 30 days after the applicable "Payment Due Date."

[Add if creditor will charge an annual membership fee:]

5. An annual membership fee of \$_____ will be imposed on this Account.

[Add if creditor has or will acquire a security interest in property purchased under the plan or other property:]

6. We will retain a security interest in [property purchased under this plan *or describe other property*]. *[Add if account is retailer's installment account: We _____ (have retained or may retain) a security interest under the following conditions: _____ (describe conditions under which creditor may retain or acquire security interest)].*

7. The minimum payment due within 30 days of the closing date on your account each month will be determined according to the Minimum Payment Schedule plus any past due amounts for the prior months.

Minimum Payment Schedule	The Monthly
Balance is:	Payment is:
\$101-200	\$ _____
\$201-300	\$ _____
\$301-400	\$ _____
Over \$400	_____ of Balance

YOUR BILLING RIGHTS

KEEP THIS NOTICE FOR FUTURE USE

This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

Notify Us in Case of Errors or Questions About Your Bill

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us *[add if applicable: on a separate sheet]* at _____ *[insert address or the address shown on your bill]* as soon as possible. We must hear from you no later than 60 days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights.

In your letter, give us the following information:

--Your name and account number.

--The dollar amount of the suspected error.

--Describe the error and explain, if you can, why you believe there is an error. If you need more information, describe the item you are not sure about.

If you have authorized us to pay your credit card bill automatically from your savings or checking account, you can stop the payment on any amount you think is wrong. To stop the payment, your letter must reach us three business days before automatic payment is scheduled to occur.

Your Rights and Our Responsibilities After We Receive Your Written Notice

We must acknowledge your letter within 30 days, unless we have corrected the error by then. Within 90 days, we must either correct the error or explain why we believe the bill was correct.

After we receive your letter, we cannot try to collect any amount you question, or report you as delinquent. We can continue to bill you for the amount you question, including finance charges, and we can apply any unpaid amount against your credit limit. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question.

If we find that we made a mistake on your bill, you will not have to pay any finance charges related to any questioned amount. If we did not make a mistake, you may have to pay finance charges, and you will have to make up any missed payments on the questioned amount. In either case, we will send you a statement of the amount you owe and the date that it is due.

If you fail to pay the amount that we think you owe, we may report you as delinquent. However, if our explanation does not satisfy you and you write to us within ten days telling us that you still refuse to pay, we must tell anyone we report you to that you have a question about your bill. And we must tell you the name of anyone we reported you to. We must tell anyone we report you to that the matter has been settled between us when it finally is.

If we don't follow these rules, we cannot collect the first \$50 of the questioned amount, even if your bill was correct.

[Add if a credit card or similar device is provided with the account:]

Special Rule for Credit Card Purchases

If you have a problem with the quality of property or services that you purchased with a credit card, and you have tried in good faith to correct the problem with the merchant, you may have a federally protected right not to pay the remaining amount due on the property or services.

There are two limitations on this right:

- (a) You must have made the purchase in your home state or, if not within your home state, within 100 miles of your current mailing address; and
- (b) The purchase price must have been more than \$50.

These limitations do not apply if we own or operate the merchant or if we mailed you the advertisement for the property or services.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral OverviewContracts LawDebtor & Creditor Relations



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 46 CREDIT CARD AND OTHER OPEN-END CREDIT TRANSACTIONS
PART IV. FORMS

B. Consumer Credit Card and Retail Installment Accounts

20-46 California Legal Forms--Transaction Guide § 46.213

§ 46.213 Notice to Cardholder of Potential Liability for Unauthorized Use of Credit Card

[1] Comment

[a] Use of Form

This form is a model disclosure statement issued by the Federal Reserve Board explaining the cardholder's liability for unauthorized use of a credit card [see 12 C.F.R. pt. 226, app. G-2]. The credit card issuer must provide the cardholder with this notice in order to impose any liability for unauthorized use [15 U.S.C. § 1643(a)(1)(C), (D); 12 C.F.R. § 226.12(b)(2)(ii); Civ. Code § 1747.10(c), (d)].

[b] Method of Disclosure

This disclosure may be made in any manner as long as the cardholder might be reasonably expected to notice it and understand its meaning [12 C.F.R. § 226.12(b)(2) n.23]. For example, it may be made on periodic statements, or with the initial disclosure statement. This disclosure may be made at any time before the unauthorized use of the card [see 12 C.F.R. pt. 226, supp. I, § 226.12(b)(2)(ii) (Official Staff Interpretations)]. Use of this model form, even if minor changes are made, automatically complies with the Truth in Lending Act and Regulation Z [15 U.S.C. § 1604(b); see 12 C.F.R. pt. 226, supp. I, apps. G, H (Official Staff Interpretations)].

[c] Liability for Unauthorized Use

[i] In General

The Truth in Lending Act [15 U.S.C. § 1601 *et seq.*] and the Song-Beverly Credit Card Act of 1971 [Civ. Code § 1747 *et seq.*] contain identical provisions governing the cardholder's liability for unauthorized use. These provisions apply to all credit cards, not just to those issued for consumer credit purposes [12 C.F.R. § 226.2(a)(8); Civ. Code § 1747.02(d)], although businesses that have been issued 10 or more credit cards for use by employees may agree to liability for unauthorized use without regard to the statutory rules, provided that any such agreement does not affect the statutory liability of individual employees [12 C.F.R. § 226.12(b)(5); Civ. Code § 1747.20].

[ii] Definition of "Unauthorized Use"

"Unauthorized use" is the use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for the use, and from which the cardholder receives no benefit [15 U.S.C. § 1602(o); 12 C.F.R. § 226.12(b)(1) n.22; Civ. Code § 1747.02(f)]. The Song-Beverly Credit Card Act of 1971 specifies that "unauthorized use" does not include use of a credit card by a person who has been given authority by the cardholder to use the card, before the time the cardholder complies with the card issuer's procedures for terminating such authority [Civ. Code § 1747.02(f)].

[iii] Conditions and Extent of Liability

A cardholder's maximum liability for unauthorized use (including a series of unauthorized uses) is limited to the lesser of \$50 or the amount of property, money, labor, or services obtained by the unauthorized use before the card issuer is notified of the loss, theft, or possible unauthorized use of the card [15 U.S.C. § 1643(a)(1)(B), (E); 12 C.F.R. § 226.12(b)(1); Civ. Code § 1747.10(b), (e); see 12 C.F.R. pt. 226, supp. I, § 226.12(b)(1) (Official Staff Interpretations)]. For a notice of loss or theft that a cardholder can send to a card issuer, see § 46.234.

Liability may be imposed on the cardholder only if certain conditions are met. The card must be an "accepted credit card," one the cardholder has requested and received or has signed, used, or authorized another to use [15 U.S.C. §§ 1602(l), 1643(a)(1)(A); 12 C.F.R. § 226.12(a)(2) n.21, (b)(2)(i); Civ. Code §§ 1747.02(b), 1747.10(a)]. The card issuer must provide adequate notice to the cardholder of the maximum potential liability and of the means by which the issuer may be notified of the loss or theft of the card [15 U.S.C. § 1643(a)(1)(C), (D); 12 C.F.R. § 226.12(b)(2)(ii); Civ. Code § 1747.10(c), (d)]. Finally, the card issuer must provide a method to identify the cardholder or authorized user of the card [15 U.S.C. § 1643(a)(1)(F); 12 C.F.R. § 226.12(b)(2)(iii); Civ. Code § 1747.10(f)]. Methods used to identify the cardholder or authorized user may consist of a signature, photograph, or fingerprint on the card, or some electronic or mechanical means of identification [see 12 C.F.R. pt. 226, supp. I, § 226.12(b)(2)(iii) (Official Staff Interpretations)].

[2] FORM**Notice to Cardholder of Potential Liability for Unauthorized Use of Credit Card**

You may be liable for the unauthorized use of your credit card [*or other term that describes the credit card*]. You will not be liable for unauthorized use that occurs after you notify [*name of card issuer or its designee*] at _____ [*address and telephone number*], orally or in writing, of the loss, theft, or possible unauthorized use. In any case liability, your liability will not exceed [*insert \$50 or any lesser amount under agreement with the cardholder*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionCredit Card AgreementsGeneral OverviewBanking LawConsumer ProtectionCredit Card AgreementsLiability



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 46 CREDIT CARD AND OTHER OPEN-END CREDIT TRANSACTIONS
PART IV. FORMS

B. Consumer Credit Card and Retail Installment Accounts

20-46 California Legal Forms--Transaction Guide § 46.214

§ 46.214 Solicitation and Application Disclosure Statement

[1] Comment

[a] Use of Form

This form is a statement of the disclosures required on or with issuer-initiated applications and solicitations to open credit card or charge card accounts [*see 15 U.S.C. § 1637(c); 12 C.F.R. § 226.5a; see also [e], below (charge cards)*]. These disclosures, which may be made orally or in writing, must be made when the issuer solicits the consumer's application [*15 U.S.C. § 1637(c); 12 C.F.R. § 226.5a*]. The form of disclosure is determined by the manner in which the solicitation or application is delivered to the consumer [*see 15 U.S.C. § 1637(c)(1)-(4); 12 C.F.R. § 226.5a(a)(2), (c), (d)*]. Refer to [d], *below*, for discussion of methods of disclosure. The disclosures may be incorporated into the application or solicitation, or may supplement them [*see 12 C.F.R. § 226.5a(a)(2)(i)*].

This form is based on the model clauses promulgated by the Federal Reserve Board [12 C.F.R. pt. 226, apps. G-10A-G-12]. Proper use of the model forms is deemed to be in compliance with applicable requirements of the Truth in Lending Act [*see 15 U.S.C. § 1604(b)*].

For a form for a consumer credit card agreement, see § 46.210. For a form illustrating the initial disclosures required to be made to a cardholder before the first use of an issued card, see § 46.212.

[b] Types of Solicitations and Applications Subject to Disclosure Requirements

Solicitations may take the form of direct mailings, telephone applications and solicitations, and "take one" forms and other applications and solicitations made available to the general public [*see 54 Fed. Reg. 13855, 13856 (1989)*].

A "solicitation" is an offer by the card issuer to open a credit or charge card account that does not require the consumer to complete an application [12 C.F.R. § 226.5a(a)(1)]. Solicitations qualifying under this definition are otherwise known as "preapproved" solicitations [*54 Fed. Reg. 13855, 13857 (1989)*].

The disclosure requirements for credit card applications and solicitations do not apply to (1) home equity plans accessible by a charge or credit card that are subject to the disclosure requirements of 12 C.F.R. § 226.5b [see Ch. 25, *Real Estate Loans*], (2) overdraft lines of credit tied to asset accounts accessed by check guarantee cards or by debit cards, or (3) lines of credit accessed by check guarantee cards or by debit cards that can be used only at automated teller machines [12 C.F.R. § 226.5a(a)(3)].

[c] Required Disclosures

A card issuer must disclose specified information on or with the application or solicitation, as appropriate [15 U.S.C. § 1637(c); 12 C.F.R. § 226.5a(b)]. Except as otherwise indicated, the following information must be provided [15 U.S.C. § 1637(c)(1), (4); 12 C.F.R. § 226.5a(b)(1)-(10)]:

- (1) The annual percentage rate, including, if applicable, the fact that the card has a variable rate and how the variable rate is determined [15 U.S.C. § 1637(c)(1)(A)(i); 12 C.F.R. § 226.5a(b)(1); see 12 C.F.R. § 226.14(b) (annual percentage rate determined)]. Charge card, as opposed to credit card, account solicitations or applications need not make this disclosure [12 C.F.R. § 226.5a(b); see also 15 U.S.C. § 1602(k) "credit card" defined]; 12 C.F.R. § 226.2(a)(15) ("charge card" defined)].
- (2) Any fees for issuance or availability of a credit or charge card [15 U.S.C. § 1637(c)(1)(A)(ii)(I), (4)(A)(i); 12 C.F.R. § 226.5a(b)(2)].
- (3) Any minimum finance charges [15 U.S.C. § 1637(c)(1)(A)(ii)(II); 12 C.F.R. § 226.5a(b)(3)]. Charge card account solicitations or applications are excluded from this disclosure requirement [12 C.F.R. § 226.5a(b)].
- (4) Any transaction charges imposed for the use of the card for purchases [15 U.S.C. § 1637(c)(1)(A)(ii)(III), (4)(A)(ii); 12 C.F.R. § 226.5a(b)(4)].
- (5) The date by which or the period within which any extended credit may be paid without incurring a finance charge ("grace period"). If no grace period is provided, that fact must be disclosed [15 U.S.C. § 1637(c)(1)(A)(ii)(I); 12 C.F.R. § 226.5a(b)(5)]. Charge card account solicitations or applications are exempt from this requirement [12 C.F.R. § 226.5a(b)].
- (6) The name of the balance computation method, as provided by statute [15 U.S.C. § 1637(c)(1)(A)(iv)(II); 12 C.F.R. § 226.5a(b)(6); see 12 C.F.R. § 226.5a(g) (balance computation methods described)]. Charge card account solicitations or applications are exempt from this requirement [12 C.F.R. § 226.5a(b)].
- (7) A statement that charge card balances are due when the periodic statement is received [15 U.S.C. § 1637(c)(4)(A)(iii); 12 C.F.R. § 226.5a(b)(7)].
- (8) Any fee imposed for cash advances [15 U.S.C. § 1637(c)(1)(B)(i), (4)(B)(i); 12 C.F.R. § 226.5a(b)(8)].
- (9) Any fee imposed for late payments [15 U.S.C. § 1637(c)(1)(B)(ii), (4)(B)(ii); 12 C.F.R. § 226.5a(b)(9)].
- (10) Any fee imposed for exceeding a credit limit [15 U.S.C. § 1637(c)(1)(B)(iii), (4)(B)(iii); 12 C.F.R. § 226.5a(b)(10)].

The information to be disclosed under Items 1-7, *above*, must be provided in a prominent location on or with the application or solicitation, or other applicable document, and in the form of a table with headings, content and format substantially similar to the model clauses issued by the Board of Governors of the Federal Reserve System [15 U.S.C. § 1632(c)(1); 12 C.F.R. § 226.5a(a)(2)(i); *see* 12 C.F.R. pt. 226, apps. G-10A-G-11].

The disclosures in Items 8-10, *above*, must be provided either in the table containing the disclosures in Items 1-7, or clearly and conspicuously elsewhere on the application or solicitation [15 U.S.C. § 1637(c)(1)(B), (4)(B); 12 C.F.R. § 226.5a(a)(2)(ii)]. *See* [2], *below*, for text of the Federal Reserve Board's model clauses.

An application or solicitation to open a credit card account and all promotional materials accompanying the application or solicitation for which a disclosure is required under 15 U.S.C. § 1637(c)(1) (discussed *above*), and that offers a temporary annual percentage rate of interest, must use the term "introductory" in immediate proximity to each listing of the temporary annual percentage rate applicable to that account, and the term must appear clearly and conspicuously [15 U.S.C. § 1637(c)(6)(A)(i); *see* Pub. L. No. 109-8, § 1303(b)(2) (Apr. 20, 2005) (requirement takes effect either on April 20, 2006 or 12 months after publication of final regulations to implement it, whichever is later); *see also* 15 U.S.C. § 1637(c)(6)(D) (definitions of temporary annual percentage rate of interest, temporary annual percentage rate, and introductory period)].

- If the annual percentage rate of interest that will apply after the end of the temporary rate period will be a fixed rate, the application or solicitation and accompanying materials must state in a clear and conspicuous manner, in a prominent location closely proximate to the first listing of the temporary annual percentage rate (other than a listing of the temporary annual percentage rate in tabular format), the time period in which the introductory period will end and the annual percentage rate that will apply after the end of the introductory period [15 U.S.C. § 1637(c)(6)(A)(ii)].

- If the annual percentage rate that will apply after the end of the temporary rate period will vary in accordance with an index, then the required information is the time period in which the introductory period will end and the rate that will apply after that, based on an annual percentage rate that was in effect within 60 days before the date of mailing the application or solicitation [15 U.S.C. § 1637(c)(6)(A)(iii)].

An application or solicitation to open a credit card account for which a disclosure is required under 15 U.S.C. § 1637(c)(1) and that offers a temporary annual percentage rate of interest, if that rate of interest is revocable under any circumstance or on any event, must clearly and conspicuously disclose, in a prominent manner on or with the application or solicitation, a general description of the circumstances that may result in the revocation of the temporary annual percentage rate. If the annual percentage rate that will apply on the revocation of the temporary annual percentage rate will be a fixed rate, the disclosure must include the annual percentage rate that will apply on the revocation of the temporary annual percentage rate. If the annual percentage rate that will apply on the revocation of the temporary annual percentage rate will vary in accordance with an index, the disclosure must include the rate that will apply after the temporary rate, based on an annual percentage rate that was in effect within 60 days before the date of mailing the application or solicitation [15 U.S.C. § 1637(c)(6)(C); *see* Pub. L. No. 109-8, § 1303(b)(2) (Apr. 20, 2005) (requirement takes effect 12 months after publication of final regulations to implement it)].

In any solicitation to open a credit card account for any person under an open end consumer credit plan using the internet or other interactive computer service, the person making the solicitation must clearly and conspicuously disclose the information described in 15 U.S.C. § 1637(c)(1)(A) and (B), *above*, and the information described in 15 U.S.C. § 1637(c)(6), *above* [15 U.S.C. § 1637(c)(7)(A); *see* Pub. L. No. 109-8, § 1304(b)(2) (Apr. 20, 2005) (requirement takes effect 12 months after publication of final regulations to implement it); *see also* 15 U.S.C. § 1637(c)(7)(C) (definitions of internet and interactive computer service)]. The disclosures must be readily accessible to consumers, in close proximity to the solicitation to open a credit card account, and must be updated regularly to reflect

the current policies, terms, and fee amounts applicable to the credit card account [15 U.S.C. § 1637(c)(7)(B)].

[d] Method of Disclosure

[i] Direct Mail Applications and Solicitations

The card issuer must disclose the applicable items of information on or with an application or solicitation that is mailed to consumers or provided by electronic communication [15 U.S.C. § 1632(c)(1); 12 C.F.R. § 226.5a(c); see [c], above].

Under the Aerias-Robbins Credit Card Full Disclosure Act of 1986 [Civ. Code §§ 1748.10-1748.14], any application form or preapproved written solicitation for an open-end credit card account to be used for personal, family, or household purposes that is mailed to a California consumer (other than through newspapers, magazines, or similar publications distributed by someone other than the creditor), by or on behalf of a creditor, must contain or be accompanied by specified disclosures [Civ. Code § 1748.11(a); see Civ. Code § 1748.11(g)-(i) (exceptions)]. Alternatively, an application may contain a specified statement regarding the availability of disclosures in lieu of the actual disclosures [Civ. Code § 1748.11(g)]. The issuer may either comply with the initial disclosure requirements of Regulation Z [Civ. Code § 1748.11(a)(2); see Civ. Code § 1748.11(e); see also 12 C.F.R. § 226.5a(b)(1)-(10) (required disclosures)], or with similar disclosures specified by the California statute [Civ. Code § 1748.11(a)(1)(A)-(D); see § 46.40[2]].

In addition, a credit card issuer that extends credit to a cardholder through the use of a preprinted check or draft must disclose all of the following information in clear and conspicuous language [Civ. Code § 1748.9]:

- That "use of the check or draft constitutes a charge against your account."
- The annual percentage rate and calculation of finance charges associated with the use of the attached check or draft [see 12 C.F.R. § 226.16 (required disclosures)].
- Whether the finance charges are triggered immediately on the use of the check or draft.

This disclosure must be on the front of an attachment affixed by perforation or other means to the preprinted check or draft [Civ. Code § 1748.9].

Waiver of any of these provisions is against public policy and is unenforceable [see Civ. Code § 1748.14].

The Ninth Circuit holds that the National Bank Act [12 U.S.C. § 21 *et seq.*] preempts the disclosure requirements of Civ. Code § 1748.9, insofar as those requirements apply to national banks [*Rose v. Chase Bank USA* (9th Cir. 2008) 513 F.3d 1032, 1038] .

[ii] Telephone Applications and Solicitations

In any telephone application or solicitation, the card issuer must orally disclose all of the applicable disclosures, except those relating to cash advance, late payment, or over-the-credit-limit fees [15 U.S.C. § 1637(c)(2)(A); 12 C.F.R. § 226.5a(d)(2); see 12 C.F.R. § 226.5a(b)(1)-(7) (required disclosures)].

If there is no fee for the issuance of the card, the issuer may, instead, within the earlier of either 30 days after the consumer requests the card or the delivery of the card, make the required disclosures in writing [15 U.S.C. § 1637(c)(2)(B)(i)(I), (ii); 12 C.F.R. § 226.5a(d)(2)(i); see 12 C.F.R. § 226.5a(b)(1)-(10) (required disclosures)]. In this case, in addition to the standard applicable disclosures, the issuer must also state that the consumer need not accept the card or pay any fee disclosed unless the consumer uses the card [15 U.S.C. § 1637(c)(2)(B)(iii); 12 C.F.R. §

226.5a(d)(2)(ii)].

[iii] Applications and Solicitations Made Available to the General Public

A card issuer making a solicitation or application available to the general public must comply with the statutory disclosure requirement by one of three alternative methods, listed below [15 U.S.C. § 1637(c)(3); 12 C.F.R. § 226.5a(e)]. An application or solicitation made available to the general public includes one contained in a catalog, magazine, or other generally available publication [15 U.S.C. § 1637(c)(3); 12 C.F.R. § 226.5a(e)].

In accordance with the first alternative, the card issuer must (1) disclose in a prominent location on the application or solicitation the required information [see 12 C.F.R. § 226.5a(b)(1)-(10) (required disclosures); see also [c], above]; (2) state the date the required information was printed, including a statement that the required information was accurate as of that date and is subject to change after that date; and (3) include a statement that the consumer should contact the card issuer for any change in the required information since it was printed, and a toll-free telephone number or mailing address for that purpose [15 U.S.C. § 1637(c)(3)(B); 12 C.F.R. § 226.5a(e)(1)].

The second alternative allows the card issuer to disclose the required credit information by stating on or with the application or solicitation (1) the disclosures required in the initial disclosure statement [see 12 C.F.R. § 226.6(a)-(c); see also § 46.212]; and (2) that the consumer should contact the card issuer for any change in the required information, and a toll-free telephone number or mailing address for that purpose [12 C.F.R. § 226.5a(e)(2)].

If the card issuer does not disclose any of the information required on credit card and charge card applications and solicitations on or with the application or solicitation, the card issuer may comply under the third alternative by stating in a prominent location on the application or solicitation that (1) there are costs associated with the use of the card, and (2) the consumer may contact the card issuer to request specific information about the costs [12 C.F.R. § 226.5a(e)(3)]. The card issuer must provide a toll-free telephone number and mailing address for that purpose [12 C.F.R. § 226.5a(e)(3)].

On receiving a request from a consumer for any information required to be disclosed, a card issuer must promptly and fully disclose that information, using any of the three alternative methods of disclosure [12 C.F.R. § 226.5a(e)(4)]. Information is promptly disclosed if it is given within 30 days of a consumer's request for information, but in no event later than delivery of the card [see 54 Fed. Reg. 13855, 13861 (1989)] .

[iv] Internet-Based Solicitations

In any solicitation to open a credit card account under an open end consumer credit plan using the Internet or other interactive computer service, the person making the solicitation must clearly and conspicuously disclose the information described in 15 U.S.C. § 1637(c)(1)(A) and (B) and the information described in 15 U.S.C. § 1637(c)(6) [15 U.S.C. § 1637(c)(7)(A); see [c], above; see also 15 U.S.C. § 1637(c)(7)(C) (definitions of internet and interactive computer service); Pub. L. 109-8, § 1304(b)(2) (requirement takes effect either on April 20, 2006, or 12 months after the publication of final implementing regulations, whichever is later)]. The required disclosures must be readily accessible to consumers, in close proximity to the solicitation to open a credit card account, and must be updated regularly to reflect the current policies, terms, and fee amounts applicable to the credit card account [15 U.S.C. § 1637(c)(7)(B)].

[e] Disclosures in Charge Card Applications

The Areias-Robbins Charge Card Full Disclosure Act of 1986 [Civ. Code § 1748.20-1748.23] imposes disclosure requirements similar to those of the federal Truth in Lending Act [see [d][i]-[iv], above]. An application form or preapproved written solicitation for a charge card must contain the following information [Civ. Code § 1748.22(a)]:

- Any fee or charge assessed for or that may be assessed for issuing or renewing the charge card, expressed as an annualized amount, and denominated as an "annual fee";
- The charge card does not permit the charge card holder to defer payment of charges incurred by the use of the charge card on receipt of a periodic statement of charges; and
- Any fee that may be assessed for an extension of credit to a charge card holder if the extension of credit is made by the charge card issuer, denominated as a "cash advance fee."

Like the Areias-Robbins Credit Card Full Disclosure Act of 1986, waiver of any of the provisions of the Areias-Robbins Charge Card Full Disclosure Act of 1986 is against public policy and is unenforceable [see *Civ. Code* § 1748.23].

These state-specific disclosures are in addition to the federal disclosures required by Regulation Z.

[2] FORM

Solicitation and Application Disclosure Statement

CREDIT CARD OR CHARGE CARD APPLICATION OR SOLICITATION DISCLOSURE STATEMENT

[Choose one of the following:]

[Use for credit card applications and solicitations:]

Annual Percentage Rate for Purchases

Your annual percentage rate is _____ percent.

Variable Rate Information

Your annual percentage rate may vary. This rate is determined by [explain method of determination].

Grace Period for Repayment of Balance for Purchases

[Use if a grace period will be offered:]

You have _____ days from the statement date to repay your purchase balance before a finance charge on purchases will be imposed.

[OR]

[Use if no grace period will be offered:]

You have no grace period in which to repay your purchase balance before a finance charge on purchases will be imposed.

[Continue with the following:]

Method of Computing Balance for Purchases

The method used to compute your monthly balance for purchases is [explain method of computation].

Annual Fees

The annual fee for the issuance of the card is \$_____.

Minimum Finance Charge

There is a minimum finance charge imposed on all outstanding balances of \$_____.

Transaction Fee for Purchases

There is a transaction fee of \$_____ imposed in connection with the use of the card to purchase goods and services.

Transaction Fee for Cash Advances

There is a cash advance fee of \$[or _____ percent of the total] imposed in connection with the use of the card to acquire cash advances.

Late Payment Fee

There is a fee of \$[or _____ percent of the outstanding balance] imposed for payments not reaching us by the _____ day after the payment due date indicated on the monthly statement.

Over-the-Credit-Limit Fee

There is a fee of \$_____ imposed for exceeding the credit limit on the card as indicated in the issuance agreement.

[OR]

[Use for charge card applications and solicitations:]

Annual Fees

The annual fee for the issuance of the card is \$_____.

Transaction Fee for Purchases

There is a transaction fee of \$_____ imposed in connection with the use of the card to purchase goods and services.

Transaction Fee for Cash Advances

There is a cash advance fee of \$[or _____ percent of the total] imposed in connection with the use of the card to acquire cash advances.

Late Payment Fee

There is a fee of \$[or _____ percent of the outstanding balance] imposed for payments not reaching us by the _____ day after the payment due date indicated on the monthly statement.

Over-the-Credit-Limit Fee

There is a fee of \$_____ imposed for exceeding the credit limit on the card as indicated in the issuance agreement.

Charges Due and Payable

All charges made on this charge card are due and payable when you receive your periodic statement. You may not defer payment of charges incurred by the use of this charge card.

[Use if card provides access to another credit plan:]

Access to Another Credit Plan

This charge card may allow you to access credit offered by another creditor. Our decision about issuing you a charge card will be independent of the other creditor's decision about allowing you access to a line of credit. Therefore, approval by us to issue you a card does not constitute approval by the other creditor to grant you credit privileges. If we issue you a charge card, you may receive it before the other creditor decides whether or not to grant you credit privileges.

[Continue with the following:]

[Add one of the following clauses to all applications or solicitations made available to the general public (see 12 C.F.R. § 226.5a(e)):]

[Use for solicitations or applications containing all of applicable required disclosures (see 12 C.F.R. § 226.5a(e)(1)):]

Changes in Disclosed Information

The information about the costs of the card described in this [application or solicitation] is accurate as of _____ [specify date]. This information may have changed after that date. To find out what may have changed, _____ [call us at _____ (telephone number) or write to us at _____ (address)].

[OR]

[Use if disclosures will be made in the format required for an account opening statement:]

Changes in Disclosed Information

To find out about changes in the information in this [application or solicitation], _____ [call us at _____ (telephone number) or write to us at _____ (address)].

[OR]

[Use for applications or solicitations containing none of the required disclosures]:

Costs Associated With Card

There are costs associated with the use of this card. To obtain information about these costs, call us toll- free at [telephone number] or write to us at _____[address].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionCredit Card AgreementsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 46 CREDIT CARD AND OTHER OPEN-END CREDIT TRANSACTIONS
PART IV. FORMS

B. Consumer Credit Card and Retail Installment Accounts

20-46 California Legal Forms--Transaction Guide § 46.215

§ 46.215 Periodic Statement

[1] Comment

[a] Use of Form

This form is a periodic statement for an open-end credit account. The form meets the requirements of both the Truth in Lending Act [15 U.S.C. § 1601 *et seq.*] and the Unruh Act [Civ. Code §§ 1801-1812.20]. Both acts require the creditor to send a periodic statement for each billing cycle in which a finance charge has been imposed, or at the end of which the account has a debit (or, under federal law, a credit) balance of more than \$1 [15 U.S.C. § 1637(b); 12 C.F.R. § 226.5(b)(2)(i); Civ. Code § 1810.3(a)].

The form also meets the "minimum payment warning" and related disclosure requirements regarding the length of time it will take, at various payment rates, to pay off the balance due on an open-end credit card account, which are required under both the Truth in Lending Act and the Areias-Robbins Credit Card Full Disclosure Act of 1986 [Civ. Code §§ 1748.10-1748.14; *see Civ. Code § 1748.13(a)*].

The Unruh Act applies only to retail installment sales of consumer goods or services [*see Civ. Code §§ 1802.1-1802.7*]. A "retail installment sale" is a sale by a person engaged in the business of selling consumer goods or services to a consumer, not principally for the purpose of resale, with payment in installments [Civ. Code § 1802.5]. A "retail installment account" is one established by an agreement entered into in California, under which the buyer makes installment payments to a retail seller of goods or services on an outstanding balance incurred in retail installment sales, and under which there is a finance charge expressed as a percent of the periodic balances [Civ. Code § 1802.7].

Under federal law, billing cycles must be equal and may be no longer than a quarter of a year [12 C.F.R. § 226.2(a)(4)]. If the periodic statement is not mailed or delivered at least 14 days before the date on which additional finance charges accrue, the creditor may not collect those additional charges [12 C.F.R. § 226.5(b)(2)(ii)].

The billing cycles for a retail account subject to the Unruh Act must be monthly [Civ. Code § 1802.17]. If the periodic statement is not mailed or delivered at least 14 days before the date on which additional finance charges accrue, the

creditor may not collect those additional charges [*Civ. Code § 1810.3(b)*; but see *Civ. Code § 1810.12(c)*] (notwithstanding *Civ. Code § 1810.3(b)* retail installment account holder must provide minimum of 20 days between monthly billing date and date minimum payment is due)].

[b] Form of Periodic Statement

The Truth in Lending Act requires that periodic disclosures be made clearly and conspicuously in writing, in a form the consumer may keep. The terms "finance charge" and "annual percentage rate," when accompanied by the corresponding amount or rate, must be printed more conspicuously than other required disclosures [*12 C.F.R. § 226.5(a)(2)*]. There are no other federal requirements or restrictions on the form of a periodic statement [see *12 C.F.R. § 226.5(a)*]. Other information may be integrated with the required disclosures, as long as the required disclosures remain clear and conspicuous [see *12 C.F.R. 226.5(a)*].

Under the Unruh Act, the outstanding balance in a retail installment at the beginning of the billing cycle must be disclosed on the face side of the periodic statement, and the term "previous balance" must be used to describe the amount [*Civ. Code § 1810.3(c)(1)*]. All other required disclosures must appear on the face or reverse side of the periodic statement, or on supplemental statements enclosed together and delivered to the consumer at the same time. Regardless of where placed, certain disclosures regarding the finance charge, periodic rate(s), and the balance on which the finance charge was computed must appear together [*Civ. Code § 1810.3(c)(2)*]. If all required disclosures do not appear on the face of the periodic statement, the face of the statement must contain one of the following notices, as appropriate: "NOTICE: See reverse side for important information"; "NOTICE: See accompanying statement(s) for important information"; or "NOTICE: See reverse side and accompanying statement(s) for important information" [*Civ. Code § 1810.3(c)(3)*].

[c] Required Disclosures Under Truth in Lending and Unruh Acts

[i] In General

The following disclosures [see [ii]-[xii], below] are those required by the Truth in Lending Act and the Unruh Act. For transactions covered by both acts, there are a few additional disclosure requirements imposed by the Unruh Act. However, the Unruh Act applies only if the account is one provided by a retailer of goods or services for its customers [*Civ. Code § 1802.5*].

[ii] Previous Balance

The creditor must disclose the previous balance, which is the account balance outstanding at the beginning of the billing cycle [*15 U.S.C. § 1637(b)* *12 C.F.R. § 226.7(a)*; *Civ. Code § 1810.3(a)(1)*].

[iii] Identification of Transactions

The creditor must identify credit transactions on or with the first periodic statement that reflects the transaction. For a credit transaction involving a sale of property or services (a "sale credit"), the transaction is sufficiently identified by providing a copy of the credit document, if the document gives the amount of the transaction and either the sale date or the posting date [*12 C.F.R. § 226.8(a)(1)*]. If no credit document is provided, and if the creditor and the seller are the same or related entities, the creditor must disclose the amount and date of the transaction and a brief identification of the property or services purchased [*12 C.F.R. § 226.8(a)(2)*].

As an alternative to the brief identification of the property or services, the creditor may disclose a number or symbol that also appears on the receipt or other credit document given to the consumer, if the number or symbol reasonably identifies that transaction with that creditor [*12 C.F.R. § 226.8(a)(2) n.17*]. Another alternative for creditor-sellers with fewer than 15,000 open-end accounts is to omit the identification of property or services but supply the seller's name

and the location of the transaction, if the creditor provides the consumer with point-of-sale documentation for the transaction [12 C.F.R. § 226.8(a)(2) n.18]. However, if either of the alternatives is followed, a consumer's request for further information must be treated as a billing error, and any finance charge must be waived until the "error" of insufficient identification is corrected [12 C.F.R. § 226.8(a)(2) nn. 17, 18; see § 46.233]. Finally, for sale credit where the creditor and seller are not the same or related entities and no credit document copy is provided, the creditor must disclose the amount and date of the transaction, the seller's name, and the city and state or foreign country where the transaction took place [12 C.F.R. § 226.8(a)(3)].

The identification rule differs for nonsale credit. Sufficient identification of nonsale credit includes a brief identification of the transaction (or number or symbol as specified in the preceding paragraph); the amount of the transaction; and the date of the transaction, or the date of posting of the amount, or the date of a credit document bearing the consumer's signature [12 C.F.R. § 226.8(b)]. If an actual copy of the receipt or other credit document is provided and that copy shows the amount and at least one of the above-specified dates, the brief identification may be omitted [12 C.F.R. § 226.8(b)].

In the case of either nonsale credit or any sale credit not covered by the Unruh Act, creditors may omit all identification of credit transactions from the periodic statement, provided the following two conditions are met. First, the creditor must maintain procedures reasonably adapted to obtaining and providing the required identification. Second, the creditor must treat an inquiry for clarification or documentation as a notice of a billing error and the lack of information as a billing error [12 C.F.R. § 226.8 n.16; see 12 C.F.R. § 226.13(e) (billing error resolution)]. See § 46.233[1] for discussion of billing error resolution.

Identification of transactions governed by the Unruh Act must include (1) the amount of each extension of credit, (2) the date of each extension or of its posting, and (3) unless previously furnished, a brief identification of any goods or services purchased or other extension of credit [Civ. Code § 1810.3(a)(2)]. Because the Unruh Act provides for disclosures made "in any manner, method, or terminology required or permitted under Regulation Z" [Civ. Code § 1801.5], it would arguably permit reliance on one of the federal options that provides for less information. However, Civ. Code § 1801.5 has not been the subject of much litigation, and case law does not establish the extent of such statutory protection. Therefore, it is advisable to provide the disclosures required by the Unruh Act, or at the very least, to carefully compare the possible adverse consequences of ignoring its disclosure requirements to the advantages of disclosing less information than the Unruh Act requires.

[iv] Credits

This item must list any credit to the account during the billing cycle, including the amount and the date of crediting. The date need not be provided if a delay in crediting does not result in any finance or other charge [15 U.S.C. § 1637(b)(3); 12 C.F.R. § 226.7(c)]. For retailers' accounts, the Unruh Act requires labeling payments as such and other credits as "credits." Unless previously furnished, there must be a brief identification of each item included in "credits" [Civ. Code § 1810.3(a)(3); see also Civ. Code § 1801.5].

[v] Periodic Rates

The creditor must disclose each periodic rate that may be used to compute the finance charge, the range of balances to which the periodic rate is applicable, and the corresponding annual percentage rate [12 C.F.R. § 226.7(d); see 12 C.F.R. § 226.14 (determination of annual percentage rate)]. If different periodic rates apply to different types of transactions, these types of transactions must also be disclosed. [15 U.S.C. § 1637(b)(5); 12 C.F.R. § 226.7(d)]. For retail installment accounts, this disclosure must use the term "periodic rate" (or "periodic rates") [Civ. Code § 1810.3(a)(5)]. The corresponding annual percentage rate should be labeled in a manner such as "corresponding annual percentage rate," "nominal annual percentage rate," or "corresponding nominal annual percentage rate" [see 12 C.F.R. pt. 226, supp. I, § 226.7(d) (Official Staff Interpretations)].

The reference to a periodic rate that "may be" used to compute the finance charge means a rate that the creditor is permitted to use under the credit agreement. In other words, "may" in 12 C.F.R. § 226.7(d) connotes contractual entitlement, not mere possibility. Therefore, a creditor does not violate that disclosure requirement unless the creditor omits to disclose, in the credit agreement, any periodic rate that the agreement permits the creditor to use. The required disclosure can be adequately made by the usual change-in-terms provision (which reserves to the creditor a right to change periodic rates, among other terms, without any limitation on why the creditor could make such a change), provided the change-in-terms provision meets the "clear and conspicuous" test of 12 C.F.R. § 226.5(a)(1) [cf. *Barrar v. Chase Bank U.S.* (9th Cir. 2009) 566 F.3d 883, 2009 U.S. App. LEXIS 10913, at *16-*18, *21-*22 (construing 12 C.F.R. § 226.6(a)(2), which is identical to 12 C.F.R. § 226.7(d) in relevant part; in this case, change-in-terms provision was not clear and conspicuous when it appeared "five dense pages after the disclosure of the APR ... buried too deeply in the fine print for a reasonable cardholder to realize that, in addition to the specific grounds for increasing the APR listed in the 'Finance Charges' section, [the creditor] could raise the APR for other reasons")].

[vi] Balance on Which Finance Charge Computed

The creditor must disclose the amount of the balance to which a periodic rate was applied and an explanation of how that balance was determined [12 C.F.R. § 226.7(e)]. When a balance is determined without first deducting all credits and payments made during the billing cycle, that fact and the amount of the credits and payments must also be disclosed [15 U.S.C. § 1637(b)(7); 12 C.F.R. § 226.7(e); Civ. Code § 1810.3(a)(6)]. This form contains provisions explaining the four balance computation methods: (1) the previous balance method, (2) the adjusted balance method, (3) the average daily balance method (excluding current transactions), and (4) the average daily balance method (including current transactions) [see 12 C.F.R. pt. 226, app. G-1]. The form's clauses are based on the four model computation clauses issued by the Federal Reserve Board in Form G-1 of Appendix G of Regulation Z [see 12 C.F.R. pt. 226, app. G-1].

[vii] Amount of Finance Charge

The creditor must disclose the dollar amount of any finance charge imposed during the billing cycle, using the term "finance charge" [12 C.F.R. § 226.7(f)]. The components of the finance charge due to periodic rates and to other types of finance charges must be itemized as such, but the amount attributable to each of several periodic rates need not be separately stated [15 U.S.C. § 1637(b)(4); 12 C.F.R. § 226.7(f); Civ. Code § 1810.3(a)(4)]. For a definition of the term "finance charge" and further discussion, Ch. 45, *Consumer Installment Loans and Credit Sales*.

[viii] Annual Percentage Rate

When a finance charge is imposed during the billing cycle, the annual percentage rate based on that charge must be computed as provided by statute and disclosed in the periodic statement [15 U.S.C. § 1637(b)(6); 12 C.F.R. § 226.7(g); see 12 C.F.R. § 226.14 (annual percentage rate determined)]. The annual percentage rate will differ from the "corresponding annual percentage rate" if there are finance charges other than the periodic rate.

[ix] Other Charges

If any charges other than finance charges (such as late payment charges and over-the-credit-limit charges) are debited to the account, these charges must be itemized and identified by type [12 C.F.R. § 226.7(h)].

[x] Closing Date of Billing Cycle; New Balance

The creditor must disclose the closing date of the billing cycle and the account balance outstanding on that date. Unruh Act creditors are required to use the term "new balance" in making the latter disclosure [15 U.S.C. § 1637(b)(8); 12 C.F.R. § 226.7(i); Civ. Code § 1810.3(a)(7)].

[xi] Free-Ride Period

If finance charges on all or a portion of the new balance may be avoided by payment within a certain time, the creditor must state the pertinent time period or the required date of payment [15 U.S.C. § 1637(b)(9); 12 C.F.R. § 226.7(j); *Civ. Code* § 1810.3(a)(7)]. The creditor may impose the avoidable finance charges only if the periodic statement was mailed 14 days before the end of the free-ride period [15 U.S.C. § 1666b(a); 12 C.F.R. § 226.5(b)(2)(ii)].

[xii] Address for Notice of Billing Errors

This address may either be on the periodic statement or, if the creditor elects to provide a billing rights statement with each periodic statement [12 C.F.R. § 226.9(a)(2)], on the billing rights statement [15 U.S.C. § 1637(b)(10); 12 C.F.R. § 226.7(k)].

Certain required disclosures relating to credit or charge card renewals, and changes in credit insurance providers may be made on or with periodic statements [see 12 C.F.R. § 226.9(e), (f)]. For further discussion of these disclosures, see § 46.140.

[xiii] Late Payment Deadlines and Penalties

If a late payment fee will be due to the obligor's failure to make payment on or before a required payment due date, the billing statement must clearly and conspicuously state (1) date on which that payment is due or, if different, the earliest date on which a late payment fee may be charged, and (2) the amount of the late payment fee to be imposed if payment is made after that date [15 U.S.C. § 1637(b)(12); see Pub. L. 109-8, § 1305(b)(2) (requirement takes effect either on April 20, 2006, or 12 months after the publication of final implementing regulations, whichever is later)].

Civ. Code §§ 9 and 11, stating that whenever a legal or contractual act is required to be performed on a holiday, it may be performed on the next business day without any adverse consequence, do not apply to a national bank's credit card payment due dates because those state laws are preempted by a federal law [see 12 C.F.R. § 7.4008(d)(2)(iv)] stating that a national bank may make non-real-estate loans without regard to state law limitations concerning the terms of credit, including the schedule for repayment of principal and interest and the payments due [*Miller v. Bank of Am.* (2009) 170 Cal. App. 4th 980, 982, 88 Cal. Rptr. 3d 723] .

[d] Minimum Payment Warnings**[I] TILA Requirement**

In the case of an open end credit plan that requires a minimum monthly payment, the front side of the billing statement must include a prescribed minimum payment warning, disclosed clearly and conspicuously [15 U.S.C. § 1637(b)(11)]. This federal requirement takes effect on Oct. 21, 2006, or 12 months after publication of final regulations to implement the statutory requirements, whichever date is later [see Pub. L. No. 109-8, § 1301(b)(2) (Apr. 20, 2005)]. The requirement does not apply to any charge card account the primary purpose of which is to require payment of charges in full each month [15 U.S.C. § 1637(b)(11)(I)].

If the required minimum payment does not exceed 4 percent of the balance on which finance charges are accruing, the prescribed statement is [15 U.S.C. § 1637(b)(11)(A)]:

"Minimum Payment Warning: Making only the minimum payment will increase the interest you pay and the time it takes to repay your balance. For example, making only the typical 2% minimum monthly payment on a balance of \$1,000 at an interest rate of 17% would take 88 months to repay the balance in full. For an estimate of the time it would take to repay your balance, making only minimum payments, call this toll-free number: _____."

If the required minimum payment exceeds 4 percent of the balance on which finance charges are accruing, the creditor may elect to use the warning for a smaller minimum payment, above [15 U.S.C. § 1637(b)(11)(D)]; otherwise, the prescribed statement is [15 U.S.C. § 1637(b)(11)(B)]:

"Minimum Payment Warning: Making only the required minimum payment will increase the interest you pay and the time it takes to repay your balance. Making a typical 5% minimum monthly payment on a balance of \$300 at an interest rate of 17% would take 24 months to repay the balance in full. For an estimate of the time it would take to repay your balance, making only minimum monthly payments, call this toll-free number: _____."

Alternatively, in either of the cases described above, if the creditor maintains a toll-free number to disclose the actual repayment period using minimum payments, the prescribed statement is:

"Making only the minimum payment will increase the interest you pay and the time it takes to repay your balance. For more information, call this toll-free number: _____." [15 U.S.C. § 1637(b)(11)(J), (K)].

If the FTC enforces the creditor's compliance with TILA, the prescribed statement is [15 U.S.C. § 1637(b)(11)(C)]:

"Minimum Payment Warning: Making only the required minimum payment will increase the interest you pay and the time it takes to repay your balance. For example, making only the typical 5% minimum monthly payment on a balance of \$300 at an interest rate of 17% would take 24 months to repay the balance in full. For an estimate of the time it would take to repay your balance, making only minimum monthly payments, call the Federal Trade Commission at this toll-free number: _____."

In any case, the creditor may substitute an example based on an interest rate that is greater than 17 percent [15 U.S.C. § 1637(b)(11)(D)].

The TILA requirements are not identical to California law [see [ii], below]. Regulations implementing the TILA requirements, when available, should be consulted in order to reconcile the differences.

[ii] California Law

Under the Areias-Robbins Credit Card Full Disclosure Act of 1986, a credit card issuer must provide, with each billing statement provided to a cardholder in California, a "Minimum Payment Warning" in the following form [Civ. Code § 1748.13(a)(1)]:

Minimum Payment Warning: Making only the minimum payment will increase the interest you pay and the time it takes to repay your balance.

This warning must be followed by various statements regarding the length of time it will take, at various payment rates, to pay off the balance due on an open-end credit card account [see Civ. Code § 1748.13(a)(2), (3); see also [2], below]. In addition, if the cardholder has not paid more than the minimum payment for six consecutive months, the credit card issuer must provide the cardholder with referrals or, in the alternative, the toll-free telephone number of the National Foundation for Credit Counseling through which the cardholder can be referred, to credit counseling services in, or closest to, the cardholder's county of residence [see Civ. Code § 1748.13(a)(2)(B)].

The warning and related disclosures must appear on the front of the first page of the billing statement, in type no smaller than that required for any other required disclosure, but in no case in less than 8-point capitalized type [Civ. Code §

1748.13(a)(1)].

These requirements do not apply in any billing cycle in which the account agreement requires a minimum payment of at least 10 percent of the outstanding balance, or in which finance charges are not imposed [Civ. Code § 1748.13(c)].

The Department of Financial Institutions is required to establish a detailed table illustrating the approximate number of months that it would take and the approximate total cost to repay an outstanding balance if the consumer pays only the required minimum monthly payments and if no other additional charges or fees are incurred on the account, such as additional extension of credit, voluntary credit insurance, late fees, or dishonored check fees [see Civ. Code § 1748.13(a)(3)(C)]. A creditor that receives a request, through the required toll-free number, for an estimate of the time it would take for the cardholder to repay his or her creditor's balance, making only minimum payments and the total amount of those payments [see Civ. Code § 1748.13(a)(3)(A)], or who is required to provide a written statement providing individualized information indicating an estimate of the number of years and months and the approximate total cost to pay off the entire balance due on an open-end credit card account, if the cardholder were to pay only the minimum amount due on the open-ended account based upon the terms of the credit agreement [see Civ. Code § 1748.13(a)(2)(B)], may satisfy its obligation to disclose an estimate of the time it would take and the approximate total cost to repay the cardholder's balance by disclosing only the information set forth in the table established by the Department of Financial Institutions [Civ. Code § 1748.13(a)(3)(D)]. Including the full chart along with a billing statement does not satisfy the creditor's obligation [Civ. Code § 1748.13(a)(3)(D)].

Any waiver of the provisions of this Act is contrary to public policy and is unenforceable [Civ. Code § 1748.14].

[e] Billing Error Information

At least once per calendar year, and at intervals of not less than six not more than 18 months, a creditor must deliver a statement of billing rights to each consumer entitled to receive periodic statements [12 C.F.R. § 226.9(a)(1); see 12 C.F.R. pt. 226, app. G-3]. For further information, see § 46.212.

As an alternative to this annual statement, the creditor may deliver a summary statement of billing rights with each periodic statement [12 C.F.R. § 226.9(a)(2)]. The reverse side of this form contains a billing rights statement, based on the model summary billing rights statement issued by the Board of Governors of the Federal Reserve System [12 C.F.R. pt. 226, app. G-4]. While use of the model form is not mandatory, the summary statement must be substantially similar to the model form [12 C.F.R. § 226.9(a)(2)].

If the periodic statement does not contain a summary of billing rights, it must disclose the address of the creditor to which notice of billing errors may be sent [see 12 C.F.R. § 226.7(k)].

[f] Annual Statement of Finance Charges

Sellers of goods and services who (1) are subject to the Unruh Act because they establish their own retail installment accounts and (2) in the past two years made sales pursuant to accounts exceeding \$150,000,000 annually, must furnish to each buyer, on the buyer's request, a statement of all finance charges that the seller has charged the buyer or which the buyer has paid to the seller during the preceding year [Civ. Code § 1810.11]. The buyer may make such a request of the seller not more than once a year. The seller must provide information to the buyer within 30 days without charge. If the buyer's request is in writing, then the seller's response must also be in writing. The statement may be enclosed with the periodic billing [Civ. Code § 1810.11(a)].

A credit cardholder may request, not more frequently than once a year, that the open-end creditor issuing the card inform the cardholder of the total amount of finance charges assessed on the account during the preceding calendar year. The card issuer must provide the information, without charge, within 30 days of receiving the request [Civ. Code §

1748.5(a); see *Civ. Code* § 1748.5(b) (exception for card issuers or cardholders who issue or use credit cards in connection with retail installment accounts); see also *Civ. Code* § 1802.7 ("retail installment account" defined)). If the cardholder's request for the information is made in writing, the card issuer must provide the information in writing. However, the cardholder may furnish the information along with a periodic billing or periodic statement of account [*Civ. Code* § 1748.5(a)].

[g] Payments, Refunds, and Credit Balances

A creditor must promptly post payments received to the consumer's account, as of the date of receipt, unless a delay in crediting does not result in a finance or other charge or except as provided in 12 C.F.R. § 226.10(b), which permits a creditor to specify reasonable requirements for payments that enable most consumers to make conforming payments [15 U.S.C. § 1666c; 12 C.F.R. § 226.10(a); see 12 C.F.R. § 226.10(b)(2) (examples of reasonable requirements)]. If a creditor fails to credit a payment, as required, in time to avoid the imposition of finance or other charges, the creditor must adjust the consumer's account so that the charges imposed are credited to the consumer's account during the next billing cycle [12 C.F.R. § 226.10(c)]. If the due date for payments is a day on which the creditor does not receive or accept payments by mail, the creditor may not treat a payment received by mail the next business day as late for any purpose [12 C.F.R. § 226.10(d)].

If a creditor other than the card issuer accepts the return of property or forgives a debt for services that is to be reflected as a credit to the consumer's credit card account, that creditor must, within 7 business days from accepting the return or forgiving the debt, transmit a credit statement to the card issuer through the card issuer's normal channels for credit statements [15 U.S.C. § 1666e; 12 C.F.R. § 226.12(e)(1)]. The card issuer must, within 3 business days from receipt of a credit statement, credit the consumer's account with the amount of the refund [15 U.S.C. § 1666e; 12 C.F.R. § 226.12(e)(2)]. If a creditor other than a card issuer routinely gives cash refunds to consumers paying in cash, the creditor must also give credit or cash refunds to consumers using credit cards, unless it discloses at the time the transaction is consummated that credit or cash refunds for returns are not given [15 U.S.C. § 1666e; 12 C.F.R. § 226.12(e)(3)].

When a credit balance in excess of \$1 is created on a credit account, the creditor must follow additional procedures mandated by state and federal law. See § 46.230 for discussion of these procedures.

[2] FORM

Periodic Statement

[Face side of form]

_____ [issuer] STATEMENT

Account No. _____ Credit Limit \$ _____
Available Credit \$ _____

[To comply with Truth in Lending Act's minimum payment warning, use one of the following five alternatives, as applicable:]

[FIRST ALTERNATIVE: Include the language below if cardholder's account requires a minimum monthly payment of not more than four percent of the balance on which finance charges are accruing:]

Minimum Payment Warning: Making only the minimum payment will increase the interest you pay and the time it takes

to repay your balance. For example, making only the typical 2% minimum monthly payment on a balance of \$1,000 at an interest rate of 17% would take 88 months to repay the balance in full. For an estimate of the time it would take to repay your balance, making only minimum payments, call this toll-free number: *[creditor's toll-free number]*.

[OR]

[SECOND ALTERNATIVE: Include the language below, or, at creditor's option, the language of the first alternative, above, if cardholder's account requires a minimum monthly payment more than four percent of the balance on which finance charges are accruing:]

Minimum Payment Warning: Making only the required minimum payment will increase the interest you pay and the time it takes to repay your balance. Making a typical 5% minimum monthly payment on a balance of \$300 at an interest rate of 17% would take 24 months to repay the balance in full. For an estimate of the time it would take to repay your balance, making only minimum monthly payments, call this toll-free number: _____.

[OR]

[THIRD ALTERNATIVE: Include the language below if creditor's compliance with Truth in Lending Act is enforced by the Federal Trade Commission:]

Minimum Payment Warning: Making only the required minimum payment will increase the interest you pay and the time it takes to repay your balance. For example, making only the typical 5% minimum monthly payment on a balance of \$300 at an interest rate of 17% would take 24 months to repay the balance in full. For an estimate of the time it would take to repay your balance, making only minimum monthly payments, call the Federal Trade Commission at this toll-free number: _____.

[OR]

[FOURTH ALTERNATIVE: Substitute an example based on interest rate greater than 17 percent.]

[OR]

[FIFTH ALTERNATIVE: Include the language below if creditor maintains a toll-free number to provide customers with the actual number of months it will take to repay an outstanding balance; do not include the disclosures required in 15 U.S.C. § 1637(b)(11)(A) or (B) (first and second alternative, above):]

Making only the minimum payment will increase the interest you pay and the time it takes to repay your balance. For more information, call this toll-free number: _____.

[OR, to comply with Areias-Robbins Credit Card Full Disclosure Act's minimum payment warning, use one of following three alternatives, as applicable (Civ. Code § 1748.13(a)(2)(A):]

[FIRST ALTERNATIVE: Include the language below, or provide the following information for the three specified amounts at the actual annual percentage rate and required minimum payment applicable to the cardholder's account (Civ. Code § 1748.13(a)(2)(A)(i)); if selected; may be omitted if cardholder has a balance of less than \$ 500:]

Minimum Payment Warning: Making only the required minimum payment will increase the interest you pay and the time it takes to repay your balance. A one thousand dollar (\$1,000) balance will take 17 years and three months to pay off at a total cost of two thousand five hundred ninety dollars and thirty-five cents (\$2,590.35).

A two thousand five hundred dollar (\$2,500) balance will take 30 years and three months to pay off at a total cost of seven thousand seven hundred thirty-three dollars and forty-nine cents (\$7,733.49).

A five thousand dollar (\$5,000) balance will take 40 years and two months to pay off at a total cost of sixteen thousand three hundred five dollars and thirty-four cents (\$16,305.34).

This information is based on an annual percentage rate of 17 percent and a minimum payment of 2 percent or ten dollars (\$10), whichever is greater.

For an estimate of the time it would take to repay your balance, making only minimum payments, and the total amount of those payments, call this toll-free telephone number: _____.

[OR]

[SECOND ALTERNATIVE: Include the language below, or provide the following information for the three specified amounts at the actual annual percentage rate and required minimum payment applicable to the cardholder's account (Civ. Code § 1748.13(a)(2)(A)(ii)); if selected, may be omitted if cardholder has a balance of less than \$ 500:]

Minimum Payment Warning: Making only the required minimum payment will increase the interest you pay and the time it takes to repay your balance. A two hundred fifty dollar (\$250) balance will take two years and eight months to pay off a total cost of three hundred twenty-five dollars and twenty-four cents (\$325.24).

A five hundred dollar (\$500) balance will take four years and five months to pay off at a total cost of seven hundred nine dollars and ninety cents (\$709.90).

A seven hundred fifty dollar (\$750) balance will take five years and five months to pay off at a total cost of one thousand ninety-four dollars and forty-nine cents (\$1,094.49).

This information is based on an annual percentage rate of 21 percent and a minimum payment of 5 percent or ten dollars (\$10), whichever is greater.

For an estimate of the time it would take to repay your balance, making only minimum payments, and the total amount of those payments, call this toll-free telephone number: _____.

[OR]

[THIRD ALTERNATIVE; if selected, may be omitted if cardholder has paid more than the minimum payment for six consecutive months after July 1, 2002 (Civ. Code § 1748.13(a)(2)(B)):]

Minimum Payment Warning: Making only the required minimum payment will increase the interest you pay and the time it takes to repay your balance. If you pay only the minimum amount due on this account, it will take _____ years and _____ months to pay off your entire balance due of \$_____, at a total cost of \$_____. This information is based on the annual

percentage rate for your account, which is _____ percent and a minimum payment of _____ percent or _____ dollars, whichever is greater. *[If account is subject to a variable interest rate, add: These figures are based on the rate for the entire balance as of the date of this statement; the actual rate may vary.]*

Here _____ [are the names of credit counseling services in your county of residence or is the toll-free number of the National Foundation for Credit Counseling], which you may contact or call for credit counseling services: _____ [name and contact information of local credit counseling services, or toll-free number of National Foundation for Credit Counseling]

[Continue with the following:]

Activity Since Last Statement

Previous Balance:	\$ _____
_____	_____
Payments:	
Date	Amount
_____	\$ _____
_____	_____
_____	\$ _____
_____	_____
Total Payments	(less)
	\$ _____

(An amount followed by a minus sign (-) is a credit or a credit balance.)

Credits:

Date	Amount
Rebates	_____ \$ _____

Returns	_____ \$ _____

Adjustments	_____ \$ _____

Total Credits	(less)	
	\$	_____

FINANCE CHARGE	(plus)	
	\$	_____

New Transactions:

[Use if creditor and seller are the same or related entities:]

Type of Goods or Services Sold or of Credit Ad- vanced	Date	Amount
Purchases	_____	_____ \$ _____
	_____	_____
		\$ _____
	_____	_____
		—
		\$ _____
	_____	_____
		—

[OR]

[Use if creditor and the seller are not the same or related entities:]

Name and Loca- tion of Seller or Type of Credit Advanced	Date	Amount
Purchases	_____	_____ \$ _____
	_____	_____
		\$ _____
	_____	_____

[Continue as follows:]

Advances _____ \$ _____

_____ \$ _____

Total New Trans- (plus)
 actions \$ _____

Other Charges:

Late Charges \$ _____

[other charges] \$ _____

Total Other (plus)
 \$ _____

New Balance at \$ _____
 Date of Billing _____
 Cycle

_____ [date]

Payment

Due Date: _____ Minimum Payment: \$ _____

Payments, credits, or charges received after the closing date of the billing cycle covered by this statement will appear on your next statement. [Add if plan has a "free ride" period: To avoid additional finance charges, pay the "New Balance" _____ [before _____ (date) or within _____ (period)].

Calculation of Finance Charge

[Choose one of the following:]

[Use if adjusted balance method is used to compute finance charge:]

Your account is subject to a monthly periodic rate of _____ percent, which corresponds to a nominal

annual percentage rate of _____ percent. We figure [*add if applicable: a portion of*] the finance charge on your account by applying the periodic rate to the amount you owe at the beginning of each billing cycle. We do not subtract any payments or credits received during the billing cycle. The amount of payments and credits to your account this billing cycle was \$_____.

[OR]

[Use if previous balance method is used to compute finance charge:]

We figure [*add if applicable: a portion of*] the finance charge on your account by applying the periodic rate to the amount you owe at the beginning of each billing cycle [*add if applicable: minus any unpaid finance charges*]. We do not subtract any payments or credits received during the billing cycle. [*Add if applicable: The amount of payments and credits to your account this billing cycle was \$_____.*]

[OR]

[Use if average daily balance method (excluding current transactions) is used to compute finance charge:]

We figure [*add if applicable: a portion of*] the finance charge on your account by applying the periodic rate to the "average daily balance" of your account (excluding current transactions). To get the "average daily balance," we take the beginning balance of your account each day and subtract any payments or credits [*add if applicable: and any unpaid finance charges*]. We do not add in any new [purchases or advances or loans]. This gives us the daily balance. Then, we add all the daily balances of the billing cycle together and divide the total by number of days in the billing cycle. This gives us the "average daily balance."

[OR]

[Use if average daily balance method (including current transactions) is used to compute finance charge:]

We figure [*add if applicable: a portion of*] the finance charge on your account by applying the periodic rate to the "average daily balance" of your account (including current transactions). To get the "average daily balance," we take the beginning balance of your account each day, add any new [purchases or advances or loans] and subtract any payments or credits [*add if applicable: and any unpaid finance charges*]. This gives us the daily balance. Then, we add all the daily balances of the billing cycle together and divide the total by number of days in the billing cycle. This gives us the "average daily balance."

[OR]

[If the ending balance method is used to compute the finance charge:]

We figure [*add if applicable: a portion of*] the finance charge on your account by applying the periodic rate to the amount you owe at the end of each cycle (including new purchases and deducting payments and credits made during the

billing cycle).

Balance on Which Finance Charge was Computed \$ _____

FINANCE CHARGE from Periodic Rate\$ _____

FINANCE CHARGE from Activity Charge\$ _____

FINANCE CHARGE from Transaction Fees\$ _____

Total **FINANCE CHARGE**\$ _____

ANNUAL PERCENTAGE RATE

(based on total Finance Charge) percent

NOTICE:

See reverse side for important information.

[Reverse side of form]

BILLING RIGHTS SUMMARY

In Case of Errors or Questions About Your Bill

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us [*add if desired: on a separate sheet*] at _____ [*address*] as soon as possible. We must hear from you no later than 60 days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights.

In your letter, give us the following information:

- Your name and account number.
- The dollar amount of the suspected error.
- Describe the error and explain, if you can, why

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You do not have to pay any amount in question while we are investigating, but you are still obligated to pay the parts of your bill that are not in question. While we investigate your question, we cannot report you as delinquent or take any action to collect the amount you question.

Special Rule for Credit Card Purchases

If you have a problem with the quality of the goods or services that you purchased with a credit card, and you have tried in good faith to correct the problem with the merchant, you may not have to pay the remaining amount due on the goods or services. You have this protection only when the purchase price was more than \$50 and the purchase was made in your home state or within 100 miles of your mailing address. (If we own or operate the merchant, or if we mailed you the advertisement for the property or services, all purchases are covered, regardless of amount or location of purchase.)

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 46 CREDIT CARD AND OTHER OPEN-END CREDIT TRANSACTIONS
PART IV. FORMS

B. Consumer Credit Card and Retail Installment Accounts

20-46 California Legal Forms--Transaction Guide § 46.216

§ 46.216 Notice of Right to Prohibit Disclosure of Marketing Information

[1] Comment

[a] Use of Form

This form is a notice of a consumer-cardholder's right to prohibit disclosure of marketing information concerning the cardholder. It is to be sent by a card issuer to cardholders before disclosing marketing information [see *Civ. Code* § 1748.12]. This notice can be sent separately or can be included with the initial disclosure statement for new cardholders [see § 46.212 (form for initial disclosure)].

[b] When Notice Must be Given

Under the Areias-Robbins Credit Card Full Disclosure Act of 1986 [*Civ. Code* §§ 1748.10-1748.14], before disclosing marketing information concerning a consumer-cardholder, a credit card issuer must provide written notice to the cardholder that clearly and conspicuously describes the cardholder's right to prohibit disclosure of marketing information concerning the cardholder that discloses the cardholder's identity [*Civ. Code* § 1748.12(b); see *Civ. Code* § 1748.12(a) (definitions)].

These notice requirements are satisfied by furnishing notice to cardholders as follows [*Civ. Code* § 1748.12(c)]:

- At least 60 days prior to the initial disclosure of marketing information concerning the cardholder by the credit card issuer.
- For all new credit cards issued on or after April 1, 2002, on the form containing the new credit card when the credit card is delivered to the cardholder.
- At least once per calendar year, to every cardholder entitled to receive an annual statement of billings rights in accordance with 12 C.F.R. 226.9 (Regulation Z).

This notice may be included on or with any periodic statement or with the delivery of the renewal card [*Civ. Code* § 1748.12(c)].

[c] Contents of Notice

The notice must be in 10-point type. It must advise the cardholder of his or her ability to exercise the right to prohibit disclosure of marketing information pertaining to the cardholder either by completing a pre-printed form or calling a toll-free number [*Civ. Code* § 1748.12(b)].

[d] When Election Is Effective

The election to prohibit disclosure of marketing information is effective only with respect to marketing information that is disclosed to any party beginning 30 days after the credit card issuer has received, at the designated address on the form containing the new credit card or on the preprinted form, or by telephone, the cardholder's election to prohibit disclosure [*Civ. Code* § 1748.12(d)(1)]. This restriction does not apply to the disclosure of marketing information prior to the cardholder's notification to the credit card issuer of the cardholder's election [*Civ. Code* § 1748.12(d)(1)].

[e] When Election Terminates

The election to prohibit disclosure of marketing information terminates on receipt by the card issuer of notice from the cardholder that the cardholder's election to prohibit disclosure is no longer effective [*Civ. Code* § 1748.12(d)(2)].

[f] Exempt Communications of Marketing Information

The requirement to provide notice of the right to prohibit disclosure of marketing information does not apply to any of the following communications of marketing information by a credit card issuer [*Civ. Code* § 1748.12(e)]:

- Communications to a party to, or merchant specified in, the credit agreement, or to any person whose name appears on the credit card or on whose behalf the credit card is issued.
- Communications to consumer credit reporting agencies [*see Civ. Code* § 1785.3(d) (definition)].
- To the extent that the Fair Credit Reporting Act [15 U.S.C. § 1681 *et seq.*] exempts the requirements contained in *Civ. Code* § 1748.12 concerning communications by a credit card issuer to a corporate subsidiary or affiliate, the credit card issuer may communicate information about a cardholder to a corporate subsidiary or affiliate to the extent and in the manner permitted by that Act.
- Communications to a third party when the third party is responsible for conveying information from the card issuer to any of its cardholders.

[g] Notification of Disclosure of Personal Information

Civ. Code § 1798.83, as revised operative January 1, 2005 [*Civ. Code* § 1798.83(i) (operative date)] provides that with specified exceptions, a business that discloses a customer's personal information, including information relating to income or purchases, to a third party for direct marketing purposes, must provide the customer, within 30 days after the customer's request, in writing or by e-mail, the names and addresses of the recipients of that information and specified details regarding the information disclosed [*see Civ. Code* § 1798.83(a); *Civ. Code* § 1798.83(b)(1)(C)]. For further discussion of this statute, see § 46.96.

[2] FORM

Notice of Right to Prohibit Disclosure of Marketing Information

NOTICE OF RIGHT TO PROHIBIT DISCLOSURE OF MARKETING INFORMATION

_____[*date*]_____[*name of cardholder*]_____[*address of cardholder*][*last four digits of credit card account number*]Dear _____[*name of cardholder*]:

This notice is to inform you of your right, pursuant to *Civil Code Section 1748.12*, to prohibit the disclosure of marketing information about you. We periodically provide marketers of goods with marketing information about our cardholders that discloses the cardholders' identity.

If you wish to prohibit us from disclosing this information about you, complete the lower portion of this form and return it to us at _____[*address*] or call us toll-free at [*telephone number*].

Your decision to prohibit disclosure of marketing information about you will be effective until you tell us that you wish to change your decision.

_____[*name of card issuer*]_____[*typed name*]_____[*address*]

I, _____[*name of cardholder*], credit card account number [*account number*], do not want you to disclose marketing information about me to marketers of goods.

_____[*signature of cardholder*]_____[*typed name*]_____[*address*]**Legal Topics:**

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionCredit Card AgreementsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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B. Consumer Credit Card and Retail Installment Accounts

20-46 California Legal Forms--Transaction Guide § 46.217

§ 46.217 Notice Regarding Change of Address Request

[1] Comment

[a] Use of Form

This form is a change of address notification. It must be sent when credit card issuer receives a change of address request, other than for a correction of a typographical error, from a cardholder who orders a replacement credit card within 60 days before or after that request is received.

In addition, any business entity that provides telephone accounts [*see Civ. Code § 1799.1b(e)(2)* ("telephone account" defined)] that receives a change of address request, other than for a correction of a typographical error, from an account holder who orders new service, must send to that account holder a change of address notification that is addressed to the account holder at the account holder's previous address of record [*Civ. Code § 1799.1b(b)*]. However, a credit card issuer or a business entity that provides telephone accounts is not required to send a change of address notification when a change of address request is made in person by a consumer who has presented valid identification, or is made by telephone and the requester has provided a unique alpha-numeric password [*Civ. Code § 1799.1b(d)*].

[b] Manner of Notice

The required notice may be given by telephone or e-mail communication, if the credit card issuer or business entity that provides telephone accounts reasonably believes that it has the current telephone number or e-mail address for the account holder or cardholder who has requested a change of address [*Civ. Code § 1799.1b(c)*].

If the notification is in writing, it may not contain the consumer's account number, social security number, or other personal identifying information. However, the notification may contain the consumer's name, previous address, and new address of record [*Civ. Code § 1799.1b(c)*]. For business entities that provide telephone accounts [*see Civ. Code § 1799.1b(b)*], the notification may also contain the account holder's telephone number [*Civ. Code § 1799.1b(c)*].

The notice must be addressed to the cardholder at the cardholder's previous address of record [*Civ. Code § 1799.1b(a)*].

[c] Timing of Notice

If the replacement credit card is requested after the effective date of the change of address, the credit card issuer must send this notification within 30 days of the request for the replacement credit card [Civ. Code § 1799.1b(a)]. For business entities that provide telephone accounts, notification must be sent within 30 days of the request for new service [Civ. Code § 1799.1b(b)].

[2] FORM**Notice Regarding Change of Address Request**

NOTICE OF CHANGE OF ADDRESS REQUEST

_____ [date]
 _____ [name of cardholder]
 _____ [cardholder's previous address of record]
 _____ [cardholder's new address of record]

[Add, if business entity provides telephone accounts:]

[cardholder's telephone number]

[CONTINUE]

Dear _____ [name of cardholder]:

This notice is given to you in accordance with *Civil Code Section 1799.1b*.

[If issuer does not provide telephone accounts, use:]

_____ [name of card issuer] has received a change of address request from _____ [name of cardholder]. _____ [name of cardholder] also ordered a replacement credit card within 60 days before or after that request was received. _____ [name of cardholder]'s new address of record is: _____ [new address].

[Or, if issuer provides telephone accounts, use:]

_____ [name of card issuer] has received a change of address request from _____ [name of cardholder]. _____ [name of cardholder] has also requested a new service. _____ [name of cardholder]'s new address of record is: _____ [new address].

[CONTINUE]

If this information is not correct, please contact us immediately. You can reach us at [toll-free telephone number for customer service].

_____ *[name of card issuer]*
_____ *[signature]*
_____ *[typed name]*
_____ *[address]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionCredit Card AgreementsGeneral Overview



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B. Consumer Credit Card and Retail Installment Accounts

20-46 California Legal Forms--Transaction Guide §§ 46.218-46.229

[Reserved]

§§ 46.218[Reserved]



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 C. Debtor's Rights and Remedies

20-46 California Legal Forms--Transaction Guide § 46.230

§ 46.230 Notice of Right to Refund of Credit Balance in Retail Installment Account

[1] Comment

[a] Use of Form

This form is a notice of a consumer's right to a refund of a credit balance in a retail installment account. It is used by a creditor to notify a consumer of the right to request the refund [*see 15 U.S.C. § 1666d; 12 C.F.R. § 226.11; Civ. Code § 1810.3(e); see also [b], below*].

This form is based on the statutory form of disclosure set forth in *Civil Code Section 1810.3(e)(2)(A)*. To comply with the statute, the disclosure must contain the statutory information that is contained in this form, but need not be in exactly the form presented [*see Civ. Code § 1810.3(e)(2)(A)*].

[b] When Notice of Right to Refund Is Required

When a credit balance in excess of \$1 is created on a credit account, the creditor must (1) credit the amount of the credit balance to the account, (2) refund any part of the remaining credit balance within seven business days from receipt of a written request from the consumer, and (3) make a good faith effort to refund any part of the credit balance remaining in the account for more than six months [*15 U.S.C. § 1666d; 12 C.F.R. § 226.11; see Civ. Code § 1810.3(e)*]. Periodic statements must be delivered for each billing cycle at the end of which there is a debit or credit balance of more than \$1 or on which a finance charge has been imposed [*12 C.F.R. § 226.5(b)(2)(i); see Civ. Code § 1810.3(e)*]. Avoiding these requirements by simply mailing a refund without waiting for a request from the consumer is also permissible [*12 C.F.R. pt. 226, supp. I, § 226.11 (Official Staff Interpretations); Civ. Code § 1810.3(e)(2)(B)*]. The good faith effort at refunding a credit balance required after six months must include making attempts to reach or trace the consumer through the consumer's last known address or telephone number, or both if necessary [*12 C.F.R. pt. 226, supp. I, § 226.11(c) (Official Staff Interpretations)*].

If the account is a retail installment account subject to the Unruh Act [*Civ. Code §§ 1801-1812.20; see § 46.32[3]*], a creditor must comply with additional requirements. If the credit balance exists for a period of 90 days, and the seller

chooses not to simply refund the balance [see *Civ. Code* § 1810.3(e)(2)(B)], the seller must notify the buyer of his or her right to a refund. The notice must be sent in each of two billing cycles immediately following the 90-day period. It must contain prescribed information (set forth in this form), and it must be accompanied by a return envelope addressed to the seller [*Civ. Code* § 1810.3(e)(2)(A)].

If no refund request is received after 180 days, and the required attempt to mail a refund results in a return because the addressee is not at the address, the seller must again mail the refund with an address correction request and, if the seller obtains a corrected address, mail the refund to the corrected address [*Civ. Code* § 1810.3(f)(1), (2)]. If the seller is unable to refund a credit balance exceeding \$25, the seller must reinstate the credit balance on the account and leave it available as a credit against future purchases for a year [*Civ. Code* § 1810.3(f)(3)]. If, after three years from the creation of a credit balance, the sum remains unrefundable, it escheats to the state and must be paid to the Controller [*Civ. Code* § 1810.3(g)].

Since the requirements enumerated above can be complied with without violating the Truth in Lending Act, they are not preempted by that act [see 12 C.F.R. § 226.28(a)(2)].

[2] FORM

Notice of Right to Refund of Credit Balance in Retail Installment Account

REFUND OF CREDIT BALANCE

We owe you [amount]. Your credit balance will be refunded on request. If you don't request a refund, six months from the first appearance of a "credit balance" on your bill, your credit balance will be refunded automatically.

If your credit balance is \$1 or less, it will not be refunded unless requested, and after six months, it will not be credited against future purchases.

You may obtain a refund of your credit balance by mail by presenting your statement at our store or by returning the top half of your statement in the enclosed envelope.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Truth in Lending General Overview Contracts Law Secured Transactions Installment Contracts General Overview



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20-46 California Legal Forms--Transaction Guide § 46.231

§ 46.231 Cardholder's Demand on Retailer for Satisfactory Resolution of Dispute

[1] Comment

[a] Use of Form

This form is a letter by a credit card holder to a retailer demanding satisfactory resolution of a dispute or problem arising out of a retail purchase. This letter informs the retailer of the problem and preserves the cardholder's right to assert against the card issuer any claims or defenses arising out of the transaction. Use of this form is not mandatory; neither the federal Truth in Lending Act nor the California Song-Beverly Credit Card Act of 1971 requires that the cardholder make a written demand on the retailer [*see 15 U.S.C. § 1666i; 12 C.F.R. § 226.12(c)(1); Civ. Code § 1747.90(a)(1)*]. However, a demand in writing documents that a good faith effort has been made.

[b] Cardholder's Right to Assert Claims and Defenses Against Issuer

When a retailer that honors a credit card fails to satisfactorily resolve a dispute relating to property or services purchased with a credit card, the cardholder may assert against the card issuer all claims (other than tort claims) and defenses arising out of the transaction and relating to the failure to resolve the dispute [*15 U.S.C. § 1666i(a); 12 C.F.R. § 226.12(c)(1); Civ. Code § 1747.90(a)(1)*]. However, the right to assert such claims and defenses against the card issuer applies only if the cardholder has made a good faith attempt to resolve the dispute with the retailer honoring the card [*15 U.S.C. § 1666i(a)(1)(i); 12 C.F.R. § 226.12(c)(3)(i); Civ. Code § 1747.90(a)(1)(A); see 15 U.S.C. § 1666i(b)* (additional limitations); *12 C.F.R. § 226.12(c)(3)(ii); Civ. Code § 1747.90(a)(1)(B), (C); see also 12 C.F.R. § 226.12(c)(3)(ii) n.26* (exceptions to limitations); *Civ. Code § 1747.90(a)(2)*]. Refer to Section 46.232 for discussion of the additional limitations on this right.

The provisions of the Truth in Lending Act and the Song-Beverly Credit Card Act of 1971 relating to the assertion of claims and defenses against the card issuer are applicable only to consumer credit transactions [*15 U.S.C. § 1666i(a); Civ. Code §§ 1747.02(d), 1747.90*], not to transactions on credit cards issued for business use [*see 15 U.S.C. § 1603(1); 12 C.F.R. § 226.2(a)(8); Civ. Code § 1747.02(d)*]. Therefore, this form cannot be used to preserve any claims or defenses against a card issuer in a transaction involving a business credit card.

[2] FORM**Cardholder's Demand on Retailer for Satisfactory Resolution of Dispute****DEMAND ON RETAILER FOR SATISFACTION**_____[*date*]_____[*name of retailer*]_____[*address of retailer*]

Re: DEMAND FOR SATISFACTION

_____[*cardholder's name*][*credit card account number*]

To whom it may concern:

The purpose of this letter is to make a good faith effort to resolve my dispute with you regarding the following credit card purchase:

Date of purchase: _____.

Amount of purchase: \$_____

[Goods or Services] purchased: _____ [*describe goods or services, including type, brand name, model, quantity, and any other identifying information*].

[*Add if purchaser was not the cardholder:*]

The purchaser of the [goods or services] in dispute was _____ [*purchaser's name*]. The purchase described in this letter was an authorized use of this credit card.

[*Continue with the following:*]Nature of problem with respect to purchase: _____ [*state nature of problem with particularity*].Satisfaction demanded from retailer: [*describe satisfaction demanded with particularity*].

I look forward to your prompt response regarding this matter.

Very truly yours,

_____[*signature*]_____[*typed name*]_____[*address*]_____[*telephone number*]**Legal Topics:**

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionCredit Card AgreementsGeneral OverviewBanking LawConsumer ProtectionState
LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview



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20-46 California Legal Forms--Transaction Guide § 46.232

§ 46.232 Cardholder's Notice to Card Issuer of Claims and Defenses Against Retailer

[1] Comment

[a] Use of Form

This form is a notice by a credit card holder to a credit card issuer stating that the cardholder has a claim or defense against a retailer arising out of a credit card transaction. It apprises the card issuer of the fact that payment is being withheld and explains why.

This notice assumes that the cardholder has made a good faith effort and has failed to obtain satisfaction from the retailer honoring the card [*see 15 U.S.C. § 1666i(a)(1); 12 C.F.R. § 226.12(c)(3)(i); Civ. Code § 1747.90(a)(1)(A); see also § 46.231 [2]* (form of demand for satisfaction)]. To avoid any adverse effect on the cardholder's credit, this notice should be mailed to the card issuer as soon as it appears that the retailer will not honor the cardholder's claim, or within two billing cycles of the transaction if the retailer fails to respond to the cardholder's written demand for satisfaction. Refer to [c], *below*, for discussion of adverse credit reporting.

It is important to note that the cardholder should not pay any portion of the disputed amount prior to sending this notice, since doing so may limit the cardholder's rights [*see 15 U.S.C. § 1666i(b); 12 C.F.R. § 226.12(c)(1) n.25; Civ. Code § 1747.90(b)*].

[b] Cardholder's Right to Assert Claims and Defenses Against Issuer

The federal Truth in Lending Act and the California Song-Beverly Credit Card Act of 1971 give the cardholder the right to assert against the card issuer all claims and defenses arising out of a credit card transaction, other than tort claims [*15 U.S.C. § 1666i(a); 12 C.F.R. § 226.12(c)(1); Civ. Code § 1747.90(a)(1)*]. Thus, the cardholder may withhold payment up to the amount of credit outstanding for the property or services that gave rise to the dispute, and any finance or other charges imposed on that amount [*12 C.F.R. § 226.12(c)(1)*]. However, this right applies only to consumer credit transactions [*15 U.S.C. § 1666i; Civ. Code § 1747.90(a)(1)*], not to transactions on credit cards issued for business use [*see 15 U.S.C. § 1603(1); 12 C.F.R. § 226.2(a)(8); Civ. Code § 1747.02(d)*].

The cardholder's right to assert claims and defenses against the card issuer is subject to the following limitations [15 U.S.C. § 1666i(a); 12 C.F.R. § 226.12(c)(3)]:

- (1) The cardholder must make a good faith attempt to arrive at a satisfactory settlement of the disagreement with the person who honored the card;
- (2) The amount of the initial transaction must exceed \$50; and
- (3) The transaction must have occurred in the same state as the cardholder's mailing address, or, if it occurred in another state, within 100 miles of that address [see *Civ. Code* § 1747.90(a)(1)(C) (Song-Beverly Act requirement that transaction have occurred within California or within 100 miles of cardholder's current designated address in California)].

If the person honoring the card is also the card issuer, is controlled by the issuer, is under direct or indirect common control with the issuer, is a franchised dealer in the issuer's products or services, or obtained the order for the transaction through a mail solicitation made by or participated in by the issuer, then the \$50 minimum and the geographical restrictions are inapplicable [15 U.S.C. § 1666i(a); 12 C.F.R. § 226.12(c)(3) n.26; *Civ. Code* § 1747.90(a)(2)].

The amount of claims and defenses asserted by the cardholder may not exceed the amount of credit outstanding relating to the transaction at issue at the time the cardholder first notifies the card issuer or the person honoring the card of the claim or defense [15 U.S.C. § 1666i(b); 12 C.F.R. § 226.12(c)(1) n.25; *Civ. Code* § 1747.90(b)]. Thus, a cardholder who pays a disputed balance waives any right to assert any claims and defenses against the cardholder [12 C.F.R. pt. 226, supp. I, § 226.12(c) (Official Staff Interpretations)]. However, certain claims or defenses, such as nondelivery of goods, may be treated as billing errors irrespective of whether or not the cardholder has waived the right to assert claims and defenses [12 C.F.R. pt. 226, supp. I, § 226.12(c) (Official Staff Interpretations)]. For discussion of what constitutes a "billing error," refer to Section 46.233.

To determine the amount of outstanding credit, payments and credits to the cardholder's account will be applied first to payment of any late charges in the order of their entry, then to payment of any finance charges in the order of their entry, and finally to the payment of any other debits in the order of entry to the account [15 U.S.C. § 1666i(b); 12 C.F.R. § 226.12(c)(1) n.25; *Civ. Code* § 1747.90(b)].

[c] Prohibition Against Adverse Credit Reports

If a cardholder entitled to withhold payments to the issuer because of a claim or defense against a business honoring the card exercises that right, the card issuer may not report the withheld amount as delinquent until the dispute is settled or judgment is rendered [12 C.F.R. § 226.12(c)(2)].

[2] FORM

Cardholder's Notice to Card Issuer of Claims and Defenses Against Retailer

NOTICE TO CARD ISSUER OF CLAIM OR DEFENSE AGAINST RETAILER

_____ [date]

_____ [name of card issuer]

_____ [address of card issuer]

Re: NOTICE OF _____ CLAIM [or DEFENSE] AGAINST RETAILER

_____ [cardholder's name]
 [credit card account number]

To whom it may concern:

The purpose of this letter is to notify you that _____ [cardholder's name], the holder of _____ [card issuer's name] credit card account number [account number] has a [claim or defense] against _____ [retailer's name], _____ [retailer's address], arising out of a credit card transaction.

[Add if purchaser was not the cardholder:]

The purchaser of the [goods or services] in dispute was _____ [purchaser's name]. The purchase described in this letter was an authorized use of this credit card.]

[Continue with the following:]

Date of purchase: _____.

Amount of purchase: \$ _____

[Goods or Services] purchased: _____ [describe goods or services, including type, brand name, model, quantity, and any other identifying information].

Nature of [claim or defense] with respect to purchase: _____ [state nature of claim with particularity].

Attempts to obtain satisfaction from retailer: [describe attempts with particularity].

For the foregoing reasons, the cardholder intends to withhold payment of the amount of credit outstanding for the above [goods or services], and any finance or other charges imposed on that amount, until this dispute is settled or a judgment is rendered.

Thank you for your attention.

Very truly yours,

_____ [signature]
 _____ [typed name]
 _____ [address]
 _____ [telephone number]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Credit Card Agreements General Overview Banking Law Consumer Protection State Law General Overview Banking Law Consumer Protection Truth in Lending General Overview



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20-46 California Legal Forms--Transaction Guide § 46.233

§ 46.233 Notice of Billing Error

[1] Comment

[a] Use of Form

This form is a notice by a credit card holder informing the credit card issuer of a billing error and requesting a correction or explanation.

In order to take advantage of the fair credit billing provisions of the Truth in Lending Act and the Song-Beverly Credit Card Act of 1971, the cardholder must notify the card issuer, in writing, of a billing error no later than 60 days after receiving the first periodic statement reflecting the error [15 U.S.C. § 1666(a); 12 C.F.R. § 226.13(b)(1); *Civ. Code* § 1747.02(g)]. The notice must enable the issuer to identify the cardholder's name and account number, and, to the extent possible, indicate the consumer's belief that a billing error exists, the reasons for that belief, and the type, date, and amount of the error [15 U.S.C. § 1666(a); 12 C.F.R. § 226.13(b); *Civ. Code* § 1747.02(g)]. The credit card issuer may require that the notice of billing error be made on a separate sheet rather than on the payment medium or other material accompanying the periodic statement, provided that any such requirement is disclosed in the statement of billing rights [12 C.F.R. § 226.13(b) n.29; *see* § 46.212].

The fair credit billing provisions of the Truth in Lending Act and the Song-Beverly Credit Card Act of 1971 are inapplicable to transactions on business credit cards [15 U.S.C. § 1603(1); 12 C.F.R. § 226.2(a)(8); *Civ. Code* § 1747.02(d); *see American Express Co. v. Koerner* (1981) 452 U.S. 233, 241-244, 101 S. Ct. 2281, 68 L. Ed. 2d 803] .

[b] Billing Error Rights Independent of Right to Assert Claims and Defenses

The cardholder's right to the correction of billing errors is completely independent of the right to assert claims and defenses against the card issuer [12 C.F.R. pt. 226, supp. I, § 226.12(c) (Official Staff Interpretations)]. Thus, when a dispute constitutes both a defense to payment and a billing error, as in the case of nondelivery of merchandise, the cardholder may institute procedures to have the dispute corrected as a billing error without affecting the right to assert claims and defenses against the card issuer. Alternatively, such a dispute can be asserted as a billing error even if the

cardholder has waived the right to assert claims and defenses against the card issuer by paying the disputed balance [12 C.F.R. pt. 226, supp. I, § 226.12(c) (Official Staff Interpretations); *see* § 46.232].

[c] "Billing Error" Defined

The federal Truth in Lending Act and the California Song-Beverly Credit Card Act of 1971 define "billing error" differently. The Truth in Lending Act specifies seven specific categories of errors [*see* 15 U.S.C. § 1666(b); 12 C.F.R. § 226.13(a)], while the Song-Beverly Act simply defines the term as an error in posting any debit or credit, an error in computation, or a similar error of an accounting nature contained in a statement given to the cardholder by the card issuer [*Civ. Code* § 1747.02(j)]. When there is a conflict, the federal definition preempts any state definition [12 C.F.R. pt. 226, supp. I, § 226.28(a) (Official Staff Interpretations); *see* 12 C.F.R. § 226.28(a); *Civ. Code* § 1747.01].

Thus, a periodic statement that reflects any of the following contains a "billing error" [12 C.F.R. § 226.13(a); *see* 15 U.S.C. § 1666(b); *see also* *Civ. Code* § 1747.01]:

- (1) An extension of credit that was not made to the cardholder or to a person who has actual, implied, or apparent authority to use the cardholder's credit card or open-end credit plan.
- (2) An extension of credit that is not properly identified [*see* 12 C.F.R. §§ 226.7(b) (periodic statement requirements), 226.8 (transactions identification requirements)].
- (3) An extension of credit for property or services not accepted by the cardholder or the cardholder's designee, or not delivered to the cardholder or the cardholder's designee as agreed. This category covers a variety of disputes, including a billing for goods that the consumer refused to accept because the goods did not comply with the contract, delivery of property or services different from those agreed upon, delivery of the wrong quantity, late delivery, or delivery to the wrong location [12 C.F.R. pt. 226, supp. I, § 226.13(a)(3) (Official Staff Interpretations)]. Although the Song-Beverly Credit Card Act of 1971 specifies that "billing error" does not mean "any dispute with respect to value, quantity or quality of goods, services, or other benefits obtained through use of a credit card" [*Civ. Code* § 1747.02(j)], the Federal Reserve Board's Official Staff Interpretations to Regulation Z state that this category does not apply "to a dispute relating to the quality of property or services that a consumer accepts" [12 C.F.R. pt. 226, supp. I, § 226.13(a)(3) (Official Staff Interpretations)]. Because the federal definition preempts any conflicting state definition [12 C.F.R. pt. 226, supp. I, § 226.28(a) (Official Staff Interpretations); *see* 12 C.F.R. § 226.28(a); *Civ. Code* § 1747.01], a dispute over the quantity, quality, or value of goods may be asserted as a billing error provided the cardholder has not yet accepted the goods [*see* 12 C.F.R. pt. 226, supp. I, § 226.13(a)(3) (Official Staff Interpretations)]. Whether acceptance occurred is determined by state or other applicable law [12 C.F.R. pt. 226, supp. I, § 226.13(a)(3) (Official Staff Interpretations)].
- (4) The creditor's failure to properly credit a payment or other credit issued to the cardholder's account.
- (5) A computational or similar accounting error made by the creditor.
- (6) An extension of credit for which the consumer requests additional clarification, including documentary evidence.
- (7) The creditor's failure to mail or deliver a periodic statement to the consumer's last known address if that address was received by the creditor, in writing, at least 20 days before the end of the billing cycle for which the statement was required.

[d] Creditor's Duties After Receipt of Notice

The creditor must mail or deliver written acknowledgment to the consumer within 30 days of receiving a billing error notice if the matter is not resolved within that time [12 C.F.R. § 226.13(c)(1)]. If the creditor determines that a billing error occurred as asserted, it must correct the error and credit the consumer's account with any disputed amount and related finance or other charges, as well as mail or deliver a correction notice to the consumer [15 U.S.C. § 1666(a)(3)(B)(i); 12 C.F.R. § 226.13(e)]. If, after conducting a reasonable investigation, a creditor determines that no billing error occurred, the creditor must send the consumer an explanation of the creditor's position and furnish copies of documentary evidence of the consumer's indebtedness, if the consumer requests such copies [15 U.S.C. § 1666(a)(3)(B)(ii); 12 C.F.R. § 226.13(f)(1), (2)]. The creditor must complete the applicable procedures within two complete billing cycles, but in no event later than 90 days, after receiving a billing error notice [12 C.F.R. § 226.13(c)(2); Civ. Code § 1747.50(a)].

Pending resolution of the alleged billing error, the consumer need not pay (and the creditor may not try to collect) any portion of any required payment that the consumer believes is related to the disputed amount [12 C.F.R. § 226.13(d)(1)]. The amount may be reflected on a periodic statement but only if the creditor indicates that payment of any disputed amount and related charges is not required before the creditor resolves the billing error claim [12 C.F.R. § 226.13(d)(1) n.30]. During this period the creditor may not make or threaten to make any adverse credit report based on the consumer's nonpayment of the disputed amount [15 U.S.C. § 1666a(a); 12 C.F.R. § 226.13(d)(2)].

Further, if the cardholder maintains a deposit account with the card issuer and has agreed to pay the credit card indebtedness by periodic deductions from this account, the card issuer may not deduct any part of the disputed amount or related charges if the billing error notice is received at least three business days before the scheduled payment date [12 C.F.R. § 226.13(d)(1)].

[e] Creditor's Rights and Duties After Resolution

If a creditor determines that a consumer owes all or part of the disputed amount and related charges, the creditor must promptly notify the consumer, in writing, of the time when payment is due and the portion of the disputed amount and charges that the consumer owes [12 C.F.R. § 226.13(g)(1)].

If the creditor generally allows a "free-ride period" within which any credit extended may be paid without imposition of additional finance charges, the same time period must be allowed for payment of the disputed amount [12 C.F.R. § 226.13(g)(2)]. After the expiration of the free-ride period, or 10 days, whichever is longer, if the amount remains unpaid, the creditor may report the account as delinquent [12 C.F.R. § 226.13(g)(3)]. However, a creditor may not report that an account is delinquent if, within the time allowed for payment, the creditor receives written notice from the consumer that any portion of the billing error is still in dispute, unless (1) the creditor promptly reports that the account is in dispute, (2) delivers to the consumer written notice of the name and address of each person to whom the creditor makes a report (at the same time the report is made), and (3) promptly reports any subsequent resolution of the reported delinquency to all persons to whom such a report was made [15 U.S.C. § 1666a(b), (c); 12 C.F.R. § 226.13(g)(4)].

A creditor has no further responsibilities if a consumer reasserts substantially the same billing error [12 C.F.R. § 226.13(h)].

[f] Penalties for Creditor's Failure to Act

Under the federal Truth in Lending Act, a creditor who fails to comply with the billing error requirements forfeits any right to collect from the cardholder the amount of the claimed billing error and any finance charges on that amount, whether or not a billing error actually occurred [15 U.S.C. § 1666(e)]. However, the amount that may be forfeited for noncompliance is limited to \$50 [15 U.S.C. § 1666(e)]. The creditor is also subject to civil liability for actual damages, twice the amount of any finance charge in connection with the transaction, costs, and attorneys' fees [see 15 U.S.C. §

1640(a)], except in the case of unintentional violations resulting from bona fide errors [15 U.S.C. § 1640(c)].

The California Song-Beverly Credit Card Act of 1971 provides that a card issuer that fails to correct a billing error within the prescribed 90-day period is not entitled to collect the amount by which the outstanding balance of the cardholder's account is greater than the correct balance, or any other charges on the obligation giving rise to the billing error [Civ. Code § 1747.50(b)]. In addition, a card issuer may be liable for treble damages, reasonable costs, and attorneys' fees for willful failure to comply with the fair credit billing requirements [Civ. Code § 1747.50(c)]. There has been no definitive determination regarding whether the latter remedy is preempted by the Truth in Lending Act [see 12 C.F.R. § 226.28(a)(2)(i) (all state requirements relating to correction of billing errors are inconsistent if they provide different rights, responsibilities, or procedures); *but see* 15 U.S.C. § 1666j(a) (Federal Reserve Board may not declare inconsistent a state law giving consumer greater protection); 12 C.F.R. § 226.28(a)(2)(ii); *see also* 12 C.F.R. pt. 226, supp. I, § 226.28(a) (Official Staff Interpretations)]. However, there does not appear to be any fundamental inconsistency between the additional state remedy and the federal statute's stated purpose of protecting the consumer [see 15 U.S.C. § 1601(a)].

The Song-Beverly Credit Card Act of 1971 also provides for mandatory correction by a retailer of billing errors made by the retailer, within 60 days from the date of mailing of the billing-error inquiry [Civ. Code § 1747.60(a)]. It appears that this provision is not preempted since it covers a situation not dealt with in the Truth in Lending Act [see 12 C.F.R. § 226.28(a)(2)].

[2] FORM

Notice of Billing Error

NOTICE OF BILLING ERROR

_____ [date]

_____ [name of card issuer]

_____ [address of card issuer]

Re: BILLING ERROR

_____ [cardholder's name]

[credit card account number]

To whom it may concern:

The purpose of this letter is to notify you that _____ [cardholder's name], the holder of _____ [card issuer's name] credit card account number [account number], believes that the _____ [bill or statement] sent by _____ [card issuer's name] [on or for] _____ [date of bill or period covered] contains a billing error.

The amount of the billing error is \$ _____.

The reasons for the cardholder's belief that there is a billing error are as follows: _____ [state reasons with particularity].

[Add if applicable:]

The cardholder requests documentary evidence of the debt claimed by _____ [card issuer's name], which is disputed by this notice.

[Add if the cardholder has a deposit account with the issuer:]

You are further required to take no action to offset the disputed amount against any funds that the cardholder has on deposit with your institution, if you receive this billing error notice at least three days before the scheduled payment date, which is _____ [date].

[Continue with the following:]

Thank you for your attention.

Very truly yours,

_____ [signature]
_____ [typed name]
_____ [address]
_____ [telephone number]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionCredit Card AgreementsGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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 C. Debtor's Rights and Remedies

20-46 California Legal Forms--Transaction Guide § 46.234

§ 46.234 Notice of Loss or Theft of Credit Card and Possible Unauthorized Use

[1] Comment

[a] Use of Form

This form is a notice used to report the loss or theft of a credit card to the card issuer in order to limit the cardholder's liability to a maximum of \$50 [12 C.F.R. § 226.12(b)(1); see [b], *below*].

Notification is given when the cardholder takes whatever steps are reasonably required to provide the card issuer with pertinent information about the loss or theft of the card and possible unauthorized use. Notification may be given in person, by telephone, or in writing. Notification in writing is considered given at the earlier of the time of receipt or at the expiration of the time ordinarily required for transmission, whether or not received [12 C.F.R. § 226.12(b)(3)].

Prompt notification to the card issuer may limit or eliminate the cardholder's liability. Written notice of loss or theft is not required under either federal or state law [see 12 C.F.R. § 226.12(b)(3); *Civ. Code* § 1747.10(e)]. However, if a telephone call informing the issuer of loss or theft is followed by a written notice, the consumer will have proof of notice to the issuer if a dispute arises.

[b] Conditions and Extent of Liability for Unauthorized Use

A cardholder's maximum liability for unauthorized use (including a series of unauthorized uses) is limited to the lesser of \$50 or the amount of property, money, labor, or services obtained by the unauthorized use before the card issuer is notified of the loss, theft, or possible unauthorized use of the card [15 U.S.C. § 1643(a)(1)(B), (E); 12 C.F.R. § 226.12(b)(1); *Civ. Code* § 1747.10(b), (e); see 12 C.F.R. pt. 226, supp. I, § 226.12(b)(1) (Official Staff Interpretations)]. Liability may be imposed on the cardholder only if certain conditions are met [see 15 U.S.C. §§ 1602(l), 1643(a)(1); 12 C.F.R. § 226.12(b)(2); *Civ. Code* §§ 1747.02(b), 1747.10]. For discussion of the extent of the cardholder's liability for unauthorized use of the card, and the conditions under which liability can be imposed, see *Section 46.213[1][c]*. For a form of disclosure to a cardholder of potential liability for unauthorized use, see *Section 46.213[2]*.

[2] FORM**Notice of Loss or Theft of Credit Card and Possible Unauthorized Use**

NOTICE OF LOSS OR THEFT OF CREDIT CARD

_____ [date]

_____ [name of card issuer]

_____ [address of card issuer]

Attention: Lost or Stolen Card Department

Re: REPORT OF LOSS OR THEFT

_____ [cardholder's name]

[credit card account number]

To whom it may concern:

The purpose of this letter is to notify you that the _____ [name of credit card], account number [credit card account number], issued to _____ [cardholder's name], was [lost or stolen] at approximately [time], on _____ [date], and that unauthorized use may occur.

The [loss or theft] occurred at [specify location] under the following circumstances: [describe]. [Add if applicable: It is likely that the credit card is in the possession of _____ (name or general description), who may be located at _____ (location)]. The first notice of this [loss or theft] was given to you by telephone at [time], on _____ [date], and notice was also given to _____ [name and address of authorities] on _____ [date].

Thank you for your attention.

Very truly yours,

_____ [signature]

_____ [typed name]

_____ [address]

_____ [telephone number]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Credit Card Agreements General Overview Banking Law Consumer Protection Credit Card Agreements Liability



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20-46 California Legal Forms--Transaction Guide § 46.250

§ 46.250 Notice of Unauthorized Access to Unencrypted Confidential Personal Information Contained in Data Files

[1] Comment

[a] Use of Form

This form is a notice to a California resident informing that person of the unauthorized acquisition of computerized data containing the person's personal information. The form is for use by a state agency, or a person or business that conducts business in California, that owns or licenses computerized data that includes personal information, following discovery of a breach in the security of that data [*see Civ. Code §§ 1798.29(a), (b), 1798.82(a); see also Civ. Code §§ 1798.29(d), (e), 1798.82(d), (e)* ("personal information" and "breach of the security system" defined); [b], *below*]. This form satisfies the requirements of written notice under the statute [*see Civ. Code §§ 1798.29(g)(1), 1798.82(g)(1); see also [d], below*]. The law became effective on July 1, 2003 [*see 2002 Stats., Ch. 915, § 5*].

For a notice of loss or theft of credit card and possible unauthorized use, see § 46.235.

[b] Disclosure Requirements

Effective July 1, 2003, a state agency, or a person or business that conducts business in California, that owns or licenses computerized data that includes personal information must disclose, in specified ways, any breach of the security of the data to any resident of California whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person [*Civ. Code §§ 1798.29(a), 1798.82(a); see Civ. Code §§ 1798.29(g), (h) 1798.82(g), (h)* (methods of giving notice); [c], *below*]. In addition, a state agency that maintains computerized data that includes personal information that the agency does not own must notify the owner or licensee of the information of any breach of the security of the data immediately following discovery, if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person [*Civ. Code § 1798.29(b)*].

"Personal information" in this context means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either the name or the data elements are not encrypted [*Civ. Code*

§§ 1798.29(e), 1798.82(e)]:

- Social security number.
- Driver's license number or California Identification Card number.
- Account number, credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account.
- Medical information [see *Civ. Code* §§ 1798.29(f)(2), 1798.82(f)(2) (definition)].
- Health insurance information [see *Civ. Code* §§ 1798.29(f)(3), 1798.82(f)(3) (definition)].

"Personal information" does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records [*Civ. Code* §§ 1798.29(f)(1), 1798.82(f)(1)].

"Breach of the security system" is unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by the agency, person, or business [*Civ. Code* §§ 1798.29(d), 1798.82(d)]. Good faith acquisition of personal information by an employee or agent of the agency for the purposes of the agency is not a breach of the security of the system, provided that the personal information is not used or subject to further unauthorized disclosure [*Civ. Code* §§ 1798.29(d), 1798.82(d)].

Disclosure must be made "in the most expedient time possible and without unreasonable delay," consistent with any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system [*Civ. Code* §§ 1798.29(a), 1798.82(a)]. Notifications may be delayed if a law enforcement agency determines that it would impede a criminal investigation [see *Civ. Code* §§ 1798.29(a), (c), 1798.82(a), (c)].

[c] Notification Procedures

Notice may be provided by one of the following methods [*Civ. Code* §§ 1798.29(g)(1)-(3), 1798.82(g)(1)-(3)]:

- Written notice.
- Electronic notice, if the notice provided is consistent with the provisions regarding electronic records and signatures set forth in the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 [see § 46.212[1][h]].
- Substitute notice, if the agency, person, or business demonstrates that the cost of providing notice would exceed \$250,000, or that the affected class of subject persons to be notified exceeds 500,000, or the agency, person, or business does not have sufficient contact information.

Substitute notice must consist of all of the following [*Civ. Code* §§ 1798.29(g)(3)(A)-(C), 1798.82(g)(3)(A)-(C)]:

- E-mail notice when the agency, person, or business has e-mail addresses for the subject persons.
- Conspicuous posting of the notice on the Web site page of the agency, person, or business, if a Web site page is maintained.
- Notification to major statewide media.

Notwithstanding these notice requirements, an agency, person or business that maintains its own notification procedures as part of an information security policy for the treatment of personal information and is otherwise consistent with the timing requirements of *Civ. Code* §§ 1798.29(a) and 1798.82(a) [see [b], above] is deemed to be in compliance with the statutory notification requirements [see *Civ. Code* §§ 1798.29(g), 1798.82(g)] if it notifies affected persons in accordance with its policies in the event of a breach of security of the system [*Civ. Code* §§ 1798.29(h) and 1798.82(h)].

[d] Rights and Remedies

Any customer injured by a violation of the law protecting consumer records [*Civ. Code* §§ 1798.80-1798.84] may institute a civil action to recover damages [*Civ. Code* § 1798.84(b)]. Injunctive relief is also available [*Civ. Code* § 1798.84(e)]. A prevailing plaintiff in any action commenced under *Civ. Code* § 1798.83 [discussed in § 46.96] is entitled to recover reasonable attorneys' fees and costs [*Civ. Code* § 1798.84(g)]. For additional discussion of the remedies available for violations of the laws governing consumer records, see § 46.97.

[2] FORM

Notice of Unauthorized Access to Unencrypted Confidential Personal Information Contained in Data Files

Date: _____

From: _____ [Sender's name]

_____ [Sender's address]

_____ [Sender's telephone number]

To: _____ [Customer's name]

_____ [Customer's address]

NOTICE OF UNAUTHORIZED ACCESS TO YOUR PERSONAL INFORMATION CONTAINED IN DATA FILES

This notice is to inform you that there has been a breach in the security of our computerized system and that your unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person.

Your "personal information" in this case means your first name or first initial and last name in combination with any the following:

[Include only the relevant data elements:]

- Social security number.
- Driver's license number or California Identification Card number.
- Account number, credit or debit card number, in combination with any required security code, access code, or password that would permit access to your financial account.

[The following is not required by statute; add if desired:]

There are several sources to contact to resolve the problems that result from identity theft. These include, but are not

limited to, the three credit reporting companies--CSC Credit Services (Equifax), Experian (formerly TRW), and Trans Union, your creditors, and law enforcement.

The California State Attorney General provides resources for information about identity theft, including:

- *The General Guide for Victims of Identity Theft*. This guide is available online at the following address: www.privacy.ca.gov/identitytheft.htm.
- *Tips for Victims, A General Guide for Victims of Identity Theft*. This publication includes a list of things to do immediately, as well as a list of identity theft resources. It is available online at <http://caag.state.ca.us/idtheft/tips.htm>.

[Continue with the following:]

If you have any questions, please call us at the telephone number listed above.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewContracts LawDebtor & Creditor Relations



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20-46 California Legal Forms--Transaction Guide § 46.251

§ 46.251 Notice to Consumer Regarding Choice With Respect to Sharing of Nonpublic Personal Information

[1] Comment

[a] Use of Form

This form, entitled Important Privacy Choices for Consumers, is a notice from a financial institution to a consumer informing the consumer regarding the consumer's right to control the dissemination of his or her nonpublic personal information, and soliciting the consumer's response regarding whether or not the consumer will permit disclosure of that information. This form is set out by statute [*Fin. Code § 4053(d)(2)(A)*] and is presumed by statute to satisfy the notice requirements of the California Financial Information Privacy Act (*Fin. Code § 4050 et seq.*) [*see Fin. Code § 4053(d)(1)(A)*], effective July 1, 2004 [*Fin. Code § 4060*]. Financial institutions are required to send such a notice to consumers so that the consumers may make a decision and provide direction to the financial institution regarding the sharing of their nonpublic personal information. If the financial institution does not use the statutory form, it must use a form that meets specified requirements [*Fin. Code § 4053(d)(1)*; *see [e], below*].

However, state laws are preempted by provisions of the federal Fair Credit Reporting Act concerning the exchange of information among persons affiliated by common ownership or common corporate control [*15 U.S.C. § 1681t(b)(2)*], and the federal act preempts the Financial Information Privacy Act insofar as the California law attempts to regulate the communication between affiliates of consumer-report information as that term is defined in *15 U.S.C. § 1681a(d)(1)* [*American Bankers Ass'n v. Lockyer* (9th Cir. 2008) 541 F.3d 1214, 2008 U.S. App. LEXIS 18861, at *5-*6, *10 (*Fin. Code § 4053(b)(1)* is preempted insofar as it applies to consumer-report information as defined in *15 U.S.C. § 1681a(d)(1)* but is not preempted insofar as it applies to nonconsumer-report information); *American Bankers Ass'n v. Gould* (9th Cir. 2005) 412 F.3d 1081, 1087 (federal act preempts California Financial Information Privacy Act, *Fin. Code § 4050 et seq.*, insofar as California law attempts to regulate inter-affiliate communication of "information," as that term is defined in *15 U.S.C. § 1681a(d)(1)*)].

A financial institution is not required to provide the form to its consumers if the institution does not disclose any nonpublic personal information to any nonaffiliated third party or to any affiliate [*Fin. Code §§ 4053(b)(5), 4054(a)*; *see Fin. Code § 4052* (definitions); *[b], [c], below*].

[b] "Nonpublic Personal Information" Defined

For the purposes of the California Financial Information Privacy Act (Act) [*Fin. Code § 4050 et seq.*], "nonpublic personal information" means personally identifiable financial information (1) provided by a consumer to a financial institution, (2) resulting from any transaction with the consumer or any service performed for the consumer, or (3) otherwise obtained by the financial institution [*Fin. Code § 4052(a)*]. The term includes any list, description, or other grouping of consumers, and publicly available information pertaining to them, that is derived using any nonpublic personal information other than publicly available information [*Fin. Code § 4052(a)*]. However, the term does not include any list, description, or other grouping of consumers, and publicly available information pertaining to them, that is derived without using any nonpublic personal information [*Fin. Code § 4052(a)*]. Additionally, the term does not include publicly available information that the financial institution has a reasonable basis to believe is lawfully made available to the general public from federal, state, or local government records, widely distributed media, or disclosures to the general public that are required to be made by federal, state, or local law [*Fin. Code § 4052(a)*].

[c] "Consumer," "Financial Institution," and Related Terms Defined

"Consumer" means an individual resident of California, or that individual's legal representative, who obtains or has obtained from a financial institution a financial product or service to be used primarily for personal, family, or household purposes [*Fin. Code § 4052(f)*]. In this context, a California resident is someone whose last known mailing address, other than an Armed Forces Post Office or FPO address, as shown in the records of the financial institution, is located in California [*Fin. Code § 4052(f)*]. If the financial institution provides all required notices and rights required by the Act to the plan sponsor, group or blanket insurance policyholder, or group annuity contract holder, an individual is *not* a consumer of a financial institution solely because he or she is one of the following [*Fin. Code § 4052(f)*]:

- A participant or beneficiary of an employee benefit plan that a financial institution administers or sponsors, or for which the financial institution acts as a trustee, insurer, or fiduciary.
- Covered under a group or blanket insurance policy or group annuity contract issued by the financial institution.
- A beneficiary in a workers' compensation plan.
- A beneficiary of a trust for which the financial institution is a trustee.
- A person who has designated the financial institution as trustee for a trust.

"Financial institution" means any institution engaged in financial activities [*see 12 U.S.C. § 1843(k)* (applicable description of activities)] and doing business in California. Basically, this includes, among others, institutions engaged in lending, exchanging, transferring, investing for others, or safeguarding money and securities; insurers; investment and economic advisers; and securities dealers and underwriters [*see 12 U.S.C. § 1843(k)(4)*]. An institution that is not "significantly" engaged in financial activities is not a financial institution [*Fin. Code § 4052(c)*]. The term also is subject to numerous specific exceptions [*see Fin. Code § 4052(c)*]. For example, it does not include licensed auto dealers or manufacturers [*see Veh. Code § 11700 et seq.*] who enter into installment contracts for the sale or lease of motor vehicles and assign substantially all of those contracts to financial institutions within 30 days. Significantly, the term also does not include any provider of professional services (or any wholly owned affiliate of such a provider) that is prohibited by rules of professional ethics and applicable law from voluntarily disclosing confidential client information without the consent of the client [*Fin. Code § 4052(c)*].

An "affiliate" is any entity that controls, is controlled by, or is under common control with, another entity. The term does not include a joint employee of the entity and the affiliate. A franchisor, including any affiliate of the franchisor, is

an affiliate of the franchisee for purposes of the Act [*Fin. Code § 4052(d)*].

"Nonaffiliated third party" means any entity that is not an affiliate of, or related by common ownership or affiliated by corporate control with, the financial institution. The term does not include a joint employee of that institution and a third party [*Fin. Code § 4052(e)*].

[d] Disclosure of Nonpublic Personal Information Without Prior Written Consent Prohibited

The Act generally prohibits a financial institution from sharing, transferring, or otherwise disclosing a consumer's nonpublic personal information to any unaffiliated third parties without the consumer's express prior written consent [*see Fin Code §§ 4052.5, 4053(b)*]. The Act also allows a consumer to direct the financial institution not to share the nonpublic personal information with affiliated companies or with nonaffiliated financial companies with which the financial institution has contracted to provide financial products and services [*see Fin. Code § 4053(a)(1)*]. However, the Act does not restrict or prohibit the sharing of nonpublic personal information between a financial institution and its wholly owned financial institution subsidiaries or in certain other circumstances if, among other requirements, both entities are regulated by the same functional regulator and are engaged in the same line of business [*see Fin. Code § 4053(c)*].

For further discussion of the general prohibitions and limitations of the Act, see § 46.99[2].

[e] Privacy Notice Requirements

To obtain consent to disclose nonpublic personal information to nonaffiliated third parties, the financial institution must use a form, statement, or writing that [*Fin. Code § 4053(a)(2)*]:

- Is a separate document, not attached to any other document.
- Is dated and signed by the consumer.
- Clearly and conspicuously discloses that by signing, the consumer is consenting to the disclosure to nonaffiliated third parties of nonpublic personal information pertaining to the consumer.
- Clearly and conspicuously discloses (1) that the consent will remain in effect until revoked or modified by the consumer; (2) that the consumer may revoke the consent at any time; and (3) the procedure for the consumer to revoke consent.
- Clearly and conspicuously informs the consumer that (1) the financial institution will maintain the document or a true and correct copy; (2) the consumer is entitled to a copy of the document upon request; and (3) the consumer may want to make a copy of the document for the consumer's records.

If the financial institution does not use the statutory form set out in [2], *below*, the form must meet all of the following additional requirements [*Fin. Code § 4053(d)(1)*; *see Fin. Code § 4053(d)(2)(B)* (regulatory approval of alternative form)].

- It must use the same title as the statutory form ("IMPORTANT PRIVACY CHOICES FOR CONSUMERS").
- It must use headers, if applicable, as follows: "Restrict Information Sharing With Companies We Own Or Control (Affiliates)" and "Restrict Information Sharing With Other Companies We Do Business With To Provide Financial Products And Services."

- The titles and headers must be clearly and conspicuously displayed, and no text in the form may be smaller than 10-point type.
- It must be a separate document [*see Fin. Code §§ 4053(d)(2)(D), 4054, 4058.7* (limited exceptions)].
- It must provide choices in accordance with *Fin. Code § 4053(b)* [*see [d], above*] and *Fin. Code § 4054.6* (rules when credit cards are issued in name of business entity that is not financial institution), if applicable, that are stated separately and may be selected by checking a box.
- It must be designed to call attention to the nature and significance of the information in the document.
- It must present information in clear and concise sentences, paragraphs, and sections.
- It must use short explanatory sentences (an average of 15-20 words) or bullet lists whenever possible.
- It must avoid multiple negatives, legal terminology, and highly technical terminology whenever possible.
- It must avoid explanations that are imprecise and readily subject to different interpretations.
- It must achieve a minimum Flesch reading ease score of 50, as defined in *10 Cal. Code Reg. § 2689.4(a)(7)*, with specified exceptions [*see Fin. Code § 4053(d)(1)(J)*].
- It must provide wide margins, ample line spacing and uses boldface or italics for key words.
- It must not be more than one page.

None of the instructional items appearing in brackets in the form in [2], *below*, may appear in the form provided to the consumer, because those items are for explanation purposes only [*Fin. Code § 4053(d)(2)(A)*]. However, a financial institution does not violate the Act's notice requirements solely because it includes in the form one or more brief examples or explanations of the purposes, or context, within which information will be shared, provided those examples meet the required clarity and readability standards [*Fin. Code § 4053(d)(2)(C)*].

If a financial institution does not disclose or share nonpublic personal information as described in a header of the form, the financial institution may omit the applicable header or headers, and the accompanying information and box, in the form it provides. The form with those omissions is conclusively presumed to satisfy the notice requirements [*Fin. Code § 4053(d)(2)(A)*].

[f] Envelope and Mailing Requirements

The outside of the envelope in which the form is sent to the consumer generally must clearly state in 16-point boldface type "IMPORTANT PRIVACY CHOICES." However, a financial institution sending the form to a consumer in the same envelope as a bill, account statement, or application requested by the consumer does not have to include this wording on that envelope [*Fin. Code § 4053(d)(2)(D)*].

The form must be sent in one of the following ways [*Fin. Code § 4053(d)(2)(D)(i)-(iii)*]:

- With a bill, other statement of account, or application requested by the consumer. If sent in this manner, the information required by the Gramm-Leach-Bliley Act [*see* 15 U.S.C. § 6801 *et seq.*; *see also* § 46.99[1][d]-[f]] may also be included in the same envelope.
- As a separate notice or with the information required by the Gramm-Leach-Bliley Act, and including only information related to privacy.
- With any other mailing. If included with another mailing, the form must be the first page of the mailing.

If a financial institution uses a form other than that set forth in the statute [*see* [2], *below*], that form must be filed with the Office of Privacy Protection within 30 days after it is first used *Fin. Code* § 4053(d)(2)(E).

[g] Compliance With Consumer's Request

The financial institution must comply with the consumer's request regarding nonpublic personal information within 45 days of receipt of the request [*Fin. Code* § 4053(d)(3)].

[2] FORM

Notice to Consumer Regarding Choice With Respect to Sharing of Nonpublic Personal Information

Important Privacy Choices for Consumers

You have the right to control whether we share some of your personal information.

Please read the following information carefully before you make your choices below.

Your Rights

You have the following rights to restrict the sharing of personal and financial information with our affiliates (companies we own or control) and outside companies that we do business with. Nothing in this form prohibits the sharing of information necessary for us to follow the law, as permitted by law, or to give you the best service on your accounts with us. This includes sending you information about some other products or services.

Your Choices

Restrict Information Sharing With Companies We Own or Control (Affiliates): Unless you say "No," we may share personal and financial information about you with our affiliated companies.

(____) NO, please do not share personal and financial information with your affiliated companies.

Restrict Information Sharing With Other Companies We Do Business With To Provide Financial Products And

Services: Unless you say "No," we may share personal and financial information about you with outside companies we contract with to provide financial products and services to you.

(_____) NO, please do not share personal and financial information with outside companies you contract with to provide financial products and services.

Time Sensitive Reply

You may make your privacy choice(s) at any time. Your choices(s) marked here will remain unless you state otherwise. However, if we do not hear from you we may share some of your information with affiliated companies and other companies with whom we have contracts to provide products and services.

Name: _____

Account or Policy Number(s): *[to be filled in by consumer]*

Signature: _____

To exercise your choices do [one of] the following:

(1) fill out, sign and send back this form to us using the envelope provided (you may want to make a copy for your records; [*#1 is mandatory*])

[(2) Call this toll-free number (800) xxx-xxxx or (xxx) xxx-xxxx; [*optional*]]

[(3) Reply electronically by contacting us through the following Internet option: xxxx.com] [*optional*]]

Legal Topics:

For related research and practice materials, see the following legal topics:

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 47 AUTOMOTIVE FINANCING AND VEHICLE LEASING

20-47 California Legal Forms--Transaction Guide 47.syn

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 47 AUTOMOTIVE FINANCING AND VEHICLE LEASING

20-47 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers financing arrangements for both consumer credit sales of vehicles and consumer vehicle leases. Consumer financing for vehicles is subject to strict disclosure requirements under both federal law and state law. Sales on credit are controlled by the Truth in Lending Act [15 U.S.C. § 1601 *et seq.*] and the Rees-Levering Motor Vehicle Sales and Finance Act [Civ. Code § 2981 *et seq.*], commonly called the Rees-Levering Act. Vehicle leasing is regulated by the Consumer Leasing Act [15 U.S.C. § 1667 *et seq.*] and the Vehicle Leasing Act [Civ. Code § 2985.7 *et seq.*]. This chapter also briefly discusses wholesale financing of a dealer's inventory.

The Truth in Lending Act applies to a wide range of credit transactions, most of which are not covered in this chapter. For further discussion of how the Truth in Lending Act applies to closed-end (single-transaction) consumer loans, see Ch. 45, *Consumer Installment Loans and Credit Sales*.



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[2] Regulations

Consumer Leasing (Regulation M). 12 C.F.R. pt. 213.

Authority, scope, purpose, and enforcement. *12 C.F.R. § 213.1.*

Definitions. *12 C.F.R. § 213.2.*

General disclosure requirements. *12 C.F.R. § 213.3.*

Content of disclosures. *12 C.F.R. § 213.4.*

Renegotiations, extensions, and assumptions. *12 C.F.R. § 213.5.*

Advertising. *12 C.F.R. § 213.7.*

Records retention. *12 C.F.R. § 213.8.*

Relation to state laws. *12 C.F.R. § 213.9.*

Model disclosure forms. 12 C.F.R. pt. 213, app. A.

Federal enforcement agencies. 12 C.F.R. pt. 213, app. B.

Issuance of staff interpretations. 12 C.F.R. pt. 213, app. C.

Official staff commentary to Regulation M. 12 C.F.R. pt. 213, supp. I.

Truth in Lending (Regulation Z). 12 C.F.R. pt. 226.



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[Reserved]

§§ 47.03[Reserved]



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20-47 California Legal Forms--Transaction Guide § 47.06

§ 47.06 Annotations

Annot., What Constitutes Truth in Lending Act Violation Which "Was Not Intentional and Resulted From a Bona Fide Error," Within Meaning of § 130(c) of Act (*15 USCS § 1640(c)*), *27 A.L.R. Fed. 602 (1976)* .

Annot., Validity of Disclaimer of Warranty Clauses in Sale of New Automobiles, *54 A.L.R.3d 1217 (1973)* .

Annot., Priorities as Between Vendor's Lien and Subsequent Title or Security Interest Obtained in Another State to Which Vehicle Was Removed, *42 A.L.R.3d 1168 (1972)* .

Annot., Implied Warranties in Sale of Used Automobiles, *22 A.L.R.3d 1272 (1968)* .



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20-47 California Legal Forms--Transaction Guide § 47.07

§ 47.07 Text References

[1] Matthew Bender Sources

California Legal Forms(Matthew Bender).

Ch. 42, *Secured Transactions* .

Ch. 45, *Consumer Installment Loans and Credit Sales* .

Ch. 53, *Personal Property Leasing* .

Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

Ch. 102D, *Registration and Transfer of Vehicles, Vessels, and Aircraft* .

California Forms of Pleading and Practice(Matthew Bender).

Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* .

Ch. 90, *Automobiles: Vehicle Leasing Act* .

Ch. 93, *Bailments*, § 93.100 et seq.

Rabkin & Johnson, *Current Legal Forms with Tax Analysis*(Matthew Bender).

Ch. 4A, *Lease of Personal Property*.

Ch. 6, *Credit and Finance*.

[2] Additional Text References

Witkin, Summary of California Law, vol. 4, *Sales*, §§ 235-260, vol. 13, *Personal Property*, §§ 193-194 (10th ed. 2005).

Keest & Klein, Truth in Lending, Ch. 9, *Consumer Leasing Act* (Nat'l Consumer Law Ctr., 3d ed. 1995).



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§§ 47.08[Reserved]



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§ 47.10 Automobile Credit Transactions

[1] Consumer Credit Financing

Consumer credit financing is the extension of credit by a seller to a buyer in order to finance the acquisition of a vehicle for noncommercial use. When the vehicle is being purchased on credit from a dealer by a person not in the business, who intends to use it primarily for noncommercial personal or family purposes, the relative bargaining power of each party is often unequal. The buyer could not be expected to know all of the "tricks of the trade" that the dealer has learned to use. Both the U.S. Congress and the California Legislature have enacted special statutes protecting "unsophisticated" buyers from the unscrupulous practices of dealers and lenders. The Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*] regulates the conditional sale contract, chattel mortgages, and other purchase or credit instruments that may be involved in such a transaction. The federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] is a disclosure statute requiring full disclosure of the terms of any retail credit transaction, including consumer leases, to the retail consumer.

[2] Purchasing of Conditional Sale Contracts

There are several types of so-called dealer plans under which commercial lenders purchase conditional sale contracts produced by automobile dealers. One is the full recourse plan, under which the dealer unconditionally guarantees every conditional sale contract assigned to the lender [*see § 47.207*]. If the buyer defaults, the lender deducts the full unpaid balance due on contract from the dealer's reserve account, reassigns the contract back to the dealer, and leaves the dealer to pursue whatever remedies may be available against the buyer. In most instances a necessary prerequisite to the establishment of a full recourse arrangement is the maintenance by the dealer of a reserve account with the lender. The account guarantees to the lender a ready source of funds from which to collect any amounts due from the dealer because of the default of a buyer on a conditional sale contract assigned to the lender.

Under the nonrecourse plan, the dealer does not guarantee the assigned contract. If the buyer defaults, the lender must either absorb the loss or pursue its remedies against the buyer.

Under a nonrecourse repurchase plan, the lender must repossess the vehicle and return it to the dealer within a specified

number of days after the buyer's first default. The dealer agrees that if the vehicle is returned within the specified period, the dealer will purchase it from the lender for the unpaid balance due on the conditional sale contract. If the lender is unable to repossess and return the vehicle as agreed, the dealer's liability under the assignment is ended.

When a dealer assigns an automobile conditional sale contract to a lender under a limited liability plan, the dealer's liability to the lender for any default by the buyer is limited to the amount in the dealer's reserve account.

[3] Wholesale Financing

Wholesale financing is the extending of credit to a dealer for the acquisition of inventory to be held for sale to retail customers. The parties are a bank or other commercial lender as lender and an automobile dealer as borrower. No special statutes regulate wholesale financing.

The major concerns for a lender in the wholesale financing of a dealer's inventory are preventing the dealer from disposing of a financed article without paying the loan secured by the article, and protecting the lender's security interest in a financed article against the claims of unsecured creditors and assignees of the dealer. In part these problems can be solved only by internal procedures established by the lender for checking and examining the financed inventory. Otherwise, the lender's concerns can be allayed, in large part, by compliance with the California Commercial Code provisions governing secured transactions [*Com. Code § 9301 et seq.*], discussed in Ch. 42, *Secured Transactions* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Truth in Lending General Overview Commercial Law (UCC) Secured Transactions (Article 9) General Overview Contracts Law Debtor & Creditor Relations



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§ 47.11 Truth in Lending Act

[1] Requirements

The Truth in Lending Act [15 U.S.C. § 1601 *et seq.*] (TILA) and Regulation Z [12 C.F.R. pt. 226] require credit-sellers of automobiles, except casual sellers [15 U.S.C. § 1602(f); 12 C.F.R. § 226.2(a)(17)], to present disclosure statements containing uniform credit terms and computations to buyers who buy primarily for personal, family, or household purposes [12 C.F.R. § 226.2(a)(12)]--that is, consumers--unless the total amount to be financed exceeds \$25,000 [15 U.S.C. § 1603(3); 12 C.F.R. § 226.3(b)]. Credit transactions for business, commercial, or agricultural use would not be covered [15 U.S.C. § 1603(1); 12 C.F.R. § 226.3(a)].

The implementing mechanism of TILA is a detailed disclosure document containing uniformly defined and computed credit terms. If the document contains any information other than the disclosures required by TILA, the required disclosures must be grouped together and segregated from everything else [12 C.F.R. § 226.17(a)].

For discussion of the transactions and creditors covered by TILA, see Ch. 45, *Consumer Installment Loans and Credit Sales*.

[2] Coordination of Truth in Lending Act and Rees-Levering Act

The Truth in Lending Act (TILA) alters or annuls state credit disclosure laws only to the extent that the state laws are inconsistent with TILA provisions. The Federal Reserve Board may declare state disclosure requirements inconsistent and prohibit compliance with them, acting either on its own motion or at the request of an interested party [see 12 C.F.R. pt. 226, app. A]. The Federal Reserve Board may also determine that a state-required disclosure is substantially similar to one required under TILA, in which case creditors in that state may elect to comply with the state requirement alone [15 U.S.C. § 1610(a); 12 C.F.R. § 226.29].

The Rees-Levering Motor Vehicle Sales and Finance Act [Civ. Code § 2981 *et seq.*; see § 47.12] facilitates coordination with TILA by authorizing required disclosures to be made in the manner, method, or terminology required or permitted by Regulation Z [Civ. Code § 2982(m)] and eliminates inconsistency by requiring that all vehicle conditional sale

contracts contain the Regulation Z disclosures, whether or not Regulation Z applies to the transaction [*Civ. Code* § 2982]. Except in the area of disclosure requirements, TILA does not affect state law regarding terms of credit sales and formalities of the transactions [*15 U.S.C. § 1610(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosure



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§ 47.12 Rees-Levering Act

[1] Transactions Governed by Act

[a] Conditional Sales of Vehicles to Consumers

The Rees-Levering Act [*Civ. Code § 2981 et seq.* (Rees-Levering Motor Vehicle Sales and Finance Act)] applies to a seller engaged in the business of selling or leasing motor vehicles [*Civ. Code §§ 2981(a), (b), 2982*], in any sale by conditional sale contract of a vehicle that is required to be registered under the Vehicle Code and is purchased for use primarily for personal and family purposes [*Civ. Code § 2981(k)*]. The Rees-Levering Act also applies when the seller substantially assists the buyer in obtaining financing from a third party, even though the loan obviates a conditional sale contract [*Hernandez v. Atlantic Fin. Co. (1980) 105 Cal. App. 3d 65, 77-80, 164 Cal. Rptr. 279*] .

The following transactions are not subject to the Rees-Levering Act [*Civ. Code § 2981(k)*]:

- Sale of a mobilehome [*see Health & Safety Code § 18008* (mobilehome defined)].
- Sale of a boat trailer sold in connection with a boat and included in the definition of "goods" under the Unruh Act [*see Civ. Code § 1802.1*].
- Sale of a vehicle for use primarily for business or commercial purposes.

[b] Exclusion for Loans by Financial Institutions

Nothing contained in the Rees-Levering Act affects a loan, or the security for it, between a purchaser of a vehicle and a supervised financial organization, other than the seller of the vehicle, when all or a portion of the loan is used in connection with the purchase of a vehicle. "Supervised financial organization" means a financial institution organized, chartered, or holding a license or authorization certificate under California law or federal law to make loans, which is subject to supervision by a California or federal official or agency [*Civ. Code § 2982.5(a)*].

[2] Contract Definitions**[a] Conditional Sale Contract**

"Conditional sale contract" means any contract for the sale of a vehicle between a buyer and a seller, with or without accessories, under which possession is delivered to the buyer and either (A) the title vests in the buyer only on the payment of all or a part of the price, or the performance of any other condition, or (B) a lien on the property is to vest in the seller as security for the payment of part or all of the price, or for the performance of any other condition [*Civ. Code* § 2981(a)(1)].

Any contract for the bailment (lease) of a vehicle, with or without accessories, from a seller also is a "conditional sale contract" if the bailee or lessee agrees to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the vehicle and its accessories, if any, at the time the contract is executed, and it is agreed that the bailee or lessee will become, or for no other or for a nominal consideration has the option of becoming, the owner of the vehicle on full compliance with the terms of the contract [*Civ. Code* § 2981(a)(2)].

PRACTICE TIP:

A contract for the bailment or leasing of a vehicle, with or without accessories, that establishes the maximum for which a bailee or lessee could be held liable at the end of the lease or bailment period, or on an earlier termination, by reference to the value of the vehicle at the time, is not a contract by which the bailee or lessee will become, or for no other or for a nominal consideration has the option of becoming the owner of the vehicle, for the purposes of *Civ. Code* § 2981(a)(2) or any other provision of the Rees-Levering Act [*Civ. Code* § 2981.5].

[b] Seller and Buyer

"Seller" means a person engaged in the business of selling or leasing vehicles under conditional sale contracts [*Civ. Code* § 2981(b)]. "Buyer" means the person who buys or hires a vehicle under a conditional sale contract [*Civ. Code* § 2981(c)]. "Person" includes an individual, company, firm, association, partnership, trust, corporation, limited liability company, or other legal entity [*Civ. Code* § 2981(d)].

[c] Motor Vehicle

"Motor vehicle" means any vehicle required to be registered under the Vehicle Code that is bought for use primarily for personal or family purposes [*Civ. Code* § 2981(k)]. The term does not include any vehicle that is bought for use primarily for business or commercial purposes, or a mobilehome [*see Health & Safety Code* § 18008 (definition)], and does not include any trailer that is sold in conjunction with a vessel and comes within the definition of "goods" under *Civ. Code* § 1802.1 [*Civ. Code* § 2981(k)].

[d] Purchase Order and Service Contract

"Purchase order" means a sales order, car reservation, statement of transaction, or any other instrument used in the conditional sale of a vehicle pending execution of a contract. The purchase order must conform to the disclosure requirements of *Civ. Code* § 2982(a) and *Civ. Code* § 2984.1 and the provisions of *Civ. Code* § 2982(m) apply to it [*Civ. Code* § 2981(l)].

"Service contract" means a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair, or both, of the vehicle described in the contract [*Civ. Code* § 2981(p)].

Effective July 1, 2006, a "service contract" means a vehicle service contract or agreement for a separately stated consideration and for a specific duration to repair, replace, or maintain a motor vehicle or watercraft, or to indemnify for

the repair, replacement, or maintenance of a motor vehicle or watercraft because of an operational or structural failure due to a defect in materials or workmanship, or due to normal wear and tear. A vehicle service contract may also provide for the incidental payment of indemnity under limited circumstances only in the form of the following additional benefits: coverage for towing, substitute transportation, emergency road service, rental car reimbursement, road hazard protection, reimbursement of deductible amounts under a manufacturer's warranty, and reimbursement for travel, lodging, or meals. A vehicle service contract also includes an agreement of a term of at least one year, for separately stated consideration, that promises routine maintenance, and an agreement that promises repair or replacement of a vehicle's tire, wheel, or glass, necessitated by wear and tear, defect, or damage caused by a road hazard, or removal of a dent, ding, or crease using paintless dent repair techniques [see *Civ. Code* § 2981(p); see Stats. 2005 ch. 128, § 12 (effective July 1, 2006); *Ins. Code* § 12800(c)].

[e] Surface Protection Product; Theft Deterrent Device

"Surface protection product" means the following products installed by the seller after the motor vehicle is sold [*Civ. Code* § 2981(q); see Stats. 2005 ch. 128, § 12 (effective July 1, 2006)]:

- Undercoating.
- Rustproofing.
- Chemical or film paint sealant or protectant.
- Chemical sealant or stain inhibitor for carpet and fabric.

"Theft deterrent device" means the following devices installed by the seller after the motor vehicle is sold [*Civ. Code* § 2981(r); see Stats. 2005 ch. 128, § 12 (effective July 1, 2006)]:

- A vehicle alarm system.
- A window etch product.
- A body part marking product.
- A steering lock.
- A pedal or ignition lock.
- A fuel or ignition kill switch.

[3] Finance Definitions

[a] Amount Financed

"Amount financed" means the amount required to be disclosed pursuant to *Civ. Code* § 2982(a)(8) [*Civ. Code* § 2981(g)].

[b] Cash Price

"Cash price" means the amount for which the seller would sell and transfer to the buyer unqualified title to the vehicle described in the contract, if the property were sold for cash at the seller's place of business on the date the contract is executed, and includes taxes to the extent imposed on the cash sale and the cash price of accessories or services related

to the sale, including but not limited to delivery, installation, alterations, modifications, improvements, document preparation fees, a service contract, a vehicle contract cancellation option agreement (as of July 1, 2006), and payment of a prior credit or lease balance remaining on property being traded in [Civ. Code § 2981(e)].

[c] Down Payment

"Down payment" means a payment that the buyer pays or agrees to pay to the seller in cash or property value or money's worth at or prior to delivery by the seller to the buyer of the vehicle described in the contract. The term also includes the amount of any portion of the down payment the payment of which is deferred until not later than the due date of the second otherwise scheduled payment, if the amount of the deferred down payment is not subject to a finance charge. The term does not include any administrative finance charge charged, received or collected by the seller as provided in the Rees-Levering Act [Civ. Code § 2981(f)].

[d] Finance Charge

"Finance charge" has the meaning of that term in Regulation Z [see 12 C.F.R. § 226.4]. The term does not include delinquency charges or collection costs and fees as provided by Civ. Code § 2982(k), extension or deferral agreement charges as provided by Civ. Code § 2982.3, or amounts for insurance, repairs to or preservation of the vehicle, or preservation of the security interest in it advanced by the holder under the terms of the contract [Civ. Code § 2981(i)].

In practice, if the disclosed "cash price" in a credit sale is higher than the total price that the seller would fix for a cash buyer [see [b], above], then the difference is a finance charge and must be disclosed as such. This normally would be the case whenever the disclosed "cash price" in a credit sale is inflated because the buyer needs financing. (That practice usually is driven by various requirements imposed by financial companies as conditions for providing financing.) Moreover, when a higher "cash price" in a credit sale necessarily entails additional costs for the buyer, those also must be disclosed as finance charges. The extra amount of sales or use tax payable by the credit buyer is one such additional cost. In the case of buying a motor vehicle, the buyer will have to pay a license fee that is computed on the basis of the cash price, and the extra amount paid because of the higher "cash price" for the credit buyer is a finance charge that must be disclosed [*Thompson v. 10,000 RV Sales, Inc.* (2005) 130 Cal. App. 4th 950, 970, 974, 31 Cal. Rptr. 3d 18 ("dealer must offer the vehicle at a price that reflects an amount imposed equally in cash and credit transactions, so any additional charge is explicitly identified and disclosed as a finance charge")].

[e] Precomputed Basis

"Precomputed basis" means the determination of a finance charge by multiplying the original unpaid balance of the contract by a rate and multiplying that product by the number of payment periods elapsing between the date of the contract and the date of the last scheduled payment [Civ. Code § 2981(o)].

[f] Simple-Interest Basis

"Simple-interest basis" means the determination of a finance charge, other than an administrative finance charge, by applying a constant rate to the unpaid balance as it changes from time to time, computed on the basis of a 365-day year and actual days elapsed (although the seller may, but need not, adjust the computation to account for leap years). Reference in the Rees-Levering Act to the "365-day basis" means this method of determining the finance charge [Civ. Code § 2981(n)(1); but see Civ. Code § 2981(n)(2) (contract entered into before 1988)].

[g] Total of Payments

"Total of payments" means the amount required to be disclosed pursuant to Regulation Z [see 12 C.F.R. § 226.18(h)]. The term includes any portion of the down payment that is deferred until not later than the second otherwise scheduled payment and that is not subject to a finance charge. The term does not include amounts for which the buyer may later

become obligated under the terms of the contract in connection with insurance, repairs to or preservation of the vehicle, preservation of the security interest in it, or otherwise [*Civ. Code* § 2981(j)].

[h] Unpaid Balance

"Unpaid balance" means the difference between the cash price and the down payment, plus all insurance premiums (except for credit life or disability insurance when the amount of it is included in the finance charge), that are included in the contract balance, and the total amount paid or to be paid as follows: (1) to a public officer in connection with the transaction, (2) for license, certificate of title, and registration fees imposed by law, and the amount of the state fee for issuance of a certificate of compliance or certificate of waiver pursuant to *Bus. & Prof. Code* § 9889.56 [*Civ. Code* § 2981(h)].

[4] Seller's Dealings With Buyer

[a] Delivery of Contract Documents to Buyer

No vehicle may be delivered pursuant to a contract subject to the Rees-Levering Act until the seller delivers to the buyer a fully executed copy of the contract or purchase order, any vehicle purchase proposal, and any credit statement, that the seller has required or requested the buyer to sign and that the buyer has signed during the contract negotiations. The seller must furnish the buyer with an exact copy of the contract or purchase order at the time the buyer and the seller have signed it. The seller must not obtain the signature of the buyer to a contract when it contains blank spaces to be filled in after it has been signed [*Civ. Code* § 2981.9].

[b] Application Fee

A seller may not impose an application fee for a transaction governed by the Rees-Levering Act [*Civ. Code* § 2982(o)].

PRACTICE TIP:

The seller may impose a document preparation fee, however, as long as the contract discloses that it is not a governmental fee [*Civ. Code* § 2982(n)].

[c] Inducement by Referral Discount

It is unlawful for any seller to induce or attempt to induce any person to enter into a contract subject to the Rees-Levering Act by offering a rebate, discount, commission, or other consideration, contingent on the happening of a future event, on the condition that the buyer either sells, or gives information or assistance for the purpose of leading to a sale by the seller of, the same or related goods [*Civ. Code* § 2982.1].

[d] Restitution After Failed Transaction

Any payment made by a buyer to a seller pending execution of a contract must be refunded to the buyer in the event the contract is not executed [*Civ. Code* § 2982.7(a)].

If a buyer becomes obligated to purchase or receives possession of a vehicle pursuant to a contract or purchase order, the seller knows that the buyer intends to obtain financing from a third party without the assistance of the seller, and the buyer is unable to obtain the financing, the contract or purchase order must be deemed rescinded, and all the parties must return all consideration received on it without demand [*Civ. Code* § 2982.9].

In the event of breach of a contract or purchase order by the seller, if the buyer left the buyer's vehicle with the seller as a down payment and the vehicle is not returned by the seller to the buyer for any reason, the buyer may recover from the seller either the fair market value of the vehicle left as a down payment or its value as stated in the contract or purchase

order, whichever is greater. The recovery must be tendered to the buyer within five business days after the breach [*Civ. Code* § 2982.7(b)]. This remedy is nonexclusive and cumulative, and does not preclude the buyer from pursuing any other remedy that the buyer may have under any other provision of law [*Civ. Code* § 2982.7(c)].

PRACTICE TIP:

The Rees-Levering Act provides various specific remedies for the buyer in the event of a seller's violation of statutory provisions [*see, e.g., Civ. Code* §§ 2983, 2983.1]. For discussion and forms for complaints, see *California Forms of Pleading and Practice, Ch. 89, Automobiles: Sales and Financing Under the Rees-Levering Act*, § 89.23 (Matthew Bender).

[e] Acceleration of Maturity

In the absence of default in the performance of any of the buyer's obligations under the contract, the seller or holder may not accelerate the maturity of any part or all of the amount due under it or repossess the vehicle [*Civ. Code* § 2983.3(a)].

PRACTICE TIP:

The buyer, on the other hand, has an absolute right to prepay [*Civ. Code* § 2982(l); *see* [6][a], *below*]. In addition, even if the buyer is in default, there may be a statutory right to reinstate the contract and prevent acceleration of maturity [*see Civ. Code* § 2983.3(b)-(e); *see also Civ. Code* § 2983.35 (cosigner's right to notice of delinquency)]. For discussion and a related complaint form, see *California Forms of Pleading and Practice, Ch. 89, Automobiles: Sales and Financing Under the Rees-Levering Act*, (Matthew Bender).

[5] Finance Charge Computation and Collection

[a] Forced Election of Simple-Interest Finance Charge

All contracts must provide for the computation of the finance charge contemplated by *Civ. Code* § 2982(j)(1)(A) on the simple-interest basis, if the date the final installment is due, according to the original terms of the contract, is more than 62 months after the date of the contract [*Civ. Code* § 2981.7].

[b] Restriction on Combining Computation Methods

No contract may provide for a finance charge that is determined in part by the precomputed basis and in part by the simple-interest basis, except for any finance charge permitted by *Civ. Code* § 2982.8(a) and (c) [*Civ. Code* § 2981.8], concerning delinquent payments of insurance premiums [*see* [7][a], *below*].

[c] Maximum Amount of Finance Charge

Until July 1, 2006, finance charges are governed by the rules set forth in the list in this paragraph [Stats. 2005 ch. 128, § 12; for rules effective on July 1, 2006, *see below*]. Except for contracts in which the finance charge or a portion of it is determined on the simple-interest basis and the disclosed amount financed [*see Civ. Code* § 2982(a)(8); § 47.200[1][d]] exceeds \$2,500, the amount of the disclosed finance charge may not exceed whichever of the following is the greatest [*Civ. Code* § 2982(j)(1)]:

- 1.5 percent on the first \$225 of the unpaid balance, plus 1.167 percent (1-and-1/6 percent) on the next \$675, plus 0.833 percent (5/6 of 1 percent) on the next \$1,600, the sum to be multiplied by the number of months (computed on the basis of a full month for any fractional month in excess of 15 days) elapsing between the date of the contract and the due date of the last installment [*Civ. Code* § 2982(j)(1)(A)(i)].

- 1 percent of the entire unpaid balance, multiplied by the number of months (computed on the basis of a full month for any fractional month in excess of 15 days) elapsing between the date of the contract and the due date of the last installment [*Civ. Code* § 2982(j)(1)(A)(ii)].

- \$25 if the finance charge is determined by the precomputed basis [*Civ. Code* § 2982(j)(1)(B)].

- The following sum if the finance charge or a portion of it is determined on the simple-interest basis [*Civ. Code* § 2982(j)(1)(C)]:

- \$25 if the unpaid balance does not exceed \$1,000.

- \$50 if the unpaid balance exceeds \$1,000 but does not exceed \$2,000.

- \$75 if the unpaid balance exceeds \$2,000.

If the contract provides for unequal or irregular payments, or payments on other than a monthly basis, the maximum finance charge must be at the effective rate provided for in *Civ. Code* § 2982(j)(1), above, having due regard for the schedule of installments [*Civ. Code* § 2982(j)(4)].

PRACTICE TIP:

A ceiling on the amount of the finance charge, determined as described above, is imposed whenever the amount financed does not exceed \$2,500, regardless of whether the finance charge is computed on the simple-interest basis or is precomputed. When the amount financed exceeds \$2,500 and the finance charge is computed on the simple-interest basis, there is no ceiling (under the Rees-Levering Act) on the amount of the finance charge. However, if the finance charge is precomputed, it may not exceed the ceiling determined as described above.

Effective July 1, 2006, the rules listed below in this paragraph apply with respect to finance charges [*see Civ. Code* § 2982; Stat. 2005 ch. 128, § 12]. Except for contracts in which the finance charge or a portion of it is determined on the simple-interest basis and the disclosed amount financed [*see Civ. Code* § 2982(a)(8); § 47.200[1][d]] exceeds \$2,500, the amount of the disclosed finance charge may not exceed whichever of the following is the greatest [*Civ. Code* § 2982(j)(1)]:

- 1.5 percent on the first \$225 of the unpaid balance, plus 1.167 percent (1-and-1/6 percent) on the next \$675, plus 0.833 percent (5/6 of 1 percent) on the next \$1,600 [*Civ. Code* § 2982(j)(1)(A)(i)].

- 1 percent of the entire unpaid balance, multiplied by the number of months (computed on the basis of a full month for any fractional month in excess of 15 days) elapsing between the date of the contract and the due date of the last installment [*Civ. Code* § 2982(j)(1)(A)(ii)].

- \$25 if the finance charge is determined by the precomputed basis [*Civ. Code* § 2982(j)(1)(B)].

- The following sum if the finance charge or a portion of it is determined on the simple-interest basis [*Civ. Code* § 2982(j)(1)(C)]:

- \$25 if the unpaid balance does not exceed \$1,000.

- \$50 if the unpaid balance exceeds \$1,000 but does not exceed \$2,000.

- \$75 if the unpaid balance exceeds \$2,000.

If the contract provides for unequal or irregular payments, or payments on other than a monthly basis, the maximum finance charge must be at the effective rate provided for in *Civ. Code* § 2982(j)(1)], above, having due regard for the schedule of installments [*Civ. Code* § 2982(j)(4)].

PRACTICE TIP:

A ceiling on the amount of the finance charge, determined as described above, is imposed whenever the amount financed does not exceed \$2,500, regardless of whether the finance charge is computed on the simple-interest basis or is precomputed. When the amount financed exceeds \$2,500 and the finance charge is computed on the simple-interest basis, there is no ceiling (under the Rees-Levering Act) on the amount of the finance charge. However, if the finance charge is precomputed, it may not exceed the ceiling determined as described above.

[d] Administrative Finance Charge

If the finance charge or a portion of it is determined on the simple-interest basis, and the amount of the unpaid balance exceeds \$5,000, the holder of the contract may charge, receive, or collect, on the date of the contract, an administrative finance charge not to exceed \$75, in lieu of a minimum finance charge under *Civ. Code* § 2982(j)(1)(C) [see [c], above]. The sum of the administrative finance charge and the portion of the finance charge determined on the simple-interest basis must not exceed the maximum total finance charge permitted by *Civ. Code* § 2982(j)(1)(A) [see [c], above]. The administrative finance charge must be deemed a finance charge earned on the date of the contract [*Civ. Code* § 2982(j)(3)].

[e] Contract Holder's Right to More Than Disclosed Finance Charge

The holder of the contract may not charge, collect, or receive a finance charge that exceeds the disclosed finance charge, except to the extent of [*Civ. Code* § 2982(j)(2)]:

- Any excess caused by the holder's receipt of one or more payments under a contract that provides for determination of the finance charge or a portion of it on the 365-day basis at a time or times other than as originally scheduled, whether or not the parties enter into an agreement pursuant to *Civ. Code* § 2982.3.
- Any excess permitted by Regulation Z [see 12 C.F.R. § 226.17(c)(2)-(4)].
- Any excess permitted by *Civ. Code* § 2982.8(a) and (c), concerning delinquent payments of insurance premiums [see [7][a], below].

[6] Prepayment

[a] Buyer's Right to Prepay

Notwithstanding any provision of a contract to the contrary, the buyer may pay, at any time before maturity, the entire indebtedness evidenced by the contract without penalty [*Civ. Code* § 2982(l)].

The amount required to prepay the contract must be the outstanding contract balance as of the date of prepayment in full [*Civ. Code* § 2982(l)(1), (2)].

If the finance charge or a portion of it was determined on the simple-interest basis, the amount required to prepay the contract includes, in addition, any earned finance charges that are unpaid as of that date and, if applicable, the amount provided in *Civ. Code* § 2982(l)(3) [*Civ. Code* § 2982(l)(2); see [c], below].

[b] Refund of Unearned Precomputed Finance Charge

If the finance charge was determined on the precomputed basis, the buyer is entitled to a refund credit in the amount of the unearned portion of the finance charge [*Civ. Code* § 2982(l)(1)], except as provided in *Civ. Code* § 2982(l)(3) and (4) [*see* [c], *below*].

The amount of the unearned portion of the finance charge must be at least as great a proportion of the finance charge, including any additional finance charge imposed pursuant to *Civ. Code* § 2982.8 (concerning delinquent payment of insurance premiums [*see* [7][a], *below*]) or other additional charge imposed because the contract has been extended, deferred, or refinanced, as the sum of the monthly time balances payable more than 15 days after the date of prepayment bears to the sum of all monthly time balances under the schedule of installments in the contract or, if the contract has been extended, deferred, or refinanced, as extended, deferred, or refinanced. When the amount of the refund credit is less than \$1, no refund credit need be made by the holder. Any refund credit may be made in cash or credited to the outstanding obligations of the buyer under the contract [*Civ. Code* § 2982(l)(1)].

[c] Holder's Right to Additional Amounts

When the minimum finance charge provided by *Civ. Code* § 2982(j)(1)(B) or (C), if either is applicable [*see* [5][c], *above*], is greater than the earned finance charge as of the date of prepayment, the holder is also entitled to the difference [*Civ. Code* § 2982(l)(3)].

The provisions of *Civ. Code* § 2982(l) concerning prepayment may not impair the right of the seller or the seller's assignee to receive delinquency charges on delinquent installments and reasonable costs and fees [*see* *Civ. Code* § 2982(k); [8][a], *below*], or extension or deferral agreement charges [*Civ. Code* § 2982(l)(4); *see* *Civ. Code* § 2982.3 (extension or deferral); [8][c], *below*].

[7] Amounts Advanced to Cover Buyer's Obligations**[a] Maintenance of Insurance Coverage**

If the buyer is obligated under the terms of the contract to maintain insurance on the vehicle, and after the execution of the contract, the buyer either fails to maintain or requests the holder to procure the insurance, any amounts advanced by the holder to procure the insurance may be the subject of finance charges from the date of advance as provided in *Civ. Code* § 2982.8(e) [*Civ. Code* § 2982.8(a)].

PRACTICE TIP:

No contract may provide for a finance charge that is determined in part by the precomputed basis and in part by the simple-interest basis, except for any finance charge permitted by *Civ. Code* § 2982.8(a) or (c) [*Civ. Code* § 2981.8]. The maximum rate of finance charge imposed on amounts advanced by the holder after execution of the contract for insurance must not exceed the annual percentage rate disclosed pursuant to *Civ. Code* § 2982 [*Civ. Code* § 2982.8(e)].

These amounts are secured as provided in the contract and permitted by *Civ. Code* § 2984.2 concerning security [*see* [9], *below*] if the holder notifies the buyer in writing of the buyer's option to repay those amounts [*Civ. Code* § 2982.8(b)]. *See* § 47.205 for further discussion and a form for notice.

[b] Repairs; Preservation of Vehicle or Security Interest

If, after execution of the contract, the holder advances amounts for repairs to or preservation of the vehicle, or preservation of the holder's security interest in it, and the advances are occasioned by the buyer's default under the contract, the advances may be the subject of finance charges from the date of advance as provided in *Civ. Code* §

2982.8(e), and are secured as provided in the contract and permitted by *Civ. Code* § 2984.2 [*Civ. Code* § 2982.8(d)].

The maximum rate of finance charge imposed on amounts advanced by the holder after execution of the contract for repairs, preservation of the vehicle, or preservation of the holder's security interest in it, must not exceed the annual percentage rate disclosed pursuant to *Civ. Code* § 2982 [*Civ. Code* § 2982.8(e)].

[8] Consequences of Buyer's Default

[a] Delinquency Charges and Collection Costs

The contract may provide that for each installment that is in default for a period of not less than 10 days, the buyer must pay a delinquency charge in an amount not to exceed in the aggregate 5 percent of the delinquent installment. That amount may be collected only once on any installment, regardless of the period during which it remains in default. Payments timely received by the seller under an extension or deferral agreement may not be subject to a delinquency charge unless the charge is permitted by *Civ. Code* § 2982.3 [*see* [c], *below*]. The contract may provide for reasonable collection costs and fees in the event of delinquency [*Civ. Code* § 2982(k)].

The seller or holder may charge and collect a fee not to exceed \$15 for the return by a depository institution of a dishonored check, negotiated order of withdrawal, or share draft issued in connection with the contract, if the contract so provides or if the contract contains a generalized statement that the buyer may be liable for collection costs incurred in connection with the contract [*Civ. Code* § 2982(p)].

[b] Contract Holder's Taking of Vehicle

Notwithstanding any provision of the contract to the contrary, whenever the indebtedness created by the contract is satisfied before maturity through surrender of the vehicle, repossession of the vehicle, redemption of the vehicle after repossession, or any judgment, the outstanding obligation of the buyer must be determined as provided in *Civ. Code* § 2982(l)(1) or (2) concerning prepayment [*see* [6][a], [b], *above*]. Notwithstanding, the holder must compute the buyer's outstanding obligation as of the date the holder recovers the value of the vehicle through disposition of it or the date judgment is entered, or, if the holder elects to keep the vehicle in satisfaction of the buyer's indebtedness, the date the holder takes possession of the vehicle [*Civ. Code* § 2982(l)(5)].

[c] Extension or Deferral of Payment Obligation

The holder of the contract, on agreement with the buyer, may extend the scheduled due date or defer the scheduled payment of all or of any part of any installment or installments payable under it. No charge may be made for any extension or deferral unless the agreement for the extension or deferral is in writing and signed by the parties. However, the seller or holder, as an adjunct to, or to assist in, efforts to collect any delinquent installments on the contract, may advise any obligors on the contract, either in writing or orally, that the due date for any installment under the contract will be extended, with no charge being made for the extension other than any applicable late charge provided for in the contract [*Civ. Code* § 2982.3(a)].

When the contract includes a finance charge determined on the precomputed basis, the holder may contract for the payment of a charge by the buyer, and collect and receive the charge, for the extension or deferral agreement. The charge may not exceed an amount equal to 1 percent per month simple interest on the amount extended or deferred, for the period of extension or deferral. That period must not exceed the period from the date the extended or deferred amount would have been payable in the absence of the extension or deferral to the date the amount is payable under the extension or deferral agreement. However, a minimum charge of \$1 for the period of extension or deferral may be made in any case if the normal charge, when computed at the specified rate, amounts to less than \$1 [*Civ. Code* § 2982.3(b)].

When the contract includes a finance charge determined on the simple-interest basis, the holder may also contract for

the payment of a charge by the buyer, and collect and receive the charge, for the extension or deferral agreement. The charge may not exceed \$25 or 10 percent of the then outstanding principal balance of the contract, whichever is less. That charge must be in addition to any finance charges that accrue because the extended or deferred payments are received at a time other than as originally scheduled [*Civ. Code* § 2982.3(c)].

[9] Permissible Collateral

No contract or ancillary agreement between the seller and the buyer may provide for the inclusion of title to or a lien on any property other than the following:

- The vehicle, including any replacement vehicle, or accessories, accessions, or replacements of accessories or accessions, or proceeds [*Civ. Code* § 2984.2(a)(1)].
- The proceeds of any insurance covering the vehicle that is required by the seller or the returned premiums for that insurance if the premiums are included in the amount financed [*Civ. Code* § 2984.2(a)(2)].
- The proceeds of any credit insurance that the buyer purchases in connection with the contract or the returned premiums of that insurance if the premiums are included in the amount financed [*Civ. Code* § 2984.2(a)(3)].
- The proceeds and returned price of any service contract if the cost of the service contract is included in the amount financed [*Civ. Code* § 2984.2(a)(4)].

Civ. Code § 2984.2(a) does not apply to any agreement that meets the requirements of *Civ. Code* § 2982.5(b) concerning third-party loans [see § 47.13] and otherwise complies with the Rees-Levering Act [*Civ. Code* § 2984.2(b)]. A contract provision in violation of *Civ. Code* § 2984.2 is void [*Civ. Code* § 2984.2(c)].

[10] Disallowed Contract Provisions

[a] Buyer to Forgo Claim, Defense, or Remedy

The contract may not contain any provision by which the buyer does either of the following:

- Agrees not to assert against the seller a claim or defense arising out of the sale, or agrees not to assert against an assignee such a claim or defense [*Civ. Code* § 2983.7(a)].
- Relieves the seller from liability for any legal remedies that the buyer may have against the seller under the contract or any separate instrument executed in connection with it [*Civ. Code* § 2983.7(e)].

[b] Buyer to Confess Judgment, Assign Wages, or Empower Collection

The contract may not contain any provision by which the buyer does either of the following:

- Gives a power of attorney to confess judgment in California or gives an assignment of wages, except that this does not prohibit the giving of an assignment of wages contained in a separate instrument pursuant to *Lab. Code* § 300 [*Civ. Code* § 2983.7(b)].
- Executes a power of attorney appointing the seller or holder of the contract, or another person, as the buyer's agent in the collection of payments under the contract or in the repossession of the vehicle [*Civ. Code* § 2983.7(d)].

[c] Buyer to Waive Litigation Rights

The contract may not contain any provision by which the buyer does either of the following:

- Waives any right of action against the seller or holder of the contract or another person, for any illegal act committed in the collection of payments under the contract or in the repossession of the vehicle [*Civ. Code* § 2983.7(c)].
- Gives the seller or holder of the contract the right to commence an action on the contract in a county other than the county in which the contract was in fact signed by the buyer, the county in which the buyer resides at the commencement of the action, the county in which the buyer resided at the time the contract was entered into, or the county in which the vehicle purchased pursuant to the contract is permanently garaged [*Civ. Code* § 2983.7(f)].

[d] Prevailing Party to Recover Attorneys' Fees and Costs

Reasonable attorneys' fees and costs must be awarded to the prevailing party in any action on a contract or purchase order subject to the provisions of the Rees-Levering Act, regardless of whether the action is instituted by the seller, holder, or buyer [*Civ. Code* § 2983.4; see *Damian v. Tamondong* (1998) 65 Cal. App. 4th 1115, 1129-1130, 77 Cal. Rptr. 2d 262 (defendant in deficiency action brought under Rees-Levering Act can be "prevailing party" for purposes of awarding attorney fees when, prior to trial, plaintiff has voluntarily dismissed underlying contract-based action without prejudice)]. Therefore, the contract need not contain a provision for the prevailing party in any litigation based on the contract to recover attorneys' fees and costs, since the recovery is mandated by the Rees-Levering Act. Moreover, the contract may not contain any provision contravening that mandate, since such a provision would be forbidden by *Civ. Code* § 2983.7(a) or (e) [see [a], above].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor Relations



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20-47 California Legal Forms--Transaction Guide § 47.13

§ 47.13 Seller-Assisted Loans From Third Parties

[1] Down-Payment or Scheduled-Payment Loan

[a] Required Disclosures in Contract

Nothing in the Rees-Levering Act prohibits the seller from assisting the buyer in obtaining a loan on any security [*but see* [b], *below*] from any third party to be used as a part or all of the down payment or any other payment on a sale contract or purchase order, provided the sale contract sets forth the following on its face [*Civ. Code § 2982.5(b)*]:

- The amount of the loan.
- The finance charge.
- The sum of those amounts.
- The number of installments scheduled to repay the loan and the amount of each installment.
- A statement that the buyer may be required to pledge security for the loan, and the security must be mutually agreed to by the buyer and the lender.
- A notice to the buyer in at least eight-point type that the buyer is obligated for the installment payments on both the contract and the loan.

[b] Seller-Provided Security

The seller may not provide any security or other guaranty of payment on the third-party loan [*Civ. Code § 2982.5(b)*].

[c] Seller's Financial Interest in Loan

The seller may not receive any commission or other remuneration for assisting the buyer to obtain the loan [*Civ. Code* § 2982.5(b); see *Kunert v. Mission Financial Services Corp.* (2003) 110 Cal. App. 4th 242, 252-254, 1 Cal. Rptr. 3d 589 (payment to dealer of portion of finance charges--"dealer reserve"--due under conditional sales contract assigned to finance company which made loan to buyer did not violate Act)].

If any proceeds of the arranged loan are payable to the seller after the date of the contract but before the due date of the second payment otherwise scheduled under it, that amount must not be subject to a finance charge, and the amount must be disclosed [*Civ. Code* § 2982.5(c)] pursuant to *Civ. Code* § 2982(a)(6)(D) [see § 47.200[1][e]].

[d] Rescission and Restitution

If the buyer agrees to purchase the vehicle, or the buyer receives possession of the vehicle, before obtaining the loan, and the buyer, in either case, on appropriately applying for the loan is unable to obtain the loan on the conditions stated in the contract, then the contract or purchase order must be deemed rescinded, and all consideration received on it by either party must be returned without demand [*Civ. Code* § 2982.5(b)].

[2] Purchase-Money Loan

[a] Loan From Bank or Savings and Loan

Civ. Code § 2982.5(d), discussed in [b]-[i], below, regulates seller-assisted purchase-money loans from third parties. That section does not apply to state or federally chartered banks and savings and loan associations. It does not affect existing law governing sellers who assist buyers to obtain a loan from a bank or savings and loan association, or any loan obtained by the buyer from those lenders [*Civ. Code* § 2982.5(d)].

[b] Required Disclosures in Contract

Nothing in the Rees-Levering Act prohibits the seller from assisting the buyer in obtaining a loan from any third party to be used to pay the purchase price, or any part of the price, of a vehicle [*Civ. Code* § 2982.5(d)].

If the buyer becomes obligated to purchase the vehicle, or receives possession of the vehicle, before obtaining the loan, the agreement between the buyer and the seller must set forth the following on its face [*Civ. Code* § 2982.5(d)(5)]:

- The amount of the loan.
- The finance charge.
- The sum of those amounts.
- The number of installments scheduled to repay the loan and the amount of each installment.
- A statement that the buyer may be required to pledge security for the loan, and the security must be mutually agreed to by the buyer and the lender.
- A notice to the buyer in at least eight-point type that the buyer is obligated for the installment payments on the loan and for any payments that may be due on the agreement between the buyer and the seller.

[c] Seller-Provided Security

The seller may not provide any security or other guarantee of payment on the loan [*Civ. Code* § 2982.5(d)(5)].

[d] Seller's Financial Interest in Loan

The seller may not receive any commission or other remuneration for assisting the buyer to obtain the loan [*Civ. Code* § 2982.5(d)(5)].

[e] Rescission and Restitution

If the buyer becomes obligated to purchase the vehicle, or receives possession of the vehicle, before obtaining the loan, and the buyer, on appropriately applying for the loan, is unable to obtain the loan on the conditions stated in the contract, the contract or purchase order must be deemed rescinded, and all consideration received on it by either party must be returned without demand [*Civ. Code* § 2982.5(d)(5)].

[f] Real Property as Security

The loan may be on any security [*but see* [c], *above*], but except as provided in *Civ. Code* § 2982.5(d)(2), noted below, the loan may not be secured in whole or in part by a lien on real property. Any lien on real property taken in violation of *Civ. Code* § 2982.5 is void and unenforceable [*Civ. Code* § 2982.5(d)(1)].

A lien on real property may be taken to secure a loan of \$7,500 or more used to pay all or any part of the purchase price of a recreational vehicle [*see Health & Safety Code* § 18010 (definition)] that is not less than 20 feet in length [*Civ. Code* § 2982.5(d)(2)].

[g] Preservation of Buyer's Claims and Defenses

The lender or the lender's successor in interest is subject to all claims and defenses that the buyer could assert against the seller, but liability may not exceed the amount of the loan [*Civ. Code* § 2982.5(d)(4)].

[h] Consequences of Buyer's Default

The provisions of *Civ. Code* § 2983.2 concerning a notice of intention to sell the vehicle after repossession [*see* § 47.203] and *Civ. Code* § 2983.3 concerning acceleration of maturity [*see* § 47.12[4][e]] apply in the event of a default, except when the contract holder is a lender licensed under the Finance Lenders Law [*see Fin. Code* § 22000 *et seq.*]. To obtain a deficiency judgment, a secured creditor who sells a defaulting debtor's repossessed car must comply not only with all the provisions of the Rees-Levering Act, but also with any relevant provisions in Division 9 of the Commercial Code [*Bank of America v. Lallana* (1998) 19 Cal. 4th 203, 206, 77 Cal. Rptr. 2d 910, 960 P.2d 1133 (decided under version of Division 9 that was in effect prior to July 1, 2001); *see Civ. Code* §§ 2983.2(a), 2983.8(b); *Com. Code* §§ 9611(b)-(d), 9614; *see also* § 47.203, *below*].

The provisions of *Civ. Code* § 2984.4 concerning civil actions apply to the loan. For discussion of civil actions, see California Forms of Pleading and Practice, Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* (Matthew Bender). In no event, however, is the lender or the lender's successor in interest authorized to charge for any costs, fees, or expenses, or to obtain any other benefit that the lender is prohibited from charging or obtaining under any regulatory law applicable to the lender [*Civ. Code* § 2982.5(d)(3)].

[i] Unenforceability of Waiver

Any waiver by the buyer of the provisions of *Civ. Code* § 2982.5 is void and unenforceable [*Civ. Code* § 2982.5(d)(6)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionGeneral
OverviewContracts LawDebtor & Creditor RelationsContracts LawRemediesRescission & RedhibitionGeneral
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20-47 California Legal Forms--Transaction Guide § 47.14

§ 47.14 Translation of Contract Negotiated in Language Other than English

If a language other than English is the primary language used for negotiations with a consumer, the consumer may have to be provided with a translation of the contract in that other language. For contracts entered into prior to July 1, 2004, this requirement applied only to contracts negotiated primarily in Spanish. On and after July 1, 2004, it applies to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [*see Civ. Code § 1632*].

Generally, any person engaged in a trade or business who negotiates primarily in the other language, orally or in writing, in the course of entering into any consumer contract or agreement, must deliver to the consumer, before the consumer executes the contract or agreement, a translation of the contract or agreement in the other language. This translation must include a translation of every term and condition in that contract or agreement. This requirement is specifically applicable to contracts under the Rees-Levering Act or the Vehicle Leasing Act [*Civ. Code § 1632(b)(1)*]. Generally, "contract or agreement" in *Civ. Code § 1632* means the document creating the rights and obligations of the parties, and includes any subsequent document making substantial changes in the rights and obligations of the parties [*Civ. Code § 1632(g)*]. For example, a notice of repossession and deficiency of a motor vehicle under *Civ. Code § 2983.2* is a document that substantially affects the borrower's rights under the contract; therefore, the borrower is entitled to a translation of the notice [*Reyes v. Superior Court (1981) 118 Cal. App. 3d 159, 162, 173 Cal. Rptr. 267*]. However, documents such as periodic statements, sales slips, invoices, and other similar documents are excluded [*see Civ. Code § 1632(g)*].

The above requirements, together with related requirements and exceptions, are discussed in detail in *Ch. 45, Consumer Installment Loans and Credit Sales, § 45.64*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law
Debtor & Creditor Relations



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20-47 California Legal Forms--Transaction Guide § 47.15

§ 47.15 Seller's Involvement in Related Insurance Transactions

[1] Requiring Credit Life or Disability Insurance

A retailer or credit card issuer may wish to protect its position through the use of credit disability insurance covering the debtor. However, a creditor who has sold, arranged for the sale, or received a commission for the sale of credit disability insurance to a debtor is precluded from collecting any credit balance until three calendar months after the first missed payment is due or the insurer pays or rejects the debtor's claim, whichever is first [*see Civ. Code § 1812.402(a)*], and that fact must be disclosed to the debtor by the creditor when the creditor sells the insurance to the debtor [*see Civ. Code § 1812.402(f)(1)*; *see also § 45.80 et seq. in Ch. 45, Consumer Installment Loans and Credit Sales*]. The insurer must disclose the claim procedure to the debtor when it sends claims forms to the debtor [*see Civ. Code § 1812.402(f)(2)*; *see also McManis v. San Diego Postal Credit Union (1998) 61 Cal. App. 4th 547, 557-558, 71 Cal. Rptr. 2d 617* (credit union failed to meet its burden on summary judgment to negate consumer's breach of contract claim because it did not establish compliance with *Civ. Code § 1812.400 et seq.*, including *Civ. Code § 1812.402(f)*, before repossession)].

Article 5.9 of the Insurance Code [*Ins. Code § 779.1 et seq.*] contains provisions regulating the sale and issuance of such credit life and disability insurance. For more detailed coverage of this topic, see *California Insurance Law and Practice*, Ch. 31, *Credit Life and Disability Insurance* (Matthew Bender).

[2] Steering Buyer to Insurance Agent

It is illegal in California for any person in the business of financing the purchase of personal property to require the purchaser to insure the property through any particular insurance agent or broker [*Ins. Code § 770*]. A written statement signed by the buyer to the effect that the buyer voluntarily chose the insurance agent or broker through whom the insurance was placed, and that the choice made was not a condition precedent to the sale, is *prima facie* evidence of compliance with *Ins. Code § 770*, if the buyer wrote the name of the chosen agent or broker into an authorization for the insurance [*Ins. Code § 772*].

If the creditor requires credit life insurance or credit disability insurance [*see [1], above*], the buyer on request to the

creditor must be given the option of furnishing the required insurance through existing policies owned or controlled by the buyer, or procuring it through any insurer acceptable to the creditor authorized to transact insurance business in California [*Ins. Code* § 779.20].

[3] Financial Interest in Insurance

An automobile dealer that enters into a vehicle insurance transaction must be licensed as an insurance agent or broker, unless the dealer receives no commission, dealer's reserve, or bonus that is directly or indirectly dependent on insurance and the insurance is personally transacted by a dealer's subsidiary or another person licensed to transact insurance business [*10 Cal. Code Reg. § 2110*]. Specified disclosures must be included either in the contract or in a separate document [*10 Cal. Code Reg. § 2114; see § 47.200[1][m]*].

An automobile dealer must remit any automobile insurance premium included in the "unpaid balance" of the contract to the insurance company issuing the policy within 90 days after execution of the conditional sale contract. If the premium is not remitted, the dealer cannot collect any finance charge on the amount of the premium until it is actually remitted to the insurance company [*10 Cal. Code Reg. § 2121.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance LawLife InsuranceCredit LifeInsurance LawMotor Vehicle InsuranceGeneral Overview



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§ 47.16 Seller's Advertising

[1] Prices and Added Charges

Prices advertised [*see 13 Cal. Code Reg. § 255.00* ("advertising" defined)] by dealers or lessor-retailers must not be qualified by such terms as "unpaid balance" or "balance can be financed" unless the total cash price is included in the immediate proximity of the qualified price in type not less than one third of the type size in which the price is quoted [*13 Cal. Code Reg. § 262.00(a)*]. A dealer must not advertise the price of a new vehicle or class of new vehicles unless the vehicle has all of the equipment listed as standard by the manufacturer or distributor [*13 Cal. Code Reg. § 262.00(b)*].

"Dealer's cost," "factory invoice," and similar terms are defined as the actual cost to the dealer of any vehicle or part delivered to the dealer's place of business, not including expenses incurred by the dealer such as flooring, overhead, commissions, dealer advertising, or other costs [*13 Cal. Code Reg. § 255.01*].

A dealer may not identify any separate charge or charges for services performed on vehicles prior to delivery to the extent that the dealer is or will be reimbursed for the expenditures by another party. If a dealer does identify any separate charge or charges for delivery and preparation services performed over and above those delivery and preparation obligations specified by the franchiser and for which the dealer is to be reimbursed by the franchiser, the services performed and the charges for them must be separately itemized. The added charges must be included in the advertised price [*13 Cal. Code Reg. § 262.03*].

[2] Credit Terms

[a] In General

The Truth in Lending Act prescribes various items that must be disclosed in any kind of credit advertising in which any disclosure of certain "triggering" credit terms is made [*15 U.S.C. §§ 1662, 1664; see § 45.54 in Ch. 45, Consumer Installment Loans and Credit Sales*]. The Department of Motor Vehicles, under its authority to license dealers, also regulates advertising of credit sales of automobiles. Credit terms advertised must include all charges required to place

the transaction on a time-payment basis. Advertisements of terms that include escalated payments, balloon payments, or pick-up payments must clearly identify those payments as to amounts and time due [13 Cal. Code Reg. § 262.05(a)].

Claims such as "everybody financed" and "no credit rejected," or words of a similar nature, must not be made unless the advertiser is willing to extend credit to each and every individual under any and all circumstances [13 Cal. Code Reg. § 262.05(b)]. If qualifying words such as "on credit approval" are used in conjunction with advertised credit terms, the qualifying words must be clearly stated, unabbreviated, in type of a size not less than one third of the type size used for the credit terms, and in close proximity to the credit terms [13 Cal. Code Reg. § 262.05(c)].

[b] Down Payments and Trade-Ins

The amount of down payment required to purchase a vehicle must not be advertised unless it is clearly identified as being a down payment in type of size not less than one third of the type size in which the amount of the down payment is stated [13 Cal. Code Reg. § 262.05(d)]. The statement "no down payment" or a similar statement must not be advertised unless the dealer or lessor-retailer will sell and deliver the advertised vehicle to any qualified purchaser without prior payment of any kind or trade-in [13 Cal. Code Reg. § 262.05(e)].

If an advertisement quotes the amount of a periodic payment, the advertisement must also quote the amount of the down payment required, unless the down payment required is equal to or less than the amount of the quoted periodic payment [13 Cal. Code Reg. § 262.05(f)].

The amount of a down payment must not be advertised unless it represents the total payment to be required of the purchaser prior to delivery of the vehicle, including any payment for sales tax or license [13 Cal. Code Reg. § 262.05(g)].

[c] Tentative Offers as Enticements

If a dealer or the dealer's salesperson uses cards, circulars, letters, notes or similar means to communicate tentative offers such as "would you take \$ _____," "if I could get you \$ _____," or "your car is worth \$ _____," the dealer must allow the prospective purchaser the amount stated on the tentative offer as a trade-in allowance on any vehicle selected for purchase by the prospective purchaser. Each tentative offer must include an expiration date printed or written on the offering document [13 Cal. Code Reg. § 262.05(h)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Truth in Lending General Overview Banking Law Consumer Protection Truth in Lending Disclosure Contracts Law Debtor & Creditor Relations



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California Legal Forms--Transaction Guide

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CHAPTER 47 AUTOMOTIVE FINANCING AND VEHICLE LEASING
PART II. LEGAL BACKGROUND
A. Automotive Finance

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[Reserved]

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DIVISION III: COMMERCIAL TRANSACTIONS
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B. Vehicle Leasing and Renting

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§ 47.30 Consumer Leasing Act and Regulation M

[1] Overview

[a] Scope, Purpose, and Enforcement

The Consumer Leasing Act (CLA) [Pub. L. No. 94-240, § 3; *see 15 U.S.C. § 1667 et seq.*] was enacted in 1976 as an amendment to the Truth in Lending Act (TILA) [*see* Pub. L. No. 90-321, § 181 *et seq.*; *15 U.S.C. § 1601 et seq.*]. The CLA generally applies to "consumer leases" of "personal property" in which the contractual obligation does not exceed \$25,000 and has a term of more than four months [*see* [2], *below*]. An automobile lease is the most common type of consumer lease covered by the CLA. Under the CLA, lessors are required to provide uniform cost and other information [*see* [3]-[7], *below*] about consumer lease transactions.

The Board of Governors of the Federal Reserve System has rulemaking authority [*see 15 U.S.C. § 1667f*]. Its Regulation M [12 C.F.R. pt. 213] implements the CLA and applies to all persons that are lessors of personal property under consumer leases, as defined [*see* [2], *below*]. The purposes of Regulation M are (1) to ensure that lessees of personal property receive meaningful disclosures that enable them to compare lease terms with other leases and, where appropriate, with credit transactions, (2) to limit the amount of balloon payments in consumer lease transactions, and (3) to provide for the accurate disclosure of lease terms in advertising [12 C.F.R. § 213.1(b)]. An official staff commentary interprets the regulation [*see* 12 C.F.R. pt. 213, *supp. I*].

Several agencies have enforcement authority, depending on the status of the lessor (or other person required to comply with the CLA and Regulation M) as a bank, savings and loan association, and so forth. The Federal Trade Commission is the default enforcement agency. Enforcement agencies are listed in Appendix B to Regulation M [*see* 12 C.F.R. pt. 213, *app. B*].

[b] Exclusion of Lease to Organization or for Nonpersonal Use

"Consumer lease" does not include a lease for agricultural, business, or commercial purposes, or a lease to a government or governmental agency or instrumentality or to an organization [15 U.S.C. § 1667(1); 12 C.F.R. § 213.2(e)(2)]. In

addition, Regulation M does not apply to a lease transaction of personal property that is incident to the lease of real property and provides that (1) the lessee has no liability for the value of the personal property at the end of the lease term except for abnormal wear and tear and (2) the lessee has no option to purchase the leased property [12 C.F.R. § 213.2(e)(3)].

An "agricultural purpose" is a purpose related to the production, harvest, exhibition, marketing, transportation, processing, or manufacture of agricultural products by a natural person who cultivates, plants, propagates, or nurtures those agricultural products, including (but not limited to) the acquisition of personal property and services used primarily in farming. Agricultural products include horticultural, viticultural, and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any products of the same, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products of the same [12 C.F.R. pt. 213, supp. I, comment 2(e)-5].

A lease made to an organization [see 12 C.F.R. § 213.2(j) ("organization" means corporation, trust, estate, partnership, cooperative, association, or government entity or instrumentality)] is not subject to Regulation M even if the property is used (by an employee, for example) primarily for personal, family or household purposes. Likewise, a lease made to an organization is not a consumer lease even if it is guaranteed by or subsequently assigned to a natural person [12 C.F.R. pt. 213, supp. I, comment 2(e)-6].

[c] Exclusion of Lease Qualifying as Credit Sale

A lease that meets the definition of a credit sale in Regulation Z is not a consumer lease [12 C.F.R. pt. 213, supp. I, comment 2(e)-4]. Regulation Z defines a credit sale, in part, as a bailment or lease (unless terminable without penalty at any time by the consumer) under which (1) the consumer agrees to pay as compensation for use a sum substantially equivalent to, or in excess of, the total value of the property and services involved and (2) the consumer will become (or has the option to become), for no additional consideration or for nominal consideration, the owner of the property on compliance with the agreement [12 C.F.R. § 226.2(a)(16)]. For discussion of Regulation Z, see Ch. 45, *Consumer Installment Loans and Credit Sales*.

[d] Exclusion of Safe-Deposit Box Lease

A lease of a safe deposit box is not a consumer lease for purposes of Regulation M [12 C.F.R. pt. 213, supp. I, comment 2(e)-8].

[e] Exclusion of Lease Incidental to Service

Leases of the following kinds of personal property are deemed incidental to services and are not consumer leases subject to Regulation M [12 C.F.R. pt. 213, supp. I, comment 2(e)-7]:

- Home entertainment systems, when the consumer is required to lease equipment that enables a television to receive the transmitted programming.
- Security alarm systems requiring the installation of leased equipment intended to monitor unlawful entries into a home and in some cases to provide fire protection.
- Propane gas tanks, when the consumer must lease a tank to receive the propane gas service.

[2] Definitions

[a] Consumer Lease

"Consumer lease" means a contract in the form of a lease or bailment for the use of personal property [see [d], *below*] by a natural person, for a period of time exceeding four months, and for a total contractual obligation not exceeding \$25,000, primarily for personal, family, or household purposes, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, except that the term does not include any credit sale as defined in 15 U.S.C. § 1602(g) [15 U.S.C. § 1667(1); 12 C.F.R. § 213.2(e)(1); see 12 C.F.R. § 226.2(a)(16) ("credit sale" defined)].

A lessor must determine in each case whether the leased property will be used primarily for personal, family, or household purposes. If a question exists as to the primary purpose for a lease, the fact that a lessor gives disclosures is not controlling on the question of whether the transaction is covered. The primary purpose of a lease is determined before or at consummation, and a lessor need not provide Regulation M disclosures when there is a subsequent change in the primary use [12 C.F.R. pt. 213, supp. I, comment 2(e)-1].

To be a consumer lease, the initial term of the lease must be more than four months. Thus, a lease of personal property for four months, three months or on a month-to-month or week-to-week basis (even though the lease actually extends beyond four months) is not a consumer lease and is not subject to the disclosure requirements of Regulation M. However, a lease that imposes a penalty for not continuing the lease beyond four months is considered to have a term of more than four months [12 C.F.R. pt. 213, supp. I, comment 2(e)-2]. For example:

- A three-month lease extended on a month-to-month basis and terminated after one year is not subject to Regulation M.
- A month-to-month lease with a penalty, such as the forfeiture of a security deposit for terminating before one year, is subject to Regulation M.

[b] Lessee

"Lessee" means a natural person who leases or is offered a consumer lease [15 U.S.C. § 1667(2); 12 C.F.R. § 213.2(g)]. Guarantors are not lessees for purposes of Regulation M [12 C.F.R. pt. 213, supp. I, comment 2(g)-1], although a guarantor would be entitled to a warning under California law [see *Civ. Code* § 1799.91; § 47.222].

[c] Lessor

"Lessor" means a person who is regularly engaged in leasing, offering to lease, or arranging to lease under a consumer lease [15 U.S.C. § 1667(3)]. A person who has leased, offered, or arranged to lease personal property more than five times in the preceding calendar year or more than five times in the current calendar year is subject to the CLA and Regulation M [12 C.F.R. § 213.2(h)]. "Person" means a natural person or an organization [12 C.F.R. § 213.2(k)]. "Organization" means a corporation, trust, estate, partnership, cooperative, association, or government entity or instrumentality [12 C.F.R. § 213.2(j)]; the term includes joint ventures and persons operating under a business name [12 C.F.R. pt. 213, supp. I, comment 2(j)-1]. An assignee may be a lessor for purposes of Regulation M in the same circumstances in which an assignee has been held to be a creditor for purposes of former Regulation Z because of being substantially involved in the credit transaction [12 C.F.R. pt. 213, supp. I, comment 2(h)-3; see *Ford Motor Credit Co. v. Cenance* (1981) 452 U.S. 155, 158, 101 S. Ct. 2239, 68 L. Ed. 2d 744 (assignee was creditor for purposes of pre-1980 Truth in Lending Act and Regulation Z because of substantial involvement in credit transaction)].

To "arrange" for the lease of personal property means to provide or offer to provide a lease that is or will be extended by another person under a business or other relationship pursuant to which the person arranging the lease either (a) receives or will receive a fee, compensation, or other consideration for the service or (b) has knowledge of the lease terms and participates in the preparation of the contract documents required in connection with the lease [12 C.F.R. pt. 213, supp. I, comment 2(h)-1]. For example:

- An automobile dealer who, pursuant to a business relationship, completes the necessary lease agreement before forwarding it to the leasing company (to whom the obligation is payable on its face) for execution is arranging for the lease.
- An automobile dealer who, receiving no fee for the service, refers a customer to a leasing company that will prepare all relevant contract documents is not arranging for the lease.

The term "other consideration" in this context refers to an actual payment corresponding to a fee or similar compensation, and not to intangible benefits, such as the advantage of increased business, that may flow from the relationship between the parties [12 C.F.R. pt. 213, supp. I, comment 2(h)-2].

Regulation M applies to all persons (including branches of foreign banks or leasing companies located in the United States) that offer consumer leases to residents of any state (including foreign nationals) [see 12 C.F.R. § 213.2(p) ("state" defined); [9], *below*]. Regulation M does not apply to a foreign branch of a U.S. bank or leasing company leasing to a U.S. citizen residing or visiting abroad or to a foreign national abroad [12 C.F.R. pt. 213, supp. I, comment 1-1].

[d] Property

"Personal property" means any property that is not real property under the laws of the state where it is situated at the time offered or otherwise made available for lease [15 U.S.C. § 1667(4); 12 C.F.R. § 213.2(l)]. Whether or not property is considered personal property depends on state or other applicable law. For example, a mobile home or houseboat may be considered personal property in one state but real property in another [12 C.F.R. pt. 213, supp. I, comment 2(l)-1]. A vehicle is personal property under California law [see *Civ. Code* §§ 657-663 (property is either real property or personal property, and "real property" is specifically defined; property other than real property is personal property)].

[e] Security and Security Interest

"Security" and "security interest" mean any interest in property that secures payment or performance of an obligation [15 U.S.C. § 1667(5); 12 C.F.R. § 213.2(o)]. Only interests that are security interests under state or other applicable law are encompassed by the definition. For example, any interest that the lessor may have in the leased property falls within this definition only if it is considered a security interest under state or other applicable law [12 C.F.R. pt. 213, supp. I, comment 2(o)-2]. Federally mandated disclosures [see [3], *below*] encompass a description of any security interest held or to be retained by the lessor in connection with the lease and a clear identification of the property to which the security interest relates [15 U.S.C. § 1667a(8); see § 47.220[1][c]].

For purposes of disclosure, a security interest is an interest taken by the lessor to secure performance of the lessee's obligation. For example, if a bank that is not a lessor makes a loan to a leasing company and takes assignments of consumer leases generated by that company to secure the loan, the bank's security interest in the lessor's receivables is not a security interest for purposes of Regulation M [12 C.F.R. pt. 213, supp. I, comment 2(o)-1]. The lessor's right to insurance proceeds or unearned insurance premiums is not a security interest for purposes of Regulation M [12 C.F.R. pt. 213, supp. I, comment 2(o)-3].

An interest that the lessor may have in leased property must be disclosed only if it is considered a security interest under state or other applicable law. The term includes (but is not limited to) security interests under the Uniform Commercial Code; real property mortgages, deeds of trust, and other consensual or confessed liens, whether or not recorded; mechanic's, materialman's, artisan's, and other similar liens; vendor's liens in both real and personal property; liens on property arising by operation of law; and any interest in a lease when used to secure payment or performance of an obligation [12 C.F.R. pt. 213, supp. I, comment 2(o)-2].

[3] Disclosure Requirements

[a] In General

Each lessor must give a lessee, before the consummation of the lease, a dated written statement on which the lessor and lessee are identified, setting out accurately and in a clear and conspicuous manner the information prescribed by statute with respect to that lease. The disclosures may be made in the lease to be signed by the lessee [15 U.S.C. § 1667a]. For further discussion, see § 47.220[1][b].

Disclosures must reflect the terms of the legal obligation between the parties. For example, in a three-year lease with no penalty for termination after a one-year minimum term, disclosures must be based on the full three-year term of the lease. The one-year minimum term is relevant only to the early-termination provisions of Regulation M [12 C.F.R. pt. 213, supp. I, comment 3(a)-1; see 12 C.F.R. § 213.4(g)(1), (k), (l)].

[b] Use of Estimates

If an amount or other item needed to comply with a required disclosure is unknown or unavailable after reasonable efforts have been made to ascertain the information, the lessor may use a reasonable estimate that is based on the best information available to the lessor, is clearly identified as an estimate, and is not used to circumvent or evade any disclosures required by Regulation M [12 C.F.R. § 213.3(d); see 15 U.S.C. § 1667a (regulations may provide that any information required to be disclosed may be given as estimates if lessor is not in position to know exact information)]. For example 12 C.F.R. § 213.4(n) requires the lessor to disclose the total amount payable by the lessee during the lease term for official and license fees, registration, certificate of title fees, or taxes. If these amounts are subject to increases or decreases over the course of the lease, the lessor may estimate the disclosures based on the rates or charges in effect at the time of the disclosure [12 C.F.R. pt. 213, supp. I, comment 3(d)(1)-1].

Estimates must be made on the basis of the best information reasonably available at the time disclosures are made. The "reasonably available" standard requires that the lessor, acting in good faith, exercise due diligence in obtaining information. The lessor may rely on the representations of other parties. For example, the lessor might look to the consumer to determine the purpose for which leased property will be used, to insurance companies for the cost of insurance, or to an automobile manufacturer or dealer for the date of delivery [12 C.F.R. pt. 213, supp. I, comment 3(d)(1)-2].

Generally, only the disclosure for which the exact information is unknown is labeled as an estimate. Nevertheless, when several disclosures are affected because of the unknown information, the lessor has the option of labeling as an estimate every affected disclosure or only the disclosure primarily affected [12 C.F.R. pt. 213, supp. I, comment 3(d)(1)-5].

[c] Tolerance for Minor Variations

A lessor may disregard the effects of the following in making disclosures [12 C.F.R. § 213.3(f)]:

- That payments must be collected in whole cents.
- That dates of scheduled payments may be different because a scheduled date is not a business day.
- That months have different numbers of days.
- That February 29 occurs in a leap year.

[d] Records-Retention Requirement

The lessor must retain evidence of compliance with the requirements imposed by Regulation M, other than the advertising requirements [see 12 C.F.R. § 213.7; [6], [7], *below*], for at least two years after the date the disclosures are required to be made or an action is required to be taken [12 C.F.R. § 213.8]. For discussion of the civil liability of lessors, see [8], *below*.

The lessor must retain evidence of having performed required actions and of having made required disclosures. These records may be retained in paper form, on microfilm, microfiche, or computer, or by any other method designed to reproduce records accurately. The lessor need retain only enough information to reconstruct the required disclosures or other records [12 C.F.R. pt. 213, supp. I, comment 8-1].

[4] Effect of Subsequent Event

[a] Disregard of Inaccurate Disclosure

If a required disclosure becomes inaccurate because of an event occurring after consummation, the inaccuracy is not a violation of Regulation M [12 C.F.R. § 213.3(e)]. Examples of subsequent occurrences include [12 C.F.R. pt. 213, supp. I, comment 3(e)-1]:

- An agreement between the lessee and lessor to change from a monthly to a weekly payment schedule.
- An increase in official fees or taxes.
- An increase in insurance premiums or coverage caused by a change in the law.
- Late delivery of an automobile caused by a strike.

When a disclosure becomes inaccurate because of a subsequent occurrence, the lessor need not make new disclosures unless new disclosures are required under 12 C.F.R. § 213.5 [12 C.F.R. pt. 213, supp. I, comment 3(e)-2] in a case of renegotiation or extension [see [b], *below*].

The lessor does not violate Regulation M if a previously given disclosure becomes inaccurate when a lessee fails to perform obligations under the contract and the lessor takes actions that are necessary and proper in the circumstances to protect the lessor's interest. For example, the addition of insurance or a security interest by the lessor because the lessee has not performed obligations contracted for in the lease is not a violation of Regulation M [12 C.F.R. pt. 213, supp. I, comment 3(e)-3].

[b] Renegotiation or Extension

A renegotiation occurs when a consumer lease subject to Regulation M is satisfied and replaced by a new lease undertaken by the same consumer. A renegotiation requires new disclosures [12 C.F.R. § 213.5(a)], except as provided in 12 C.F.R. § 213.5(d) [see [c], *below*].

An extension is a continuation, agreed to by the lessor and the lessee, of an existing consumer lease beyond the originally scheduled end of the lease term, except when the continuation is the result of a renegotiation. An extension that exceeds six months requires new disclosures [12 C.F.R. § 213.5(b)], except as provided in 12 C.F.R. § 213.5(d) [see [c], *below*]. If a consumer lease is extended for a specified term greater than six months, new disclosures are required at the time the extension is agreed on. If the lease is extended on a month-to-month basis and the cumulative extensions exceed six months, new disclosures are required at the commencement of the seventh month and at the commencement of each subsequent seventh month for as long as the extensions continue. If a consumer lease is

extended for terms of varying durations, one of which will exceed six months beyond the originally scheduled termination date of the lease, new disclosures are required at the commencement of the term that will exceed six months beyond the originally scheduled termination date [12 C.F.R. pt. 213, supp. I, comment 5(b)-1]. The disclosures for a lease extended on a month-to-month basis for more than six months should reflect the month-to-month nature of the transaction [12 C.F.R. pt. 213, supp. I, comment 5(b)-2].

These rules apply only to existing leases that are covered by Regulation M. They do not apply to the renegotiation or extension of leases with an initial term of four months or less, because such leases are not covered by the definition of consumer lease [see 12 C.F.R. § 213.2(e); see [2][a], above]. Whether and when a lease is satisfied and replaced by a new lease is determined by state or other applicable law [12 C.F.R. pt. 213, supp. I, comment 5-1].

[c] New Disclosures Not Required

New disclosures are not required when a consumer lease is assumed by another person, regardless of whether the lessor charges an assumption fee [12 C.F.R. § 213.5(c)].

New disclosures are not required for the following, even if they meet the definition of a renegotiation or an extension [see [b], above]:

- A reduction in the lease charge [12 C.F.R. § 213.5(d)(1)].
- The deferment of one or more payments, regardless of whether a fee is charged [12 C.F.R. § 213.5(d)(2)].
- The extension of a lease for not more than six months on a month-to-month basis or otherwise [12 C.F.R. § 213.5(d)(3)].
- A substitution of leased property with property that has a substantially equivalent or greater economic value, provided no other lease terms are changed [12 C.F.R. § 213.5(d)(4)].
- The addition, deletion, or substitution of leased property in a multiple-item lease, provided the average periodic payment does not change by more than 25 percent [12 C.F.R. § 213.5(d)(5)].
- An agreement resulting from a court proceeding [12 C.F.R. § 213.5(d)(6)].

[5] Expiration or Termination of Open-End Lease

[a] Estimated Residual Value of Property

When the lessee's liability on expiration of a consumer lease is based on the estimated residual value of the property (which is true in the case of an open-end lease), the estimated residual value must be a reasonable approximation of the anticipated actual fair market value of the property on lease expiration [15 U.S.C. § 1667b(a)]. "Residual value" means the value of the leased property at the end of the lease term, as estimated or assigned at consummation by the lessor, used in computing the base periodic payment [12 C.F.R. § 213.2(n)]. The estimate of the residual value must be based on the best information reasonably available to the lessor [see 12 C.F.R. § 213.3(d); see also [3][b], above]. A lessor generally should use an accepted trade publication listing estimated current or future market prices for the leased property unless other information or a reasonable belief based on the lessor's experience provides a better estimate [12 C.F.R. pt. 213, supp. I, comment 3(d)(1)-3].

EXAMPLE:

A lessor offering a three-year open-end lease assigns a wholesale value to the vehicle at the end of the

lease term. The lessor may disclose as an estimate a wholesale value derived from a generally accepted trade publication listing current wholesale values [12 C.F.R. pt. 213, supp. I, comment 3(d)(1)-3].

EXAMPLE:

The facts are the same as in the preceding illustration except that the lessor discloses an estimated value derived by adjusting the residual value quoted in the trade publication because, in the lessor's experience, the trade publication either understates or overstates the prices actually received in local used-vehicle markets. The lessor may adjust estimated values quoted in trade publications if the lessor reasonably believes, based on the lessor's experience, that the values are understated or overstated [12 C.F.R. pt. 213, supp. I, comment 3(d)(1)-3].

There is a rebuttable presumption that the estimated residual value is unreasonable to the extent that the estimated residual value exceeds the actual residual value by more than three times the average payment allocable to a monthly period under the lease. In addition, when the lessee has the liability on expiration of a consumer lease, there is a rebuttable presumption that the lessor's estimated residual value is not in good faith to the extent that the estimated residual value exceeds the actual residual value by more than three times the average payment allocable to a monthly period under the lease. The lessor must not collect from the lessee the amount of the excess liability on expiration of a consumer lease unless the lessor brings a successful action with respect to the excess liability. In all actions, the lessor must pay the lessee's reasonable attorneys' fees. However, these presumptions do not apply to the extent that the excess of estimated over actual residual value is due to physical damage to the property beyond reasonable wear and use, or to excessive use; and the lease may set standards for the wear and use if the standards are not unreasonable [15 U.S.C. § 1667b(a)].

Nothing in 15 U.S.C. § 1667b, discussed above, precludes the right of a willing lessee to make any mutually agreeable final adjustment with respect to the excess residual liability, provided the agreement is reached after termination of the lease [15 U.S.C. § 1667b(a)].

[b] Independent Appraisal of Residual Value

If a lease has a residual value provision at the termination of the lease, the lessee may obtain, at the lessee's expense, a professional appraisal of the leased property by an independent appraiser agreed to by both parties. The appraisal is final and binding on the parties [15 U.S.C. § 1667b(c)]. The lessor must disclose this appraisal right [12 C.F.R. § 213.4(l); see § 47.220[1][c]].

Regulation M does not specify a period in which the lessee must exercise the appraisal right. The lessor may require the lessee to obtain the appraisal within a reasonable period after termination of the lease [12 C.F.R. pt. 213, supp. I, comment 4(l)-4].

The lessee does not have the right to an independent appraisal merely because the lessee is liable at the end of the lease term or at early termination for unreasonable wear or use, and in that event, the disclosure requirement does not apply. For example, the lessor might expect the lessee to return an undented car with four good tires at the end of the lease term. Even though the lessor may hold the lessee liable for the difference between a dented car with bald tires and the value of a car in reasonably good condition, no disclosure of an appraisal right is required [12 C.F.R. pt. 213, supp. I, comment 4(l)-1].

[c] Delinquency, Default, or Early-Termination Charges

Penalties or other charges for delinquency, default, or early termination may be specified in the lease, but only at an amount that is reasonable in the light of the anticipated or actual harm caused by the delinquency, default, or early termination, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate

remedy [15 U.S.C. § 1667b(b); 12 C.F.R. pt. 213, supp. I, comment 4(q)-5; *see* 12 C.F.R. § 213.4(q) (disclosure requirement); § 47.220[1][c]].

In a simple-interest accounting lease, the additional rent charge that accrues on the lease balance when a periodic payment is made after the due date does not constitute a penalty or other charge for late payment. Similarly, continued accrual of the rent charge after termination of the lease because the lessee fails to return the leased property does not constitute a default charge. In either case, however, if the additional charge accrues at a rate higher than the normal rent charge, the lessor must disclose the amount of, or the method of determining, the additional charge [12 C.F.R. pt. 213, supp. I, comment 4(q)-3; *see* 12 C.F.R. § 213.4(q) (disclosure requirement)].

[6] Consumer Lease Advertisements

[a] In General

An advertisement is a commercial message in any medium that directly or indirectly promotes consumer lease transactions [12 C.F.R. § 213.2(b)]. "Advertisement" includes messages inviting, offering, or otherwise generally announcing to prospective customers the availability of consumer leases, whether in visual, oral, print or electronic media. Examples include the following [12 C.F.R. pt. 213, supp. I, comment 2(b)-1]:

- Messages in newspapers, magazines, leaflets, catalogs, and fliers.
- Messages on radio, television, and public address systems.
- Direct mail literature.
- Printed material on any interior or exterior sign or display, in any window display, in any point-of-transaction literature or price tag that is delivered or made available to a lessee or prospective lessee in any manner whatsoever.
- Telephone solicitations.
- On-line messages, such as those on the Internet.

The term does not apply to the following [12 C.F.R. pt. 213, supp. I, comment 2(b)-2]:

- Direct personal contacts, including follow-up letters, cost estimates for individual lessees, or oral or written communications relating to the negotiation of a specific transaction.
- Informational material distributed only to businesses.
- Notices required by federal or state law, if the law mandates that specific information be displayed and only the mandated information is included in the notice.
- News articles controlled by the news medium.
- Market research or educational materials that do not solicit business.

All "persons" must comply with the advertising provisions in this section, not just persons meeting the definition of lessor [*see* 12 C.F.R. § 213.2(h); [2][c], *above*]. Thus, automobile dealers, merchants, and others who are not themselves lessors must comply with the advertising provisions of Regulation M if they advertise consumer lease

transactions [12 C.F.R. pt. 213, supp. I, comment 7(a)-1]. However, owners and personnel of the media in which an advertisement appears or through which it is disseminated are not subject to civil liability for violations [see [g], *below*]. In addition, 12 C.F.R. § 213.7(a) does not prohibit the advertising of a single item or the promotion of a new leasing program, but prohibits the advertising of terms that are not and will not be available. Thus, an advertisement may state terms that will be offered for only a limited period or terms that will become available at a future date [12 C.F.R. pt. 213, supp. I, comment 7(a)-2].

[b] Lease and Payment Information

An advertisement for a consumer lease may state that a specific lease of property at specific amounts or terms is available only if the lessor usually and customarily leases or will lease the property at those amounts or terms [12 C.F.R. § 213.7(a)].

If an advertisement for a consumer lease includes a statement of the amount of any payment, or a statement that any or no initial payment is required, the advertisement must clearly and conspicuously state the following, as applicable [15 U.S.C. § 1667c(a); 12 C.F.R. § 213.7(b)]:

- That the transaction advertised is a lease [15 U.S.C. § 1667c(a)(1)].
- The total amount of any initial payments required on or before consummation of the lease or delivery of the property, whichever is later [15 U.S.C. § 1667c(a)(2)].
- That a security deposit is required [15 U.S.C. § 1667c(a)(3)].
- The number, amount, and timing of scheduled payments [15 U.S.C. § 1667c(a)(4)].
- With respect to an open-end lease, in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the property [see 12 C.F.R. § 213.2(i)], a statement that an extra charge may be imposed at the end of the lease term [15 U.S.C. § 1667c(a)(5)].

In order to conform to the "clearly and conspicuously" standard, any affirmative or negative reference to a charge that is a part of the total amount due at lease signing, other than the statement of a periodic payment [see 12 C.F.R. § 213.7(d)(2)(ii); [f], *below*], such as the amount of any capitalized cost reduction (or no capitalized cost reduction is required), must not be more prominent than the disclosure of the total amount due at lease signing [12 C.F.R. § 213.7(b)(1)]. The disclosures in an advertisement in any media must be reasonably understandable. For example, very fine print in a television advertisement or detailed and very rapidly stated information in a radio advertisement does not meet the clear and conspicuous standard if consumers cannot see and read or hear, and cannot comprehend, the information required to be disclosed [12 C.F.R. pt. 213, supp. I, comment 7(b)-1]. Only a total of amounts due at lease signing or delivery is required to be disclosed, not an itemization of its component parts [12 C.F.R. pt. 213, supp. I, comment 7(b)(1)-1]. However, except for a periodic payment, if there is any oral or written reference to components of the total due at lease signing or delivery (for example, a reference to a capitalized cost reduction, when permitted), that reference may not be more prominent than the disclosure of the total amount due at lease signing or delivery [12 C.F.R. pt. 213, supp. I, comment 7(b)(1)-2].

[c] Limitation on Rate Information

If a lessor provides a percentage rate in an advertisement, the rate must not be more prominent than any of the mandatory disclosures, with the exception of the notice referred to in the next sentence. The rate must be accompanied by a notice stating that "this percentage may not measure the overall cost of financing this lease." The lessor must not use "annual percentage rate" or "annual lease rate" or any equivalent term [12 C.F.R. §§ 213.4(s), 213.7(b)(2)].

The notice required to accompany a percentage rate stated in an advertisement must be placed in close proximity to the rate without any other intervening language or symbols. For example, the lessor may not place an asterisk next to the rate and place the notice elsewhere in the advertisement. In addition, with the exception of the required notice stating that "this percentage may not measure the overall cost of financing this lease," the rate cannot be more prominent than any mandatory disclosure [see 12 C.F.R. § 213.4; § 47.220[1][c]-[e]] stated in the advertisement [12 C.F.R. pt. 213, supp. I, comment 7(b)(2)-1].

[d] Catalog or Multipage Advertisement

A catalog or other multi-page advertisement that provides a table or schedule of the required disclosures must be considered as a single advertisement if, for lease terms that appear without all of the required disclosures, the advertisement refers to the page or pages on which the table or schedule appears [12 C.F.R. § 213.7(c)].

The multiple-page advertisements referred to above are advertisements consisting of a series of numbered pages (for example, a supplement to a newspaper). A mailing comprising several separate flyers or pieces of promotional material in a single envelope is not a single multiple-page advertisement [12 C.F.R. pt. 213, supp. I, comment 7(c)-1]. A multiple-page advertisement is a single advertisement (requiring only one set of lease disclosures) if it contains a table, chart, or schedule with the mandatory disclosures [see 12 C.F.R. § 213.7(d)(2)(i)-(v); [f], *below*]. If one of the triggering terms [see 12 C.F.R. § 213.7(d)(1); [e], *below*] appears in a catalog or other multiple-page advertisement, the page on which the triggering term is used must clearly refer to the specific page where the table, chart, or schedule begins [12 C.F.R. pt. 213, supp. I, comment 7(c)-2].

[e] Terms Triggering Disclosure Requirements

An advertisement other than a merchandise tag must contain required disclosures [see 12 C.F.R. § 213.7(d)(2); [f], *below*], or a radio or television advertisement must meet alternative requirements [see [7], *below*], if the advertisement states any of the following items:

- The amount of any payment [12 C.F.R. § 213.7(d)(1)(i)].
- The number of required payments [12 C.F.R. § 213.7(d)(1)(ii)].
- A statement of any capitalized cost reduction or other payment required before or at consummation, or by delivery if delivery occurs after consummation [12 C.F.R. § 213.7(d)(1)(ii)].

A merchandise tag stating any item listed above may comply with the disclosure requirement [see [f], *below*] by referring to a sign or display prominently posted in the lessor's place of business that contains a table or schedule of the required disclosures [12 C.F.R. § 213.7(e)].

When any triggering term appears in a lease advertisement, the mandatory disclosures [see 12 C.F.R. § 213.7(d)(2)(i)-(v); [f], *below*] must also appear. In a multi-lease advertisement, an example of one or more typical leases with a statement of all of the terms applicable to each may be used. The examples must be labeled as such and must reflect representative lease terms that are made available by the lessor to consumers [12 C.F.R. pt. 213, supp. I, comment 7(d)(1)-1].

[f] Mandatory Disclosures

When an advertisement contains a statement that triggers disclosure requirements [see 12 C.F.R. § 213.7(d)(1); [e], *above*], the following information must be disclosed:

- That the transaction advertised is a lease [12 C.F.R. § 213.7(d)(2)(i)].
- The total amount due before or at consummation, or by delivery if delivery occurs after consummation [12 C.F.R. § 213.7(d)(2)(ii)].
- The number, amounts, due dates or periods of scheduled payments, and total of such payments under the lease [12 C.F.R. § 213.7(d)(2)(iii)].
- A statement of whether or not a security deposit is required [12 C.F.R. § 213.7(d)(2)(iv)].
- A statement that an extra charge may be imposed at the end of the lease term when the lessee's liability (if any) is based on the difference between the residual value of the leased property and its realized value at the end of the lease term [12 C.F.R. § 213.7(d)(2)(v)].

The disclosure of the total amount due at lease signing or delivery may exclude third-party fees, such as taxes, licenses, and registration fees, and disclose that fact, or provide a total that includes third-party fees based on a particular state or locality, as long as that fact and the fact that fees may vary by state or locality are disclosed [12 C.F.R. pt. 213, supp. I, comment 7(d)(2)-1].

[g] Enforcement

From time to time, the Federal Trade Commission publishes enforcement documents that illustrate failures to comply with the advertising requirements [see, e.g., *Grey Advertising, Inc.*, 63 F.R. 3744 (F.T.C. 1998) (consent orders); *Volkswagen of America, Inc.*, 62 F.R. 53640 (F.T.C. 1997) (consent orders); *Herb Gordon Auto World, Inc.*, 62 F.R. 5414 (F.T.C. 1997) (consent orders)].

No owner or employee of any entity that serves as a medium in which an advertisement appears or through which an advertisement is disseminated is liable for noncompliance with 15 U.S.C. § 1667c [15 U.S.C. § 1667c(b)].

[7] Radio and Television Advertisements

[a] In General

An advertisement by radio broadcast (which includes television) to aid, promote, or assist, directly or indirectly, any consumer lease must be deemed to be in compliance with the requirements of 15 U.S.C. § 1667c(a) [see [6][b], *above*] if the advertisement clearly and conspicuously conforms to the following standards [see 15 U.S.C. § 1667c(c)(3) (nothing in these requirements for radio advertising affects requirements of federal law applying to advertisement by any medium other than radio broadcast)].

- It states the information required by 15 U.S.C. § 1667c(a)(1) and (2) [15 U.S.C. § 1667c(c)(1)(A); see [6][b], *above*].
- It states the number, amounts, due dates or periods of scheduled payments, and the total of the payments under the lease [15 U.S.C. § 1667c(c)(1)(B)].

PRACTICE TIP:

This statement of payment terms will trigger a disclosure requirement under Regulation M [see 12 C.F.R. § 213.7(d)(1); [6][e], *above*]. The advertisement will be in compliance with the disclosure requirement if it contains the first three mandatory disclosures [see 12 C.F.R. § 213.7(d)(2)(i)-(iii)] listed in [6][f], *above*, and meets the following requirements

[see 12 C.F.R. § 213.7(f)(1)].

- It includes a referral to one of the following [15 U.S.C. § 1667c(c)(1)(C)(i)]:
 - A duly established toll-free telephone number [see [b], below] that may be used by consumers to obtain the information required under 15 U.S.C. § 1667c(a) [see 12 C.F.R. § 213.7(f)(1)(i); [6][b], above].
 - A written advertisement that both (1) appears in a publication in general circulation in the community served by the radio station on which the advertisement is broadcast during the period beginning three days before the broadcast and ending 10 days after the broadcast and also (2) includes the information required to be disclosed under 15 U.S.C. § 1667c(a) [see 12 C.F.R. § 213.7(f)(1)(ii); [6][b], above].

PRACTICE TIP:

A reference to a written advertisement appearing in a newspaper circulated nationally, for example, *USA Today* or the *Wall Street Journal*, may satisfy the general circulation requirement [12 C.F.R. pt. 213, supp. I, comment 7(f)(1)-1].

- It includes the name and dates of any publication referred to in the preceding item [15 U.S.C. § 1667c(c)(1)(C)(ii)].
- It includes any other information that the Federal Reserve Board determines necessary to carry out the CLA [15 U.S.C. § 1667c(c)(1)(D)].

[b] Establishment of Toll-Free Number

In the case of a radio (or television) broadcast advertisement that includes a referral to a toll-free telephone number, the lessor who offers the consumer lease must do each of the following [15 U.S.C. § 1667c(c)(2)(A)]:

- Establish the toll-free telephone number not later than the date the advertisement including the referral is broadcast [15 U.S.C. § 1667c(c)(2)(A)(i)].
- Maintain the telephone number for a period of not less than 10 days, beginning on the date of the broadcast [15 U.S.C. § 1667c(c)(2)(A)(ii); 12 C.F.R. § 213.7(f)(2)(i)].
- Provide the information required under 15 U.S.C. § 1667c(a) [see [6][b], above] with respect to the lease to any person who calls the number [15 U.S.C. § 1667c(c)(2)(A)(iii)].

The information required to be provided may be provided orally or, if requested by the consumer, in written form [15 U.S.C. § 1667c(c)(2)(B); 12 C.F.R. § 213.7(f)(2)(ii)].

The lessor must provide a toll-free number for nonlocal calls made from an area code other than the one used in the lessor's dialing area. Alternatively, the lessor may provide any telephone number that allows a consumer to reverse the phone charges when calling for information [12 C.F.R. pt. 213, supp. I, comment 7(f)(1)-2]. When an advertised toll-free number responds with a recording, lease disclosures must be provided early in the sequence to ensure that the consumer receives the required disclosures. For example, in providing several dialing options (such as providing directions to the lessor's place of business), the option allowing the consumer to request lease disclosures should be provided early in the telephone message to ensure that the option to request disclosures is not obscured by other information [12 C.F.R. pt. 213, supp. I, comment 7(f)(1)-3]. Language must accompany a telephone and television number indicating that disclosures are available by calling the toll-free number, such as "call 1-800-000-0000 for details

about costs and terms" [12 C.F.R. pt. 213, supp. I, comment 7(f)(1)-4].

[8] Civil Liability of Lessors

Any lessor who fails to comply with any requirement imposed under the CLA regarding disclosures [see 15 U.S.C. § 1667a; [3], *above*] and the lessee's liability on expiration or termination of the lease [see 15 U.S.C. § 1667b; [5], *above*] with respect to any person is liable to the person as provided in 15 U.S.C. § 1640 [15 U.S.C. § 1667d(a)], which governs liability for failure to comply with the Truth in Lending Act (TILA) and is discussed in Ch. 45, *Consumer Installment Loans and Credit Sales*. For further discussion and forms for use in actions against lessors, see California Forms of Pleading and Practice, Ch. 80, *Automobiles*, pt. VII, "Actions Against Manufacturers, Dealers, Lessors, and Repairers," subpt. B (Matthew Bender).

Any lessor who fails to comply with any requirement imposed under the CLA regarding advertising [see 15 U.S.C. § 1667c; [6], [7], *above*] with respect to any person who suffers actual damage from the violation is liable to the person as provided in 15 U.S.C. § 1640. For this purpose, "creditor" as used in 15 U.S.C. §§ 1640 and 1641 includes a lessor as defined in the CLA [15 U.S.C. § 1667d(b)].

Notwithstanding 15 U.S.C. § 1640(e) (concerning jurisdiction and limitation of actions to enforce compliance with TILA), an action may be brought in any U.S. district court or in any other court of competent jurisdiction. An action alleging a failure to disclose or otherwise comply with the requirements of the CLA must be brought within one year after termination of the lease agreement [15 U.S.C. § 1667d(c)].

PRACTICE TIP:

The staff of the Division of Consumer and Community Affairs of the Federal Reserve Board issues official staff interpretations of Regulation M, which are published as Supplement I to Regulation M (following Appendix A) under the heading "Official Staff Commentary to Regulation M." Good faith compliance with this commentary affords protection from liability under 15 U.S.C. § 1640(f), which protects lessors from civil liability for any act done or omitted in good faith in conformity with any interpretation issued by a duly authorized official or employee of the Federal Reserve System [12 C.F.R. pt. 213, app. C; 12 C.F.R. pt. 213, supp. I, comment Introduction-1]. Anyone may request an official staff interpretation [12 C.F.R. pt. 213, supp. I, comment Introduction-2; see 12 C.F.R. pt. 213, app. C]. Except in unusual circumstances, interpretations will not be issued separately but will be incorporated in the official commentary to Regulation M (Supplement I to Regulation M), which will be amended periodically. No staff interpretations will be issued approving a lessor's forms, statements, or computation tools or methods [12 C.F.R. pt. 213, app. C].

[9] Applicability of State Laws

The CLA does not annul, alter, affect, or exempt any person subject to the provisions of the CLA from complying with, the laws of any state with respect to consumer leases, except to the extent that those laws are inconsistent with any provision of the CLA, and then only to the extent of the inconsistency. The Federal Reserve Board is authorized to determine whether inconsistencies exist. The FRB may not determine that any state law is inconsistent with any provision of the CLA if the FRB determines that the state law gives greater protection and benefit to the consumer than the CLA provision [15 U.S.C. § 1667e(a)]. "State" includes the District of Columbia, Puerto Rico, and any U.S. territory or possession [see 12 C.F.R. § 213.2(p)].

A state law that is inconsistent with the requirements of the CLA and Regulation M is preempted to the extent of the inconsistency. If a lessor cannot comply with a state law without violating a provision of Regulation M, the state law is inconsistent within the meaning of 15 U.S.C. § 1667e(a) and is preempted, unless the state law gives greater protection and benefit to the consumer. A state, through an official having primary enforcement or interpretative responsibilities

for the state consumer leasing law, may apply to the FRB for a preemption determination [12 C.F.R. § 213.9(a)].

[10] Exemptions

The Federal Reserve Board may by regulation exempt from the requirements of the CLA any class of lease transactions within any state if it determines that under the law of that state that class of transactions is subject to requirements substantially similar to those imposed under the CLA or that the law gives greater protection and benefit to the consumer, and that there is adequate provision for enforcement [15 U.S.C. § 1667e(b)]. "State" includes the District of Columbia, Puerto Rico, and any U.S. territory or possession [see 12 C.F.R. § 213.2(p)].

A state may apply to the FRB for an exemption from the requirements of the CLA and Regulation M for any class of lease transactions within the state [12 C.F.R. § 213.9(b)(1)]. The FRB will grant such an exemption if the FRB determines that:

- The class of leasing transactions is subject to state law requirements substantially similar to the CLA and Regulation M, or lessees are afforded greater protection under state law [12 C.F.R. § 213.9(b)(1)(i)].
- There is adequate provision for state enforcement [12 C.F.R. § 213.9(b)(1)(ii)].

After an exemption has been granted, the requirements of the applicable state law (except for additional requirements not imposed by federal law) will constitute the requirements of the CLA and Regulation M. No exemption will extend to the civil liability provisions of the CLA and Truth in Lending Act [12 C.F.R. § 213.9(b)(2); see [8], above].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionConsumer LeasingGeneral OverviewBanking LawConsumer ProtectionConsumer LeasingDisclosure



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 47 AUTOMOTIVE FINANCING AND VEHICLE LEASING
PART II. LEGAL BACKGROUND
B. Vehicle Leasing and Renting

20-47 California Legal Forms--Transaction Guide § 47.31

§ 47.31 Vehicle Leasing Act

[1] Overview

[a] Statutory Scheme

California's Vehicle Leasing Act (VLA) [*Civ. Code § 2985.7 et seq.*] applies to consumer leases of motor vehicles for a term of more than four months [*Civ. Code § 2985.7(d)*]. The VLA supplements the federal Consumer Leasing Act [*15 U.S.C. § 1667 et seq.*] and Regulation M [*12 C.F.R. pt. 213*] when the lessee's total contractual obligation does not exceed \$25,000. When the contractual obligation exceeds that amount, the VLA alone governs (that is, the Consumer Leasing Act does not govern) the transaction [*see 15 U.S.C. § 1667(1); § 47.30[2][a]*]. The VLA in turn is supplemented by the Uniform Commercial Code--Leases [*Com. Code § 10101 et seq.*] (Division 10 of the UCC), which is a general law. In other words, in the case of a consumer lease of a motor vehicle, the governing laws will be determined as follows [*see 15 U.S.C. § 1667e(a); 12 C.F.R. § 213.9(a); Civ. Code § 2985.7(d); Com. Code §§ 10102, 10103(a)(5), (10), 10104(a)(3), (b)*]:

- When the lease term exceeds four months:
 - If the total contractual obligation does not exceed \$25,000: the Consumer Leasing Act and Regulation M [*see § 47.30*] apply primarily (they prescribe disclosure requirements, for the most part), while the VLA applies except as preempted by the Consumer Leasing Act (the VLA imposes numerous additional requirements), and the UCC--Leases applies to the extent that the other laws do not preempt the field.
 - If the total contractual obligation exceeds \$25,000: the VLA alone prescribes disclosure requirements and imposes additional requirements, while the UCC--Leases applies to the extent that the VLA does not preempt the field.
- When the lease term does not exceed four months: only the UCC--Leases applies.

When the VLA alone prescribes disclosure requirements, that is done by reference to Regulation M [*see Civ. Code* §§ 2985.71(b)(1), 2985.8(c)(1)]; therefore, in such a case, even though the Consumer Leasing Act and Regulation M do not apply by their own terms, Regulation M applies indirectly because the VLA incorporates it by reference. The official commentary to Regulation M by the Federal Reserve Board's staff [*see* 12 C.F.R. pt. 213, supp. I; § 47.30[1][a]] likewise is adopted along with Regulation M [*Civ. Code* § 2985.7(e)].

The UCC--Leases supplies a number of important provisions in the federal-state statutory scheme regulating consumer leases of goods. For instance, that division provides for the creation of warranties in the lease transaction [*see Com. Code* §§ 10210-10215]. For further discussion of the UCC--Leases, see Ch. 53, *Personal Property Leasing*.

[b] Administrative Regulations

The Director of Motor Vehicles may adopt and enforce rules and regulations to carry out or implement the provisions of the Vehicle Leasing Act [*Civ. Code* § 2989.6]. To date, no such regulations have been adopted.

[c] Exclusion of Lease to Government or for Nonpersonal Use

The Vehicle Leasing Act does not apply to a lease for agricultural, business or commercial purposes, or to a government or governmental agency or instrumentality [*Civ. Code* § 2985.7(d)].

[d] Exclusion of Rees-Levering Transaction

The Vehicle Leasing Act does not apply to any transaction that is regulated by the Rees-Levering Act [*Civ. Code* § 2990; *see Civ. Code* § 2981 *et seq.*].

[2] Definitions

[a] Lease and Vehicle

In the Vehicle Leasing Act, "lease" (or "lease contract") means any contract for or in contemplation of the lease or bailment for the use of a vehicle, and the purchase of incidental services, by a natural person for a term exceeding four months, primarily for personal, family or household purposes, whether or not it is agreed that the lessee will bear the risk of the vehicle's depreciation [*Civ. Code* § 2985.7(d)].

"Vehicle" (or "motor vehicle") means any vehicle required to be registered under the Vehicle Code, not including any trailer that is sold in conjunction with a vessel [*Civ. Code* § 2985.7(a)].

[b] Lessee

"Lessee" (which includes "bailee") is a natural person who leases, offers to lease, or is offered the lease of, a vehicle under a lease [*Civ. Code* § 2985.7(c)].

[c] Lessor

"Lessor" (which includes "bailor") is a person who is engaged in the business of leasing, offering to lease, or arranging the lease of, a vehicle under a lease. In this context, "person" means an individual, partnership, corporation, limited liability company, estate, trust, cooperative, association, or any other legal entity [*Civ. Code* § 2985.7(b)].

Under the Vehicle Leasing Act, an assignee may be considered a lessor only if the assignee has a substantial involvement in the lease transaction. Simply approving the creditworthiness of the lessee does not constitute "substantial involvement." Some greater involvement in the negotiations of the lease itself is required [*Bescos v. Bank*

of America (2003) 105 Cal. App. 4th 378, 390-391, 129 Cal. Rptr. 2d 423 (assignee bank that financed lease but was not agent of dealer in lease transaction was not responsible as lessor for misrepresentations made by dealer that were unknown to lender and not apparent on face of lease)].

[3] Disclosure Requirements

[a] Regulation M Disclosures

The lease must disclose all of the information prescribed by Regulation M, set forth in the manner required or permitted by Regulation M, whether or not Regulation M applies to the transaction [*Civ. Code* § 2985.8(c)(1)]. The Regulation M disclosures are discussed, and model disclosure forms are reproduced, in § 47.220. For further discussion in the context of the Vehicle Leasing Act, see § 47.221[1].

[b] Itemization of Gross Capitalized Cost

The lease must contain a separate statement labeled "Itemization of Gross Capitalized Cost" that appears immediately following or directly adjacent to the disclosures required to be segregated by Regulation M [*Civ. Code* § 2985.8(c)(2); see 12 C.F.R. § 213.3(a)(2) (segregated disclosures); § 47.220[1][d]]. For further discussion, see § 47.221[1][h].

[c] Execution of Contract Preceding Delivery of Vehicle

No vehicle may be delivered under a lease subject to the Vehicle Leasing Act until the lessor provides to the lessee a fully executed copy of the lease [*Civ. Code* § 2985.8(h)]. The lessor may not obtain the signature of the lessee to a contract when it contains blank spaces to be filled in after it has been signed [*Civ. Code* § 2985.8(i)].

[4] Prohibited Provisions

[a] Confession of Judgment or Assignment of Wages

The lease may not contain a provision by which a power of attorney is given to confess judgment in California, or an assignment of wages is given, except that this does not prohibit the giving of an assignment of wages contained in a separate instrument pursuant to *Lab. Code* § 300 [*Civ. Code* § 2986.3(a)]. For further discussion of *Lab. Code* § 300, see Ch. 76, *Assignments of Rights and Obligations*.

[b] Waiver of Right of Action

The lease may not contain a provision by which the lessee waives any right of action against the lessor or holder of the contract, or another person, for any illegal act committed in the collection of payments under the contract or in the repossession of the vehicle [*Civ. Code* § 2986.3(b)].

[c] Release of Liability

The lease may not contain a provision by which the lessee relieves the lessor from liability for any legal remedies that the lessee may have against the lessor under the contract or any separate instruments executed in connection with the lease [*Civ. Code* § 2986.3(c)].

[d] Waiver of Venue Right

The lease may not contain a provision by which the lessor or holder of the contract is given the right to commence action on a contract under the provisions of the Vehicle Leasing Act in a county other than the county in which the contract was in fact signed by the lessee, or the county in which the lessee resides at the commencement of the action, or the county in which the lessee resided at the time the contract was entered into, or the county in which the vehicle is

permanently garaged [*Civ. Code* § 2986.3(d)].

[5] Lease of Used Vehicle

No person may lease a used vehicle, for operation on California highways, that does not meet all of the equipment requirements of Division 12 of the Vehicle Code [*see Veh. Code* § 24000 *et seq.*]. This does not apply, however, to an extension or a subsequent lease of the same vehicle to the same lessee [*Civ. Code* § 2986.5(a)].

[6] Solicitations (Advertisements) by Lessor

[a] Content Triggering Disclosure Requirement

Any solicitation to enter into a lease that includes any of the following items must contain the disclosures described in [b], below [*Civ. Code* § 2985.71(a)]:

- The amount of any payment.
- A statement of any capitalized cost reduction or other payment required before or at consummation or by delivery, if delivery occurs after consummation.
- A statement that no capitalized cost reduction or other payment is required before or at consummation or by delivery, if delivery occurs after consummation.

[b] Required Disclosures

A solicitation to enter into a lease that includes any item listed in [a], *above*, must also clearly and conspicuously state all of the following items [*Civ. Code* § 2985.71(b)]:

- All of the disclosures prescribed by Regulation M set forth in the manner required or permitted by Regulation M, whether or not Regulation M applies to the transaction [*see* § 47.30[6][f]].
- The mileage limit after which mileage charges may accrue and the charge per mile for mileage in excess of the stated mileage limit.
- The statement "plus tax and license" or a substantially similar statement, if amounts due for use tax, license fees, and registration fees are not included in the payments.

[c] Bait and Switch

No solicitation to aid, promote, or assist directly or indirectly any lease may state that a specific lease of any vehicle at specific amounts or terms is available unless the lessor usually and customarily leases or will lease that vehicle at those amounts or terms [*Civ. Code* § 2985.71(c)].

[d] Limited Effect of Violation

A failure to comply with the provisions of *Civ. Code* § 2985.71 [*see* [a]-[c], *above*] does not affect the validity of the lease [*Civ. Code* § 2985.71(d)].

No owner or employee of any entity, other than the lessor, that serves as a medium in which a lease solicitation appears or through which a lease solicitation is disseminated, is liable under *Civ. Code* § 2985.71 [*Civ. Code* § 2985.71(d)].

[e] Referral Inducements

It is unlawful for any lessor to induce or attempt to induce any person to enter into a contract subject to the Vehicle Leasing Act by offering a rebate, discount, commission or other consideration, on the condition that the lessee give information or assistance for the purpose of enabling a lessor to either lease or sell a vehicle to another [Civ. Code § 2986.12].

[7] Extraneous Security Interests

No agreement providing, in connection with a lease, for the inclusion of title to or a lien on any personal or real property, other than the vehicle is the subject matter of the lease, or accessories for the vehicle, or special and auxiliary equipment used in connection with the vehicle, as security for the payment of the contract obligations, is enforceable. This rule does not apply, however, to a security deposit, advance payment of rent, or other cash prepayment [Civ. Code § 2986.6].

[8] Rights of Lessor's Assignee

An assignee of the lessor's rights is subject to all equities and defenses of the lessee against the lessor, notwithstanding an agreement to the contrary, but the assignee's liability may not exceed the amount of the obligation owing to the assignee at the time of the assignment [Civ. Code § 2986.10(a)].

The assignee has recourse against the lessor to the extent of any liability incurred by the assignee pursuant to foregoing rule regardless of whether the assignment was with or without recourse [Civ. Code § 2986.10(b)].

For further discussion of assignments, see Ch. 76, *Assignments of Rights and Obligations*.

[9] Refunds to Lessee and Return of Trade-In

Any payment made by a lessee to a lessor pending the execution of a lease must be refunded to the lessee in the event the lease is not executed [Civ. Code § 2986.13(a)].

If the lessee pays to the lessor an amount for the licensing or transfer of title of the vehicle to the lessee, and the amount paid exceeds the actual fees due for licensing or transfer, or exceeds the amount actually paid, before the sale, by the lessor to the state in order to avoid penalties that would have accrued because of late payment of fees, the lessor must return the excess amount to the lessee, whether or not the lessee requests the return of the excess amount [Civ. Code § 2986.5(b)].

In the event of the lessor breaches the after the lessee left a vehicle with the lessor as a trade-in down payment, if the vehicle is not returned by the lessor to the lessee for whatever reason, the lessee may recover from the lessor either the fair market value of the vehicle left as a down payment or its value as stated in the lease, whichever is greater. The recovery must be tendered to the lessee within five business days after the breach [Civ. Code § 2986.13(b)]. These remedies of the lessee are nonexclusive and cumulative, and do not preclude the lessee from pursuing any other remedy that the lessee may have under any other provision of law [Civ. Code § 2986.13(c)].

[10] Protection Against Excessive Open-End Lease Liability**[a] Legislative Findings**

The Legislature has found that it is necessary to provide protection for consumers who enter into leases in which the lessee will bear the risk of the vehicle's depreciation (that is, open-end leases, also called finance leases) by providing relief to the consumer when an ostensibly inexpensive lease establishes an excessively low level of periodic payment

resulting in an excessively high liability being imposed on the lessee at the expiration of the lease term because the lessor has failed to act in good faith, by either estimating an unreasonable residual value of the vehicle or establishing a level of periodic payment that bears no reasonable relation to the reasonably expected depreciation during the lease term. Therefore, the lessor has the obligation to act in good faith and to come forward with competent evidence showing that the estimated residual value was so determined given the circumstances existing at the inception of the lease [Civ. Code § 2988(a)].

[b] Estimation of Residual Value

When the lessee is to bear the risk of the vehicle's depreciation, and the lessee's liability on expiration of the lease is based on the estimated residual value of the vehicle, the estimated residual value must be a reasonable approximation of the anticipated actual fair market value of the vehicle on lease expiration. There is a rebuttable presumption that the estimated residual value is unreasonable to the extent that the estimated residual value exceeds the actual residual value by more than three times the average payment allocable to a monthly period under the lease. The presumption does not apply, however, to the extent that the excess of estimated over actual residual value is due to physical damage to the vehicle beyond reasonable wear and use or to excessive use, and the lease may set standards for wear and use if the standards are not unreasonable [Civ. Code § 2988(b)]. In this context, "fair market value" means the value that the vehicle would have when sold in a commercially reasonable manner in the customary market for the vehicle [Civ. Code § 2988(c)].

PRACTICE TIP:

The Consumer Leasing Act provides the same protection using the same rebuttable presumption [see 15 U.S.C. § 1667b(a); § 47.30[5][a]], and Regulation M requires disclosure of this protection to the lessee [see 12 C.F.R. § 213.4(m)(2); see also § 47.220[1][c], [4], [6]].

[c] Disposition and Notice of Intent to Sell

When the lessee is to bear the risk of depreciation on the scheduled expiration of the lease, the lessor, in disposing of the vehicle or obtaining cash bids for the purpose of setting the fair market value of the vehicle, must act in a commercially reasonable manner in the customary market for the vehicle [Civ. Code § 2989.2(a)]. Any provision in the lease to the contrary notwithstanding, the holder of the contract must give each lessee and guarantor at least 10 days written notice of intent to sell the vehicle, unless the lessor and lessee have agreed in writing to the amount of the lessee's liability under the lease after the lessee returns the vehicle to the lessor, or the lessee has satisfied the lease obligations by payment to the lessor [Civ. Code § 2989.2(b)]. For further discussion and a form for giving notice, see § 47.224.

[11] Violations

[a] Civil Action or Rescission

If the lessor fails to comply with any disclosure requirement imposed under Civ. Code § 2985.8 [see [3], above] or to provide the lessee protection mandated by Civ. Code § 2988 [see [10], above], and no specific relief is provided with respect to an aggrieved person, the lessor may be liable to that person for statutory damages as well as attorneys' fees and costs [Civ. Code § 2988.5(a)]. An assignee of the lease agreement, however, is only liable for defects apparent on the face of the document [Civ. Code § 2988.5(e); see *Bescos v. Bank of America* (2003) 105 Cal. App. 4th 378, 391, 129 Cal. Rptr. 2d 423 (assignee bank which financed lease but was not agent of dealer in lease transaction was not responsible as lessor for misrepresentations made by dealer that were unknown to lender and not apparent on face of lease)]. For discussion of civil actions under the Vehicle Leasing Act [see Civ. Code §§ 2988.5, 2988.9, 2989] and forms for complaints and affirmative defenses, see California Forms of Pleading and Practice, Ch. 90, *Automobiles: Vehicle Leasing Act* (Matthew Bender).

If the lessor fails to comply with disclosure requirements imposed under Civ. Code § 2985.8 [see [3], above], as an

alternative to an action under *Civ. Code* § 2988.5, the lessee may rescind the lease if the failure to comply was willful or if correction will increase the amount of the contract balance, unless the lessor waives the collection of the increased amount [*Civ. Code* § 2988.7].

[b] Nonactionable Violations

A lessor that does any of the following is in violation of the Vehicle Leasing Act:

- Fails to register the leased vehicle pursuant to the lease [*Civ. Code* § 2989.4(a)(1)].
- Advertises any specific vehicle in the inventory of the lessor for lease without identifying the vehicle by either the vehicle identification number or the license number [*Civ. Code* § 2989.4(a)(2)].
- Refuses to lease a vehicle to any creditworthy person at the advertised total price, exclusive of sales tax, vehicle registration fees, and finance charges [*Civ. Code* § 2989.4(a)(3)].

Although there can be no civil liability for any of these violations [*Civ. Code* § 2989.4(b)], there could be a criminal penalty [see [c], *below*]. In addition, the Department of Motor Vehicles has power to investigate consumer complaints about violations of the Vehicle Leasing Act [see *Civ. Code* § 2989.5].

[c] Criminal Violations

Any person who knowingly and willfully violates any provision of the Vehicle Leasing Act is guilty of a misdemeanor [*Civ. Code* § 2989.8].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Consumer Leasing General Overview Banking Law Consumer Protection Consumer Leasing Disclosure Banking Law Consumer Protection State Law General Overview



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§ 47.32 Early Termination of Post-1997 Lease

[1] Lessee's Early-Termination Rights

In the case of a vehicle lease entered into after 1997 [*see Civ. Code § 2987(i)*], the lessee has the right to terminate the contract at any time before the scheduled expiration date specified in the contract [*Civ. Code § 2987(a)*].

If the lessee terminates the lease, voluntarily returns possession of the vehicle to the lessor, and timely pays all sums required under the lease as limited by *Civ. Code § 2987* [*see [2]-[8], below*], the lessor or holder must not provide any adverse information concerning the early termination to any consumer credit reporting agency [*Civ. Code § 2987(g)*].

[2] Early Termination by Purchase of Trade-In

If, before the scheduled expiration date specified in the lease, the lessee terminates the lease and purchases the vehicle or trades-in the vehicle in connection with the purchase or lease of another vehicle, the lessee must be relieved of any further liability under the lease, and the selling price of the leased vehicle, exclusive of taxes and other charges incidental to the sale, must not exceed the sum of the following [*Civ. Code § 2987(f)*]:

- All unpaid periodic lease payments that have accrued up to the date of termination. The Rule of 78 must not be used to compute accrued rent charges [*Civ. Code § 2987(h)*].
- All other amounts due and unpaid by the lessee under the lease, other than excess wear and mileage charges and unpaid periodic lease payments.
- Any charges, however denominated, that the lessor or holder of the lease may assess in connection with termination of the lease and the acquisition of the vehicle, not to exceed in the aggregate the amount of a reasonable purchase option fee, if any, disclosed in the lease and assessed on the scheduled termination of the lease.
- The adjusted capitalized cost disclosed in the lease less all depreciation and other amortized amounts

accrued through the date of early termination, computed in accordance with the constant yield or other generally accepted actuarial method.

[3] Lessee's Limited Liability in Other Cases

Unless the lessee purchases or trades in the vehicle on early termination of the lease [see [2], *above*], the lessee's liability under the contract must not exceed the sum of the following:

- All unpaid periodic lease payments that have accrued up to the date of termination [*Civ. Code* § 2987(b)(1)].

PRACTICE TIP:

The Rule of 78 must not be used to compute accrued rent charges [*Civ. Code* § 2987(h)].

- All other amounts due and unpaid by the lessee under the lease, other than excess wear and mileage charges and unpaid periodic lease payments [*Civ. Code* § 2987(b)(2)].
- Any charges, however denominated, that the lessor or holder of the lease may assess in connection with termination not to exceed in the aggregate the amount of a reasonable disposition fee, if any, disclosed in the lease and assessed on termination of the lease [*Civ. Code* § 2987(b)(3)].
- In the event of the lessee's default, reasonable fees paid by the lessor or holder for reconditioning of the leased vehicle, and reasonable and necessary fees paid by the lessor or holder, if any, in connection with the repossession and storage of the leased vehicle [*Civ. Code* § 2987(b)(4)].
- The difference, if any, between the adjusted capitalized cost disclosed in the lease and the sum of the following [*Civ. Code* § 2987(b)(5)]:
 - All depreciation and other amortized amounts accrued through the date of early termination, computed in accordance with the constant-yield (see below) or other generally accepted actuarial method [*Civ. Code* § 2987(b)(5)(A)].
 - The realized value of the vehicle [*Civ. Code* § 2987(b)(5)(B); see [6], *below*].

In the case of a periodic-payment lease, the "constant-yield" method is the method of determining the rent charge portion of each base payment in which the rent charge for each computational period is earned in advance, by multiplying the constant rate implicit in the lease times the balance subject to a rent charge as it declines during the scheduled lease term. At any time during the scheduled term of a periodic-payment lease, the balance subject to a rent charge is the difference between the adjusted capitalized cost and the sum of (1) all depreciation and other amortized amounts accrued during the preceding computational periods plus (2) the first base periodic payment [*Civ. Code* § 2985.7(f)(1)].

In the case of a single-payment lease, the "constant-yield" method is the method of determining the periodic earning of rent charges in which the rent charge for each computational period is earned in advance, by multiplying the constant rate implicit in the lease times the balance subject to a rent charge as it increases during the scheduled lease term. At any time during the scheduled term of a single-payment lease, the balance subject to a rent charge is determined by (1) subtracting from the residual value the total rent charge scheduled to be earned over the term of the lease and (2) adding to the difference all rent charges accrued during the preceding computational periods [*Civ. Code* § 2985.7(f)(2)].

In either case, periodic rent charge computations are based on the assumption that the lessor will receive the lease

payments on their exact due dates and that the lease does not end before its scheduled termination date [*Civ. Code* § 2985.7(f)(3)].

[4] Effect of Noncompliance and Bona Fide Error

The lessee has no liability if the lessor or holder of the lease does not comply with *Civ. Code* § 2987(d) [see [7], [8], *below*], relating to good faith and notice requirements, unless all of the following conditions are satisfied [*Civ. Code* § 2987(d)(3)]:

- Noncompliance was the result of a bona fide error in stating an amount required to be disclosed [*Civ. Code* § 2987(d)(3)(A); see *Civ. Code* § 2987(d)(2)(B)(ii)-(iv) (disclosures); § 47.223].
- The holder of the lease gives the lessee written notice of the error within 30 days after discovering the error and before an action is filed to recover the amount claimed to be owed and before written notice of the error is received by the holder of the lease from the lessee [*Civ. Code* § 2987(d)(3)(B)].
- The lessee is liable for the originally claimed amount or the correct amount, whichever is less [*Civ. Code* § 2987(d)(3)(C)].
- The holder of the lease refunds any amount collected in excess of the amount described in the preceding item within 10 days after notice of the error is given [*Civ. Code* § 2987(d)(3)(D)].

PRACTICE TIP:

"Bona fide error" means an error that was not intentional and occurred notwithstanding the maintenance of procedures reasonably adapted to avoid that error. Examples of bona fide errors include clerical errors, computation errors, errors caused by unintentionally improper computer programming or data entry, and printing errors. A bona fide error does not include an error of legal judgment with respect to a lessor's or lease holder's obligations under *Civ. Code* § 2987 [*Civ. Code* § 2987(d)(3)].

[5] Effect of Security Deposit or Advance Rent Payment

The lessor or holder of the lease must credit any security deposit or advance rent payment held by the lessor or holder of the lease against the lessee's liability under the lease as limited by *Civ. Code* § 2987. The portion of a security deposit or advance rental payment, if any, remaining after the lessee's liability under the lease as limited by *Civ. Code* § 2987 has been satisfied must be returned to the lessee not later than 30 days after satisfaction of the obligation [*Civ. Code* § 2987(e)].

[6] Realized Value

Subject to requirements for good faith and a notice to the lessee [see *Civ. Code* § 2987(d); [7], [8], *below*; § 47.223], the realized value of the vehicle used to compute the lessee's liability under *Civ. Code* § 2987(b)(5) [see [3], *above*] must be one of the following:

- If the lessee maintains insurance on the leased vehicle as required in the lease and the vehicle is a total loss as a result of theft or damage: the amount of any applicable insurance deductible owed by the lessee and the proceeds of the settlement of the insurance claim, unless a higher amount is agreed to by the holder of the lease [*Civ. Code* § 2987(c)(1); see [9], *below*].
- If the lessee elects to have an appraisal conducted as provided in Regulation M: the value determined on appraisal [*Civ. Code* § 2987(c)(2)].

- If the holder of the lease or lessor elects to retain ownership of the vehicle for use or to lease to a subsequent lessee: the wholesale value of the vehicle as specified in the current edition of a recognized used vehicle value guide customarily used by California vehicle dealers to value vehicles in California, including, but not limited to, the Kelley Blue Book Auto Market Report and the N.A.D.A. Official Used Car Guide [*Civ. Code* § 2987(c)(3)].

- In all other circumstances: either (whichever is higher) the price paid for the vehicle on disposition, or any other amount established by the lessor or the lease [*Civ. Code* § 2987(c)(4)].

[7] Contract Holder's Good Faith

The lessor or holder of the lease must act in good faith and in a commercially reasonable manner in connection with the disposition of the vehicle [*Civ. Code* § 2987(d)(1)].

[8] Notice Requirement

In addition to the good-faith requirement, any disposition of the vehicle must be preceded by a notice in writing [*see* § 47.223], which the holder of the contract must give to each lessee and guarantor at least 10 days in advance of any disposition or the valuation date pursuant to *Civ. Code* § 2987(c)(3) [*see* [3], *above*]. The notice must be personally served or must be sent by certified mail, return receipt requested, or first-class mail, postage prepaid, directed to the last known address of each lessee and guarantor. One notice is sufficient if those persons are married to each other and the most recent records of the holder of the lease indicate that they reside at the same address. The last known address of each lessee and guarantor must be presumed to be the address stated in the lease or guaranty for each lessee and guarantor unless the lessee or guarantor notifies the holder of the lease of a change of address [*Civ. Code* § 2987(d)(2)(A)].

[9] Total Loss of Insured Vehicle

The requirements for good-faith disposition of the vehicle and a related notice to the lessee [*see* [7], [8], *above*] do not apply when the lessee maintains insurance on the leased vehicle as required in the lease and the vehicle is declared a total loss by the insurer as a result of theft or damage [*Civ. Code* § 2987(d)(4)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesLessee's Remedies & Rights



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§ 47.33 Prohibition of Subleasing

It is unlawful to make, assist, cause, or arrange an actual or purported transfer or assignment of a right or interest in a vehicle subject to a lease, conditional sale contract, or security agreement if the following apply [*Penal Code §§ 570, 571*]:

- The transferor or assignor is not a party to the contract.
- The transferee or assignee is not a party to the contract.
- The terms of the contract prohibit the transfer or assignment of any right or interest in the vehicle.
- The transferor or assignor does not get written consent to the transfer or assignment from the lessor, seller, or secured party before the transfer or assignment.
- The transferor or assignor receives compensation or some other consideration for the transfer or assignment.

A person injured by unlawful vehicle subleasing may be able to bring an action for damages [*see Civ. Code § 3343.5(a)* (persons entitled to bring action)]. For further discussion, see *California Forms of Pleading and Practice*, Ch. 90, *Automobiles: Vehicle Leasing Act* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsPersonalty LeasesSubleases



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§ 47.34 Damage Liability and Waiver in Short Term Passenger Car Rental Agreement

[1] Definitions

[a] Rental Company and Renter

"Rental company" means a person or entity in the business of renting passenger vehicles to the public [*Civ. Code § 1936(a)(1)*].

"Passenger vehicle" means a passenger vehicle as defined in *Veh. Code § 465* [*Civ. Code § 1936(a)(10)*], that is, any motor vehicle, other than a motortruck or truck tractor, designed for carrying not more than 10 persons including the driver, and used or maintained for the transportation of persons, including a house car. In the present context, a "house car" is a motor vehicle originally designed, or permanently altered, and equipped for human habitation, or to which a camper has been permanently attached [*see Veh. Code § 362*], that is, a vehicle popularly known as a motor home (a recreational vehicle).

"Renter" means any person in any manner obligated under a contract for the lease or hire of a passenger vehicle from the rental company for a period shorter than 30 days [*Civ. Code § 1936(a)(2)*].

[b] Damage Waiver

"Damage waiver" means the rental company's agreement not to hold the renter liable for all or any portion of any damage or loss related to the rented vehicle, any loss of use of the rented vehicle, or any storage, impound, towing, or administrative charges [*Civ. Code § 1936(a)(5)*]. This is also known as a "collision damage waiver."

In the absence of a damage waiver, there are limitations on the renter's liability under the rental agreement for damage to the vehicle, loss of the vehicle, and the rental company's loss of use of the vehicle [*see [4], below*].

[c] Authorized Driver

"Authorized driver" means any of the following persons [*Civ. Code* § 1936(a)(3)]:

- The renter.
- The renter's spouse if that person is a licensed driver and satisfies the rental company's minimum age requirement.
- The renter's employer or coworker if he or she is engaged in business activity with the renter, is a licensed driver, and satisfies the rental company's minimum age requirement [*see Lazar v. Hertz Corporation* (1999) 69 Cal. App. 4th 1494, 1504-1506, 82 Cal. Rptr. 2d 368 (rejecting claim for age discrimination under Unruh Civil Rights Act since *Civ. Code* § 1936 expressly approves adoption of minimum age requirements; claim that defendants' business practice were unlawful and unfair under *Bus. & Prof. Code* § 17200 et seq. also rejected since practices were permitted by *Civ. Code* § 1936)].
- Any person expressly listed by the rental company on the rental agreement as an authorized driver.

[d] Customer Facility Charge

"Customer facility charge" means a fee required by an airport to be collected by a rental company from a renter, to finance, design, and construct consolidated airport car rental facilities, or to finance, design, construct, and provide common-use transportation systems that move passengers between airport terminals and those consolidated car rental facilities [*Civ. Code* § 1936(a)(4)(A)]. Limitations on the amount that may be collected are discussed in [6][c], *below*.

[e] Electronic Surveillance Technology

"Electronic surveillance technology" means a technological method or system used to observe, monitor, or collect information, including telematics, a global positioning system (GPS), wireless technology, and location-based technologies [*Civ. Code* § 1936(a)(6)]. The term does not include event data recorders (EDR), sensing and diagnostic modules (SDM), or other systems that are used either (1) to identify, diagnose, or monitor functions related to the potential need to repair, service, or perform maintenance on the rental vehicle or (2) as part of the vehicle's airbag sensing and diagnostic system in order to capture safety-related data for retrieval after a crash or in the event that the collision sensors are activated to prepare the decision-making computer to make the determination to deploy or not to deploy the airbag [*Civ. Code* § 1936(a)(6)].

[2] Authority to Use Damage Waiver

[a] Limitation on Use and Charge

A rental company may not require the purchase of a damage waiver, optional insurance, or other optional goods or services [*Civ. Code* § 1936(k)(1)].

Notwithstanding any other provision of law, a rental company may sell a damage waiver, subject to the following rate limitations for each full or partial 24-hour rental day for the damage waiver [*Civ. Code* § 1936(h)]:

- For a rental vehicle that the rental company designates as an "economy car," "subcompact car," "compact car," or another term having similar meaning when offered for rental, or another vehicle having a manufacturer's suggested retail price of \$19,000 or less, the rate may not exceed \$9.00.
- For a rental vehicle that has a manufacturer's suggested retail price from \$19,001 to \$34,999, inclusive, and that is also either a vehicle of the next year's model-year or not older than the previous year's model year, the rate may not exceed \$15.00. For those rental vehicles older than the previous

year's model-year, the rate may not exceed \$9.00.

The manufacturer's suggested retail prices are adjusted annually to reflect changes from the previous year in the Consumer Price Index. "Consumer Price Index," in this context, means the United States Consumer Price Index for All Urban Consumers, for all items [*Civ. Code* § 1936(i)].

See [4], *below*, for discussion of the renter's liability in the absence of a damage waiver.

[b] Required Disclosures

A rental company that offers or provides a damage waiver for any consideration in addition to the rental rate must clearly and conspicuously disclose specified information in the rental agreement or in the holder in which the agreement is placed, as well as in signs posted at the place, such as the counter, where the renter signs the rental agreement [*see Civ. Code* § 1936(g)(1)]. For renters enrolled in the company's membership program, a rental company must clearly and conspicuously disclose specified information in signs posted where their reserved cars are parked or near the exit for the bus transporting enrollees to their reserved cars [*see Civ. Code* § 1936(g)(1), [c], *below*; *see also Civ. Code* § 1936(a)(9)(A) (membership program means service offered by rental company that permits customers to bypass rental counter and go directly to previously reserved car); *Civ. Code* § 1936(a)(9)(A)-(E) (membership program's requirements)].

In addition, the rental company must orally disclose to all renters, except those who are participants in the rental company's membership program, that the damage waiver may be duplicative of coverage that the customer maintains under his or her own motor vehicle insurance policy [*Civ. Code* § 1936(g)(2)]. The renters' receipt of the oral disclosure is demonstrated through the renter's acknowledgment of receipt near that part of the contract in which the renter indicates, by the renter's own initials, that he or she has accepted or declined the damage waiver. Adjacent to that same part, the contract must also state that damage waiver is optional [*Civ. Code* § 1936(g)(2)]. Further, the contract must include a clear and conspicuous written disclosure that the damage waiver may be duplicative of coverage that the renter maintains under his or her own motor vehicle insurance policy [*Civ. Code* § 1936(g)(2)].

A statutory example of required disclosures [*see Civ. Code* § 1936(g)(3)] is included in the rental agreement in § 47.225[2].

[c] Special Disclosure Requirements for Renters Enrolled in Membership Program

A rental company's disclosure requirements will be satisfied for renters who are enrolled in the rental company's membership program if all of the following conditions are met: First, before the enrollee's first rental as a participant in the program, the renter must receive, in writing [*Civ. Code* § 1936(t)(1)(A)]:

- All of the disclosures required by *Civ. Code* § 1936(g)(1) [*see* [b], *above* and § 47.225[2]], including the terms and conditions of the rental agreement then in effect; and
- An internet website address, as well as a contact number or address, where the enrollee can learn of changes to the rental agreement or to the state laws governing rental agreements since the effective date of the rental company's most recent restatement of the agreement and distribution of that restatement to its members.

Second, at the beginning of each rental period, the renter must be provided, on the rental record or the folder in which it is inserted, with a printed notice stating that he or she had either previously selected or declined an optional damage waiver and that the renter has the right to change preferences [*Civ. Code* § 1936(t)(1)(B)].

Third, at the beginning of each rental period, the rental company must provide, on the rearview mirror, a hanger on which a statement is printed, in a box, in at least 12-point boldface type, notifying the renter that the collision damage waiver offered by the rental company may be duplicative of coverage that the customer maintains under his or her own policy of motor vehicle insurance. If it is not feasible to hang the statement from the rearview mirror, it must be hung from the steering wheel [Civ. Code § 1936(t)(1)(C)]. The hanger must provide the renter a box to initial if he or she (not his or her employer) has previously accepted or declined the collision damage waiver and that he or she now wishes to change his or her decision to accept or decline the collision damage waiver. The language is specified by statute: "/_/ If I previously accepted the collision damage waiver, I now decline it. /_/ If I previously declined the collision damage waiver, I now accept it." [Civ. Code § 1936(t)(1)(C)]. The hanger must provide a box for the enrollee to indicate whether this change applies to this rental transaction only or to all future rental transactions. The hanger must also notify the renter that he or she may make such a change, before leaving the lot, by returning the form to an employee designated to receive the form who is present at the lot where the renter takes possession of the car, to receive any change in the rental agreement from the renter [Civ. Code § 1936(t)(1)(C); see also Civ. Code § 1936(t)(2)(A) (this provision is not applicable unless rental company employee actually is present at required location)].

These statutory provisions do not relieve the rental company from the disclosures required to be made within the text of a contract or holder in which the contract is placed; in or on an advertisement containing a rental rate; or in a telephonic, in-person, or computer-transmitted quotation or reservation [Civ. Code § 1936(t)(2)(B)].

[3] Scope of Damage Waiver

[a] General Protection Against Liability

Every damage waiver must provide (or, if not expressly stated in writing, must be deemed to provide) that the renter has no liability for any damage, loss, loss of use, or any cost or expense incident to damage, loss, or loss of use [Civ. Code § 1936(e)(1)]. The rental company may impose certain limitations, exceptions, and exclusions [see [b], *below*], but every other limitation, exception, or exclusion to any damage waiver is void and unenforceable [Civ. Code § 1936(e)(2)].

[b] Exceptions and Limitations

The rental company may provide in the rental contract that a damage waiver does not apply in any of the following circumstances:

- Damage or loss results from an authorized driver's [Civ. Code § 1936(f)(1)]:
 - Intentional, willful, wanton, or reckless conduct.
 - Operation of the vehicle under the influence of drugs or alcohol in violation of *Veh. Code* § 23152.
 - Towing or pushing anything.
 - Operation of the vehicle on an unpaved road if the damage or loss is a direct result of the road or driving conditions.
- Damage or loss occurs while the vehicle is [Civ. Code § 1936(f)(2)]:
 - Used for commercial hire.
 - Used in connection with conduct that could be properly charged as a felony.

- Involved in a speed test or contest or in driver training activity.
- Operated by a person other than an authorized driver.
- Operated outside the United States.
- An authorized driver [*Civ. Code § 1936(f)(3)*]:
 - Provided fraudulent information to the rental company.
 - Provided false information and the rental company would not have rented the vehicle if it had instead received true information.

[4] Renter's Liability Without Damage Waiver

[a] Limitation on Extent of Renter's Liability

The rental company and the renter may agree that the renter will be responsible for *no more than* all of the following [*Civ. Code § 1936(b)*], subject to a ceiling on the amount of the renter's liability for damage [*see [b], below*]:

- Physical or mechanical damage to the rented vehicle, up to its fair market value, as determined in the customary market for the sale of that vehicle, resulting from collision regardless of the cause of the damage [*Civ. Code § 1936(b)(1)*].
- Loss due to theft of the rented vehicle, up to its fair market value, as determined in the customary market for the sale of that vehicle, provided the rental company establishes by clear and convincing evidence that the renter or an authorized driver failed to exercise ordinary care while in possession of the vehicle. In addition, the renter is presumed to have no liability for any loss due to theft if (1) an authorized driver has possession of the ignition key furnished by the rental company or an authorized driver establishes that the ignition key furnished by the rental company was not in the vehicle at the time of the theft; and (2) an authorized driver files an official report of the theft with the police or other law enforcement agency within 24 hours of learning of the theft and reasonably cooperates with the rental company and the police or other law enforcement agency in providing information concerning the theft. This presumption is a presumption affecting the burden of proof, which the rental company may rebut by establishing that an authorized driver committed, or aided and abetted the commission of, the theft [*Civ. Code § 1936(b)(2)*].
- Physical damage to the rented vehicle, up to its fair market value, as determined in the customary market for the sale of that vehicle, resulting from vandalism occurring after, or in connection with, the theft of the rented vehicle; however, the renter must have no liability for any damage due to vandalism if the renter would have no liability for theft as stated in the preceding paragraph [*Civ. Code § 1936(b)(3)*].
- Physical damage to the rented vehicle and loss of use of the rented vehicle, up to a total of \$500, resulting from vandalism unrelated to the theft of the rented vehicle [*Civ. Code § 1936(b)(4)*].
- Actual charges for towing, storage, and impound fees paid by the rental company if the renter is liable for damage or loss [*Civ. Code § 1936(b)(5)*].
- An administrative charge, including the cost of appraisal and all other costs and expenses incident to

the damage, loss, repair, or replacement of the rented vehicle [*Civ. Code § 1936(b)(6)*; see [e], *below*].

[b] Ceiling on Amount of Renter's Liability for Damage

The total amount of the renter's liability to the rental company resulting from damage to the rented vehicle may not exceed the sum of the following amounts [*Civ. Code § 1936(c)*], as limited by statute [see [c], [d], *below*]:

- The estimated cost of parts that the rental company would have to buy to replace damaged vehicle parts [*Civ. Code § 1936(c)(1)*; see [c], *below*].
- The estimated cost of labor to replace damaged vehicle parts [*Civ. Code § 1936(c)(2)*; see [c], *below*].
- The estimated cost of labor to repair damaged vehicle parts [*Civ. Code § 1936(c)(3)(A)*; see [d], *below*].
- Actual charges for towing, storage, and impound fees paid by the rental company [*Civ. Code § 1936(c)(5)*].
- The administrative charge, including the cost of appraisal and all other costs and expenses incident to the damage, loss, repair, or replacement of the rented vehicle [*Civ. Code § 1936(c)(6)*; see [e], *below*].

[c] Replacement Parts and Labor

All discounts and price reductions or adjustments that are or will be received by the rental company must be subtracted from the estimated cost of parts to the extent not already incorporated in the estimate. Otherwise, the discounts or price reductions or adjustments must be promptly credited or refunded to the renter [*Civ. Code § 1936(c)(1)*].

The estimated cost of labor to replace damaged vehicle parts may not exceed the product of (1) the rate for labor usually paid by the rental company to replace vehicle parts of the type that were damaged times (2) the estimated time for replacement. All discounts and price reductions or adjustments that are or will be received by the rental company must be subtracted from the estimate to the extent not already incorporated in the estimate. Otherwise, the discounts or price reductions or adjustments must be promptly credited or refunded to the renter [*Civ. Code § 1936(c)(2)*]. "Estimated time for replacement" means the number of hours of labor, or fractional hours, needed to replace damaged vehicle parts as set forth in collision damage estimating guides generally used in the vehicle repair business and commonly known as "crash books" [*Civ. Code § 1936(a)(7)*].

[d] Repair Labor

The estimated cost of labor to repair damaged vehicle parts may not exceed the lesser of the following [*Civ. Code § 1936(c)(3)(A)*]:

- The product of (1) the rate for labor usually paid by the rental company to repair vehicle parts of the type that were damaged times (2) the estimated time for repair.
- The sum of the estimated labor and parts costs to replace the same vehicle parts [see [c], *above*].

All discounts and price reductions or adjustments that are or will be received by the rental company must be subtracted from the estimate to the extent not already incorporated in the estimate; otherwise, the discounts or price reductions or adjustments must be promptly credited or refunded to the renter [*Civ. Code § 1936(c)(3)(B)*].

"Estimated time for repair" means a good faith estimate of the reasonable number of hours of labor, or fractional hours, needed to repair damaged vehicle parts [*Civ. Code* § 1936(a)(8)].

[e] Administrative Charge

An administrative charge [*see Civ. Code* § 1936(b)(6); [a], *above*] may not be imposed if the total estimated cost of parts and labor does not exceed \$100 [*Civ. Code* § 1936(c)(6)]. Otherwise, the administrative charge is limited as follows [*Civ. Code* § 1936(c)(6)]:

- If the total estimated cost for parts and labor is more than \$100 and not more than \$500, the administrative charge may be \$50.
- If the total estimated cost for parts and labor is more than \$500 and not more than \$1,500, the administrative charge may be \$100.
- If the total estimated cost for parts and labor is more than \$1,500, the administrative charge may be \$150.

[5] Authorized Driver's Share of Liability

The total amount of an authorized driver's liability to the rental company, if any, for damage occurring during the authorized driver's operation of the rented vehicle may not exceed the amount of the renter's liability [*Civ. Code* § 1936(d)(1); *see* [4], *above*].

The rental company may not recover from the renter and another authorized driver an amount exceeding the renter's liability [*Civ. Code* § 1936(d)(2); *see* [4], *above*].

A claim against a renter resulting from damage or loss, excluding loss of use, to a rental vehicle must be reasonably related to the actual loss incurred. A rental company must mitigate damages when possible and may not assert or collect a claim for physical damage that exceeds the actual costs of the repairs performed--or the estimated cost of repairs, if the rental company chooses not to repair the vehicle--including all discounts and price reductions [*Civ. Code* § 1936(d)(3)]. However, if the vehicle is a total loss vehicle, the claim may not exceed the total loss vehicle value established in accordance with procedures that are customarily used by insurance companies when paying claims on total loss vehicles, less the proceeds from salvaging the vehicle, if those proceeds are retained by the rental company [*Civ. Code* § 1936(d)(3)].

If insurance coverage exists under the renter's applicable personal or business insurance policy, and the coverage is confirmed during regular business hours, the renter may require that the rental company submit any claims to the renter's applicable insurance carrier. The rental company may not make any written or oral representations that it will not present claims or negotiate with the renter's insurance carrier. Confirmation of coverage in this context includes telephone confirmation from insurance company representatives during regular business hours [*Civ. Code* § 1936(d)(4)]. On request of the renter and after confirmation of coverage, the amount of claim must be resolved between the insurance carrier and the rental company. The renter remains responsible for payment to the rental car company for any loss sustained that the renter's applicable insurance policy does not cover [*Civ. Code* § 1936(d)(4)].

A rental company may not recover from the renter or other authorized driver for any damage, loss, or fees for which the renter is responsible [*see Civ. Code* § 1936(b) (limitations on loss); [4][a], *above*], to the extent the rental company obtains recovery from another person [*Civ. Code* § 1936(d)(5)].

Civ. Code § 1936 applies only to the maximum liability of the renter or another authorized driver to the rental company resulting from damage to the rented vehicle, and not to the liability of another person [*Civ. Code § 1936(d)(6)*].

[6] Regulation of Trade Practices

[a] Advertisements

A rental company that disseminates in California any advertisement containing a rental rate must include in that advertisement a clearly readable statement of the charge for a damage waiver and a statement that a damage waiver is optional [*Civ. Code § 1936(j)*].

When the rental company states a rental rate in a television, radio, or print advertisement or in a telephonic, in-person, or computer-transmitted quotation, the rental company must disclose clearly in that advertisement or quotation the terms of any mileage conditions relating to the advertised or quoted rental rate, including (as applicable), but not limited to, the amount of mileage and gas charges, the number of miles for which no charges will be imposed, and a description of geographic driving limitations within the United States and Canada [*Civ. Code § 1936(n)(4)*].

When the rental company states a rental rate in an advertisement (including any radio, television, other electronic media, and print advertisement), quotation, or reservation (including those that are telephonic, in-person, and computer-transmitted) in connection with a car rental at an airport where a customer facility charge is imposed, the rental company must disclose clearly the existence and amount of the customer facility charge [*Civ. Code § 1936(n)(5)(A)*; see *Civ. Code § 1936(a)(4)* ("customer facility charge" defined); [1][d], *above*]. If the rate advertisement is intended to include transactions at more than one airport imposing a customer facility charge, the advertisement must state a range of fees. However, all rate advertisements that include car rentals at airport destinations must clearly and conspicuously include a toll-free telephone number at which a customer can be told the specific amount of the customer facility charge to which the customer will be obligated [*Civ. Code § 1936(n)(5)(A)*].

If a person or entity other than a rental car company, including a passenger carrier or a seller of travel services, advertises or quotes a rate for a car rental at an airport where a customer facility charge is imposed, that person or entity, provided the person or entity is provided with information about the existence and amount of the fee, to the extent not specifically prohibited by federal law, must clearly disclose the existence and amount of the fee in any telephonic, in-person, or computer-transmitted quotation, at the time of quoting an initial rental rate and at the time of making a rental car reservation. If a rental car company provides the person or entity with rate and customer facility charge information, the rental car company is not responsible for the failure of that person or entity to comply with applicable law when quoting or confirming a rate to a third person or entity [*Civ. Code § 1936(n)(5)(B)*].

[b] Charges In General

A rental company may advertise, quote, and charge a rental rate that includes only the entire amount (except taxes, a customer facility charge, if any [see [c], *below*], and a mileage charge, if any) that the renter must pay to hire or lease the vehicle for the period to which the rental rate applies. The rental company may not charge, in addition to the rental rate (and taxes and mileage charge, if any), any fee that is required to be paid by the renter as a condition of hiring or leasing the vehicle, including, but not limited to, required fuel or airport surcharges, nor any fee for transporting the renter to the location where the rented vehicle will be delivered to the renter [*Civ. Code § 1936(n)(1)*].

Despite these prohibitions, a rental car company may, in connection with the qualified business rental of a passenger vehicle to a business renter of a business-program sponsor under the sponsor's business program, do both of the following [*Civ. Code § 1936.05(b)*; see *Civ. Code § 1936.05(a)* (definitions); see also *Civ. Code § 1936.05(c),(d)* (enforcement; waiver is void as contrary to public policy)]:

- Separately quote additional charges for the rental if, at the time the quote is provided, the person receiving the quote is also provided a good faith estimate of the total of all the charges for the entire rental (except that the estimate may exclude mileage charges and charges for optional items and services that cannot be determined before completing the reservation based on the information provided by the renter).

- Separately impose additional charges for the rental, if the rental contract, or another document provided to the business renter at the time and place the rental begins, clearly and conspicuously discloses the total of all the charges for the entire rental, exclusive of charges that cannot be determined at the time the rental begins.

"Additional charges" in this context means charges other than a per-period base-rental rate established by the business program [*Civ. Code* § 1936.05(a)(1)].

However, a rental car company that separately quotes and separately imposes additional charges as discussed above must comply with the requirements of *Civ. Code* § 1936(n)(2)-(6) [*Civ. Code* § 1936.05(e)], discussed below.

The rental company may not charge a fee for authorized drivers in addition to the rental charge for an individual renter [*Civ. Code* § 1936(n)(3)].

In addition to the rental rate (and taxes, a customer facility charge, if any [*see* [c], *below*], and mileage charge, if any), the rental company may impose a charge based on reasonable age criteria established by the rental company [*see Lazar v. Hertz Corporation* (1999) 69 Cal. App. 4th 1494, 1507-1509, 82 Cal. Rptr. 2d 368 (holding that practice of imposing surcharges was neither unlawful nor unfair)]. The rental company also may charge for an item or service provided in connection with a particular rental transaction if the renter could have avoided incurring the charge by choosing not to obtain or use the optional item or service. Items and services for which the rental company may impose an additional charge, include, but are not limited to, the following [*Civ. Code* § 1936(n)(2)]:

- Optional insurance and accessories requested by the renter.
- Service charges incident to the renter's optional return of the vehicle to a location other than the location where the vehicle was hired or leased.
- Charges for refueling the vehicle at the conclusion of the rental transaction in the event the renter did not return the vehicle with as much fuel as was in the fuel tank at the beginning of the rental [*see Schnall v. Hertz Corporation* (2000) 78 Cal. App. 4th 1144, 1162, 1170, 93 Cal. Rptr. 2d 439 (holding that *Civ. Code* § 1936(m)(2) provided rental car company with safe harbor against claim that amount of fuel service charge was unfair within meaning of Unfair Competition Law, but did not provide safe harbor against allegations that it confused and misled customers in violation of unfair and fraud prongs of UCL)].

If a rental company delivers a vehicle to a renter at a location other than the location where the rental company normally carries on its business, the rental company may not charge the renter an amount for the rental for the period before the delivery of the vehicle. If the rental company picks up a rented vehicle from the renter at a location other than the location where the rental company normally carries on its business, the rental company must not charge the renter an amount for the rental for the period after the renter notifies the rental company to pick up the vehicle [*Civ. Code* § 1936(n)(6)].

[c] Customer Facility Charge

An airport may require that a "customer facility charge" be collected by a rental company from a renter, to finance, design, and construct consolidated airport car rental facilities, or to finance, design, construct, and provide common-use transportation systems that move passengers between airport terminals and those consolidated car rental facilities [*Civ. Code § 1936(a)(4)(A)*; see [1][d], *above*]. However, the aggregate amount to be collected may not exceed the reasonable costs, as determined by an independent audit paid for by the airport, to finance, design, and construct those facilities. In the case of a transportation system, the audit also must consider the reasonable costs of providing the transit system or busing network [*Civ. Code § 1936(a)(4)(B)*]. Further, the fees designated as a customer facility charge may not be used to pay for terminal expansion, gate expansion, runway expansion, changes in hours of operation, or changes in the number of flights arriving or departing from the airport [*Civ. Code § 1936(a)(4)(B)*].

An airport's authorization to impose a customer facility charge will become inoperative when the bonds used for financing are paid [*Civ. Code § 1936(a)(4)(C)*].

A rental company may collect a customer facility charge when all of the following conditions are satisfied [*Civ. Code § 1936(m)(1)(A)-(G)*; see *Civ. Code § 1936(m)(1)(E)* (fees imposed); see also *Civ. Code § 1936(m)(1)(H)* (exceptions for certain airports)]:

- Collection of the fee by the rental company is required by an airport operated by a city, a county, a city and county, a joint powers authority, a special district, or the San Diego County Regional Airport Authority.
- The fee is calculated on a per-contract basis.
- The fee is a user fee, not a tax imposed upon real property or an incidence of property ownership [see *Cal. Const., Art. XIID*].
- With specified exceptions, the fee is \$10 per contract [see *Civ. Code § 1936(m)(1)(E)*] (exceptions).
- Revenues collected from the fee do not exceed the reasonable costs of financing, designing, constructing, or operating the facility or services and may not be used for any other purpose.
- The fee is separately identified on the rental agreement.

These fees, or fees collected under another law under which a local agency operating an airport requires a rental car company to collect a facility financing fee from its customers, are not subject to sales, use, or transaction taxes [*Civ. Code § 1936(m)(2)*].

[d] Unfair Conduct

A rental company may not engage in any unfair, deceptive, or coercive conduct to induce a renter to purchase a damage waiver, optional insurance, or another optional good or service, including, but not limited to, conduct such as refusing to honor the renter's reservation, limiting the availability of vehicles, requiring a deposit, or debiting or blocking the renter's credit card account for a sum equivalent to a deposit if the renter declines to purchase a damage waiver, optional insurance, or another optional good or service [*Civ. Code § 1936(k)(2)*].

A rental company may not seek to recover any portion of any claim arising out of damage to, or loss of, the rented vehicle by processing a credit card charge or causing a debit or block to be placed on the renter's credit card account [*Civ. Code § 1936(l)(1)*].

A rental company may not engage in any unfair, deceptive, or coercive tactics in attempting to recover or in recovering

on any claim arising out of damage to, or loss of, the rented vehicle [*Civ. Code* § 1936(l)(2)].

[e] Waiver

A waiver of any of the provisions of *Civ. Code* § 1936 is void and unenforceable as contrary to public policy [*Civ. Code* § 1936(s)].

[f] Restrictions on Use of Electronic Surveillance Technology

A rental company may not use, access, or obtain any information relating to the renter's use of the rental vehicle that was obtained using electronic surveillance technology, except in the following circumstances [*Civ. Code* § 1936(o)]:

- When the equipment is used by the rental company only to locate a stolen, abandoned, or missing rental vehicle, after [*Civ. Code* § 1936(o)(1)(A); see *Civ. Code* § 1936(o)(1)(B) (record-keeping requirements)]:
 - The renter or law enforcement has informed the rental company that the vehicle is missing, or has been stolen or abandoned; or
 - The rental vehicle has not been returned following one week after the contracted return date, or by one week following the end of an extension of that return date; or
 - The rental company discovers the rental vehicle is missing, or has been stolen or abandoned.
- In response to a specific request from law enforcement pursuant to a subpoena or search warrant [*Civ. Code* § 1936(o)(2)].

This law does not prohibit a rental company from equipping rental vehicles with:

- GPS-based technology, if the rental company does not use, access, or obtain information relating to the renter's use of the rental vehicle that was obtained using that technology, except to discover or repair a defect in the technology [*Civ. Code* § 1936(o)(3)].
- Electronic surveillance technology that allows the remote locking or unlocking of the vehicle at the renter's request, if the rental company does not use, access, or obtain information relating to the renter's use of the rental vehicle that was obtained using that technology, except as necessary to lock or unlock the vehicle [*Civ. Code* § 1936(o)(4)].
- Electronic surveillance technology that allows the company to provide roadside assistance, such as towing, flat-tire, or fuel services, at the renter's request, if the rental company does not use, access or obtain information relating to the renter's use of the rental vehicle that was obtained using that technology, except as necessary to provide the requested roadside assistance [*Civ. Code* § 1936(o)(5)].

This law also does not prohibit a rental company from obtaining, accessing, or using information from electronic surveillance technology for the sole purpose of determining the date and time the vehicle is returned to the rental company, and the total mileage driven and the vehicle fuel level of the returned vehicle, after the renter has returned the vehicle [see *Civ. Code* § 1936(o)(6)].

A rental company may not use electronic surveillance technology to track a renter in order to impose fines or surcharges

relating to the renter's use of the rental vehicle [*Civ. Code* § 1936(p)].

[7] Civil Actions

A renter may bring an action against the rental company for the recovery of damages and appropriate equitable relief for a violation of *Civ. Code* § 1936. The prevailing party is entitled to recover reasonable attorneys' fees and costs [*Civ. Code* § 1936(q)]. Any action by a rental company against a renter for loss due to theft of the vehicle must be brought in the county in which the renter resides or, if the renter is not a California resident, in the jurisdiction in which the renter resides [*Civ. Code* § 1936(r)]. For discussion of actions under *Civ. Code* § 1936, and an illustrative complaint, see *California Forms of Pleading and Practice*, Ch. 93, *Bailments*, § 93.100 *et seq.* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 47 AUTOMOTIVE FINANCING AND VEHICLE LEASING
PART II. LEGAL BACKGROUND
B. Vehicle Leasing and Renting

20-47 California Legal Forms--Transaction Guide §§ 47.35-47.99

[Reserved]

§§ 47.35[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 47 AUTOMOTIVE FINANCING AND VEHICLE LEASING
PART III. TRANSACTION GUIDE
A. Client Interview

20-47 California Legal Forms--Transaction Guide § 47.100

§ 47.100 Facts

[1] Dealer's Business

1. Identity:
 - a. Name of dealer.
 - b. Legal status as proprietor, partnership, or corporation.
 - (1) If partnership, names and addresses of all partners.
 - (2) If corporation, state and date of incorporation, and names of all corporate officers.
2. License number assigned to dealer by Department of Motor Vehicles.
3. Location of office and showroom.
4. Location of warehouse, if any.
5. Type and make of automobiles sold by dealer (*e.g.*, new cars of a particular make and used cars, or used cars only).
6. Reputation and experience:
 - a. Number of years in business.
 - b. Number of years in automobile sales.
 - c. Credit rating.

7. Area served by dealer's franchise:

- a. Size of area.
- b. Type of area (*e.g.*, metropolitan downtown area, suburban area).

8. Number and types of vehicles sold each month during the past six months.

9. Number of vehicles sold by dealer in credit sales during past year.

10. Number of vehicles repossessed by dealer during past year.

11. Dealer's past sales and advertising methods.

[2] Dealer's Wholesale-Financing Profile

1. Number and types of vehicles that dealer should keep in stock or inventory.

NOTE:

This is usually computed by lenders as the number of vehicles the dealer can reasonably be expected to sell in a specified 30-day or 45-day period, based on the immediate past "volume of sales" (*see* [1], P 9, *above*).

2. Use to be made of financed vehicles while in dealer's custody (other than keeping them for sale), particularly which vehicles will be used as demonstration models.

3. Dealer's net profit on sale of financed automobile.

NOTE:

This will limit the interest rate that the dealer can afford to pay for financing of the dealer's inventory.

4. Name of wholesale distributor from whom automobiles are purchased.

5. Percentage of wholesale price of automobiles that dealer wishes to finance.

6. Lender, if any, with which dealer has arranged for wholesale financing of inventory.

7. "Discount rate" paid by area lenders purchasing dealer's motor vehicle conditional sale contracts.

8. Amount of down payment that retail purchaser must make before area lender will purchase conditional sale contract.

9. Amount that lender will require to be credited to and maintained in dealer's reserve account as security for performance of conditional sale contracts assigned by dealer.

10. Type of recourse or nonrecourse retail financing arrangement dealer can reasonably expect to make with area lender (which will largely depend on dealer's credit rating, experience, reputation, and financial

stability).

- a. Full-recourse agreement [*see* § 47.207].
- b. Nonrecourse agreement.
- c. Repurchase agreement.
- d. Limited-liability agreement [*see* § 47.208].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDebtor & Creditor RelationsContracts LawTypes of ContractsLease AgreementsPersonalty
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20-47 California Legal Forms--Transaction Guide § 47.101

§ 47.101 Documents

[1] General Business Documents

1. Latest available balance sheet.
2. Profit and loss statements for most recent business year and period since end of most recent year.
3. Report for most recent 12 months showing:
 - a. Number of new and used vehicles sold on credit.
 - b. Number of vehicles repossessed.
4. Copy of any franchise agreement with manufacturer of automobiles that dealer sells.
5. Copy of any wholesale financing agreement with any lending institution or private lender.

[2] Documents Related to Credit-Sale Practices

1. Copy of each form of contract, other agreement or debt instrument, and statement used to disclose credit terms in transactions with consumers [see § 47.200].
2. Copy of each form of "purchase order," "sales order," "car reservation," "statement of transaction," or other instrument that dealer has used in connection with sales pending execution of conditional sale contract.

3. Copy of each form of any credit application or "customer's statement" to be executed by buyer, as required by lender that purchases dealer's interest in buyer's conditional sale contract.
4. Copy of any agreement between dealer and lender for purchase by lender of conditional sale contracts produced by dealer.

[3] Documents Related to Long-Term Leasing Practices

1. Copy of each form of lease and disclosure statement that dealer uses in consumer transactions [see §§ 47.220, 47.221].
2. Copy of any loan agreement under which dealer is financing purchase of vehicles for leasing [see § 47.226].
3. Copy of each form of any credit application or "customer's statement" to be executed by lessee, as required by lender that finances purchase of vehicles for leasing.

Legal Topics:

For related research and practice materials, see the following legal topics:

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[Reserved]

§§ 47.102[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 47 AUTOMOTIVE FINANCING AND VEHICLE LEASING
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

20-47 California Legal Forms--Transaction Guide § 47.110

§ 47.110 Retail Sales on Credit

1. Determine applicability of closed-end credit requirements of Truth in Lending Act [15 U.S.C. § 1601 *et seq.*; 12 C.F.R. pt. 226; *see* § 47.11].
2. Determine applicability of Rees-Levering Act [Civ. Code § 2981 *et seq.*; *see* § 47.12[1]].
3. If dealer will assist buyers in obtaining credit from third party (such as bank), determine whether dealer may be subject to special regulation [*see* § 47.13].
4. If dealer will negotiate in Spanish (or any other foreign language), determine applicability of special requirements [*see* § 47.14].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral OverviewContracts LawDebtor & Creditor Relations



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B. Preliminary Determinations

20-47 California Legal Forms--Transaction Guide § 47.111

§ 47.111 Vehicle Leases

1. Determine applicability of Consumer Leasing Act [*15 U.S.C. § 1667 et seq.*] and Regulation M [12 C.F.R. pt. 213; *see § 47.30[1]*].
2. Determine applicability of Vehicle Leasing Act [*Civ. Code § 2985.7 et seq.*; *see § 47.31[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionConsumer LeasingGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview



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20-47 California Legal Forms--Transaction Guide §§ 47.112-47.119

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20-47 California Legal Forms--Transaction Guide § 47.120

§ 47.120 Procedural Guide to Credit Sale by Dealer

[1] Conducting Consumer Conditional Sale Transaction

1. Review dealer's form of conditional sale contract for compliance with Rees-Levering Act [*Civ. Code* § 2981 *et seq.*; *see* §§ 47.12, 47.200] and disclosure requirements of Truth in Lending Act [15 U.S.C. § 1601 *et seq.*; *see* § 47.11; Ch. 45, *Consumer Installment Loans and Credit Sales*].
2. Instruct dealer to make appropriate disclosures to buyer, in a separate writing from the conditional sale contract, as required under the Car Buyer's *Bill of Rights*, [*see Civ. Code* § 2982.2 (effective July 1, 2006)].
3. If purchase order is negotiated in connection with conditional sale contract, instruct dealer to use purchase order form containing [*Civ. Code* §§ 2981(l), 2982]:
 - a. Same financial disclosures as required in conditional sale contract [*see Civ. Code* § 2982(a), (m); § 47.200[1][c]-[i]].
 - b. Same notice regarding liability insurance as required in conditional sale contract [*see Civ. Code* § 2984.1; § 47.200[1][m]].
4. Instruct dealer [*Civ. Code* § 2981.9; *see* §§ 47.12[4][a], 47.200[1][p]]:
 - a. Not to obtain buyer's signature until all blank spaces in contract have been filled in.
 - b. To furnish exact copy of executed conditional sale contract to buyer at time buyer and dealer execute the contract.

NOTE:

If a language other than English is the primary language used for negotiations with a consumer with respect to a contract under the Rees-Levering Act, the consumer (and any other party to the contract) may have to be provided with a translation of the contract in that other language *Civ. Code § 1632(b)(1); see § 47.14*. For contracts entered into prior to July 1, 2004, this requirement applied only to contracts negotiated primarily in Spanish. On and after July 1, 2004, it applies to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [*see Civ. Code § 1632*]. For detailed discussion of these requirements, and exceptions, see *Ch. 45, Consumer Installment Loans and Credit Sales, § 45.64*.

c. Not to deliver vehicle to buyer until buyer has received fully executed copies of conditional sale contract and any other documents signed during purchase negotiations.

5. Instruct dealer not to charge application fee for conditional sale contract [*Civ. Code § 2982(o); see § 47.12[4][b]*].
6. Instruct dealer to return any property or payment given by buyer pending execution of contract, in event contract is not executed [*Civ. Code § 2982.7; see § 47.12[4][d]*].
7. Instruct dealer to allow buyer to rescind any contract or purchase order if buyer is unable to obtain third-party financing known by dealer to be required by buyer in order to make purchase [*Civ. Code § 2982.9; see § 47.12[4][d]*].
8. Instruct dealer not to compute finance charge in part on simple-interest basis and in part on precomputed basis [*Civ. Code § 2981.8; see § 47.12[5][b]*].
9. Instruct dealer not to impose excessive finance charge [*Civ. Code § 2982(j)(1); see § 47.12[5][c]*].
10. Instruct dealer not to take prohibited lien on or title to property as security [*Civ. Code § 2984.2; see § 47.12[9]*].
11. Instruct dealer to complete numbered report-of-sale form issued by Department of Motor Vehicles and attach copy to vehicle [*Veh. Code § 4456(a)(1)*].

NOTE:

A vehicle displaying a copy of the report of sale may be operated without a license plate or registration card until those items are received by the buyer [*Veh. Code § 4456(c)*].

12. When purchased vehicle is new vehicle not previously registered in California, instruct dealer to deliver or mail to Department of Motor Vehicles in Sacramento as soon as possible and not more than five days after date of sale [*Veh. Code § 5901(a)*]:

- a. Original report of sale for vehicle [*Veh. Code § 4456(a)*].
- b. Application for registration of vehicle.

NOTE:

The application must be submitted to the Department accompanied by all fees and penalties due for registration or transfer of registration within 20 days after the date of sale [*Veh. Code § 4456(a)(2)*].

- c. Consent, signed by buyer, to have lender that has taken assignment of contract to be named as legal

owner of vehicle.

d. Dealer's check, payable to Department of Motor Vehicles, for all registration and license fees payable on registration of vehicle and recordation of conditional sale contract.

13. If purchased vehicle is used vehicle already registered in California, instruct dealer to deliver or mail to Department of Motor Vehicles in Sacramento as soon as possible and not more than five days after date of sale [*Veh. Code § 5901*]:

a. Report of sale for vehicle [*Veh. Code § 4456(a)*].

NOTE:

The dealer must also notify the DMV of the vehicle's odometer reading at the time of sale or transfer. If the dealer knows that the odometer reading is incorrect, the dealer must indicate that the mileage registered by the odometer is incorrect [*Veh. Code § 5901(b)*]. If the dealer is not in possession of the vehicle, the person in physical possession must give the mileage notice to the DMV [*Veh. Code § 5901(c)*].

b. Certificate of ownership ("pink slip") endorsed by former owner of vehicle, endorsed by dealer, and showing buyer as new registered owner and lender as new legal owner.

c. Certificate of registration ("white slip") previously issued for vehicle.

d. Dealer's check, payable to Department of Motor Vehicles, for all fees payable for transfer of registration and legal ownership of vehicle.

[2] Financing Dealer's Credit Sales

1. Instruct dealer to have buyer complete and execute, then to forward copy of, any form of credit application or "customer's statement" required by lender that has agreed to purchase conditional sale contracts from dealer.

2. Instruct dealer to follow lender's requirements as to following terms in conditional sale contract:

a. Amount of buyer's down payment.

b. Number of installment payments.

c. Amount of monthly installment.

d. Credit life or disability insurance.

3. Instruct dealer to produce three executed copies of contract, reserving one copy for lender.

4. Instruct dealer to have buyer sign consent for lender that has agreed to purchase contract to be named as legal owner of purchased automobile.

5. Instruct dealer to execute assignment of conditional sale contract to lender conforming to dealer's financing agreement with lender:

- a. Assignment with full recourse [*see* § 47.207[2]].
 - b. Assignment without recourse.
 - c. Assignment under repurchase agreement.
 - d. Assignment under limited liability agreement [*see* § 47.208[2]].
6. Instruct dealer to deliver executed assignment and original conditional sale contract to lender that has agreed to purchase contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral OverviewContracts LawDebtor & Creditor Relations



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20-47 California Legal Forms--Transaction Guide § 47.121

§ 47.121 Procedural Guide to Vehicle Leasing

1. Review lessor's lease forms to ensure compliance with Vehicle Leasing Act [*Civ. Code* § 2985.7 *et seq.*; *see* §§ 47.31, 47.221] as well as Consumer Leasing Act [15 U.S.C. § 1667 *et seq.*] and Regulation M [12 C.F.R. pt. 213; *see* §§ 47.30, 47.220].

NOTE:

For example, in *Kroupa v. Sunrise Ford* (1999) 77 Cal. App. 4th 835, 843-844, 92 Cal. Rptr. 2d 42, the court found a violation of *Civ. Code* § 2985.8(a) when there was a single transaction involving two trade-ins and a new truck lease but no single document containing "all the agreements" regarding the parties' obligations.

2. Instruct lessor to have each lease executed by lessor and lessee, and give one fully completed and executed copy to lessee [*Civ. Code* § 2985.8(g)].

NOTE:

If a language other than English is the primary language used for negotiations with a consumer with respect to a contract under the Vehicle Leasing Act, the consumer (and any other party to the contract) may have to be provided with a translation of the contract in that other language *Civ. Code* § 1632(b)(1); *see* § 47.14]. For contracts entered into prior to July 1, 2004, this requirement applied only to contracts negotiated primarily in Spanish. On and after July 1, 2004, it applies to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [*see Civ. Code* § 1632]. For detailed discussion of these requirements, and exceptions, *see Ch. 45, Consumer Installment Loans and Credit Sales*, § 45.64.

3. Advise that lessor and lessee must complete and sign application for registration or transfer of registration of leased vehicle by Department of Motor Vehicles to:

- a. Lessor and lessee, as registered owners.
- b. Lender, if any, that is financing purchase of vehicle by lessor, as legal owner.

NOTE:

The lessor will be shown on the registration card as the owner, and the lessee will be shown as the lessee of the vehicle. The DMV will designate their relationships on the card and the ownership certificate as "lessor" and "lessee." At the lessor's election, the DMV may designate the address of either party [*Veh. Code* § 4453.5(a)].

- 4. When lessor is engaged in business of selling automobiles, instruct lessor to have report of sale of leased vehicle completed and, together with paper license plate, attached to leased vehicle in same manner as if vehicle had been sold to lessee [*see* § 47.120[1], P 12].
- 5. Instruct lessor to forward necessary documents to Department of Motor Vehicles within five days after execution of lease by lessee [*see* § 47.120[1] P, 12].
- 6. Advise that lessor may assign and deliver lease to lender that is financing purchase of the leased vehicle by lessor [*see* § 47.226].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Consumer Leasing General Overview Contracts Law Types of Contracts Lease Agreements Personalty Leases General Overview



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20-47 California Legal Forms--Transaction Guide §§ 47.122-47.199

[Reserved]

§§ 47.122[Reserved]



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 PART IV. FORMS
 A. Automotive Finance

20-47 California Legal Forms--Transaction Guide § 47.200

§ 47.200 Conditional Sale Contract for Motor Vehicle--Between Dealer and Consumer [Civ. Code § 2982]

[1] Comment

[a] Use of Form

This form is a conditional sale contract for use by motor vehicle retailers in California when selling vehicles that will be used for noncommercial purposes. For a conditional sale contract that may be used for the casual sale of an automobile by a person not engaged in the business, see § 47.206.

[b] Form and Format of Contract

Every contract subject to the Rees-Levering Act must be in writing. If printed, it must be printed in at least 6-point type. It must contain in a single document all of the agreements of the buyer and seller with respect to the total cost and the terms of payment for the vehicle, including any promissory notes or any other evidences of indebtedness [Civ. Code § 2981.9].

The contract must disclose on its face, by printing the word "new" or "used" in a box outlined in red, that is not smaller than a half inch high and a half inch wide, whether the vehicle is sold as a new vehicle [see Veh. Code § 430 ("new vehicle" defined)] or as a used vehicle [Civ. Code § 2982(q); see Veh. Code § 665 ("used vehicle" defined)].

It is a licensing violation for a dealer to fail to disclose, in a clear and conspicuous manner in at least 10-point boldface type on the face of a contract for the retail sale of a new motor vehicle that the transaction is, or is not, subject to a fee received by an auto broker from the selling new motor vehicle dealer, and the name of the auto broker, if applicable [Veh. Code § 11713.1(x)].

If a language other than English is the primary language used for negotiations with a consumer with respect to a contract under the Rees-Levering Act, the consumer (and any other party to the contract) may have to be provided with a translation of the contract in that other language [Civ. Code § 1632(b)(1); see § 47.14]. For contracts entered into prior to July 1, 2004, this requirement applied only to contracts negotiated primarily in Spanish. On and after July 1, 2004, it

applies to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [see *Civ. Code* § 1632]. For detailed discussion of these requirements, and exceptions, see *Ch. 45, Consumer Installment Loans and Credit Sales*, § 45.64.

[c] Disclosures and Notices in General

Every contract subject to the Rees-Levering Act must contain the disclosures required by Regulation Z [12 C.F.R. pt. 226], whether or not Regulation Z applies to the transaction. For discussion of Regulation Z, see *Ch. 45, Consumer Installment Loans and Credit Sales*. In addition, the contract must contain the other disclosures and notices, to the extent that they are applicable, required by *Civ. Code* § 2982 [see [d]-[o], below], and the contract must satisfy the other requirements and limitations of that section. All required notices and disclosures, except disclosures required by *Civ. Code* § 2982(a) [see [c], below], may appear in the contract in any location or sequence and may be combined or interspersed with other provisions of the contract [*Civ. Code* § 2982].

"Regulation Z" means any rule, regulation, or interpretation promulgated by the Board of Governors of the Federal Reserve System under the federal Truth in Lending Act, as amended [15 U.S.C. § 1601 *et seq.*], and any interpretation or approval issued by an official or employee of the Federal Reserve Board duly authorized under the Truth in Lending Act to issue the interpretation or approval [*Civ. Code* § 2981(m)].

Notwithstanding any other provision of the Rees-Levering Act to the contrary, any information required to be disclosed in a contract under the Rees-Levering Act may be disclosed in any manner, method, or terminology required or permitted under Regulation Z, as in effect at the time the disclosure is made, as long as all of the requirements and limitations set forth in *Civ. Code* § 2982(a) are satisfied [see [d], below]. However, the seller may not elect the option under Regulation Z to avoid itemizing the amount financed and merely state the buyer's right to receive a separate itemization [see 12 C.F.R. § 226.18(c)(2) ("The creditor need not comply with paragraph (c)(1) of this section [requiring itemization of the amount financed] if the creditor provides a statement that the consumer has the right to receive a written itemization of the amount financed, together with a space for the consumer to indicate whether it is desired, and the consumer does not request it"); see also [d], below]. Nothing in the Rees-Levering Act prohibits the disclosure in the contract of additional information required or permitted under Regulation Z, as in effect at the time the disclosure is made [*Civ. Code* § 2982(m)].

Effective July 1, 2006, a seller must provide a buyer with additional disclosures contained in a document separate from the conditional sales contract or purchase order, before the execution of a conditional sale contract [see *Civ. Code* § 2982.2; Stat. 2005 ch. 128, § 12 (effective date)]. For further discussion and a sample form, see § 47.200A.

[d] Itemization of Amount Financed

The components of the itemization of the amount financed, below, may be itemized or subtotaled to a greater extent than shown here, but in all cases they must be made together and in the sequence set forth here [*Civ. Code* § 2982]. No particular terminology is required to disclose these items except as expressly stated below [*Civ. Code* § 2982(b)]. The contract must contain these disclosures, as applicable, under the heading "itemization of the amount financed" [*Civ. Code* § 2982(a)]:

1. An itemization, as follows, of the total cash price:
 - a. The cash price, exclusive of document preparation fees, taxes imposed on the sale, pollution control certification fees, prior credit or lease balance remaining on property being traded in, the amount charged for a service contract, and, effective July 1, 2006 [see Stat. 2005 ch. 128, § 12], the amount charged for a surface protection product, the amount charged for an optional debt cancellation agreement, and the amount charged for a

contract cancellation option agreement [*Civ. Code* § 2982(a)(1)(A)].

b. The fee to be retained by the seller for document preparation [*Civ. Code* § 2982(a)(1)(B)].

c. The fee charged by the seller for certifying that the vehicle complies with applicable pollution control requirements [*Civ. Code* § 2982(a)(1)(C)].

d. A charge for a theft deterrent device [*Civ. Code* § 2982(a)(1)(D) (effective July 1, 2006; see Stat. 2005 ch. 128, § 12); see *Civ. Code* § 2981(r) (definition); § 47.12[2][e]].

e. A charge for a surface protection product [*Civ. Code* § 2982(a)(1)(E) (effective July 1, 2006; see Stat. 2005 ch. 128, § 12); see *Civ. Code* § 2981(q) (definition); § 47.12[2][e]].

f. Taxes imposed on the sale [*Civ. Code* § 2982(a)(1)(D) (renumbered *Civ. Code* § 2982(a)(1)(F), effective July 1, 2006); see Stat. 2005 ch. 128, § 12)].

g. The amount of any optional business partnership automation fee to register or transfer the vehicle (which must be labeled "Optional DMV Electronic Filing Fee") [*Civ. Code* § 2982(a)(1)(E) (renumbered *Civ. Code* § 2982(a)(1)(G), effective July 1, 2006); see Stat. 2005 ch. 128, § 12)].

h. The amount charged for a service contract [*Civ. Code* § 2982(a)(1)(F) (renumbered *Civ. Code* § 2982(a)(1)(H), effective July 1, 2006); see Stat. 2005 ch. 128, § 12)].

i. The prior credit or lease balance remaining on property being traded in [see *Civ. Code* § 2982(a)(6) (down payment and trade-in calculation)]. This disclosure must be labeled "prior credit or lease balance (see down payment and trade-in calculation)" [*Civ. Code* § 2982(a)(1)(G) (renumbered *Civ. Code* § 2982(a)(1)(I), effective July 1, 2006); see Stat. 2005 ch. 128, § 12]; see also [e], below].

j. Any charge for an optional debt cancellation agreement [*Civ. Code* § 2982(a)(1)(H) (renumbered *Civ. Code* § 2982(a)(1)(J), effective July 1, 2006); see Stat. 2005 ch. 128, § 12)].

k. Any charge for a used vehicle contract cancellation option agreement [*Civ. Code* § 2982(a)(1)(K) (effective July 1, 2006; see Stat. 2005 ch. 128, § 12)].

l. The total cash price, which is the sum of the foregoing amounts [*Civ. Code* § 2982(a)(1)(I) (renumbered *Civ. Code* § 2982(a)(1)(L), effective July 1, 2006); see Stat. 2005 ch. 128, § 12)].

The disclosures required for charges for a theft deterrent device, a surface protection product, or a charge for a used vehicle contract cancellation option agreement, under *Civ. Code* § 2982(a)(1)(D), (E), (K), respectively, effective July 1, 2006, as listed above, are not required on contracts involving the sale of a motorcycle [see *Veh. Code* § 400 (definition)], or on contracts involving the sale of an off-highway motor vehicle subject to identification under *Veh. Code* § 38010. Further, the amounts of those charges, if any, are not required to be reflected in the total cash price [*Civ. Code* § 2982(a)(1)(M) (effective July 1, 2006; see Stat. 2005 ch. 128, § 12)].

2. Amounts paid to public officials for vehicle license fees, registration, transfer, and titling fees, and tire fees imposed under the Public Resources Code [*Civ. Code* § 2982(a)(2); *see Pub. Res. Code* § 42885 (tire fees); Stats. 2001, ch. 287, §§ 1, 5 (effective date)].
3. The aggregate amount of premiums agreed, on execution of the contract, to be paid for policies of insurance included in the contract, excluding the amount of any insurance premium included in the finance charge [*Civ. Code* § 2982(a)(3)].
4. The amount of the state fee for issuance of a certificate of compliance, noncompliance, exemption, or waiver pursuant to any applicable pollution control statute [*Civ. Code* § 2982(a)(4)].
5. A subtotal representing the sum of all costs and charges above (items 1-4) [*Civ. Code* § 2982(a)(5)].
6. The amount of the buyer's down payment, which must be itemized [*Civ. Code* § 2982(a)(6); *see* [e], *below*].
7. The amount of any administrative finance charge, labeled "prepaid finance charge" [*Civ. Code* § 2982(a)(7)].
8. The subtotal of all costs and charges (item 5) less the sum of the down payment (item 6) plus any administrative finance charge (item 7), labeled "amount financed" [*Civ. Code* § 2982(a)(8)].

[e] Itemization of Down Payment

The amount of the buyer's down payment must be itemized [*see* [d], *above*] to show the following [*Civ. Code* § 2982(a)(6)]:

- The agreed value of the property being traded in [*Civ. Code* § 2982(a)(6)(A)].
- The prior credit or lease balance, if any, owing on the property being traded in [*Civ. Code* § 2982(a)(6)(B)].
- The net agreed value of the property being traded in, which is the difference between the property's agreed value and its prior credit or lease balance owing. If the prior credit or lease balance owing exceeds the agreed value, a negative number must be stated [*Civ. Code* § 2982(a)(6)(C)].

PRACTICE TIP:

This treatment of trade-in value is mandated to achieve two goals. One is to reduce the risk that the credit buyer and the financing company could be deceived about the buyer's actual financial situation; the other is to reduce the likelihood of unfair competition between sellers. Those goals would be frustrated by, for example, a seller's practice of inflating the agreed value of a trade-in vehicle in order to hide the buyer's negative equity—that is, hide the fact that the buyer owes more on a pre-existing contract for the trade-in vehicle than it is worth—and likewise inflating the disclosed cash price so as to absorb the phantom value added to the trade-in vehicle. The disclosure requirements concerning trade-in value will be enforced to suppress such practices [*e.g.*, *Thompson v. 10,000 RV Sales, Inc.* (2005) 130 Cal. App. 4th 950, 970, 974, 978, 31 Cal. Rptr. 3d 18 (injunction properly prohibited seller from including over-allowances on trade-in vehicles in cash price of vehicles being purchased in credit transactions)].

- The amount of any portion of the down payment to be deferred until not later than the due date of the

second regularly scheduled installment under the contract and that is not subject to a finance charge [*Civ. Code* § 2982(a)(6)(D)].

■ The amount of any manufacturer's rebate applied or to be applied to the down payment [*Civ. Code* § 2982(a)(6)(E)].

■ The remaining amount paid or to be paid by the buyer as a down payment [*Civ. Code* § 2982(a)(6)(F)].

■ The total down payment. If the sum of the amounts specified in *Civ. Code* § 2982(a)(6)(C)-(F), inclusive (discussed above), is zero or more, that sum must be stated as the total down payment, and no amount stated as the prior credit or lease balance under *Civ. Code* § 2982(a)(1)(G) (renumbered *Civ. Code* § 2982(a)(1)(I), effective July 1, 2006); see Stat. 2005 ch. 128, § 12). If the sum of amounts specified in *Civ. Code* § 2982(a)(6)(C)-(F), inclusive, is less than zero, that sum, expressed as a positive number, must be stated as the prior credit or lease balance under *Civ. Code* § 2982(a)(1)(G) [see Item 1(i) under [d], *above*; (renumbered *Civ. Code* § 2982(a)(1)(I), effective July 1, 2006); see Stat. 2005 ch. 128, § 12)], and zero must be stated as the total down payment. These disclosures must be labeled "total downpayment" and must contain a descriptor indicating that, if the total down payment is a negative number, a zero must be disclosed as the total down payment and a reference made that the remainder will be included in the disclosure required by *Civ. Code* § 2982(a)(1)(G) (renumbered *Civ. Code* § 2982(a)(1)(I), effective July 1, 2006); see Stat. 2005 ch. 128, § 12) [*Civ. Code* § 2982(a)(6)(G)].

If the down payment includes property being traded in, the contract must contain a brief description of that property [*Civ. Code* § 2982(d)].

PRACTICE TIP:

If payment of all or a portion of the down payment is to be deferred, the deferred payment must be reflected in the payment schedule disclosed pursuant to Regulation Z [*Civ. Code* § 2982(c)].

[f] Itemization of Insurance

The contract must contain an itemization of any insurance included as part of the amount financed disclosed pursuant to *Civ. Code* § 2982(a)(3) [see [d], *above*] and of any insurance included as part of the finance charge. The itemization must identify the type of insurance coverage and the premium charged for it. If the insurance expires before the date of the last scheduled installment included in the repayment schedule, the term of the insurance must be stated [*Civ. Code* § 2982(i)(1); see 10 Cal. Code Reg. § 2114(b), (c) (same information is required by Insurance Commissioner, and compliance with Rees-Levering Act is compliance with regulatory requirement); see also [m], *below*].

If any charge for insurance (other than for credit life or disability) is included in the contract balance and disbursement of any part of it is to be made more than one year after the date of the contract, any finance charge on the amount to be disbursed after one year must be computed from the month the disbursement is to be made to the due date of the last installment under the contract [*Civ. Code* § 2982(i)(2)].

[g] Document Preparation Fee

If the seller imposes a fee for document preparation, the contract must contain a disclosure that the fee is not a governmental fee [*Civ. Code* § 2982(n)].

[h] Prepayment--Simple-Interest Finance Charge

If the contract includes a finance charge that is determined on the simple-interest basis, the contract must contain a

notice, in at least 10-point boldface type if the contract is printed, reading as follows [*Civ. Code* § 2982(g)(3)]:

Notice

to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time. (4) If you default in the performance of your obligations under this agreement, the vehicle may be repossessed and you may be subject to suit and liability for the unpaid indebtedness evidenced by this agreement.

If the contract provides for a minimum simple-interest finance charge in the event of prepayment in full, the contract must contain a statement of that fact and the amount of the minimum finance charge or its method of computation [*Civ. Code* § 2982(f)(2)].

[i] Prepayment--Unearned Precomputed Finance Charge

If the contract includes a finance charge determined on the precomputed basis, the contract must do the following [*Civ. Code* § 2982(f)(1)]:

- Identify the method of computing the unearned portion of the finance charge in the event of prepayment in full of the buyer's obligation.
- Contain a statement of the amount or method of computation of any charge that may be deducted from the amount of any unearned finance charge in computing the amount that will be credited to the obligation or refunded to the buyer.

The method of computing the unearned portion of the finance charge must be sufficiently identified with a reference to the actuarial method if the computation will be under that method [*Civ. Code* § 2982(f)(1)]. In addition, the contract must contain a notice, in at least 10-point boldface type if the contract is printed, reading as follows [*Civ. Code* § 2982(g)(2)]:

Notice

to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time and obtain a partial refund of the finance charge if it is \$1 or more. (4) If you default in the performance of your obligations under this agreement, the vehicle may be repossessed and you may be subject to suit and liability for the unpaid indebtedness evidenced by this agreement.

The method of computing the unearned portion of the finance charge must be sufficiently identified with a reference to the Rule of 78's, the sum of the digits, or the sum of the periodic time balances method in all other cases, and those references must be deemed to be equivalent for disclosure purposes [*Civ. Code* § 2982(f)(1)]. In addition, the contract must contain a notice, in at least 10-point boldface type if the contract is printed, reading as shown above but with this sentence appended to the third statement [*Civ. Code* § 2982(g)(1)]:

Because of the way the amount of this refund will be figured, the time when you prepay could increase the ultimate cost of credit under this agreement.

[j] Consumer Complaint Procedure

The contract must contain a notice in at least 8-point boldface type, acknowledged by the buyer, that reads as follows [*Civ. Code* § 2982(h)]:

If you have a complaint concerning this sale, you should try to resolve it with the seller.

Complaints concerning unfair or deceptive practices or methods by the seller may be referred to the city attorney, the district attorney, or an investigator for the Department of Motor Vehicles, or any combination thereof.

After this contract is signed, the seller may not change the financing or payment terms unless you agree in writing to the change. You do not have to agree to any change, and it is an unfair or deceptive practice for the seller to make a unilateral change.

Buyer's Signature

[k] Names and Addresses for Certain Notices

The contract must contain the names and addresses of all persons to whom the notices required under *Civ. Code* § 2983.2 concerning intent to dispose of the vehicle after repossession [see § 47.203] and permitted under *Civ. Code* § 2984 concerning correction of a failure to comply with the Rees-Levering Act [see § 47.202] are to be sent [*Civ. Code* § 2982(e)].

[l] Preservation of Buyer's Claims and Defenses as Consumer

In connection with any financed sale or lease of goods to consumers subject to the Truth in Lending Act [see 15 U.S.C. § 1601 *et seq.*] and Regulation Z [see 12 C.F.R. pt. 226], in or affecting interstate commerce, it is an unfair or deceptive act or practice under the Federal Trade Commission Act [see 15 U.S.C. § 45] for a seller to take or receive a consumer credit contract that fails to contain the following provision, in at least 10-point boldface type [see 16 C.F.R. § 433.2; see also 16 C.F.R. § 433.1 (definitions); Ch. 45, *Consumer Installment Loans and Credit Sales*]:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

[m] Liability Insurance Warnings and Notices

The contract must contain a statement in contrasting red ink in at least 8-point boldface type, which is to be signed or initialed by the buyer, as follows [*Civ. Code* § 2984.1]:

THE MINIMUM PUBLIC LIABILITY INSURANCE LIMITS PROVIDED IN LAW MUST BE MET BY EVERY PERSON WHO PURCHASES A VEHICLE. IF YOU ARE UNSURE WHETHER OR NOT YOUR CURRENT INSURANCE POLICY WILL COVER YOUR NEWLY ACQUIRED VEHICLE IN THE EVENT OF AN ACCIDENT, YOU SHOULD CONTACT YOUR INSURANCE AGENT.

WARNING:

YOUR PRESENT POLICY MAY NOT COVER COLLISION DAMAGE OR MAY NOT PROVIDE FOR FULL REPLACEMENT COSTS FOR THE VEHICLE BEING PURCHASED. IF YOU DO NOT HAVE FULL COVERAGE, SUPPLEMENTAL COVERAGE FOR

COLLISION DAMAGE MAY BE AVAILABLE TO YOU THROUGH YOUR INSURANCE AGENT OR THROUGH THE SELLING DEALER. HOWEVER, UNLESS OTHERWISE SPECIFIED, THE COVERAGE YOU OBTAIN THROUGH THE DEALER PROTECTS ONLY THE DEALER, USUALLY UP TO THE AMOUNT OF THE UNPAID BALANCE REMAINING AFTER THE VEHICLE HAS BEEN REPOSSESSED AND SOLD.

FOR ADVICE ON FULL COVERAGE THAT WILL PROTECT YOU IN THE EVENT OF LOSS OR DAMAGE TO YOUR VEHICLE, YOU SHOULD CONTACT YOUR INSURANCE AGENT.

THE BUYER SHALL SIGN TO ACKNOWLEDGE THAT HE/SHE UNDERSTANDS THESE PUBLIC LIABILITY TERMS AND CONDITIONS.

s/s _____

This warning satisfies the requirements of *Veh. Code § 5604* [*Civ. Code § 2984.1*]. Under that section, if the dealer or lender will require the transferee to insure the vehicle, the dealer or lender will obtain the policy, and the policy does not insure the transferee or obligor against damages resulting from ownership or operation of the vehicle arising by reason of personal injury or death of any person, or from injury to property, the dealer or lender must notify the transferee or obligor of that fact in writing on a document other than the policy. The document must be in duplicate and signed by the transferee or obligor [*Veh. Code § 5604*].

The Insurance Commissioner requires the following warning in eight-point type, in a "separately executed portion" of the contract (otherwise, in a separate document), whenever there is no insurance coverage provided against damages resulting from the ownership or operation of the vehicle arising by reason of personal injury to or the death of any person, or from damage to property: "UNLESS A CHARGE IS INCLUDED IN THIS AGREEMENT FOR PUBLIC LIABILITY OR PROPERTY DAMAGE INSURANCE, PAYMENT FOR SUCH COVERAGE IS NOT PROVIDED BY THIS AGREEMENT" [*10 Cal. Code Reg. § 2114(a)*]. In addition, the following statement in eight-point type must be included in the same "separately executed portion" of the contract (otherwise, in a separate document), in every case: "NOTICE. No person is required as a condition precedent to financing the purchase of an automobile that any insurance be negotiated or purchased through a particular insurance agent or broker" [*10 Cal. Code Reg. § 2114(d)*].

[n] Buyer's Acknowledgment of Seller's Compliance

Any acknowledgment by the buyer of delivery of a copy of a contract or purchase order, or any vehicle purchase proposal, or any credit statement that the seller has required or requested the buyer to sign and that the buyer signed, during the contract negotiations, must be printed or written in at least 10-point boldface type and, if contained in the contract, must appear directly above the space reserved for the buyer's signature or adjacent to any other notices required by law to be placed immediately above the signature space [*Civ. Code § 2984.3*].

PRACTICE TIP:

The acknowledgment would be "adjacent to" the required cooling off notice [*see* [o], *below*] if placed directly above it. The buyer's written acknowledgment, conforming to the requirements of *Civ. Code § 2984.3*, of delivery of a completely filled-in copy of the contract, and a copy of any other documents, creates a rebuttable presumption of delivery in any action or proceeding by or against a third party without knowledge to the contrary when the third party acquired an interest in the contract. If the third party furnishes the buyer a copy of the documents, or a notice containing the disclosures identified in *Civ. Code § 2982(a)* [*see* [d], *above*] and stating that the buyer must notify the third party in writing within 30 days if copies of the documents were not furnished, and that notification is not given, it must be conclusively presumed in favor of the third party that copies of the documents were furnished as required by the Rees-Levering Act [*Civ. Code § 2984.3*].

[o] Cooling Off Notice

Contracts executed prior to July 1, 2006 [see Stat. 2005 ch. 128, § 12], must contain a notice with a heading in at least 12-point bold type and the text in at least 10-point bold type, circumscribed by a line, immediately above the contract signature line, that reads as follows [*Civ. Code* § 2982(r)]:

THERE IS NO COOLING OFF PERIOD

California law does not provide for a 'cooling off' or other cancellation period for vehicle sales. Therefore, you cannot later cancel this contract simply because you change your mind, decide the vehicle costs too much, or wish you had acquired a different vehicle. After you sign below, you may only cancel this contract with the agreement of the seller or for legal cause, such as fraud.

Effective July 1, 2006, the notice must provide as follows [*Civ. Code* § 2982(r); see Stat. 2005 ch. 128, § 12]:

THERE IS NO COOLING-OFF PERIOD UNLESS YOU OBTAIN A CONTRACT CANCELLATION OPTION

California law does not provide for a "cooling-off" or other cancellation period for vehicle sales. Therefore, you cannot later cancel this contract simply because you change your mind, decide the vehicle costs too much, or wish you had acquired a different vehicle. After you sign below, you may only cancel this contract with the agreement of the seller or for legal cause, such as fraud.

However, California law does require a seller to offer a 2-day contract cancellation option on used vehicles with a purchase price of less than \$40,000, subject to certain statutory conditions. This contract cancellation option requirement does not apply to the sale of a recreational vehicle, a motorcycle or an off-highway motor vehicle subject to identification under California law. See the vehicle contract cancellation option agreement for details.

PRACTICE TIP:

Some retail vehicle purchasers and lessees may have a misconception that California law provides for a "cooling off" or other cancellation period after the sale or lease of a vehicle, during which a purchaser or lessee may return the vehicle and cancel the contract without cause or the consent of the seller. Although California law does provide for a "cooling off" period during which certain types of contracts, such as home solicitation contracts or offers, may be canceled, California law does not provide such a remedy for the cancellation of vehicle sale and lease contracts. However, the law does provide for numerous other rescission remedies relative to the purchase or lease of vehicles, such as rescission for fraud, mistake, duress, failure of consideration, and rescission by mutual consent. The legislative intent in adding *Civ. Code* § 2982(r) was to educate and put vehicle purchasers and lessees on notice that California law does not have a "cooling off" or other cancellation period during which a vehicle purchase contract or lease may be canceled because the purchaser or lessee undergoes a change of mind, decides that the vehicle costs too much, or wishes that a different vehicle had been acquired. The contract notice requirement is intended to educate purchasers and lessees of contractual obligations under current California law and is not intended to create, expand, repeal, or in any manner limit current rescission rights or remedies [Stats. 1993, ch. 1092, § 1].

[p] Signatures

The contract or a purchase order must be signed by the buyer or an authorized representative and by the seller or an

authorized representative. The seller must not obtain the signature of the buyer to a contract when it contains blank spaces to be filled in after it has been signed [*Civ. Code* § 2981.9].

[q] Retention of Conditional Sales Contract

A seller must maintain the following documents for at least seven years, or the length of the conditional sales contract, whichever is longer [*Civ. Code* § 2984.5(a)]:

- A copy of each buyer's conditional sales contract.
- Any documents relied upon by the seller to determine a buyer's creditworthiness, including, but not limited to, any consumer credit report [*see Civ. Code* § 1785.3 (definition)], or any other document containing a buyer's credit score [*see Civ. Code* § 1785.15.1 (definition)].
- If the conditional sales contract is sold, assigned, or otherwise transferred, a copy of the terms of that sale, assignment, or transfer.

A seller that unlawfully fails to comply with a court order to produce any of these documents may be liable in an action brought by the Attorney General for a civil penalty for each violation [*see Civ. Code* § 2984.5(b)]. These penalties are in addition to all rights and remedies that are otherwise available under law [*Civ. Code* § 2984.5(b)].

[r] Assignment of Conditional Sales Contract

The provisions discussed in this subsection are effective as of July 1, 2006 [*Civ. Code* § 2982.10; *see Stat.* 2005 ch. 128, § 12].

In consideration of the assignment of a conditional sales contract, the seller may not receive or accept from the assignee any payment or credit based on any amount collected or received, or to be collected or received, under the contract as a finance charge, except to the extent the payment or credit does not exceed the amount that would be calculated, as provided by this statute, in accordance with Regulation Z, whether or not Regulation Z applies to the contract [*Civ. Code* § 2982.10(a)]. For purposes of this calculation, the seller must use as the contract's finance charge an annual percentage rate equal to 2.5 percent for a contract having an original scheduled term of 60 monthly payments or less, or 2 percent for a contract having an original scheduled term of more than 60 monthly payments [*Civ. Code* § 2982.10(a)].

These rules, however, do not apply to [*Civ. Code* § 2982.10(b)]:

- An assignment that is with full recourse or under other terms requiring the seller to bear the entire risk of financial performance of the buyer.
- An assignment that is more than six months following the date of the conditional sale contract.
- Isolated instances resulting from bona fide errors that would otherwise constitute a violation of *Civ. Code* § 2982.10(a), if the seller maintains reasonable procedures to guard against any errors and promptly, on notice of the error, remits to the assignee any consideration received in excess of that permitted by *Civ. Code* § 2982.10(a).
- The assignment of a conditional sale contract involving the sale of a motorcycle [*see Veh. Code* § 400 (definition)].
- The assignment of a conditional sale contract involving the sale of an off-highway motor vehicle that

is subject to identification under *Veh. Code § 38010*.

[2] FORM

Conditional Sale Contract for Motor Vehicle--Between Dealer and Consumer [Civ. Code § 2982]

MOTOR VEHICLE CONDITIONAL SALE CONTRACT

[Designation of vehicle as new or used, prescribed by Civ. Code § 2982(q), must be printed in red box at least half-inch square on face of contract; see [1][b], above.]

_____ [New or Used]

[In contract for new vehicle, statement mandated by Veh. Code § 11713.1(x), about autobroker, must be in at least 10-point boldface type on face of contract; see [1][b], above.]

This transaction _____ **[is or is not] subject to a fee to be received by an autobroker**
_____ *[add, if applicable:, _____ (name)].*

The undersigned Seller agrees to sell to the undersigned Buyer(s) (individually and collectively the "Buyer"), and the Buyer(s) agree(s) to purchase, the vehicle described below (the "vehicle"). *[Add if applicable: The Buyer(s) hereby acknowledge delivery of the vehicle in good condition].*

1. Description of Vehicle.

Year: _____

Make: _____

Model: _____

Color: _____

Vehicle Identification No.: _____

License No.: _____

Options: _____

☐ Automatic transmission

☐ _____ *[e.g., 4] speed transmission*

☐ Air conditioning

☐ Power steering

☐ Power windows

☐ AM-FM stereo

☐ Other: _____

2. **Late Charges.** Buyer promises to pay Seller or Seller's assignee on demand a delinquency charge on any installment in default for a period of not less than 10 days an amount equal to 5 percent of the delinquent installment and reasonable collection costs and fees, including attorneys' fees, in the event of delinquency or default by the Buyer.

3. **Security.** Title to the vehicle shall remain in Seller until full compliance by Buyer with this contract. Buyer grants Seller and any other holder of this contract a security interest in the purchased vehicle as security for all obligations of Buyer under this contract. On Buyer's performance of all obligations, Seller shall endorse and deliver the certificate of title for the vehicle to Buyer, who shall then be responsible for reregistering the vehicle.

4. **Notice of Intent to Sell Vehicle.** The names and addresses of all persons liable on this contract and to whom notice of intent to sell the vehicle on repossession must be given are: _____
[specify].

5. **Insurance.** _____ [specify type] insurance is included in the _____
[amount financed or amount financed and finance charge]. The premium for this insurance is \$ _____.
[Add if insurance expires before date of last scheduled payment: The term of the insurance is from
_____ (date), to _____ (date).]

[Paragraphs prescribed by Civ. Code § 2984.1, concerning insurance, must be in red ink in at least 8-point boldface type and followed by buyer's signature or initials; see [1][m], above.]

THE MINIMUM PUBLIC LIABILITY INSURANCE LIMITS PROVIDED IN LAW MUST BE MET BY EVERY PERSON WHO PURCHASES A VEHICLE. IF YOU ARE UNSURE WHETHER OR NOT YOUR CURRENT INSURANCE POLICY WILL COVER YOUR NEWLY ACQUIRED VEHICLE IN THE EVENT OF AN ACCIDENT, YOU SHOULD CONTACT YOUR INSURANCE AGENT.

WARNING:

YOUR PRESENT POLICY MAY NOT COVER COLLISION DAMAGE OR MAY NOT PROVIDE FOR FULL REPLACEMENT COSTS FOR THE VEHICLE BEING PURCHASED. IF YOU DO NOT HAVE FULL COVERAGE, SUPPLEMENTAL COVERAGE FOR COLLISION DAMAGE MAY BE AVAILABLE TO YOU THROUGH YOUR INSURANCE AGENT OR THROUGH THE SELLING DEALER. HOWEVER, UNLESS OTHERWISE SPECIFIED, THE COVERAGE YOU OBTAIN THROUGH THE DEALER PROTECTS ONLY THE DEALER, USUALLY UP TO THE AMOUNT OF THE UNPAID BALANCE REMAINING AFTER THE VEHICLE HAS BEEN REPOSSESSED AND SOLD.

FOR ADVICE ON FULL COVERAGE THAT WILL PROTECT YOU IN THE EVENT OF LOSS OR DAMAGE TO YOUR VEHICLE, YOU SHOULD CONTACT YOUR INSURANCE AGENT.

THE BUYER SHALL SIGN TO ACKNOWLEDGE THAT HE/SHE UNDERSTANDS THESE PUBLIC LIABILITY TERMS AND CONDITIONS.

_____ [signature]

[Warning, if required, and mandatory statement, both prescribed by 10 Cal. Code Reg. § 2114(a),(d), must be in at least 8-point type and in "separately executed portion" of contract; see [1][m], above.]

UNLESS A CHARGE IS INCLUDED IN THIS AGREEMENT FOR PUBLIC LIABILITY OR PROPERTY DAMAGE INSURANCE, PAYMENT FOR SUCH COVERAGE IS NOT PROVIDED BY THIS AGREEMENT.

NOTICE. No person is required as a condition precedent to financing the purchase of an automobile that any insurance be negotiated or purchased through a particular insurance agent or broker.

_____ [signature]
 Buyer
 _____ [seller's name]
 By: _____ [signature]
 _____ [typed name and title]

6. Complaints About Unfair and Deceptive Practices.

[Paragraphs prescribed by Civ. Code § 2982(h), regarding complaints about unfair practices, must be in at least 8-point boldface type and followed by buyer's signature; see [1][j], above.]

If you have a complaint concerning this sale, you should try to resolve it with the seller.

Complaints concerning unfair or deceptive practices or methods by the seller may be referred to the city attorney, the district attorney, or an investigator for the Department of Motor Vehicles, or any combination thereof.

After this contract is signed, the seller may not change the financing or payment terms unless you agree in writing to the change. You do not have to agree to any change, and it is an unfair or deceptive practice for the seller to make a unilateral change.

_____ [signature]

7. Prepayment. If Buyer prepays this contract in full before maturity, _____ [if finance charge is determined on simple-interest basis, Buyer will pay a minimum finance charge _____ (of \$ _____ [amount] or determined on the simple-interest basis) or if finance charge is determined on precomputed basis, Buyer is entitled to a refund of the unearned portion of the finance charge, computed in accordance with the _____ (Rule of 78's or sum of the digits or sum of the periodic time balance or actuarial method). A charge _____ (of \$ _____ [amount] or determined in accordance with the _____ [Rule of 78's or sum of the digits or sum of the periodic time balance or actuarial method]) will be deducted from this refund].

[Notice prescribed by Civ. Code § 2982(g), mainly concerning unearned finance charge, must be in 10-point boldface type; see [1][i], above.]

Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled

in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time _____ [unless finance charge is determined on simple-interest basis, add: and obtain a partial refund of the finance charge if it is \$1 or more]. _____ [If unearned portion of precomputed finance charge, which is to be refunded on full prepayment of contract, is to be determined by method other than actuarial method, add: Because of the way the amount of this refund will be figured, the time when you prepay could increase the ultimate cost of credit under this agreement.] (4) If you default in the performance of your obligations under this agreement, the vehicle may be repossessed and you may be subject to suit and liability for the unpaid indebtedness evidenced by this agreement.

[Insert or attach here Regulation Z disclosures; see [1][c], above.]

Itemization of the Amount Financed

[Items composing amount financed must be listed together and in order as shown below; see [1][d], above.]

Cash Price.

1. Cash price (exclusive of document preparation fees, taxes, pollution control certification fees, prior credit or lease balance on property being traded in and amount charged for service contract): \$ _____
2. Document preparation fee: \$ _____
3. Pollution control certification fee: \$ _____
4. Sales tax: \$ _____
5. Optional DMV Electronic Filing Fee: \$ _____
6. Service contract charge: \$ _____
7. Prior credit or lease balance (see down payment and trade-in calculation under Item 14 of "Amounts Credited," below): \$ _____
8. Optional debt cancellation agreement charge: \$ _____
9. Total cash price (total of the foregoing items): \$ _____

Additional Items.

10. Amounts paid to public officials:
 Vehicle License Fee: \$ _____
 Registration, Transfer, and Titling Fees: \$ _____
 Tire fees: \$ _____
11. Insurance premiums (aggregate of premiums agreed to be paid for insurance policies included in contract, excluding amount of insurance premium included in finance charge): \$ _____

12. Pollution control fee (state fee for issuing certificate of compliance, noncompliance, or waiver pursuant to applicable pollution control statute): \$ _____

13. Subtotal of the foregoing items: \$ _____

Amounts Credited.

14. Down Payment (as itemized below):

(a) Agreed value of trade-in vehicle: \$ _____

(b) Prior credit or lease balance owing on trade-in vehicle: \$ _____

(c) Net agreed trade-in value of vehicle (difference between (a) and (b), above): \$ _____

(Note: If the prior credit or lease balance owing exceeds trade-in value, state the value as a negative number.)

(d) Deferred down payment (portion of down payment to be deferred until not later than due date of second regularly scheduled installment under contract, and not subject to finance charge): \$ _____

(e) Manufacturer's rebate: \$ _____

(f) Remaining amount to be paid by buyer as down payment: \$ _____

TOTAL DOWN PAYMENT (sum of items 14(c) through (f), above): \$ _____

(Note: If the total down payment is zero or more, enter that number here and do not enter any amount as the prior credit or lease balance under Item 7 of "Cash Price," above.

If the total down payment is a negative number, enter that number, stated as a positive number, as the prior credit or lease balance under Item 7 of "Cash Price," above, and enter a zero here as the total down payment.)

15. Prepaid finance charge: \$ _____

Amount Financed.

16. Amount financed: \$ _____

[Notice prescribed by 16 C.F.R. § 433.2, concerning claims and defenses, must be in 10-point boldface type; see [1][1], above.]

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

[Acknowledgment of receipt of contract document prescribed by Civ. Code § 2984.3 must be in 10-point boldface type and be placed immediately preceding notice concerning cooling off period; see [1][n], above.]

Buyer acknowledges receiving an executed copy of this contract document at the time Buyer and Seller signed it.

[Notice prescribed by Civ. Code § 2982(r), concerning cooling off period, must have heading in 12-point boldface type and text in 10-point boldface type and be circumscribed by line and placed immediately above signature line; see [1][o], above.]

[For contracts entered into before July 1, 2006, include the following notice:]

THERE IS NO COOLING OFF PERIOD

California law does not provide for a "cooling off" or other cancellation period for vehicle sales. Therefore, you cannot later cancel this contract simply because you change your mind, decide the vehicle costs too much, or wish you had acquired a different vehicle. After you sign below, you may only cancel this contract with the agreement of the seller or for legal cause, such as fraud.

[OR, for contracts entered into on or after July 1, 2006, include the following notice:]

THERE IS NO COOLING-OFF PERIOD UNLESS YOU OBTAIN A CONTRACT CANCELLATION OPTION

California law does not provide for a "cooling off" or other cancellation period for vehicle sales. Therefore, you cannot later cancel this contract simply because you change your mind, decide the vehicle costs too much, or wish you had acquired a different vehicle. After you sign below, you may only cancel this contract with the agreement of the seller or for legal cause, such as fraud.

However, California law does require a seller to offer a 2-day contract cancellation option on used vehicles with a purchase price of less than \$40,000, subject to certain statutory conditions. This contract cancellation option requirement does not apply to the sale of a recreational vehicle, a motorcycle or an off-highway motor vehicle subject to identification under California law. See the vehicle contract cancellation option agreement for details.

[CONTINUE]

Date: _____.

_____ [signature]

Buyer

_____ [seller's name]

By: _____ [signature]

_____ [typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection State Law General Overview Banking Law Consumer Protection Truth in
Lending General Overview Contracts Law Debtor & Creditor Relations



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 47 AUTOMOTIVE FINANCING AND VEHICLE LEASING
PART IV. FORMS
A. Automotive Finance

20-47 California Legal Forms--Transaction Guide § 47.200A

§ 47.200A Disclosures Required by Car Buyer's Bill of Rights Prior to Execution of Conditional Sales Contract

[1] Comment

[a] Use of Form

This form contains the disclosures required under the Car Buyer's *Bill of Rights*, effective July 1, 2006 [*see Civ. Code § 2982.2*; Stat. 2005 ch. 128, § 12 (effective date)], and is for use by motor vehicle retailers in California. These disclosures are in addition to the disclosures required by the Rees-Levering Act [*see § 47.200[1][c]* (disclosures and notices in general)].

Effective July 1, 2006, before the execution of a conditional sale contract, a seller must provide to a buyer, and obtain the buyer's signature on, additional disclosures contained in a document separate from the conditional sales contract or purchase order [*Civ. Code § 2982.2(d)*]. The required disclosures must be in at least 10-point type [*Civ. Code § 2982.2(d)*].

[b] Required Disclosures

A written disclosure must set forth the following information:

■ A description and the price of each item sold if the contract includes a charge for the item [*Civ. Code § 2982.2(a)(1)*]. This disclosure requirement applies to each item in the following categories [*Civ. Code § 2982.2(a)(2)*]:

- A service contract.
- An insurance product.
- A debt cancellation agreement.

- A theft deterrent device.
- A surface protection product.
- A vehicle contract cancellation option agreement.
- The sum of all of the charges disclosed under *Civ. Code § 2982.2(a)*, labeled "total" [*Civ. Code § 2982.2(b)*].
- The amount that would be calculated under the contract as the regular installment payment if charges for the items disclosed pursuant to *Civ. Code § 2982.2(a)* are not included in the contract. This amount must be labeled "Installment Payment EXCLUDING Listed Items" [*Civ. Code § 2982.2(c)*].
- The amount that would be calculated under the contract as the regular installment payment if charges for the items disclosed under *Civ. Code § 2982.2(a)* are included in the contract. The amount must be labeled "Installment Payment INCLUDING Listed Items" [*Civ. Code § 2982.2(d)*].

[2] FORM**Disclosures Required by Car Buyer's Bill of Rights Prior to Execution of Conditional Sales Contract**

[Disclosures required by *Civ. Code § 2982.2* must be in at least 10-point type; see [1][a], above]

DISCLOSURES REQUIRED BY THE CAR BUYER'S BILL OF RIGHTS, CIVIL CODE SECTION 2982.2

[For any of items listed in *Civ. Code § 2982.2(a)(2)* (see [1][b], above) that are included in conditional sales contract, provide, for each item:]

_____ [description]

_____ [price]

[CONTINUE:]

TOTAL: _____ [sum of all charges disclosed under *Civ. Code § 2982.2(a)*]

Installment Payment EXCLUDING Listed Items: _____ [amount that would be calculated under contract as regular installment payment if charges for items disclosed pursuant to *Civ. Code § 2982.2(a)* are not included in the contract]

Installment Payment INCLUDING Listed Items: _____ [amount that would be calculated under contract as regular installment payment if charges for items disclosed under *Civ. Code § 2982.2(a)* are included in contract]

BUYER ACKNOWLEDGES SIGNING THIS DISCLOSURE DOCUMENT BEFORE SIGNING THE CONDITIONAL SALES CONTRACT OR PURCHASE ORDER: _____ [Buyer's initials]

Date: _____

_____ [signature]

Buyer

_____ [seller's name]

By: _____ [signature]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionState LawGeneral OverviewContracts LawDebtor & Creditor Relations



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DIVISION III: COMMERCIAL TRANSACTIONS
 CHAPTER 47 AUTOMOTIVE FINANCING AND VEHICLE LEASING
 PART IV. FORMS
 A. Automotive Finance

20-47 California Legal Forms--Transaction Guide § 47.201

§ 47.201 Notice to Cosigner of Conditional Sale Contract [Civ. Code § 1799.91]**[1] Comment--Use of Form**

This form may be used to comply with a notice requirement that applies to conditional sale contracts governed by the Rees-Levering Act [*see Civ. Code § 2981 et seq.*], when the buyer's financial obligation is to be secured by another person's guaranty [*see Civ. Code § 1799.90(a)(3)*]. Unless the persons in question are married to each other, the seller must deliver to each person who does not in fact receive the vehicle that is the subject of the contract (that is, each guarantor), before that person becomes liable on the contract, the notice in [2], below. The notice must be in both English and Spanish, or whatever other language the contract is written in, in at least 10-point type [*Civ. Code § 1799.91(a), (b)*]. The word "your" in the last sentence of the third paragraph of the notice in English must be italicized [*Civ. Code § 1799.91(f)*]. If the notice is not included with the text of the contract, it must be on a separate sheet, which must not contain any other text except as is necessary to identify the seller and the contract to which the statement refers, and to provide for the date and the cosigner's acknowledgment of receipt [*Civ. Code § 1799.92(b)*].

A seller, or an assignee of the seller, who fails to comply with this notice requirement is precluded from suing a cosigner or enforcing a security interest against that party. However, the rights of a bona fide purchaser for value of property sold after enforcement of a security interest are unaffected if the purchase was made without notice of the facts constituting a violation of the requirement [*Civ. Code § 1799.95*].

[2] FORM**Notice to Cosigner of Conditional Sale Contract [Civ. Code § 1799.91]**

To: [Name and address of cosigner]

From: _____ [Name and address of seller]

Re: _____ Motor Vehicle Conditional Sale Contract Dated _____, Between
 _____ [name and address of buyer] and _____ [name of seller]

NOTICE TO COSIGNER

(Traducci'on en Ingl'es Se Requiere por La Ley)

You are being asked to guarantee this debt. Think carefully before you do. If the borrower doesn't pay the debt, you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility.

You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase this amount.

The creditor can collect this debt from you without first trying to collect from the borrower. The creditor can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, etc. If this debt is ever in default, that fact may become a part of *your* credit record.

This notice is not the contract that makes you liable for the debt.

AVISO PARA EL FIADOR

(Spanish Translation Required by Law)

Se le est'a pidiendo que garantice esta deuda. Pi'enselo con cuidado antes de ponerse de acuerdo. Si la persona que ha pedido este prestamo no paga la deuda, usted tendr'a que pagarla. Est'e seguro de que usted podr'a pagar si sea obligado a pagarla y de que usted desea aceptar la responsabilidad.

Si la persona que ha pedido el prestamo no paga la deuda, es posible que usted tenga que pagar la suma total de la deuda, m'as los cargos por tardarse en el pago o el costo de cobranza, lo cual aumenta el total de esta suma.

El acreedor (financiero) puede cobrarle a usted sin, primeramente, tratar de cobrarle al deudor. Los mismos m'etodos de cobranza que pueden usarse contra el deudor, podr'an usarse contra usted, tales como presentar una demanda en corte, quitar parte de su sueldo, etc. Si alguna vez no se cumpla con la obligaci'on de pagar esta deuda, se puede incluir esa informaci'on en la historia de credito de usted.

Este aviso no es el contrato mismo en que se le echa a usted la responsabilidad de la deuda.

Date: _____

By signing below, you acknowledge receipt of this notice.

_____ [signature]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor Relations



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 47 AUTOMOTIVE FINANCING AND VEHICLE LEASING
PART IV. FORMS
A. Automotive Finance

20-47 California Legal Forms--Transaction Guide § 47.202

§ 47.202 Notice of Noncompliance With Rees-Levering Act and Demand for Correction [Civ. Code § 2984]

[1] Comment

[a] Use of Form

The form in [2], below, is a notice specifying how a conditional sale contract fails to comply with the Rees-Levering Act. The notice may be sent to the seller, before an assignment of the seller's interest in the contract, to notify the seller of a defect in the contract; or it may be sent to the seller's assignee, to notify the assignee of a violation that gives rise to a claim or defense of the buyer against the seller under the contract [*see Civ. Code § 2983.5* (assignee is subject to buyer's defenses and equities)]. Any failure of the contract to comply with any provision of the Rees-Levering Act must be corrected by the seller or assignee within 10 days after any notice in writing by the buyer of the failure to comply [*Civ. Code § 2984*].

PRACTICE TIP:

The statute does not clearly specify whether the 10-day period for correction begins on the mailing of the notice or on receipt by the seller or an assignee.

[b] Correction of Violations

A contract that violates any provision of the Rees-Levering Act may be corrected, and a corrected violation cannot serve as a basis for any recovery by the buyer or affect the enforceability of the contract by the holder. A violation that appears on the face of the contract may be corrected only if it is corrected within 30 days after the execution of the contract or within 20 days after the initial sale, assignment, or pledge of the seller's interest in the contract, except that if the holder is notified in writing by the buyer of a violation, the violation must be corrected within 10 days after notice [*Civ. Code § 2984*].

A correction is made by mailing or delivering a corrected copy of the contract to the buyer. A correction that increases the amount of the contract balance or the amount of any installment to more than the amount stated in the defective contract is not effective unless consented to in writing by the buyer. Any amount improperly collected by the holder

from the buyer must be credited against the debt evidenced by the contract or returned to the buyer [Civ. Code § 2984].

[2] FORM

Notice of Noncompliance With Rees-Levering Act and Demand for Correction [Civ. Code § 2984]

NOTICE OF NONCOMPLIANCE WITH REES-LEVERING ACT

To: _____[*name and address of seller or holder*]

You are hereby notified that the conditional sale contract executed on _____[*date*] by me as buyer and _____[*you or name*] as Seller for the purchase of a [*make and model of vehicle*], vehicle identification number _____, fails to comply with the requirements of Civil Code Section [*specify*] in that [*state manner in which contract violates Rees-Levering Act, e.g., the amount unpaid on the cash price is stated in the contract as \$9,235 when in fact it should be stated as \$2,235, the difference between the \$4,000 cash price shown on the contract and the \$1,765 down payment shown on the contract and paid by me*].

I demand that this failure of the contract to comply with the provisions of the Rees-Levering Motor Vehicle Sales and Finance Act be corrected by you in the manner prescribed by that law.

I further demand that any amount improperly collected by _____[*you or name of holder*] from me as a result of the above-stated violation be [credited against the debt evidenced by the contract or returned to me] immediately. You are further notified that I do not consent to any correction, whether made pursuant to this notice or otherwise, in such a way as to increase the amount of the contract balance or the amount of any installment.

Date: _____.

_____ [*signature*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection State Law General Overview Contracts Law Debtor & Creditor Relations



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20-47 California Legal Forms--Transaction Guide § 47.203

§ 47.203 Notice of Intention to Dispose of Repossessed or Surrendered Vehicle [Civ. Code § 2983.2]

[1] Comment

[a] Use of Form

This form is a notice of disposition of a repossessed or surrendered vehicle that was the subject of a conditional sale contract. If the seller is engaged in the business of selling or leasing vehicles, the contract holder must give this notice to the persons liable on the contract before selling or otherwise disposing of the vehicle [Civ. Code § 2983.2(a)]. Compliance with the statutory notice requirements is a condition precedent to recovering a deficiency judgment after disposition of the vehicle [Civ. Code § 2983.2(a); see [i], below].

When the contract holder is a lender licensed under the Finance Lenders Law [see *Fin. Code § 22000 et seq.*; see also Stats. 1994, ch. 1115, §§ 8, 9 (meaning of statutory references to certain Financial Code provisions)], this requirement does not apply [Civ. Code § 2983.2(d)]. However, the lender is subject to a similar notification requirement under the Financial Code [see *Fin. Code § 22328*].

The notice must be accompanied by a copy of the *form in § 47.204[2]*, which the person receiving the notice may return in order to request an automatic 10-day extension of the redemption period and, if applicable, the reinstatement period [see *Civ. Code § 2983.2(a)(3)*; see also [d], [e], below].

If the seller negotiated primarily in a language other than English, whether orally or in writing, in the course of entering into the transaction, the buyer and any other person liable on the contract may be entitled to a translation of the notice in that other language [see *Civ. Code § 1632*; *Reyes v. Superior Court* (1981) 118 Cal. App. 3d 159, 162, 173 Cal. Rptr. 267; see § 47.14]. Until July 1, 2004, this requirement applied only to negotiations conducted primarily in Spanish. On and after July 1, 2004, it applies to negotiations conducted primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [see *Civ. Code § 1632*]. For detailed discussion of these requirements, and exceptions, see *Ch. 45, Consumer Installment Loans and Credit Sales*, § 45.64.

[b] Exception for Vehicle Seized by Public Agency

Even if the notice requirement would otherwise apply, the seller or holder need not give the required notice if the vehicle has been seized by a federal, state, or local public agency or authority and the seizing authority, as a precondition to the return of the vehicle to the seller or holder, prohibits the return of the vehicle to the buyer or otherwise effects or requires the termination of the buyer's property rights in the vehicle [*Civ. Code* § 2983.2(a); see *Civ. Code* § 2983.3(b)(6)].

[c] Notice Period and Service of Notice

Notwithstanding any provision to the contrary in the conditional sale contract, the notice in [2], *below*, must be given to all persons liable on the contract at least 15 days before the date the seller or holder disposes of the vehicle. In addition, in order to preserve the right to recover a deficiency judgment, the notice must be given within 60 days of the date of repossession or surrender [*Civ. Code* § 2983.2(a)].

PRACTICE TIP:

If the notice is mailed from outside California, or mailed to an out-of-state address, the notice period is 20 days instead of 15 days [*Civ. Code* § 2983.2(a)(6)]. There is an automatic 10-day extension of this period on the written request of any person liable on the contract [*Civ. Code* § 2983.2(a)(3), (6); see § 47.204].

The notice must be either mailed or personally served. If mailed, the notice must be sent either by certified mail, return receipt requested, or by first-class mail, postage prepaid, and directed to the last known address of each of the persons liable on the contract. If the persons liable are married to each other, and, according to the most recent records of the seller or holder, reside at the same address, one notice addressed to both persons at that address is sufficient [*Civ. Code* § 2983.2(a)].

[d] Right to Redemption

The notice must state that the persons liable on the contract have the right to redeem the vehicle by paying in full the indebtedness evidenced by the contract, until the expiration of 15 days (or 20 days [see [c], *above*], in some cases) from the date the notice was given or mailed. The notice must itemize the contract balance and any delinquency, collection, or repossession fees, and set forth the computation or estimate of the amount of any credit for unearned finance charges or canceled insurance as of the date of the notice [*Civ. Code* § 2983.2(a)(1)]. It must also disclose the place at which the vehicle will be returned on redemption or reinstatement [*Civ. Code* § 2983.2(a)(4)] and designate the name and address of the person or office to whom payment must be made [*Civ. Code* § 2983.2(a)(5)].

[e] Right to Reinstatement

The notice must state that either (1) there is a conditional right to reinstate the conditional sale contract until the expiration of 15 days (or 20 days [see [c], *above*], in some cases) from the date the notice is given or mailed or (2) there is no such right. If there is no such right, the notice must specify why the right does not exist [*Civ. Code* § 2983.2(a)(2)]. The seller or holder of the contract may be entitled to prevent reinstatement and accelerate maturity of the obligation, if certain conditions exist [see *Civ. Code* § 2983.3]. For discussion, see California Forms of Pleading and Practice, Ch. 80, *Automobiles*, Part VII, "Actions Against Manufacturers, Dealers, Lessors, and Repairers," Subpart A (Matthew Bender).

The notice is required to state "all the conditions precedent" to the buyer's exercising the right to have the contract reinstated [*Civ. Code* § 2983.3(a)(2)]. The phrase "all the conditions precedent" does not, in itself, provide insight as to precisely what information regarding reinstatement must be provided. In a case in which a finance company, as holder of the buyer's contract, interpreted that phrase as requiring only general information, the requirement was construed by a court of appeal to mean that the seller or holder of the contract must provide sufficient information to defaulting buyers

to "enable them to determine precisely what they must do in order to reinstate their contracts, including stating the amounts due, to whom they are due, the addresses and/or contact information for those parties, and any other specific actions the buyer must take... The creditor must provide the consumer with *all* of the relevant information it possesses and/or information it has the ability to discern, concerning precisely what the buyer must do to reinstate his or her contract... [The notice] must inform the consumer of any amounts the consumer will have to pay to the creditor and/or to a third party to reinstate a contract. The [notice] must also inform the consumer if, when, and by how much those amounts may increase as a result of additional payments coming due, or as a result of late fees or other fees and charges. In other words, creditors must provide consumers with sufficient information to allow consumers to fulfill all of the conditions the consumer must meet before a creditor will reinstate the contract" [*Juarez v. Arcadia Fin., Ltd.* (2007) 152 Cal. App. 4th 889, 899, 909, 61 Cal. Rptr. 3d 382 (original emphasis)].

[f] Extension of Redemption or Reinstatement Period

The notice must state that on written request the seller or holder will extend the redemption period, or the reinstatement period if applicable, for an additional 10 days. The seller or holder must provide the proper form for applying for this extension [Civ. Code § 2983.2(a)(3)]. For a form for making such a request, see § 47.204[2].

[g] Accounting After Disposition

The notice must inform the persons liable on the contract of their right to receive an accounting on written request [see Civ. Code § 2983.2(b) (post-disposition accounting is required)]. It must also advise them that the request must be personally served or sent by first-class mail, postage prepaid, or by certified mail, return receipt requested, to a person or office and address designated by the seller or holder [Civ. Code § 2983.2(a)(7)].

[h] Potential Liability

The notice must include the following statement, in at least 10-point boldface type if the notice is printed: "**NOTICE. YOU MAY BE SUBJECT TO SUIT AND LIABILITY IF THE AMOUNT OBTAINED UPON DISPOSITION OF THE VEHICLE IS INSUFFICIENT TO PAY THE CONTRACT BALANCE AND ANY OTHER AMOUNTS DUE**" [Civ. Code § 2983.2(a)(8)]. In addition, the notice must state that on the disposition of the vehicle, the persons liable on the contract will be liable for the deficiency balance plus interest at the contract rate (or at the legal rate of interest pursuant to Civ. Code § 3289 if there is no contract rate of interest), from the date of disposition of the vehicle to the date of entry of judgment [Civ. Code § 2983.2(a)(9)].

PRACTICE TIP:

Compliance with this notice requirement will not affect the discretion of the court to strike out an unconscionable interest rate in the contract for which the notice is required, nor will it affect the court in determining whether the rate is unconscionable [Civ. Code § 2983.2(a)(9)].

[i] Requirements for Deficiency Judgment

To obtain a deficiency judgment, a secured creditor who sells a defaulting debtor's repossessed car must comply not only with all the provisions of the Rees-Levering Act, but *also* with any relevant provisions in Division 9 of the Commercial Code [*Bank of America v. Lallana* (1998) 19 Cal. 4th 203, 206, 77 Cal. Rptr. 2d 910, 960 P.2d 1133 (decided under version of Division 9 that was in effect prior to July 1, 2001)]. Civ. Code § 2983.2(a) requires a creditor to give the debtor written notice of its intent to dispose of a repossessed car. Civ. Code § 2983.2(a) specifies that, except as otherwise provided in Civ. Code § 2983.8, the debtor will be liable for any deficiency after disposition of the repossessed motor vehicle if the creditor gives the debtor requisite timely notice and provides specified information. Civ. Code § 2983.8 provides that no deficiency judgment will lie after any sale or other disposition of a motor vehicle unless the court has determined that the sale or other disposition was in conformity with the provisions of both the Rees-Levering Act and the relevant provisions of Division 9 of the Commercial Code [Com. Code § 9101 *et seq.*],

including *Com. Code* §§ 9610-9615 and 9626. A secured party who wishes to dispose of collateral must send "a reasonable authenticated notification" to specified persons, subject to specified exceptions [see *Com. Code* § 9611; see also *Ch. 42, Secured Transactions*, § 42.240]. The notification must be reasonable in the manner in which it is sent [see *Com. Code* § 9611(b)], its timeliness [see *Com. Code* § 9612 (timeliness of notification)], and its content [see *Com. Code* § 9613 (contents of notification generally); *Com. Code* § 9614 (contents of notification in consumer goods transaction); see also *Union Safe Deposit Bank v. Floyd* (1999) 76 Cal. App. 4th 25, 32, 90 Cal. Rptr. 2d 36 (bank's notice was defective under former *Com. Code* § 9504(3) [repealed eff. July 1, 2001; now see *Com. Code* §§ 9610, 9611] when it failed to state, expressly or impliedly, whether sale would be public or private)]. Every aspect of disposition of the collateral, including the method, manner, time, place, and other terms, must be reasonable [*Com. Code* § 9610(b)].

In *Bank of America v. Lallana*, the debtor's car was sold at a public auction [*Bank of America v. Lallana* (1998) 19 Cal. 4th 203, 206, 77 Cal. Rptr. 2d 910, 960 P.2d 1133] . The California Supreme Court determined that the secured creditor gave proper notice pursuant to the Rees-Levering Act, but because it failed to give the debtor proper notice of a public sale pursuant to former *Com. Code* § 9504(3) (repealed eff. July 1, 2001; now see *Com. Code* §§ 9610, 9611) (notice of both the time and place of sale), it was precluded from obtaining a deficiency judgment [*Bank of America v. Lallana* (1998) 19 Cal. 4th 203, 206, 77 Cal. Rptr. 2d 910, 960 P.2d 1133 (decided under version of Division 9 that was in effect prior to July 1, 2001)]. Thus, to obtain a deficiency judgment when the balance due on the obligation exceeds the proceeds from the disposition, the secured creditor must provide both the notice set forth in this form and the notice required by *Com. Code* § 9611. For a notice of sale pursuant to *Com. Code* § 9610, see *Ch. 42, Secured Transactions*, § 42.240.

[2] FORM

Notice of Intention to Dispose of Repossessed or Surrendered Vehicle [Civ. Code § 2983.2]

NOTICE OF INTENTION TO DISPOSE OF VEHICLE

TO: [names and addresses of buyer and other persons liable on contract]

Take notice that the following motor vehicle, which was [repossessed by us or surrendered to us by you] on _____ [date not more than 60 days before date notice is given or mailed], will be disposed of, and other actions will be taken respecting it and your rights and obligations, as follows:

Vehicle: [make and model of vehicle]

Vehicle identification number: _____

1. _____ [name of seller or holder], the [seller of the vehicle or holder of the contract for sale of the vehicle], intends to dispose of the vehicle by sale or other disposition on the expiration of [15 or, if notice is mailed and sender or recipient is outside California, 20] days from the date this notice is [given or mailed]. On receipt of your written request to extend the redemption period [add if applicable, and the reinstatement period] mentioned below for an additional 10 days, we will extend this period without further notice.

2. You have the right to redeem the vehicle by paying in full the debt evidenced by the contract of sale of the vehicle until the expiration of 15 days from the date this notice is [given or mailed].

3. The amount due is as follows:

Contract balance: \$ _____

Delinquency charges: \$ _____

Collection costs: \$ _____

Repossession costs:	\$ _____
Subtotal:	\$ _____
Less credit for	
Estimated unearned finance charges:	\$ _____
Estimate for canceled insurance:	\$ _____
Total:	\$ _____

[EITHER]

4. You have a conditional right to reinstate this contract until the expiration of [15 or 20] days from the date this notice is [mailed or given]. You may reinstate the contract as follows:

a. By _____ [paying the defaulted payments and any applicable delinquency charges or satisfying all liens and encumbrances on the vehicle or reimbursing us for \$ _____, which constitutes all of the reasonable costs and expenses we have incurred in connection with any liens and encumbrances on the vehicle or obtaining insurance on the vehicle or reimbursing us for insurance we have obtained on the vehicle plus \$ _____, which constitutes all of the reasonable costs and expenses we have incurred in connection with obtaining insurance on the vehicle or reimbursing us for \$ _____, which constitutes all reasonable costs and expenses incurred as a result of your failure to _____ (*specify obligation that was not performed*)].

b. By additionally reimbursing us for all reasonable and necessary collection and repossession costs and fees incurred, including attorneys' fees and legal expenses expended in retaking and holding the vehicle, in the amount of \$ _____.

[OR]

4. You may not reinstate the contract because we have determined that [*specify ground listed in Civ. Code § 2983.3(b), e.g., you, or another person who is liable on the contract, intentionally provided false or misleading information of material importance on your credit application*].

[CONTINUE]

5. On your written request, we will extend for an additional 10 days the redemption period [and reinstatement period] described above. A form on which you may request such an extension is enclosed.

6. On redemption [or reinstatement], the vehicle described above will be returned to you at _____[*address*].

7. All payments required above must be made to _____[*name of person or office*] at _____[*address*].

8. On your written request, we will furnish you a written accounting of the disposition of the vehicle described above. Your request must be made within one year after the disposition of the vehicle and must be personally served on us or sent to us by certified mail, return receipt requested, or by first-class mail, postage prepaid, and delivered to

_____ [name of person or office] at _____ [address].

[Notice of potential liability, prescribed by Civ. Code § 2983.2(a)(8), must be in 10-point boldface type; see [1][h], above.]

NOTICE. YOU MAY BE SUBJECT TO SUIT AND LIABILITY IF THE AMOUNT OBTAINED UPON DISPOSITION OF THE VEHICLE IS INSUFFICIENT TO PAY THE CONTRACT BALANCE AND ANY OTHER AMOUNTS DUE.

Date this notice was mailed: _____.

_____ [name of seller or holder]
 _____ [address]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Secured Transactions (Article 9) Default Foreclosure & Repossession Disposition of Collateral Contracts Law Debtor & Creditor Relations Contracts Law Secured Transactions Default Foreclosure & Repossession General Overview Contracts Law Secured Transactions Default Foreclosure & Repossession Redemption



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20-47 California Legal Forms--Transaction Guide § 47.204

§ 47.204 Request for Extension to Redeem Vehicle and Reinstate Contract [Civ. Code § 2983.2]

[1] Comment--Use of Form

This form is a request for an additional 10-day extension of the redemption period or reinstatement period (if applicable) before the holder or seller may dispose of a repossessed or surrendered vehicle. The seller or holder must provide the persons liable on the sale contract with the proper form for applying for extension of these periods [Civ. Code § 2983.2(a)(3)] when the seller or holder sends a notice of intent to dispose of the vehicle after it has been repossessed by the seller or holder or surrendered by the buyer [see § 47.203]. If the buyer or another person liable on the contract returns this form, the seller or holder is obligated to extend these periods for an additional 10 days without further notice [Civ. Code § 2983.2(a)(3),(6)].

The text of the form must be limited to the request for extension. It should include spaces for the requesting party to sign and date the form, along with instructions that it must be personally served or sent by certified or registered mail, return receipt requested, to a person or office and address designated by the seller or holder, and received before the expiration of the initial redemption and reinstatement periods [Civ. Code § 2983.2(a)(3)].

[2] FORM

Request for Extension to Redeem Vehicle and Reinstate Contract [Civ. Code § 2983.2]

REQUEST FOR EXTENSION

Instructions to Debtor

To claim a 10-day extension of the period during which you may redeem the vehicle described below and, if you are entitled to a conditional right to reinstate the sale contract for that vehicle, to obtain a 10-day extension of the reinstatement period, you must sign and date this form and personally deliver it, or send it by certified or registered mail, return receipt requested, to

_____ [name of person or office]
_____ [address]

In order to preserve your right to this extension, we must receive this notice before the expiration of the initial redemption and reinstatement periods described in the attached "NOTICE OF INTENTION TO DISPOSE OF REPOSSESSED OR SURRENDERED VEHICLE."

To: _____ [name of person or office]

Re: [identify vehicle and sale agreement]

I hereby request that you extend for an additional 10 days the period during which I may redeem the vehicle described above and, if applicable, the period during which I may reinstate the sale agreement identified above.

Date: _____.

_____ [signature]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Secured Transactions Default Foreclosure & Repossession Redemption



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20-47 California Legal Forms--Transaction Guide § 47.205

§ 47.205 Notice of Options for Repayment of Advances for Insurance [Civ. Code § 2982.8]

[1] Comment

[a] Use of Form

This form is a notice from the holder of a vehicle conditional sale contract to the buyer, stating the buyer's options for repayment of amounts advanced by the holder to obtain insurance on the vehicle. If the contract requires the buyer to insure the vehicle, and the buyer fails to do so or asks the holder to buy the insurance, premiums advanced by the holder may be subjected to a finance charge [see *Civ. Code § 2982.8(e)*] and may be secured as provided in the contract and permitted by *Civ. Code § 2984.2* [Civ. Code § 2982.8(a)] concerning security [see § 47.12[9]], provided the holder notifies the buyer of options for repaying the amounts advanced [Civ. Code § 2982.8(b); see [b], below].

[b] Contents of Notice

The notice must inform the buyer of the options for repayment [see *Civ. Code § 2982.8(b)*; [c], below] and state the following [Civ. Code § 2982.8(c)]:

- The amounts advanced by the holder.
- The amount of the additional finance charge for each amortization plan.
- The sum of the amounts advanced and the additional finance charge.
- The number of installments required.
- The amount of each installment.
- The date for payment of the installments.

- A prescribed warning, in contrasting red ink in at least eight-point boldface type, concerning the buyer's responsibility to obtain liability insurance.

[c] Options for Repayment

The holder must offer the buyer two repayment options:

- Full payment within 10 days after the date of giving or mailing of the notice [*Civ. Code* § 2982.8(b)(1)].
- Full amortization during the term of the insurance [*Civ. Code* § 2982.8(b)(2)].

In addition, the holder may choose to offer any of the following amortization plans:

- Full amortization after the term of the conditional sale contract, payable in installments that do not exceed the average payment allocable to a monthly period under the contract [*Civ. Code* § 2982.8(b)(3)].
- Partial amortization during the term of the insurance, with the remainder of the amortization payable after the term of the conditional sale contract in installments that do not exceed the average payment allocable to a monthly period under the original terms of the contract [*Civ. Code* § 2982.8(b)(4)].
- Any other amortization plan complying with the required disclosures [*Civ. Code* § 2982.8(b)(5); see [b], *above*].

If the buyer neither pays the amounts advanced in full nor notifies the holder in writing what option the buyer chooses, before the expiration of 10 days from the date the notice is given or mailed, the holder may select one of the options offered in the notice [*Civ. Code* § 2982.8(b)]. For additional discussion of payments advanced by a holder, see § 47.12[7].

[2] FORM

Notice of Options for Repayment of Advances for Insurance [*Civ. Code* § 2982.8]

NOTICE OF OPTIONS FOR REPAYMENT OF AMOUNTS ADVANCED FOR INSURANCE COVERAGE

_____ [date]

To: _____ [name and address of buyer]

_____ [Name of holder] has advanced \$ _____ to pay premiums for collision insurance on [identify vehicle] [on your behalf or at your request] under the terms of your conditional sale contract dated _____ for the purchase of that vehicle. You must repay the amounts advanced for those premiums, and you may select one of the repayment options described below. Please check the repayment option that you choose, and return this notice to _____ [name and address] by _____ [date at least 10 days from date of notice].

(1) You may pay in full by _____ [date at least 10 days from date of notice]. The total amount due under this option is \$ _____, which includes a finance charge of \$ _____.

_____ Check here if you choose Option (1), and enclose a check for the total amount shown above, made out to _____ [name of holder].

(2) You may pay \$ _____ per month for [number of months of insurance coverage] months while the insurance policy is in effect, beginning _____ [date]. Each monthly payment will be due on the _____ day of the month. The total amount due under this option is \$ _____, which includes a finance charge of \$ _____.

_____ Check here if you choose Option (2).

[Add any option(s) described below, as desired.]

(3) You may pay \$ _____ per month for _____ months, beginning [date after term of conditional sale contract], after your last scheduled payment under the conditional sale contract. Each monthly payment will be due on the _____ day of the month. The total amount due under this option is \$ _____, which includes a finance charge of \$ _____.

_____ Check here if you choose Option (3).

(4) You may pay \$ _____ per month for [number of months of insurance coverage] months while the insurance policy is in effect, beginning _____ [date], then pay \$ _____ per month for _____ months, beginning [date after term of conditional sale contract], after your last scheduled payment under the conditional sale contract. Each monthly payment will be due on the _____ day of the month. The total amount due under this option is \$ _____, which includes a finance charge of \$ _____.

_____ Check here if you choose Option (4).

[Continue]

If you do not pay the full amount due under Option (1) or notify us of your choice of the alternative option by returning this notice by _____ [date at least 10 days from date of giving or mailing notice], your payments will be due as described in Option [specify option (2), or alternatively specify option (3) or (4) if offered above].

[Warning prescribed by Civ. Code § 2982.8(c) must be in red ink and at least 8-point boldface type:]

WARNING--IT IS YOUR RESPONSIBILITY UNDER CALIFORNIA LAW TO OBTAIN LIABILITY INSURANCE OR BE SUBJECT TO PENALTIES FOR VIOLATING SECTION 16020 OF THE VEHICLE CODE, WHICH MAY INCLUDE LOSS OF LICENSE OR A FINE. THE INSURANCE ACQUIRED BY THE LIENHOLDER DOES NOT PROVIDE LIABILITY COVERAGE AND DOES NOT SATISFY YOUR RESPONSIBILITY UNDER CALIFORNIA LAW.

_____ [signature]

_____ [typed name and address]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Debtor & Creditor Relations Contracts Law Secured Transactions General Overview Insurance Law Motor Vehicle Insurance General Overview



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20-47 California Legal Forms--Transaction Guide § 47.206

§ 47.206 Agreement for Private Sale of Vehicle

[1] Comment--Use of Form

This form is a conditional sale agreement for the sale of a vehicle by a person who is not engaged in the business of selling or leasing motor vehicles under conditional sale contracts. It may be used by a seller who has established a buyer's credit standing and agrees to sell the vehicle on the installment basis. It contains protective provisions governing installment payments, repossession, and reservation of legal ownership of the vehicle in the seller until satisfaction of the obligation.

A conditional sale agreement by one who is not engaged in the business of selling or leasing motor vehicles under conditional sale contracts does not have to meet the requirements of the Rees-Levering Act [*Civ. Code § 2981 et seq.*; see *Civ. Code § 2981(a), (b)*; § 47.12[2][a], [b]].

For discussion of Department of Motor Vehicles requirements after sale of a vehicle, and illustrations of DMV forms that must be filed, see Ch. 102D, *Registration and Transfer of Vehicles, Vessels, and Aircraft* .

[2] FORM

Agreement for Private Sale of Vehicle

VEHICLE SALE CONTRACT AND SECURITY AGREEMENT

_____ [Name of seller] ("Seller") and _____ [name of buyer] ("Buyer") agree as follows:

1. **Purchase and Description.** For a purchase price and on terms and conditions set forth in this agreement, Seller hereby sells and Buyer hereby purchases a [make and model of vehicle], vehicle identification number _____ (the "vehicle").

2. **Purchase Price.** The purchase price of the vehicle is \$ _____. Seller acknowledges receipt of \$ _____ as part payment of the purchase price. The balance of the purchase price, namely \$ _____, plus interest from this date at the rate of _____ percent per annum, shall be paid in equal monthly installments of \$ _____, until the entire balance of the purchase price, plus interest, has been paid in full. The initial installment shall be due and payable on _____ [date], and the remainder of the installments shall be due and payable on the same day of each succeeding month until paid in full.

3. **Condition of Vehicle.** Buyer has made an independent investigation of the vehicle and is purchasing it in its present condition without warranty by Seller, express or implied.

4. **Security.** Possession of the vehicle is delivered to Buyer; however, as security for the payment of the entire balance of the purchase price, Seller reserves title to the vehicle until the entire balance of the purchase price has been paid and all other terms and conditions of this agreement have been satisfied.

5. **Use of Vehicle.** Buyer agrees to use, maintain, license, and register the vehicle in accordance with all applicable laws; to maintain the vehicle in good repair; and to house it in a suitable shelter. Buyer agrees not to use or permit the vehicle to be used (a) for hire, or in any race, test or contest, (b) in any manner that exceeds the insurance coverage or would affect, forfeit, or suspend insurance coverage, (c) in any manner contrary to law, or (d) in any manner that is injurious to the vehicle. Buyer further agrees not to be make or permit the making of any material modification of the vehicle.

6. **Location.** Buyer agrees to notify Seller in writing within [e.g., 30 days] of any change of Buyer's residence. Buyer also agrees not to remove or permit the removal of the vehicle from California without Seller's prior written consent.

7. **Risk of Loss.** Buyer assumes all risks of loss of the vehicle, and Buyer shall not be released from any obligations as a result of any loss, damage, or disrepair to the vehicle.

8. **Insurance.** Buyer agrees to keep the vehicle insured with a company and in the form acceptable to and with loss payable to Seller, against loss or damage by fire, theft, and collision and by causes insured against by comprehensive insurance, in amounts not less than the unpaid balance under this agreement, and to deliver all policies to Seller, the proceeds of which (including return premiums) Buyer assigns to Seller.

9. **Liens.** Buyer agrees to keep the vehicle free from all liens, taxes, fees, and encumbrances, and agrees not to commence or permit the continuance of any proceeding in bankruptcy or receivership, nor to make an assignment for creditors.

10. **Information.** Buyer agrees to establish on demand the correctness of all information and representations made by Buyer in connection with this agreement.

11. **Inspection.** On prior notice to Buyer, Seller shall have the right to inspect the vehicle at any reasonable time.

12. **Sale of Vehicle.** Buyer agrees not to sell or attempt to sell or otherwise convey or dispose of any interest in the vehicle until the entire balance of the purchase price has been paid.

13. **Delinquency Charge.** Buyer agrees to pay Seller, on demand, a delinquency charge on each installment in default for [e.g., 10 days] in an amount equal to [e.g., 5 percent] of the installment and, in the event of Buyer's delinquency or default, to pay Seller's reasonable collection costs and fees, including but not limited to attorneys' fees.

14. **Indemnification.** Buyer agrees to pay Seller the costs incurred by Seller if Seller, at its option, makes any payment or performs any act required to be undertaken by Buyer, and any necessary payment to Seller shall be secured by this

agreement.

15. Appointment as Attorney. Buyer irrevocably appoints Seller as Buyer's attorney-in-fact to make claims, receive payments, and execute and endorse all instruments for payments, for loss of, or damage to the vehicle, or for the return of premiums on policies issued in connection with the vehicle, and to sign, in the name of Buyer, any certificate of ownership, registration card, application, affidavit, or document necessary to register or transfer any right, title, or interest of Buyer in and to the vehicle.

16. Remedies on Default. On any default by Buyer under this agreement, Seller may declare all or any part of the amount unpaid to be immediately due and payable and, with or without legal process, may take possession of the vehicle and either (1) declare all of Buyer's rights under this agreement and to the vehicle terminated, and keep all sums paid by Buyer as compensation for the use and depreciation of the vehicle, or (2) sell the vehicle, without notice and without having the vehicle present at the place of sale, at a public sale (at which Seller may purchase) and in whatever manner Seller may determine, after which Buyer will pay Seller any deficiency remaining after deducting from the proceeds of the sale all sums owing by Buyer and Seller's total expenses for retaking, repairing, discharging all liens on, and selling the vehicle. On repossession of the vehicle, Seller may, without liability, take possession of all property found in the vehicle and store the property for the account of Buyer. Seller's rights and remedies are concurrent, cumulative, and in addition to those provided by law.

17. Nonwaiver. Seller's acceptance of partial or delinquent payments or the failure of Seller promptly to exercise any right or remedy provided in this agreement or by law shall not be a waiver of any obligation of Buyer nor shall it constitute a modification of this agreement.

18. Time of Essence. Time is of the essence of this agreement.

19. Entire Agreement. This document contains the entire agreement of the parties and supersedes any prior written or oral agreements between them concerning the subject matter of this agreement. There are no representations, agreements, arrangements, or understandings, oral or written, between the parties, relating to the subject matter of this agreement, that are not fully expressed in this document.

Executed on _____ [date] at _____ [city and state].

[signature]

[typed name and address]

Seller

[signature]

[typed name and address]

Buyer

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Debtor & Creditor Relations Contracts Law Secured Transactions Installment Contracts General Overview



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20-47 California Legal Forms--Transaction Guide § 47.207

§ 47.207 Full-Recourse Agreement for Purchase of Conditional Sale Contracts--Between Lender and Automobile Dealer

[1] Comment--Use of Form

This form is a full-recourse agreement for the purchase of conditional sale contracts by a lender [see § 47.10[2]]. It is based on an agreement that was prepared by the American Bankers Association, and is used here with permission.

[2] FORM

Full-Recourse Agreement for Purchase of Conditional Sale Contracts--Between Lender and Automobile Dealer

FULL-RECOURSE AGREEMENT

This agreement is made _____[date] by and between _____[name of lender] ("Bank") and _____[dealer's business name] ("Dealer"), _____[address]. In consideration of their mutual covenants, Bank agrees to purchase from Dealer certain conditional sale contracts, notes, and chattel mortgages (the "Contracts") received by Dealer for the sale of merchandise, under the following terms and conditions:

1. Dealer covenants, warrants, and represents that all Contracts offered by Dealer to Bank under this agreement will be valid deferred payment obligations for the amounts set forth in the Contracts, covering the sale of merchandise owned by Dealer (free of encumbrances), which Dealer has a legal right to sell; that the Contracts are not subject to any disputes, offsets, or counterclaims; that the descriptions of the merchandise, or services rendered, contained in the Contracts are in all respects true and complete; that the purchasers named on all of the Contracts are bona fide and have legal capacity to make the Contracts; that the down payments made by the purchasers named in the Contracts have been made in cash and not its equivalent unless otherwise mentioned in the Contracts, and that no part of the down payment has been lent directly or indirectly by Dealer to the purchasers; that the carrying charges added to the purchase price of the merchandise have been correctly represented to the purchasers; and that on the date of each assignment the

merchandise mentioned in the assigned contract has been delivered to and accepted by the purchasers.

2. Dealer also covenants, warrants, and represents that all Contracts offered by Dealer to Bank will comply with and be valid under any and all applicable federal, state and other laws, executive orders and proclamations of the President of the United States, and rules and regulations of any governmental agency, board, department, or body.

3. All purchased Contracts shall be in a form, and include terms, covenants, and conditions, acceptable to Bank. Each Contract shall be properly executed by Dealer and the purchaser.

4. When the purchaser named in any Contract purchased by Bank shall be in default of a payment for a period of _____ days or more, Dealer promises and agrees to repurchase the Contract from Bank on demand and to pay the unpaid balance owing on the Contract, including all sums of principal, interest, and charges due and to become due, less a pro rata rebate of charges over and above Bank's minimum charge.

5. Should Dealer cease to do business as a going concern, or if a petition in bankruptcy or insolvency should be filed by or against Dealer, or for the appointment of a receiver, or if a creditors' committee should be named for Dealer, or Dealer should make an assignment for the benefit of creditors, or an attachment or execution should be levied on the property of Dealer and the attachment or execution is not released within [e.g., 10 days] from and after the levy, or if Dealer should fail to repurchase any of the Contracts within [e.g., 10 days] after demand is made on Dealer, then and from time to time thereafter Dealer shall on demand from Bank immediately repurchase from Bank any or all Contracts purchased by Bank that are delinquent at the time the demand is made, the purchase price of the Contract to be the amount owing on each Contract.

6. Bank shall be under no duty to notify Dealer of any default on the part of Dealer with reference to the terms of this agreement, or to notify Dealer of any default on the part of the purchasers mentioned in Contracts sold by Dealer to Bank, and Bank shall not be required to make formal tender or demand for the repurchase of contracts pursuant to this agreement. Dealer agrees that Bank may continue to make collections on any account to be repurchased, until the payment of the repurchase price, and Bank may extend the time of payment or make any compromise, adjustment, modification, or alteration that it deems reasonable without notice to or the consent of Dealer and without in any manner affecting the obligations of Dealer to repurchase any contracts pursuant to this agreement.

7. Dealer agrees not to accept payments or tender of payments made by a purchaser under any Contract sold to the Bank and will refer the purchaser to Bank.

8. This agreement may be terminated at any time by either party on notice in writing to the other, provided, however, that termination will not impair or affect the liability or obligations of Dealer to Bank under this agreement on account of any Contract purchased or transaction had before the time the notice is given.

_____[dealer's name]
 By: _____ [signature]
 _____ [typed name and title]
 _____ [lender's name]
 By: _____ [signature]
 _____ [typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:
 Contracts LawSecured TransactionsInstallment ContractsGeneral Overview



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20-47 California Legal Forms--Transaction Guide § 47.208

§ 47.208 Limited-Liability Agreement for Purchase of Conditional Sale Contracts--Between Lender and Automobile Dealer

[1] Comment--Use of Form

The form in [2], below, illustrates the limited-liability agreement that may be entered into between an automobile dealer and a lenders to finance the dealer's conditional sale contracts with buyers [see § 47.10[2]].

[2] FORM

Limited-Liability Agreement for Purchase of Conditional Sale Contracts--Between Lender and Automobile Dealer

AUTOMOBILE DEALER AGREEMENT

(Limited Liability)

This agreement is made _____[*date*] by and between _____[*name of lender*] (the "Bank") and _____[*dealer's business name*] (the "Dealer"), _____[*address*]. Dealer proposes to sell and assign motor vehicle conditional sale contracts (the "Contracts") arising from the conduct of its business, and Bank will purchase at its sole option those Contracts it considers creditworthy, including all of Dealer's rights, title, and interest in the vehicles subject to the Contracts, all claims under insurance policies, guaranties and warranties in connection with the Contracts, and all proceeds of the Contracts. In consideration of the mutual promises, covenants, and conditions set forth in this document, the parties mutually agree as follows.

1. **Valid Contracts.** All Contracts offered by Dealer to Bank are to be valid, enforceable, existing, bona fide vehicle sale contracts for the amount set forth in the Contracts.

2. **Vehicle Description.** The description of the subject vehicle contained in a Contract is to be in all respects true and

complete, the vehicle having been delivered and all services contracted for having been performed unless Bank is notified in writing to the contrary.

3. **Contract Form and Content.** The Contracts offered by Dealer to Bank shall comply with all state and federal laws regarding form, content, manner of completion, and execution; and the buyer and each cobuyer, comaker, guarantor or cosigner shall not have been induced to enter into the Contract by fraud or false representation as to price, quality of product, or manufacturer's or Dealer's warranties or any other statement that would mislead or confuse the buyer.

4. **Security Interest in Vehicles.** All steps shall have been taken, and documents shall have been executed, to perfect Bank's interest in the vehicle, and an application for title shall have been filed with the Department of Motor Vehicles naming Bank as the legal owner, and Dealer shall provide Bank with a guaranty of title.

5. **Credit Information.** The credit information furnished to Bank by Dealer shall be true and correctly reported as received from the buyer; and any down payment shown on the Contract or credit application shall actually have been made by the buyer in cash or its equivalent, and no portion shall have been directly or indirectly advanced by Dealer.

6. **Insurance.** Vehicles subject to the Contracts sold and assigned to Bank shall be protected by fire, theft, comprehensive, and collision insurance (\$100 deductible). This insurance, naming Bank as loss payee, shall be placed, at the time a Contract is entered into, with an insurance company acceptable to Bank, and Bank shall receive notice of the placement within 15 days from the date of sale. Dealer, on a vehicle's having been repossessed by Bank, shall be liable for any loss sustained because of damage not covered by insurance, including any deductible amount. Dealer shall not be liable if insurance was in effect at the time Bank acquired the Contract, and the insurance subsequently lapsed or was canceled.

7. **Defenses, Setoffs, Counterclaims.** There are, and shall be, no legal or equitable defenses, setoffs, or counterclaims against any of the Contracts assigned or the vehicles subject to the Contracts.

8. **Modification.** This agreement is subject to further modification as provided for in this document and by mutual agreement of the parties in writing.

9. **Termination.** This agreement may be terminated by either party on written notice to the other party; but termination shall not affect any Contract previously sold and assigned to Bank pursuant to this agreement or the parties' respective rights under the Contract, and rights shall not be extinguished until the Contract is paid in full.

10. **Repurchase of Contracts.** If one or more of the warranties set forth in this document is not true as to any Contract acquired by Bank, Dealer shall at Bank's option repurchase the Contract for the net balance owing.

11. **Exercise or Waiver of Rights by Bank.** Bank's failure to exercise any of its rights shall not operate as a waiver of any rights, and Bank's rights shall continue until all Contracts have been paid in full. All of Bank's rights shall be cumulative and not in the alternative, and Bank's rights shall bind the Dealer's heirs, assigns, and successors in interest.

12. **Maturities.** Bank agrees to finance the Contracts that it finds creditworthy for the following maturities: *[specify maximum months for pay-off of contracts for new and current models, models from one year to two years old, etc.]*.

13. **Dollar Amount.** Bank agrees to finance the Contracts that it finds creditworthy for the following amounts: New Cars--dealer invoice, plus taxes, license fee and insurance; Used Cars--Kelley Bluebook wholesale price, plus taxes, license fees and insurance.

14. **Buying Rates.** The buying rates may be changed from time to time by Bank on written notice to Dealer as to all Contracts submitted after the notice.

15. **Discount.** On every contract sold and assigned by Dealer, Bank shall discount an amount of money equal to Bank's prevailing buying rate. The remainder of the finance charge to the buyer by Dealer, which shall not be more than _____ percent per annum (add-on) greater than Bank's prevailing buying rate, shall be accumulated by Bank in a Dealer Reserve Account and shall be liable for all debts of Dealer to Bank.

16. **Prepayment Rebates.** Dealer shall pay to Bank its share of any unearned finance charge refund to the buyer on the buyer's prepayment of the amount outstanding on any Contract before maturity. Dealer's share of the refund shall be computed by the Rule of 78's and shall be payable directly to Bank on demand. Bank may but shall be under no obligation to charge Dealer's share of the refund to the Dealer Reserve Account.

17. **Reserve Rebate.** Every _____ days Bank shall disburse to Dealer any amount in the Dealer Reserve Account that is in excess of _____ percent (reserve requirement) of the total gross amount outstanding due to Bank on all open Contracts that Bank purchased from Dealer, provided that Bank may withhold any or all funds due Dealer as long as Dealer is in default on any obligation presently owing to Bank or Dealer has ceased doing business with Bank or Bank with Dealer and Bank at its sole option determines that the funds in the Dealer Reserve Account are required to guarantee payment of any obligations of Dealer to Bank.

18. **Buyer Default.** If Bank has repossessed any vehicle subject to a Contract sold and assigned to Bank, Dealer shall have the following options:

- (a) Bid on the vehicle as a potential buyer.
- (b) Accept the vehicle on a consignment basis and, acting as agent for Bank, sell the vehicle, subject to Bank's approval before sale, within 20 days after receiving the vehicle.
- (c) Return the vehicle to Bank, thereby declining options (a) and (b).
- (d) Repurchase the Contract from Bank for the net balance due on the Contract.

On repurchase Bank shall reassign and return to Dealer the Contract, the vehicle, and the title and other documents necessary for Dealer to perfect Dealer's interest in the vehicle.

19. **Repossession.** Bank shall have the sole responsibility of repossessing the vehicles, and Dealer shall have no duty to assist Bank in doing so. However, should Dealer repossess or assist in repossessing a vehicle, at Bank's request, Bank shall pay to Dealer the reasonable costs incurred.

20. **Limited Liability.** If Bank presents a repossessed vehicle to Dealer, and Bank disposes of the repossessed vehicle in compliance with applicable law, the Dealer Reserve Account shall be charged for any deficiency, defined as the difference between the net balance due on the Contract with expenses added and the proceeds of the disposition. Dealer, on the Dealer Reserve Account's being charged for the deficiency, shall be subrogated to Bank's right to collect the deficiency from the buyer. The liability of Dealer for any deficiency shall not extend beyond the balance of the Dealer Reserve Account as it shall exist from time to time.

21. **Deferred Cash Down Payment.** Dealer agrees that on the failure of the buyer to pay any deferred cash down payment as agreed to in any Contract, Dealer shall pay to Bank the amount of the deferred cash down payment. Bank may but shall be under no obligation to charge the Dealer Reserve Account for any deferred cash down payment.

Date: _____.

By: _____

By: _____

[dealer's name]
[signature]
[typed name and title]
[lender's name]
[signature]
[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:
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[Reserved]

§§ 47.209[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
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 B. Vehicle Leasing

20-47 California Legal Forms--Transaction Guide § 47.220

§ 47.220 Vehicle Lease Disclosures Under Consumer Leasing Act [12 C.F.R. pt. 213]

[1] Comment

[a] Use of Forms

These forms may be used to draft a vehicle lease disclosure document complying with Regulation M [12 C.F.R. pt. 213] under the Consumer Leasing Act (CLA) [15 U.S.C. § 1667 *et seq.*; see [c]-[e], *below*; see also § 47.30[1]]. A lessor must provide the disclosures to the lessee before the consummation of a consumer lease [12 C.F.R. § 213.3(a)(3)].

When a transaction involves more than one lessor, the disclosures required by Regulation M may be made by one lessor on behalf of all of the lessors. When a lease involves more than one lessee, the lessor may provide the disclosures to any lessee who is primarily liable on the lease [12 C.F.R. § 213.3(c)]. In either case, however, the disclosure statement must identify all of the lessors and lessees [12 C.F.R. pt. 213, *supp.* I, comment 3(a)(1)-4]. If a single lessor provides disclosures to a lessee on behalf of several lessors, all disclosures for the transaction must be given, even if the lessor making the disclosures would not otherwise have been obligated to make a particular disclosure [12 C.F.R. pt. 213, *supp.* I, comment 3(c)-1].

The Federal Reserve Board is directed to publish model disclosure forms in order to facilitate compliance with the disclosure requirements of Regulation M and to aid the consumer in understanding the transaction to which the subject disclosure form relates [15 U.S.C. § 1667f(b)(1)]. Model disclosure forms are published in Appendix A to Regulation M [see 12 C.F.R. pt. 213, *app.* A], and reproductions of those model forms are printed in [3]-[6], *below*. A lessor may use such a model disclosure form for purposes of compliance with Regulation M, at the discretion of the lessor [15 U.S.C. § 1667f(b)(3)]. Any lessor that properly uses the material aspects of such a model disclosure form must be deemed to be in compliance with the disclosure requirements to which the form relates [15 U.S.C. § 1667f(b)(4)].

The form in [7], *below*, contains completed paragraphs that may be used as examples for filling in the blanks on the model forms of Regulation M nonsegregated disclosures [see [4], [6], *below*]. Those disclosures encompass many of the subjects that should be covered in a vehicle lease, but the model forms do not prescribe terms and conditions to be stated in a lease, respecting those subjects (such as the parties' insurance obligations and rights, maintenance

responsibilities, warranties, and so forth). The completed paragraphs of the form in [7], below, illustrate terms and conditions that may be stated in the disclosures. Those paragraphs are set in the same order as they appear in the model disclosure forms.

[b] Form and Format of Disclosures

The disclosures must be made clearly and conspicuously in writing in a form that the consumer may keep [12 C.F.R. § 213.3(a); see 15 U.S.C. § 1667a], in accordance with 12 C.F.R. § 213.3 [see [c]-[e], below]. The clear and conspicuous standard requires that disclosures be reasonably understandable. For example, the disclosures must be presented in a way that does not obscure the relationship of the terms to each other. Appendix A to Regulation M [12 C.F.R. pt. 213, app. A] contains model forms that meet this standard [see [3]-[6], below]. In addition, although no minimum type size is required, the disclosures must be legible, whether typewritten, handwritten, or printed by computer [12 C.F.R. pt. 213, supp. I, comment 3(a)-2]. A lessor may use a multipurpose disclosure form, provided the lessor is able to designate the specific disclosures applicable to a given transaction, consistent with the requirement that disclosures be clearly and conspicuously provided [12 C.F.R. pt. 213, supp. I, comment 3(a)-3].

PRACTICE TIP:

While disclosures must be made clearly and conspicuously, lessors are not required to use the words "lessor" and "lessee" to identify the parties to the lease transaction [12 C.F.R. pt. 213, supp. I, comment 3(a)(1)-2]. The lessor must be identified by name, and an address (and a telephone number) may be provided [12 C.F.R. pt. 213, supp. I, comment 3(a)(1)-3].

The disclosures may be made in the lease to be signed by the lessee [15 U.S.C. § 1667a]. The disclosures must be given to the lessee together in a dated statement that identifies the lessor and the lessee, which may be either a separate statement that identifies the consumer lease transaction or the contract or other document evidencing the lease [see § 47.221]. Alternatively, certain disclosures required to be segregated from other information [see 12 C.F.R. § 213.3(a)(2); [d], below] may be provided in a separate dated statement that identifies the lease, and the other required disclosures may be provided in the lease or other document evidencing the lease [12 C.F.R. § 213.3(a)(1); 12 C.F.R. pt. 213, supp. I, comment 3(a)(2)-1].

The disclosures may be made in a language other than English, provided they are made available in English on the lessee's request [12 C.F.R. § 213.3(a)(4)]. Note, however, that under California law, if a language other than English is the primary language used for negotiations with a consumer with respect to a contract under the Vehicle Leasing Act, the consumer may have to be provided with a translation of the contract in that other language in any event [Civ. Code § 1632(a)(1) (operative until July 1, 2004; applicable only to contracts negotiated in Spanish); Civ. Code § 1632(b)(1) (operative July 1, 2004; applicable to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean); see § 47.14; see also Ch. 45, *Consumer Installment Loans and Credit Sales*, § 45.64].

PRACTICE TIP:

Lessors may include in the nonsegregated disclosures [see [c], below] cross-references to items in the segregated disclosures rather than repeat those items. A lessor may include in the segregated disclosures [see [d], below] numeric or alphabetic designations as cross-references to related information, as long as those references do not obscure or detract from the segregated disclosures [12 C.F.R. pt. 213, supp. I, comment 3(a)(1)-1].

In a lease of multiple vehicles, the required property description [see 15 U.S.C. § 1667a(1); 12 C.F.R. § 213.4(a)] may be given in a separate statement that is incorporated by reference in the principal disclosure statement [12 C.F.R. § 213.3(a)(1)]. Lessors generally have flexibility in handling lease transactions that may be viewed as multiple transactions; for example [12 C.F.R. pt. 213, supp. I, comment 3(a)-4]:

- When a lessor leases two items to the same lessee on the same day, the lessor may treat the leases, for disclosure purposes, as either one transaction or two transactions.
- When a lessor sells insurance or other incidental services in connection with a lease, or when a lessor includes an outstanding lease or credit balance in a lease transaction, the lessor may treat the entire business transaction either as a single lease transaction (in which Regulation M disclosures, not Regulation Z disclosures, are required) or as a lease transaction and a credit transaction.

[c] Mandated Disclosures

Before the consummation of the lease [*see* 12 C.F.R. pt. 213, supp. I, comment 3(a)(3)-1 (state law determines time of consummation, which occurs when contractual relationship is created between lessor and lessee)], the lessor must give the lessee a dated written statement, on which the lessor and lessee are identified, setting out accurately and in a clear and conspicuous manner [*see* [b], *above*] both the "segregated disclosures" described in [d], below, and the following information, with respect to that lease, as applicable [15 U.S.C. § 1667a]:

- A brief description or identification of the leased vehicle [15 U.S.C. § 1667a(1)] sufficient to identify the vehicle to the lessee and lessor [12 C.F.R. § 213.4(a)].

PRACTICE TIP:

There is no requirement as to the placement of this information. Although the description of the leased property may not be included among the segregated disclosures, a lessor may choose to place the description directly above the segregated disclosures [12 C.F.R. pt. 213, supp. I, comment 4(a)-1]. When the disclosures are included in the lease document, a natural placement of this information would be near the beginning of the text of the parties' agreement [*see* § 47.221[2]].

- The amount of any payment by the lessee required at the inception of the lease [15 U.S.C. § 1667a(2)].
- The amount paid or payable by the lessee for official fees, registration, certificate of title, or license fees or taxes [15 U.S.C. § 1667a(3)].
- A statement that the lessee will be liable for the differential, if any, between the anticipated fair market value of the leased property (also called residual value) and its appraised actual value (also called realized value) at the termination of the lease, if the lessee has the liability [15 U.S.C. § 1667a(4); *see* 12 C.F.R. § 213.2(m), (n) ("realized value" and "residual value" defined)].

PRACTICE TIP:

Realized value is not necessarily a required disclosure. It refers to the value of the property at the end of the lease term (or on early termination). It may be either the retail value or the wholesale value. Realized value is relevant only to an open-end lease [*see* 12 C.F.R. § 213.2(i) (definition)], in which the lessee's liability at the end of the lease term is the difference between the residual value of the property (or the adjusted lease balance) and its realized value [12 C.F.R. pt. 213, supp. I, comment 2(m)-1].

- A statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and whether or not the lessee has the option to purchase the leased property and at what price and time [15 U.S.C. § 1667a(5)].

- A statement identifying all express warranties and guarantees made by the manufacturer or lessor with respect to the leased property, and identifying the party responsible for maintaining or servicing the leased property together with a description of the responsibility [15 U.S.C. § 1667a(6)].

- A brief description of insurance provided or paid for by the lessor or required of the lessee, including the types and amounts of the coverages and costs [15 U.S.C. § 1667a(7)].

- A description of any security interest held or to be retained by the lessor in connection with the lease and a clear identification of the property to which the security interest relates [15 U.S.C. § 1667a(8)].

- If the lease provides that the lessee shall be liable for the anticipated fair market value of the property on expiration of the lease: a statement of the fair market value of the property at the inception of the lease, the aggregate cost of the lease on expiration, and the differential between them [15 U.S.C. § 1667a(10)].

- A statement of the conditions under which the lessee or lessor may terminate the lease before the end of the term and the amount or method of determining any penalty or other charge for delinquency, default, late payments, or early termination [15 U.S.C. § 1667a(11); 12 C.F.R. § 213.4(g)(1)].

- When default is a condition for early termination of a lease, default charges must be disclosed [12 C.F.R. pt. 213, supp. I, comment 4(g)(1)-4].

- When the lessee is liable for the difference between the unamortized cost and the realized value at early termination, the method of determining the amount of the difference must be disclosed [12 C.F.R. pt. 213, supp. I, comment 4(g)(1)-5].

PRACTICE TIP:

12 C.F.R. § 213.4(g)(1) requires a full description of the method of determining an early termination charge. The lessor should attempt to provide consumers with clear and understandable descriptions of early termination charges. Descriptions that are full, accurate, and not intended to be misleading will comply with 12 C.F.R. § 213.4(g)(1) even if the descriptions are complex. In providing a full description of an early termination method, the lessor may use the name of a generally accepted method of computing the unamortized cost portion (also known as the "adjusted lease balance") of the early termination charges. For example, a lessor may state that the "constant-yield" method [see generally § 47.32[3]] will be used in obtaining the adjusted lease balance, but the lessor must specify how that figure, and any other term or figure, is used in computing the total early termination charge imposed on the consumer. Additionally, if the lessor refers to a named method in this manner, the lessor must provide a written explanation of that method if requested by the consumer. The lessor has the option of providing the explanation as a matter of course in the lease documents or on a separate document [12 C.F.R. pt. 213, supp. I, comment 4(g)(1)-2]. While the lessor may provide an address or telephone number for the consumer to request a written explanation of the named method used to compute the adjusted leased balance, if at consummation the consumer requests such an explanation, the lessor must provide a written explanation at that time. If the consumer requests an explanation after consummation, the lessor must provide a written explanation within a reasonable time after the request is made [12 C.F.R. pt. 213, supp. I, comment 4(g)(1)-3].

- A statement of the lessee's liability, if any, at early termination or at the end of the lease term for the difference

between the residual value of the leased property (which is the value of the leased property at the end of the lease term, as estimated or assigned at consummation by the lessor, that is used in computing the base periodic payment) and its realized value (which is one of these: the price received by the lessor for the leased property at disposition, or the highest offer for disposition of the leased property, or the fair market value of the leased property at the end of the lease term; see the Practice Tip *below*) [12 C.F.R. § 213.4(k); see 12 C.F.R. § 213.2(m),(n) ("realized value" and "residual value" defined)].

PRACTICE TIP:

Realized value is not necessarily a required disclosure. Realized value is relevant only to an open-end lease [see 12 C.F.R. § 213.2(i) (definition)], in which the lessee's liability at early termination or at the end of the lease term is the difference between the residual value of the property (or the adjusted lease balance) and its realized value [12 C.F.R. pt. 213, supp. I, comment 2(m)-1], that is, the value of the property at early termination or at the end of the lease term. It may be either the retail value or the wholesale value, provided the choice is consistent with the lessor's general practice when determining the value of the property at the end of the lease term. The lessor should indicate whether the value disclosed is a retail or wholesale value [12 C.F.R. pt. 213, supp. I, comment 3(d)(1)-4]. Subject to the contract and to state or other applicable law, the lessor may choose any of the three methods mentioned in the item above for determining the realized value at the end of the lease term or at early termination. If the lessor sells the property before making that determination, the price received for the property is the realized value. If the lessor does not sell the property before making that determination, the lessor may choose either the highest offer or the fair market value as the realized value [12 C.F.R. pt. 213, supp. I, comment 2(m)-2]. In determining the highest offer for disposition, the lessor need not consider offers that the offeror has withdrawn or is unable or unwilling to perform [12 C.F.R. pt. 213, supp. I, comment 2(m)-4]. The lessor may obtain an appraisal of the leased property to determine its realized value [see 12 C.F.R. pt. 213, supp. I, comment 4(l)-2] or may estimate the retail or wholesale value [12 C.F.R. pt. 213, supp. I, comment 3(d)(1)-4] in accordance with the requirements for using estimates [see § 47.30[3][b]]. Disposition charges may not be subtracted in determining the realized value, but any amount attributable to taxes may be excluded [12 C.F.R. pt. 213, supp. I, comment 2(m)-3].

■ If the lessee's liability at early termination or at the end of the lease term is based on the realized value of the leased property (see the preceding item):

■ A statement that the lessee may obtain, at the lessee's expense, a professional appraisal by an independent appraiser (agreed to by the lessee and the lessor) of the value that could be realized at sale of the leased property [12 C.F.R. § 213.4(l)].

■ Whether the wholesale or retail appraisal value will be used [12 C.F.R. pt. 213, supp. I, comment 4(l)-3].

PRACTICE TIP:

While this is not normally an issue in the case of a closed-end lease, in the model disclosure form in [6], below, for a closed-end lease, under the "Early Termination and Default" provision, a reference to the lessee's right to an independent appraisal of the leased vehicle under 12 C.F.R. § 213.4(l) is included for those closed-end leases in which the lessee's liability at early termination is based on the vehicle's realized value [12 C.F.R. pt. 213, supp. I, comment app. A-3].

■ If the lessee is liable at the end of the lease term for the difference between the residual value of the leased property and its realized value:

■ A statement that the lessee and lessor are permitted, after termination of the lease, to make any mutually agreeable final adjustment regarding excess liability [12 C.F.R. § 213.4(m)(3); see 15 U.S.C. § 1667b(a); § 47.30[5][a]].

■ A statement about a rebuttable presumption that, at the end of the lease term, the residual value of the leased property is unreasonable and not in good faith to the extent that the residual value exceeds the realized value by more than three times the base monthly payment (or more than three times the average payment allocable to a monthly period, if the lease calls for periodic payments other than monthly); and that the lessor cannot collect the excess amount unless the lessor brings a successful court action and pays the lessee's reasonable attorneys' fees, or unless the excess of the residual value over the realized value is due to unreasonable or excessive wear or use of the leased property (in which case the rebuttable presumption does not apply) [12 C.F.R. § 213.4(m)(2); see 15 U.S.C. § 1667b(a); § 47.30[5][a]].

PRACTICE TIP:

The limitation on liability applies only to liability at the end of the lease term that is based on the difference between the residual value of the leased property and its realized value. Regulation M does not preclude a lessor from recovering other charges from the lessee at the end of the lease term. Examples of such charges include disposition charges, excess mileage charges, late payment and default charges, and in simple-interest accounting leases, the amount by which the unamortized cost exceeds the residual value because the lessee has not made timely payments [12 C.F.R. pt. 213, supp. I, comment 4(m)(2)-3]. The disclosure limiting the lessee's liability for the value of the leased property does not apply in the case of early termination [12 C.F.R. pt. 213, supp. I, comment 4(m)(2)-1]. If a lease has an alternative minimum term, the disclosures governing the liability limitation are not applicable for the minimum term [12 C.F.R. pt. 213, supp. I, comment 4(m)(2)-2].

■ A statement specifying whether the lessor or the lessee is responsible for maintaining or servicing the leased property, together with a brief description of the responsibility [12 C.F.R. § 213.4(h)(1)].

■ A statement of the lessor's standards for wear and use (if any), which must be reasonable [12 C.F.R. § 213.4(h)(2); 12 C.F.R. pt. 213, supp. I, comment 4(h)-1 (disclosure is not required if lessor does not set standards or impose charges for wear and use, such as excess mileage)].

■ A statement of whether the lessee has the option to purchase the leased property before the end of the lease term and, if so [12 C.F.R. § 213.4(i)(2)]:

■ The purchase price or the method for determining the price.

■ The purchase-option fee (if any), which may be separately itemized or disclosed as part of the purchase-option price [12 C.F.R. pt. 213, supp. I, comment 4(i)-3].

■ When the lessee may exercise this option.

PRACTICE TIP:

Generally, the lessor need only make the specific required disclosures that apply to the transaction. In the case of a purchase option disclosure, however, the lessor must disclose affirmatively that the lessee has no option to purchase the leased property if the purchase option is not available [12 C.F.R. pt. 213, supp. I, comment 4(i)-1]. Whether a purchase option exists under the lease is determined by state or other applicable law. The lessee's

right to submit a bid to purchase property at termination of the lease is not an option to purchase under 12 C.F.R. § 213.4(i) if the lessor is not required to accept the lessee's bid and the lessee does not receive preferential treatment [12 C.F.R. pt. 213, supp. I, comment 4(i)-2]. Official fees such as those for taxes, licenses, and registration charged in connection with the exercise of a purchase option may be disclosed as part of the purchase-option price (with or without a reference to their inclusion in that price) or may be separately disclosed and itemized by category. Alternatively, the lessor may provide a statement indicating that the purchase-option price does not include fees for tags, taxes, and registration [12 C.F.R. pt. 213, supp. I, comment 4(i)-4]. The lessor must disclose the purchase-option price as a sum certain or as a sum certain to be determined at a future date by reference to a readily available independent source. The reference should provide sufficient information so that the lessee will be able to determine the actual price when the option becomes available. Statements of a purchase price as the "negotiated price" or the "fair market value" do not comply with the requirements of 12 C.F.R. § 213.4(i) [12 C.F.R. pt. 213, supp. I, comment 4(i)-5].

■ The total dollar amount for all official and license fees, registration, title, or taxes required to be paid to the lessor in connection with the lease [12 C.F.R. § 213.4(n)], except as follows [12 C.F.R. pt. 213, supp. I, comment 4(n)-1]:

■ Taxes paid at lease signing or delivery must also be disclosed among the segregated disclosures [see 12 C.F.R. § 213.4(b); [d], *below*].

■ Taxes that are part of regularly scheduled payments must be reflected in the segregated disclosures [see 12 C.F.R. § 213.4(c); [d], *below*; see also 12 C.F.R. § 213.4(f)(10) (itemization required); [e], *below*].

■ A tax payable by the lessor and absorbed as a cost of doing business need not be disclosed (however, a tax payable by the lessor that is passed on to the consumer and is reflected in the lease documentation must be disclosed).

■ Taxes charged in connection with the exercise of a purchase option must be disclosed in the segregated statement about that option [see 12 C.F.R. § 213.4(i); [d], *below*].

■ A brief identification of insurance in connection with the lease including:

■ If the insurance is provided by or paid through the lessor: the types and amounts of coverage and the cost to the lessee [12 C.F.R. § 213.4(o)(1); 12 C.F.R. pt. 213, supp. I, comment 4(o)-1].

■ If the lessee must obtain the insurance: the types and amounts of coverage required of the lessee [12 C.F.R. § 213.4(o)(2)].

PRACTICE TIP:

Insurance purchased by the lessor primarily for the lessor's own benefit, and absorbed as a business expense and not separately charged to the lessee, need not be disclosed even if it provides an incidental benefit to the lessee [12 C.F.R. pt. 213, supp. I, comment 4(o)-2]. Whether products purchased in conjunction with a lease, such as mechanical breakdown protection (MBP) or guaranteed automobile protection (GAP), should be treated as insurance is determined by state or other applicable law. In states that do not treat MBP or GAP as insurance, disclosures are not required (but the lessor may disclose this information in accordance with the additional-information provision [see 12 C.F.R. §

213.3(b); [f], *below*)). For MBP insurance contracts not capped by a dollar amount, lessors may describe coverage by referring to a limitation by mileage or time period (for example, by indicating that the mechanical breakdown contract insures parts of the automobile for up to 100,000 miles) [12 C.F.R. pt. 213, supp. I, comment 4(o)-3]. Regarding whether California law would treat MBP or GAP as insurance [see *Ins. Code* § 22 ("insurance" defined)], which appears to be an open question, see *California Insurance Law and Practice*, Ch. 1, *Overview of California Insurance Law* (Matthew Bender).

- A statement identifying all express warranties and guarantees from the manufacturer or lessor with respect to the leased property that apply to the lessee [12 C.F.R. § 213.4(p)].

PRACTICE TIP:

Whether an express warranty or guaranty exists is determined by state or other law [12 C.F.R. pt. 213, supp. I, comment 4(p)-3; see *Com. Code* §§ 10210-10215 (warranties in consumer leases of goods)]. The statement identifying warranties may be brief and need not describe or list all warranties applicable to specific parts such as for air conditioning, radio, or tires. For example, manufacturer's warranties may be identified simply by a reference to the standard manufacturer's warranty. If the lessor provides a comprehensive list of warranties that may not all apply, then to comply with 12 C.F.R. § 213.4(p), the lessor must indicate which warranties apply or, alternatively, which warranties do not apply [12 C.F.R. pt. 213, supp. I, comment 4(p)-1]. Although a disclaimer of warranties is not required by Regulation M, the lessor may give a disclaimer as additional information in accordance with 12 C.F.R. § 213.3(b) [12 C.F.R. pt. 213, supp. I, comment 4(p)-2; see [f], *below*].

- The amount or the method of determining the amount of any penalty or other charge for delinquency, default, or late payments, which must be reasonable [12 C.F.R. § 213.4(q); see 15 U.S.C. § 1667b(b); § 47.30[5][c]]; in particular:

- The automatic imposition of collection costs or attorney fees upon default must be disclosed [12 C.F.R. pt. 213, supp. I, comment 4(q)-1].

- When default is a condition for early termination of a lease, default charges must also be disclosed under 12 C.F.R. § 213.4(g)(1) (see paragraph 9, *above*) [12 C.F.R. pt. 213, supp. I, comment 4(q)-2].

- Extension charges that exceed the rent charge in a simple-interest accounting lease or that are added separately must be disclosed [12 C.F.R. pt. 213, supp. I, comment 4(q)-4].

PRACTICE TIP:

Collection costs or attorney fees that are not imposed automatically, but are contingent on expenditures in conjunction with a collection proceeding or on the employment of an attorney to effect collection, need not be disclosed [12 C.F.R. pt. 213, supp. I, comment 4(q)-1]. The required disclosures under 12 C.F.R. § 213.4(q) and 12 C.F.R. § 213.4(g)(1) may, but need not, be combined [12 C.F.R. pt. 213, supp. I, comment 4(q)-2]. Examples of combined disclosures are provided in the model lease disclosure forms in Appendix A to Regulation M [see 12 C.F.R. pt. 213, app. A], which are reproduced in [4] and [6], *below*.

- A description of any security interest held or to be retained by the lessor, other than a refundable security deposit disclosed under 12 C.F.R. § 213.4(b) as a component of the total amount to be paid before or at consummation [see [d], *below*], along with a clear identification of the property to which the security interest relates [12 C.F.R. § 213.4(r)].

- If the lessor provides a percentage rate in documents evidencing the lease transaction: a notice stating that "this

percentage may not measure the overall cost of financing this lease" [12 C.F.R. § 213.4(s)].

PRACTICE TIP:

In the statement about the percentage rate, the lessor must not use "annual percentage rate" or "annual lease rate" or any equivalent term [12 C.F.R. § 213.4(s)]. A lease rate may not be included among the segregated disclosures [12 C.F.R. pt. 213, supp. I, comment 4(s)-1; *see* [d], *below*].

[d] Segregated Disclosures

The following disclosures must be segregated from other information, with headings, content, and format substantially similar to the applicable model form in Appendix A of Regulation M [12 C.F.R. § 213.3(a)(2); *see* [3], [5], *below*], and must contain only directly related information [12 C.F.R. § 213.3(a)(2); 12 C.F.R. pt. 213, supp. I, comment 3(a)(2)-2]:

- The total amount to be paid before or at consummation, using the term "amount due at lease signing" [12 C.F.R. § 213.4(b); *see* 15 U.S.C. § 1667a(2) (disclosure of amount of any payment by lessee required at inception of lease)].
- The number, amount, and due dates or periods of payments scheduled under the lease and the aggregate amount of the periodic payments [15 U.S.C. § 1667a(9); 12 C.F.R. § 213.4(c)].

PRACTICE TIP:

The phrase "number, amount, and due dates or periods of payments" requires the disclosure of all payments that are made at regular intervals and generally derived from rent, capitalized or amortized amounts such as depreciation, and other amounts that are collected by the lessor at the same intervals, including, for example, taxes, maintenance, and insurance charges. Other periodic payments may, but need not, be disclosed [12 C.F.R. pt. 213, supp. I, comment 4(c)-1].

- An itemization by type and amount, and the aggregate amount, of charges payable by the lessee and not included in the periodic payments, and a description of the charges [15 U.S.C. § 1667a(4); 12 C.F.R. § 213.4(d)].

PRACTICE TIP:

Such charges include the amount of any liability the lease imposes on the lessee at the end of the lease term, but the potential difference between the residual value and realized value in an open-end lease [*see* 12 C.F.R. § 213.4(k)] is excluded [12 C.F.R. § 213.4(d)]. The lessor is not required to disclose charges that are imposed when the lessee terminates early or fails to abide by, or modifies the terms of, the existing lease agreement, such as charges for late payment, default, early termination, deferral of payments, and extension of the lease [12 C.F.R. pt. 213, supp. I, comment 4(d)-2], or third-party fees or charges collected by the lessor on behalf of third parties, such as taxes [12 C.F.R. pt. 213, supp. I, comment 4(d)-3]. 12 C.F.R. § 213.4(d) requires the disclosure of charges that are anticipated by the parties as incidental to the normal operation of the lease agreement. If the lessor is unsure whether a particular fee is an "other charge," the lessor may disclose the fee as such without violating 12 C.F.R. § 213.4(d) or the segregation rule under 12 C.F.R. § 213.3(a)(2) [12 C.F.R. pt. 213, supp. I, comment 4(d)-1]. The "other charges" in question here are charges that are not required to be disclosed under some other provision of 12 C.F.R. § 213.4. For instance, the price of a mechanical breakdown protection (MBP) contract is sometimes disclosed as an "other charge"; nevertheless, the price of MBP is sometimes reflected in the periodic payment disclosure under 12 C.F.R. § 213.4(c) (*see* the preceding item), or in states where MBP is regarded as insurance, the cost is to be

disclosed in accordance with *12 C.F.R. § 213.4(o)* (one of the nonsegregated disclosures listed in [c], *above*) [12 C.F.R. pt. 213, supp. I, comment 4(d)-4].

EXAMPLE: If, under a lease agreement, a lessee may return leased property to various locations, and the lessor charges a disposition fee depending upon the location chosen, the lessor must disclose the highest amount charged. Disposition and similar charges (such as "pick-up" charges) that are anticipated by the parties as an incident to the normal operation of the lease agreement must be disclosed under *12 C.F.R. § 213.4(d)* [12 C.F.R. pt. 213, supp. I, comment 4(d)-5]. In that event, the lessor may include a brief explanation of the fee structure in the segregated disclosure. For example, if no fee or a lower fee is imposed for returning a leased vehicle to the originating dealer as opposed to another location, that fact may be disclosed. By contrast, if the terms of the lease treat the return of the leased property to a location outside the lessor's service area as a default, the fee imposed is not disclosed as an "other charge," although it may be required to be disclosed under *12 C.F.R. § 213.4(q)* (one of the nonsegregated disclosures listed in [c], *above*) [12 C.F.R. pt. 213, supp. I, comment 4(d)-6].

- The total of payments, which is the sum of the amounts described in the first three items above, with a description such as "the amount you will have paid by the end of the lease" [*12 C.F.R. § 213.4(e)*].

PRACTICE TIP:

The total contractual obligation is not necessarily the same as the total of payments disclosed under *12 C.F.R. § 213.4(e)*. The total contractual obligation includes nonrefundable amounts that a lessee is contractually obligated to pay to the lessor, but it excludes items such as residual value amounts or purchase-option prices and amounts collected by the lessor but paid to another, such as taxes, licenses, and registration fees [12 C.F.R. pt. 213, supp. I, comment 2(e)-3]. The total of payments is relevant only to open-end leases, because the lessee's liability at the end of the lease term is based on the difference between the residual value of the leased property (or the adjusted lease balance) and its realized value; nevertheless, disclosure of the total of payments is required for closed-end leases as well. In the case of an open-end lease, a description such as "you will owe an additional amount if the actual value of the vehicle is less than the residual value" must accompany the disclosure [*12 C.F.R. § 213.4(e)*; 12 C.F.R. pt. 213, supp. I, comment 4(e)-1], as shown in [3], below. An "open-end lease" (also called a finance lease) is simply a consumer lease in which the lessee's liability at the end of the lease term is based on the difference between the residual value of the leased property and its realized value [*12 C.F.R. § 213.2(i)*]. A "closed-end lease" (also called a net lease or walk-away lease) is a consumer lease other than an open-end lease [*12 C.F.R. § 213.2(d)*]. In closed-end leases, the lessee is not responsible for the residual value of the leased property at the end of the lease term [12 C.F.R. pt. 213, supp. I, comment 2(d)-1; *see* [5], *below*]. Therefore, realized value is not a required disclosure except in connection with an open-end lease.

- An itemization of the "amount due at lease signing" [*12 C.F.R. § 213.4(b)*].

PRACTICE TIP:

The lessor must itemize each component by type and amount, including any refundable security deposit, advance monthly or other periodic payment, and capitalized cost reduction, in a format substantially similar to the model forms in Appendix A of Regulation M [*12 C.F.R. § 213.4(b)*; *see* 12 C.F.R. pt. 213, app. A]. Those model forms

are reproduced in [3] and [5], *below*. (As reproduced here, the forms include in this itemization space to include a California-mandated disclosure of an optional amount, a "document preparation fee" [*see Civ. Code* § 2985.8(c)(5)]; for discussion, *see* § 47.221[1][g]. If the lessor charges an optional business partnership automation fee to register or transfer the vehicle, this fee must also be listed. It must be labeled "Optional DMV Electronic Filing Fee" [*see Civ. Code* § 2985.8(c)(6); for discussion, *see* § 47.221[1][i]].) A capitalized cost reduction is a payment in the nature of a down payment on the leased property that reduces the amount to be capitalized over the term of the lease. This amount does not include any amounts included in a periodic payment paid at lease signing or delivery [12 C.F.R. pt. 213, supp. I, comment 4(b)-2]. The total for the column labeled "amount due at lease signing" must equal the total for the column labeled "how the amount due at lease signing will be paid" [12 C.F.R. pt. 213, supp. I, comment 4(b)-5].

- An itemization of how the "amount due at lease signing" will be paid [12 C.F.R. § 213.4(b)].

PRACTICE TIP:

The lessor must itemize how the amount due will be paid, by type and amount, including any net trade-in allowance, rebates, noncash credits, and cash payments, in a format substantially similar to the model forms in Appendix A of Regulation M [12 C.F.R. § 213.4(b); *see* 12 C.F.R. pt. 213, app. A; *see also* [3], [5], *below*]. If an amount owed on a prior lease or credit balance exceeds the agreed value of a trade-in, the difference is not reflected as a negative trade-in allowance under 12 C.F.R. § 213.4(b). The lessor may disclose the trade-in allowance as zero or not applicable, or may leave a blank line [12 C.F.R. pt. 213, supp. I, comment 4(b)-3]. Only rebates applied toward an amount due at lease signing or delivery are required to be disclosed [12 C.F.R. pt. 213, supp. I, comment 4(b)-4]. The term "cash" is intended to include payments by check or a similar payment medium in addition to currency payments; however, the lessor may add a line item in the column labeled "how the amount due at lease signing or delivery will be paid," for a noncurrency payment medium such as a credit card [12 C.F.R. pt. 213, supp. I, comment 4(b)-6]. The total for the column labeled "amount due at lease signing" must equal the total for the column labeled "how the amount due at lease signing will be paid" [12 C.F.R. pt. 213, supp. I, comment 4(b)-5].

- A mathematical progression of how the scheduled periodic payment is derived [*see* [e], *below*], in a format substantially similar to the applicable model form in Appendix A of Regulation M [12 C.F.R. § 213.4(f)].

- If the lessee is liable at the end of the lease term for the difference between the residual value of the leased property and its realized value: a statement of the rent and other charges, paid by the lessee and required by the lessor as an incident to the lease transaction, with a description such as "the total amount of rent and other charges imposed in connection with your lease is \$ _____ [*specify amount*]" [12 C.F.R. § 213.4(m)(1)].

PRACTICE TIP:

This disclosure is intended to represent the cost of financing an open-end lease based on charges and fees that the lessor requires the lessee to pay. Examples of disclosable charges, in addition to the rent charge, include acquisition, disposition, or assignment fees. Charges imposed by a person whose services are not required by the lessor (such as official fees and voluntary insurance) are not included in this disclosure [12 C.F.R. pt. 213, supp. I, comment 4(m)(1)-1].

- A notice substantially similar to the following: "Early Termination. You may have to pay a substantial charge if you end this lease early. The charge may be up to several thousand dollars. The actual charge will depend on when the lease is terminated. The earlier you end the lease, the greater this charge is likely to be" [12 C.F.R. § 213.4(g)(2)].
- A notice regarding wear and use substantially similar to the following (also specifying the amount or method for determining any charge for excess mileage): "Excessive Wear and Use. You may be charged for excessive wear based on our standards for normal use" [12 C.F.R. § 213.4(h)(3)].
- A statement of whether the lessee has the option to purchase the leased property at the end of the lease term and, if so, the purchase price [12 C.F.R. § 213.4(i)(1)].
- A statement that the lessee should refer to the lease documents for additional information on early termination, purchase options and maintenance responsibilities, warranties, late and default charges, insurance, and any security interests, if applicable [12 C.F.R. § 213.4(j)].

[e] Detailed Computation of Periodic Payment

A mathematical progression of how the scheduled periodic payment is derived must be disclosed and segregated from other information [12 C.F.R. §§ 213.3(a)(2), 213.4(f); see [d], above]. This must comprise the following items:

- The gross capitalized cost, including a disclosure of the agreed value of the vehicle, a description such as "the agreed upon value of the vehicle (\$ _____) and any items you pay for over the lease term (such as service contracts, insurance, and any outstanding prior credit or lease balance)" [12 C.F.R. § 213.4(f)(1)].

PRACTICE TIP:

"Gross capitalized cost" means the amount agreed on by the lessor and the lessee as the value of the leased property and any items that are capitalized or amortized during the lease term, including but not limited to taxes, insurance, service agreements, and any outstanding balance from a prior loan or lease [12 C.F.R. § 213.2(f)]. The agreed value of the vehicle includes the amount of capitalized items such as charges for vehicle accessories and options, and delivery or destination charges. The lessor may also include taxes and fees for title, licenses, and registration that are capitalized. Charges for service or maintenance contracts, insurance products, guaranteed automobile protection, or an outstanding balance on a prior lease or credit transaction are not included in the agreed value [12 C.F.R. pt. 213, supp. I, comment 4(f)(1)-1]. Regulation M also mandates a statement of the lessee's option to receive a separate written itemization of the gross capitalized cost (which, if requested by the lessee, must be provided before consummation) [12 C.F.R. § 213.4(f)(1)]. However, the lessor may elect to provide the itemization as a matter of course, in which case, the lessor need not provide a statement of the lessee's option to receive an itemization [12 C.F.R. pt. 213, supp. I, comment 4(f)(1)-2]. Since the California Vehicle Leasing Act requires the itemization to be provided [Civ. Code § 2985.8(c)(2); see § 47.221[1][h]], and that California law applies whenever Regulation M governs a lease transaction [see § 47.31[1][a]], and the California requirement is valid because it is not inconsistent with Regulation M [see 15 U.S.C. § 1667e(a); 12 C.F.R. § 213.9(a); § 47.30[9]], the lessor is bound to provide the itemization as a matter of course. For further discussion, see § 47.221[1][h].

- The capitalized cost reduction, which is the total amount of any rebate, cash payment, net trade-in allowance, and noncash credit that reduces the gross capitalized cost [12 C.F.R. § 213.2(f)], with a description such as "the amount of any net trade-in allowance, rebate, noncash credit, or cash you pay that reduces the gross capitalized cost" [12 C.F.R. § 213.4(f)(2)].
- The adjusted capitalized cost, which equals the gross capitalized cost less the capitalized cost reduction, and is the amount used by the lessor in computing the base periodic payment [12 C.F.R. § 213.2(f)], with a description such as "the amount used in calculating your base _____ [specify period, e.g., monthly] payment" [12 C.F.R. § 213.4(f)(3)].
- The residual value (which is the value of the leased property at the end of the lease term, as estimated or assigned at consummation by the lessor, used in computing the base periodic payment), with a description such as "the value of the vehicle at the end of the lease used in calculating your base _____ [specify period, e.g., monthly] payment" [12 C.F.R. § 213.4(f)(4); see 12 C.F.R. § 213.2(n) ("residual value" defined)].
- The depreciation and any amortized amounts, which is the difference between the adjusted capitalized cost and the residual value (see the preceding two items), with a description such as "the amount charged for the vehicle's decline in value through normal use and for any other items paid over the lease term" [12 C.F.R. § 213.4(f)(5)].
- The rent charge (which is the remainder of the total of the base periodic payments for the lease term minus the depreciation and minus any amortized amounts), with a description such as "the amount charged in addition to the depreciation and any amortized amounts" [12 C.F.R. § 213.4(f)(6)].
- The total of base periodic payments with a description such as "depreciation and any amortized amounts plus the rent charge" [12 C.F.R. § 213.4(f)(7)].
- The lease term, which is the number of periodic payments [12 C.F.R. pt. 213, supp. I, comment 4(f)(8)-1], with a description such as "the number of _____ [specify periods of repayment, e.g., months] in your lease" [12 C.F.R. § 213.4(f)(8)].
- The total of the base periodic payments divided by the number of payment periods in the lease [12 C.F.R. § 213.4(f)(9)].
- An itemization of any other charges included in the computation of the periodic payment [12 C.F.R. § 213.4(f)(10)].
- The sum of the base periodic payment plus any itemized other charges (the preceding item) [12 C.F.R. § 213.4(f)(11)].

[f] Additional and California Disclosures

Additional information may be provided with any disclosure that is not required to be segregated, but it must not be stated, used, or placed so as to mislead or confuse the lessee or to contradict, obscure, or detract attention from any disclosure required by Regulation M [12 C.F.R. § 213.3(b)]. For instance, a lessor may include in the nonsegregated disclosures any state law disclosures that are not inconsistent with the CLA and Regulation M [see 12 C.F.R. § 213.9; § 47.30[9]] as long as, in accordance with the standard set forth in 12 C.F.R. § 213.3(b) for additional information, the state law disclosures are not used or placed so as to mislead or confuse or detract from any disclosure required by Regulation M [12 C.F.R. pt. 213, supp. I, comment 3(b)-1].

For discussion of additional California disclosures and a vehicle lease form complying with California law, see § 47.221.

[g] Alterations and Modifications of Model Forms

Although use of the model forms is not required, lessors using them properly will be deemed to be in compliance with Regulation M [see [a], *above*]. Generally, lessors may make certain changes in the format or content of the forms without losing the CLA's protection from liability. For example, the model form based on monthly periodic payments may be modified for single-payment lease transactions or for quarterly or other periodic payments. Lessors also may delete any disclosures that are inapplicable to a transaction; for example, if a lease does not include a security interest, disclosures concerning a security interest may be omitted [12 C.F.R. pt. 213, supp. I, comment 4(j)-1; see 12 C.F.R. § 213.4(j); [c], *above*]. The content, format, and headings for the segregated disclosures must be substantially similar to those contained in the model forms; therefore, any changes should be minimal. The changes to the model forms should not be so extensive as to affect the substance and the clarity of the disclosures [12 C.F.R. pt. 213, supp. I, comment app. A-1]. Examples of acceptable changes include the following [12 C.F.R. pt. 213, supp. I, comment app. A-2]:

- Using the first person, instead of the second person, in referring to the lessee.
- Using "lessee" and "lessor" or names instead of pronouns.
- Rearranging the sequence of the nonsegregated disclosures [see [c], *above*].
- Incorporating certain state "plain English" requirements.
- Deleting inapplicable disclosures by blocking out, filling in "N/A" (not applicable) or "0" (zero), crossing out, leaving blanks, checking boxes for applicable items, or circling applicable items (which is expected to facilitate the use of multi-purpose standard forms).
- Adding language or symbols to indicate estimates [see § 47.30[3][b]].
- Adding numeric or alphabetic designations.
- Rearranging the disclosures into vertical columns, except for certain segregated disclosures required by 12 C.F.R. § 213.4(b)-(e) [see [d], *above*].
- Using icons and other graphics.

[h] Lessee's Signature

Regulation M does not require that the lessee sign the disclosure statement, whether disclosures are separately provided or are part of the lease. Nevertheless, to provide evidence that disclosures are given before a lessee becomes obligated on the lease transaction, the lessor may, for example, ask the lessee to sign the disclosure statement or an acknowledgment of receipt, may place disclosures that are included in the lease documents above the lessee's signature, or may include instructions alerting a lessee to read the disclosures before signing the lease [12 C.F.R. pt. 213, supp. I, comment 3(a)(1)-5].

[i] Electronic Disclosures

The disclosures required by the Consumer Leasing Act (CLA) [15 U.S.C. § 1667 *et seq.*] and Regulation M [12 C.F.R.

§ 213.1 et seq.] may be provided to the lessee in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) [15 U.S.C. § 7001 et seq.] [12 C.F.R. § 213.3(a); see 12 C.F.R. § 213.4 (content of disclosures, discussed in § 47.220[1][b], [c], above]. For an advertisement accessed by the consumer in electronic form, the required disclosures may be provided to the consumer in electronic form in the advertisement, without regard to the consumer consent or other provisions of the E-Sign Act [12 C.F.R. § 213.3(a); see 12 C.F.R. § 213.7 (advertisements)].

The disclosures must be made clearly and conspicuously in writing in a form the consumer may keep [12 C.F.R. § 213.3(a)]. Electronic disclosures are subject to this requirement [see 12 C.F.R. § 213.3(a)].

[2] FORM--Draft of Model Disclosures

Draft of Model Disclosures

Federal Consumer Leasing Act Disclosures

Date _____

Lessor(s) _____

Lessee(s) _____

[The following disclosures must be segregated from other information; see model forms in [3] and [5], below.]

Amount Due at Lease Signing (itemized below)* \$ _____

Monthly Payments

Your first monthly payment of \$ _____ is due on _____, followed by _____ payments of \$ _____ due on the _____ of each month. The total of your monthly payments is \$ _____.

Other Charges (not part of your monthly payment)

Disposition fee (if you do not purchase the vehicle) \$ _____

[Annual tax] [\$ _____]

_____ [list separately each additional charge, if any] \$ _____

Total \$ _____

Total of Payments (the amount you will have paid by the end of the lease) \$ _____

*** Itemization of Amount Due at Lease Signing**

Amount Due at Lease Signing:

Capitalized cost reduction	\$ _____
First monthly payment	\$ _____
Refundable security deposit	\$ _____
Title fees	\$ _____
Registration fees	\$ _____
_____ [list separately each additional component, if any, such as lessor's documentation fee or Optional DMV Electronic Filing Fee]	\$ _____
Total	\$ _____

How the Amount Due at Lease Signing will be paid:

Net trade-in allowance	\$ _____
Rebates and noncash credits	\$ _____
Amount to be paid in cash	\$ _____
Total	\$ _____

Your monthly payment is determined as shown below:

Gross capitalized cost. The agreed upon value of the vehicle (\$ _____) and any items you pay over the lease term (such as service contracts, insurance, and any outstanding prior loan or lease balance) \$ _____

If you want an itemization of this amount, please check this box. ☐

Capitalized cost reduction. The amount of any net trade-in allowance, rebate, noncash credit, or cash you pay that reduces the gross capitalized cost \$ _____

Adjusted capitalized cost. The amount used in computing your base monthly payment \$ _____

Residual value. The value of the vehicle at the end of the lease used in computing your base monthly payment \$ _____

Depreciation and any amortized amounts. The amount charged for the vehicle's decline in value through normal use and for other items paid over the lease term \$ _____

Rent charge. The amount charged in addition to the depreciation and any amortized amounts \$ _____

Total of base monthly payments. The depreciation and any \$ _____

amortized amounts plus the rent charge

Lease term. The number of months in your lease _____

Base monthly payment. \$ _____

Monthly sales/use tax. \$ _____

_____ [list separately each additional component, if any, of monthly payment] \$ _____

Total monthly payment \$ _____

[In open-end (finance) lease only, include provision on rent and other charges:]

Rent and other charges. The total amount of rent and other charges imposed in connection with your lease is \$ _____.

[Continue]

Early Termination. You may have to pay a substantial charge if you end this lease early. The charge may be up to several thousand dollars. The actual charge will depend on when the lease is terminated. The earlier you end the lease, the greater this charge is likely to be.

Excessive Wear and Use. You may be charged for excessive wear based on our standards for normal use [and for mileage in excess of _____ miles per year at the rate of \$ _____ per mile].

Purchase Option at End of Lease Term. You _____ [have an option to purchase the vehicle at the end of the lease term for \$ _____ (and a purchase option fee of \$ _____) or do not have an option to purchase the vehicle at the end of the lease term].

Other Important Terms. See your lease documents for additional information on early termination, purchase options and maintenance responsibilities, warranties, late and default charges, insurance, and any security interest, if applicable.

[The following disclosures are not required to be segregated; see model forms in [4] and [6], below.]

Official Fees and Taxes. The total amount you will pay for official and license fees, registration, title, and taxes over the term of your lease, whether included with your monthly payments or assessed otherwise: \$ _____.

Insurance. The following types and amounts of insurance will be acquired in connection with this lease: [specify, and check applicable paragraph below].

_____ We (lessor) will provide the insurance coverage quoted above for a total premium cost of \$ _____.

_____ You (lessee) agree to provide insurance coverage in the amount and types indicated above.

[In open-end lease only, include provision on end-of-term liability:]

End of Term Liability.

(a) The residual value (\$ _____) of the vehicle is based on a reasonable, good faith estimate of the value of the vehicle at the end of the lease term. If the actual value of the vehicle at that time is greater than the residual value, you will have no further liability under this lease, except for other charges already incurred [and are entitled to a credit or refund of any surplus]. If the actual value of the vehicle is less than the residual value, you will be liable for any difference up to \$ _____ (3 times the monthly payment). For any difference in excess of that amount, you will be liable only if:

1. Excessive use or damage [as described in paragraph _____ and/or representing more than normal wear and use] resulted in an unusually low value at the end of the term.
2. The matter is not otherwise resolved and we win a lawsuit against you seeking a higher payment.
3. You voluntarily agree with us after the end of the lease term to make a higher payment.

Should we bring a lawsuit against you, we must prove that our original estimate of the value of the leased property at the end of the lease term was reasonable and was made in good faith. For example, we might prove that the actual value was less than the original estimated value, although the original estimate was reasonable, because of an unanticipated decline in value for that type of vehicle. We must also pay your attorney's fees.

(b) If you disagree with the value we assign to the vehicle, you may obtain, at your own expense, from an independent appraiser agreeable to both of us, a professional appraisal of the _____ value of the leased vehicle that could be realized at sale. The appraised value shall then be used as the actual value.

[Continue]

Standards for Wear and Use. The following standards are applicable for determining unreasonable or excess wear and use of the leased vehicle: [specify].

Maintenance. [You are responsible for the following maintenance and servicing of the leased vehicle: _____ (specify).] [We are responsible for the following maintenance and servicing of the leased vehicle: _____ (specify).]

Warranties. The leased vehicle is subject to the following express warranties: [specify].

Early Termination and Default.

(a) You may terminate this lease before the end of the lease term under the following conditions:
_____.

The charge for such early termination is: [specify or explain how determined].

(b) We may terminate this lease before the end of the lease term under the following conditions:
_____.

Upon such termination we shall be entitled to the following charge(s) for: _____.

(c) To the extent these charges take into account the value of the vehicle at termination, if you disagree with the value we assign to the vehicle, you may obtain, at your own expense, from an independent appraiser agreeable to both of us, a professional appraisal of the _____ value of the leased vehicle that could be realized at sale. The appraised value shall then be used as the actual value.

Security Interest. We reserve a security interest of the following type in the property listed below to secure performance of your obligations under this lease: _____.

Late Payments. The charge for late payments is: *[specify or explain how determined]*.

Option to Purchase Leased Property Prior to the End of the Lease. You _____ [do not have an option to purchase the leased vehicle *or* have an option to purchase the leased vehicle before the end of the term. The price will be _____ (*specify or explain method of determining price*)].

[3] FORM--Open-End (Finance) Vehicle Lease--Model Segregated Disclosures [12 C.F.R. pt. 213, app. A-1]

Open-End (Finance) Vehicle Lease--Model Segregated Disclosures [12 C.F.R. pt. 213, app. A-1]

[Click here to view image.](#)

[4] FORM--Open-End (Finance) Vehicle Lease--Model Nonsegregated Disclosures [12 C.F.R. pt. 213, app. A-1]

Open-End (Finance) Vehicle Lease--Model Nonsegregated Disclosures [12 C.F.R. pt. 213, app. A-1]

[Click here to view image.](#)

[5] FORM--Closed-End (Net or Walk-Away) Vehicle Lease--Model Segregated Disclosures [12 C.F.R. pt. 213, app. A-2]

Closed-End (Net or Walk-Away) Vehicle Lease--Model Segregated Disclosures [12 C.F.R. pt. 213, app. A-2]

[Click here to view image.](#)

[6] FORM--Closed-End (Net or Walk-Away) Vehicle Lease--Model Nonsegregated Disclosures [12 C.F.R. pt. 213, app. A-2]

Closed-End (Net or Walk-Away) Vehicle Lease--Model Nonsegregated Disclosures [12 C.F.R. pt. 213, app. A-2]

[Click here to view image.](#)

[7] FORM--Example of Nonsegregated Disclosures

Example of Nonsegregated Disclosures

Official Fees and Taxes. The total amount you will pay for official and license fees, registration, title, and taxes over the term of your lease, whether included with your monthly payments or assessed otherwise: \$ _____.

Insurance. The following types and amounts of insurance will be acquired in connection with this lease: Primary

insurance coverage that we consider acceptable, at the following benefit limits:

(a) Collision (replacement value): \$ _____.

(b) Comprehensive (replacement value): \$ _____.

_____ We (the Lessor) will provide the insurance coverage quoted above for a total premium cost of \$ _____.

_____ You (the Lessee) agree to provide insurance coverage in the amount and types indicated above.

[Include the following provision on end-of-term liability in open-end (finance) lease:]

End of Term Liability. (a) The residual value (\$ _____) of the vehicle is based on a reasonable, good faith estimate of the value of the vehicle at the end of the lease term. If the actual value of the vehicle at that time is greater than the residual value, you will have no further liability under this lease, except for other charges already incurred [and are entitled to a credit or refund of any surplus]. If the actual value of the vehicle is less than the residual value, you will be liable for any difference up to \$[insert amount up to three times monthly payment]. For any difference in excess of that amount, you will be liable only if:

1. Excessive use or damage [representing more than normal wear and use] resulted in an unusually low value at the end of the term.
2. The matter is not otherwise resolved and we win a lawsuit against you seeking a higher payment.
3. You voluntarily agree with us after the end of the lease term to make a higher payment.

Should we bring a lawsuit against you, we must prove that our original estimate of the value of the leased property at the end of the lease term was reasonable and was made in good faith. For example, we might prove that the actual value was less than the original estimated value, although the original estimate was reasonable, because of an unanticipated decline in value for that type of vehicle. We must also pay your attorney's fees.

(b) If you disagree with the value we assign to the vehicle, you may obtain, at your own expense, from an independent appraiser agreeable to both of us, a professional appraisal of the [wholesale or retail] value of the leased vehicle that could be realized at sale. The appraised value shall then be used as the actual value.

[Continue:]

Standards for Wear and Use. The following standards are applicable for determining unreasonable or excess wear and use of the leased vehicle:

- (a) You will not allow the vehicle to be loaded, garaged, or used negligently or illegally, to be used as a public or private carrier, to become security for money owed to someone else, or to be taken from California to another state for an extended period, or outside the United States at all, without our written permission.
- (b) You will not, nor will you allow anyone else to, use the vehicle for any illegal purpose or for any purpose for which it was not intended, or operate it in any illegal or dangerous manner, or operate the vehicle in any manner that would cause cancellation or suspension of the insurance coverage required under this lease or would cause any applicable

manufacturer's warranty to become void.

(c) You must give us immediate written notice of any of these events: theft or loss of the vehicle, damage to the vehicle, an accident involving the vehicle, and any claims or demands related to such theft, loss, damage, or accident. You must assist us and any insurer in investigating and defending any such claim or demand and in making any claims that we have against someone else.

(d) _____ [in open-end (finance) lease, add if desired: The estimated residual value of the vehicle may be affected by your driving the vehicle in excess of _____ (specify, e.g., 10,000) miles a year. If that mileage limit is exceeded, you will pay the additional sum of \$ _____ for each mile over that limit. In the event of early termination of this lease, the excess-mileage charge, if any, will be prorated].

Maintenance. You are responsible for the following maintenance and servicing of the leased vehicle:

(a) You bear all risk of loss or destruction of the vehicle and all risk of damage to it.

(b) You will, at your own expense, have the vehicle serviced according to the manufacturer's recommendations and in compliance with the requirements of the manufacturer's warranties, if any. You will keep the vehicle in good operating order, repair, and appearance, and have all necessary repairs made.

(c) In the event of damage you will have the vehicle repaired promptly. If it is repaired satisfactorily and if we receive any insurance payment to cover the damage, we will turn the money over to you.

(d) If the vehicle is lost, stolen, confiscated, or damaged beyond repair, this lease ends. In that event your obligations will be figured as in a case of early termination at your option, described below, with this change: net sale value will be computed by adding all payments that we receive from insurance coverage and from sale or salvage of the vehicle.

(e) Without our prior written consent, you will not make changes to the vehicle that may decrease the vehicle's value or performance or limit its use.

Warranties. The leased vehicle is subject to the following express warranties: None. We make no warranties, express or implied, concerning the vehicle. We will not be responsible for any harm or loss that anyone suffers because of use or loss of use of the vehicle. We will give you a copy of the vehicle manufacturer's warranty.

Early Termination and Default. (a) You may terminate this lease before the end of the lease term under the following conditions: Only after it has been in effect for one year, and then only if you are currently in compliance with all your duties under this lease. To end this lease you must return the vehicle to the place of return specified in this lease and pay both the early termination charge specified below and any additional rentals required by this paragraph. Within 10 days after you return the vehicle, we must try to get three offers to buy the vehicle for cash, as well as accept any offer made by a person whom you name. We will determine "net sale value" by starting with the highest good faith offer and deducting from it any taxes, renovation costs, and official fees that we would have to pay to make the sale. We will also determine the "accumulated depreciation reserve" as follows. The "accumulated depreciation reserve" is \$ _____ (which is the portion of your basic monthly payment designated to cover depreciation of the vehicle) times the number of monthly payments that you have made. If the net sale value plus the accumulated depreciation reserve is more than the initial value of the vehicle, we will pay you the excess, but only after deducting the early termination charge. However, if the net sale value plus the accumulated depreciation reserve adds up to less than the initial value of the vehicle, you must pay us the difference, along with the early termination charge.

The charge for such early termination is \$ _____.

(b) We may terminate this lease before the end of the lease term under the following conditions: If you violate any term of this lease, die, become incompetent or insolvent, become the subject of legal action under any bankruptcy, insolvency, reorganization, or receivership laws, cancel required insurance on the vehicle, are determined by any insurer to be an uninsurable risk at standard rates, attempt to turn the vehicle or your rights under this lease over to someone else, or attempt to use the vehicle or this lease to secure an obligation to someone else, or if the vehicle is damaged beyond repair, or lost, destroyed, stolen, abandoned, or confiscated. We may then exercise any and all of our rights under this lease and also any others provided by law.

On such a termination, we shall be entitled to keep prior payments and retake and sell the vehicle. If we sell the vehicle, we may accept the highest cash offer then available to us. Whether you then owe us additional rent or we owe you a refund will be determined as in a case of early termination at your option, described above. You must pay us all reasonable costs of collection, repossession, storage, sale, attorney's fees, and other expenses of enforcing our rights under this lease.

Security Interest. We reserve a security interest of the following type in the property listed below to secure performance of your obligations under this lease: *[specify interest]* in *[describe property]*. We may use this security to cover any amount that you owe us under any part of this lease and fail to pay; but if you meet all of your obligations under the lease, we will return the deposit to you after the lease term expires.

Late Payments. The charge for late payments is \$ _____.

Option to Purchase Leased Vehicle Prior to the End of the Lease. You have an option to purchase the leased vehicle prior to the end of the term. The price will be either (a) _____ percent of the current wholesale value of the vehicle, including accessories, as indicated in the Western edition of the Kelley Blue Book or (b) the adjusted lease balance, whichever amount is greater. The "adjusted lease balance" equals the initial value of the vehicle minus the sum of the capitalized cost reduction, trade-in allowance, and monthly payments to date.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Consumer Leasing General Overview Banking Law Consumer Protection Consumer Leasing Disclosure Contracts Law Types of Contracts Lease Agreements Personalty Leases General Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 47 AUTOMOTIVE FINANCING AND VEHICLE LEASING
PART IV. FORMS
B. Vehicle Leasing

20-47 California Legal Forms--Transaction Guide § 47.221

§ 47.221 Consumer Vehicle Lease--Term Exceeding Four Months [Civ. Code § 2985.8]

[1] Comment

[a] Use of Form

This form may be used to draft a consumer vehicle lease for a term exceeding four months, in conformity with the Vehicle Leasing Act [Civ. Code § 2985.7 *et seq.*]. The resulting document will include not only disclosures and statements required by the Vehicle Leasing Act, but also disclosures mandated by Regulation M [12 C.F.R. pt. 213], in the format prescribed by that regulation [see § 47.220]. For additional discussion of the applicable requirements, see § 47.31.

See § 47.225 for an automobile rental agreement for a term not exceeding four months. Such an agreement is not governed by either the Vehicle Leasing Act or the Consumer Leasing Act and Regulation M.

[b] Form and Format of Lease

The lease must be in writing, and the printed portion must be in at least eight-point type and contain in a single document all of the agreements of the lessor and lessee with respect to the obligations of each party [Civ. Code § 2985.8(a); see *Kroupa v. Sunrise Ford* (1999) 77 Cal. App. 4th 835, 843-844, 92 Cal. Rptr. 2d 42 (finding violation of § 2985.8(a) when there was a single transaction involving two trade-ins and new truck lease but no single document containing "all the agreements" regarding parties' obligations)]. At the top of the lease must be a title containing the words "LEASE CONTRACT" or "LEASE AGREEMENT," which must be in at least 12-point boldface type [Civ. Code § 2985.8(b)]. For the lessor to be in compliance with both the Vehicle Leasing Act and also Regulation M, respecting the contents and format of the lease, the document may be constructed as follows:

- The first page must contain notices prescribed by the Vehicle Leasing Act [see [c], [e], *below*]. The notices may appear anywhere on the first page. Placing them immediately below the title would minimize problems in creating the other parts of the document. An additional required notice [see [d], *below*] could conveniently be placed there as well, for the same reason, even though it need not appear

on the first page.

- The text of the document (that is, the drafted provisions of the lease), including statements required by the Vehicle Leasing Act [see [f], *below*], may be laid out following the required notices. Many provisions that would normally appear in the text will be supplanted by references to the Regulation M disclosures, which must be included in the document and will contain many of the essential terms of the parties' agreement.
- The Regulation M segregated disclosures, which will have to be entirely on a separate page with no other information [see § 47.220[3], [5]], should be placed next. (These disclosures are required by the Vehicle Leasing Act and so must appear even in a lease that is not governed by Regulation M.) This page may be used also for some information that the Vehicle Leasing Act requires [see [g], *below*].
- On the next succeeding page should be an itemization of the gross capitalized cost [see [h], *below*]. This should be placed first on the page, since it must appear "immediately following or directly adjacent to" the Regulation M segregated disclosures [Civ. Code § 2985.8(c)(2)].
- The Regulation M nonsegregated disclosures [see § 47.220[4], [6]] (which are required by the Vehicle Leasing Act and so must appear even in a lease that is not governed by Regulation M) may begin next after the itemization of gross capitalized cost. These disclosures need not be set apart on a separate page. The prescribed format for these disclosures is a standard paragraph format (that is, no elements for emphasis, such as enclosing boxes and boldface type, are required).
- Finally, just above the signature lines, as prescribed by the Vehicle Leasing Act, must appear a warning to the lessee and, if required by the lessor, an acknowledgment of the lessee's having received an executed copy of the lease [see [j], [k], *below*].

If a language other than English is the primary language used for negotiations with a consumer with respect to a contract under the Vehicle Leasing Act, the consumer (and any other party to the contract) may have to be provided with a translation of the contract in that other language [Civ. Code; see § 47.14]. For contracts entered into prior to July 1, 2004, this requirement applied only to contracts negotiated primarily in Spanish. On and after July 1, 2004, it applies to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [see Civ. Code § 1632]. For detailed discussion of these requirements, and exceptions, see *Ch. 45, Consumer Installment Loans and Credit Sales*, § 45.64.

[c] Warning About Cooling Off Period

The lease must contain, in at least eight-point bold face type, on the first page of the contract and circumscribed by a line, the following notice [Civ. Code § 2985.8(e)]:

"THERE IS NO COOLING OFF PERIOD

"California law does not provide for a 'cooling off' or other cancellation period for vehicle leases. Therefore, you cannot later cancel this lease simply because you change your mind, decided the vehicle costs too much, or wish you had acquired a different vehicle. You may cancel this lease only with the agreement of the lessor or for legal cause, such as fraud."

[d] Credit Disapproval Notice

The lease must contain, in at least eight-point boldface type, the following notice [Civ. Code § 2985.8(f)]:

"You have the right to return the vehicle, and receive a refund of any payments made if the credit application is not approved, unless nonapproval results from an incomplete application or from incorrect information provided by you."

[e] Insurance-Gap Liability Warning

If the lease contains a provision that holds the lessee liable for the difference between (1) the adjusted capitalized cost disclosed in the lease reduced by the amounts described in *Civ. Code* § 2987(b)(5)(A) [see § 47.32[3]] and (2) the settlement proceeds of the lessee's required insurance and deductible in the event of theft or damage to the vehicle that results in a total loss, the lease must contain the following notice in at least eight-point boldface type on the first page of the contract [*Civ. Code* § 2985.8(j)]:

"GAP LIABILITY NOTICE

"In the event of theft or damage to the vehicle that results in a total loss, there may be a GAP between the amount due upon early termination and the proceeds of your insurance settlement and deductible. THIS LEASE PROVIDES THAT YOU ARE LIABLE FOR THE GAP AMOUNT. Optional coverage for the GAP amount may be offered for an additional price."

[f] Property Descriptions

The lease must contain the following information:

- The vehicle identification number of the leased vehicle [*Civ. Code* § 2985.8(c)(3)].
- A brief description of each vehicle or other property being traded in and the agreed-on value of that property, if the amount due at the time of signing the lease or on delivery is paid in whole or in part with a net trade-in allowance or the "Itemization of Gross Capitalized Cost" includes any portion of the outstanding prior credit or lease balance from the trade-in property [*Civ. Code* § 2985.8(c)(4)]; see [h], below (Itemization of Gross Capitalized Cost).

[g] Documentation Fee

The lease must state the fee, if any, to be retained by the lessor for document preparation, which must not exceed \$45 and may not be represented as a governmental fee [*Civ. Code* § 2985.8(c)(5)].

PRACTICE TIP:

A documentation fee must be disclosed under Regulation M as one of the components of the "amount due at lease signing" [see § 47.220[1][d]], if it would be collected when the lease is signed. By listing it on the Regulation M disclosure form (as, for example, a "document preparation fee"), the lessor would be in compliance with both the Vehicle Leasing Act and Regulation M.

[h] Itemization of Gross Capitalized Cost

PRACTICE TIP:

A lease entered into before January 1, 2002 will not necessarily conform to the requirements of the separate "Itemization of Gross Capital Costs" listed below, but rather is subject to the pre-2002 requirements. The requirements listed below apply only to leases entered into on or after January 1, 2002 [see Stats. 2001 ch. 287, §§ 2, 5].

The contract must contain a separate statement labeled "Itemization of Gross Capitalized Cost" that appears

immediately following or directly adjacent to the disclosures required to be segregated by Regulation M [*Civ. Code* § 2985.8(c)(2); *see* 12 C.F.R. § 213.3(a)(2) (segregated disclosures); § 47.220[1][d]]. The itemization of gross capitalized cost must include all of the following and be circumscribed by a line:

- The agreed value of the vehicle, as equipped at the time of the lease signing [*Civ. Code* § 2985.8(c)(2)(A)].
- The agreed-on value and a description of each accessory and item of optional equipment the lessor agrees to add to the vehicle after the lease signing [*Civ. Code* § 2985.8(c)(2)(B)].
- The premium for each policy of insurance [*Civ. Code* § 2985.8(c)(2)(C)].
- The amount charged for each service contract [*Civ. Code* § 2985.8(c)(2)(D)].
- Any charge for an optional debt cancellation agreement [*Civ. Code* § 2985.8(c)(2)(E)].
- Any outstanding prior credit or lease balance [*Civ. Code* § 2985.8(c)(2)(F)].
- An itemization by type and agreed-on value of each good or service included in the gross capitalized cost other than those items included in the required disclosures listed above [*Civ. Code* § 2985.8(c)(2)(G)].

PRACTICE TIP:

Under Regulation M, this itemization is optional. Regulation M mandates a statement of the lessee's option to receive a separate written itemization of the gross capitalized cost (which, if requested by the lessee, must be provided before consummation) [12 C.F.R. § 213.4(f)(1)]. However, the lessor may elect to provide the itemization as a matter of course, in which case, the lessor need not provide a statement of the lessee's option to receive an itemization [12 C.F.R. pt. 213, supp. I, comment 4(f)(1)-2]. Since the California Vehicle Leasing Act requires the itemization to be provided [*Civ. Code* § 2985.8(c)(2); *see* § 47.221[1][h]], and that California law applies whenever Regulation M governs a lease transaction [*see* § 47.31[1][a]], and the California requirement is valid because it is not inconsistent with Regulation M [*see* 15 U.S.C. § 1667e(a); 12 C.F.R. § 213.9(a); § 47.30[9]], the lessor is bound to provide the itemization as a matter of course.

Under Regulation M, the gross capitalized cost must be itemized by type and amount. The lessor may include in the itemization an identification of the items and amounts of some or all of the items contained in the agreed value of the vehicle. The itemization must be provided at the same time as the other disclosures required by 12 C.F.R. § 213.4, but it may not be included among the segregated disclosures [12 C.F.R. pt. 213, supp. I, comment 4(f)(1)-2], which are described in § 47.220[1][d].

[i] Optional DMV Electronic Filing Fee

The lease must state the amount of any optional business partnership automation fee to register or transfer the vehicle. This fee must be labeled "Optional DMV Electronic Filing Fee" [*Civ. Code* § 2985.8(c)(6)].

[j] Preservation of Buyer's Claims and Defenses as Consumer

In connection with any financed lease of goods to consumers subject to the Truth in Lending Act [*see* 15 U.S.C. § 1601 *et seq.*] and Regulation Z [*see* 12 C.F.R. pt. 226], in or affecting interstate commerce, it is an unfair or deceptive act or practice under the Federal Trade Commission Act [*see* 15 U.S.C. § 45] for the lessor to take or receive a consumer

credit contract (such as a motor vehicle lease) that fails to contain the following provision, in at least 10-point boldface type [see 16 C.F.R. § 433.2; see also 16 C.F.R. § 433.1 (definitions); Ch. 45, *Consumer Installment Loans and Credit Sales*]:

"NOTICE

"ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER."

[k] Signatures and Related Contents

The lease must contain, in at least eight-point boldface type, above the space provided for the lessee's signature and circumscribed by a line, the following notice [*Civ. Code* § 2985.8(d)]:

"(1) Do not sign this lease before you read it or if it contains any blank spaces to be filled in.

"(2) You are entitled to a completely filled in copy of this lease.

"(3) Warning--Unless a charge is included in this lease for public liability or property damage insurance, payment for that coverage is not provided by this lease."

Any acknowledgment by the lessee of delivery of a copy of the lease (or purchase order and any vehicle lease proposal and any credit statement) that the lessor has required or requested the lessee to sign, and the lessee has signed, during the contract negotiations, must be printed or written in size equal to at least 10-point boldface type and, if contained in the contract, must appear directly above the space reserved for the lessee's signature [*Civ. Code* § 2986.4].

PRACTICE TIP:

The lessee's written acknowledgment, conforming to these requirements, of delivery of a completely filled in copy of the contract, and copies of other documents, constitutes a rebuttable presumption of delivery in any action or proceeding by or against a third party without knowledge to the contrary when the third party acquired an interest in the contract. If the third party furnishes the lessee copies of the documents, or a notice containing items set forth in *Civ. Code* § 2985.8(c) [see [b], [f]-[i]], and stating that the lessee must notify the third party in writing within 30 days if the lessee was not furnished copies of the documents, and no such notification is given, it must be conclusively presumed in favor of the third party that copies of the documents were furnished as required by the Vehicle Leasing Act [*Civ. Code* § 2986.4].

The lease must be signed by the lessor and lessee, or their authorized representatives, and an exact copy of the fully executed lease must be provided to the lessee at the time of signing [*Civ. Code* § 2985.8(g)].

[l] Liability Insurance Warning

This form includes an optional warning that no liability insurance is provided or required. Every dealer who, on transferring by lease any new or used vehicle of a type subject to registration, requires the lessee to insure the vehicle, if the required insurance policy is obtained by the dealer and does not insure the lessee against damages resulting from ownership or operation of the vehicle arising by reason of personal injury or death of any person, or from injury to property, must notify the lessee of that fact in writing on a document other than the insurance policy. The document must be in duplicate and signed by the lessee. This requirement also applies to lending agencies that as holders of

security interests in leased vehicles require their obligors to insure the vehicles [*Veh. Code* § 5604].

PRACTICE TIP:

The lease document, if in duplicate, will meet these requirements. The statute prescribes neither wording nor format nor placement for the warning. Although a similar warning is prescribed by the Vehicle Leasing Act [*see Civ. Code* § 2985.8(d); [i], above], it is not quite the same as the one required by *Veh. Code* § 5604.

[m] Arbitration Clause

This form includes an optional clause requiring arbitration of any dispute arising under the lease. For discussion and alternative arbitration clauses, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

[2] FORM

Consumer Vehicle Lease--Term Exceeding Four Months [Civ. Code § 2985.8]

[Title must be at top of first page in at least 12-point boldface type.]

LEASE CONTRACT

[Warning about cooling off period must be on first page of contract in at least 8-point boldface type and circumscribed by line; see [1][c], above:]

THERE IS NO COOLING OFF PERIOD

California law does not provide for a "cooling off" or other cancellation period for vehicle leases. Therefore, you cannot later cancel this lease simply because you change your mind, decided the vehicle costs too much, or wish you had acquired a different vehicle. You may cancel this lease only with the agreement of the lessor or for legal cause, such as fraud.

[Credit disapproval notice (see [1][d], above) must be in at least 8-point boldface type:]

You have the right to return the vehicle, and receive a refund of any payments made if the credit application is not approved, unless nonapproval results from an incomplete application or from incorrect information provided by you.

[Insurance-gap liability warning, if required, must be on first page of contract in at least 8-point boldface type; see [1][e], above:]

GAP LIABILITY NOTICE

In the event of theft or damage to the vehicle that results in a total loss, there may be a GAP between the amount due upon early termination and the proceeds of your insurance settlement and deductible. THIS LEASE PROVIDES THAT YOU ARE LIABLE FOR THE GAP AMOUNT. Optional coverage for the GAP amount may be offered for an additional price.

AGREEMENT

This agreement for the lease of the vehicle described below is made between _____ [name and address] ("Lessor") and _____ [name(s) and address(es)] ("Lessee").

1. **Leased Vehicle.** The subject of this lease is [describe vehicle sufficiently to identify it] (the "vehicle" or the "leased vehicle"). The vehicle identification number is: _____. The parties agree that the value of the vehicle at the date of execution of this lease is \$ _____ (the "initial value").

2. **Incorporated Disclosures.** This agreement is based in part on the terms and conditions stated in the "Federal Consumer Leasing Act Disclosures" (the "Disclosures") set out below. In the Disclosures, "you" and "your" refer to Lessee; "we" and "us" and "our" refer to Lessor.

3. **Lease Documents.** This single document contains the entire agreement between the Lessor and the Lessee concerning the leased vehicle. A reference in the Disclosures to "lease documents" is a reference solely to this document.

4. **Trade-In Vehicle.** The basis for computing the net trade-in allowance, if any, stated in the Disclosures and/or the outstanding prior credit or lease balance, if any, stated in the "Itemization of Gross Capitalized Cost" set out below is [briefly describe trade-in vehicle] having an agreed value of \$ _____.

5. **Lease Term.** This lease shall begin on the scheduled delivery date, _____ [date], or when the vehicle is available, whichever is later, and shall continue for the term stated in the Disclosures. If reasons beyond the Lessor's control either delay or prevent delivery of the vehicle, the Lessor shall have no liability to the Lessee for the delay or nondelivery. If there is a delay exceeding two weeks, the Lessee may require the Lessor to reschedule the due dates of the monthly payments provided for in the Disclosures, in accordance with the delay.

6. **Return of Vehicle.** When the lease expires or ends sooner, the Lessee will return the vehicle to the Lessor at the place of vehicle return specified below. The vehicle shall be free of damage, in good operating condition, and in good appearance, except for reasonable wear.

7. **Insurance.** If the Lessee agrees to provide insurance coverage in the amount and types indicated in the Disclosures, the Lessee shall arrange for, pay for, and keep up the insurance. The policy shall name the Lessor as additional insured and loss payee. The Lessee shall give the Lessor evidence that the Lessee has fulfilled this responsibility, including giving the Lessor the insurance policies or certificates if the Lessor asks for them. All comprehensive and collision insurance shall name the loss payee pursuant to Standard Form 49A--Loss Payable Endorsement or its equivalent. Each policy shall require at least 10 days written notice to the Lessor before any cancellation. If the Lessee fails to provide or keep up the insurance, the Lessor may obtain coverage benefitting the Lessor only and add the premiums to the balance owed to the Lessor. With respect to comprehensive and collision insurance, the Lessee appoints the Lessor as attorney in fact, with power to settle any claim, to sue in the Lessor's name and/or the Lessee's name, to add the expenses of suing to the Lessee's bill, to submit proofs of claim or loss in the Lessee's name, and to sign the Lessee's name to any settlement document or check. If an insurance company makes a payment under a comprehensive or collision policy that the Lessee is required to obtain, the payment must be to the Lessor. The Lessor will apply it first to amounts that the Lessee owes to the Lessor and will give the Lessee any part of the payment that is left over. The Lessee agrees not to cause the cancellation or suspension of insurance coverage on the vehicle.

8. **Costs During Use.** The Lessee shall pay all costs, fees, and taxes arising from the use, maintenance, and repair of the vehicle during the lease term. Among such expenses are registration fees and taxes as stated in the Disclosures. If the

Lessor pays amounts that the Lessee is responsible for, the Lessee shall repay the Lessor.

9. Parts and Accessories. All replacement parts and additions or accessories that are installed in the vehicle will become the Lessor's property.

10. Assignment. The Lessor may assign any or all of the Lessor's rights. The Lessee shall not assign rights without the Lessor's prior written permission and shall not sublet the vehicle.

11. Indemnity. If the Lessor, or anyone to whom the Lessor transfers rights, suffers any losses, claims, or expenses connected with the vehicle, the Lessee will indemnify the Lessor (or the party who holds the Lessor's rights). Such losses can include, among other things, obligations arising from manufacture, selection, delivery, possession, use, and return of the vehicle.

12. No Waiver of Rights. If the Lessor delays or refrains from exercising any right, the Lessor is not waiving or giving up that right or any other right, and the Lessor may assert it later.

13. Attorneys' Fees. Should any litigation be commenced between the parties for the enforcement of any rights of either party against the other pursuant to the provisions of this lease, or by reason of any alleged breach of any of the provisions of this lease, then, except as otherwise provided in the Disclosures, the party prevailing in the litigation shall be entitled to receive from the unsuccessful party all costs incurred in connection with the litigation, including a reasonable allowance for attorneys' fees incurred by the prevailing party.

14. Notices. Any notice that may or must be given to the Lessor may be mailed to _____[lessor's mail address]. Any notice that may or must be given to the Lessee may be mailed to the address shown below next to the Lessee's signature. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this lease or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served and given when personally delivered to a party [or a designated agent of a party] or, in lieu of personal service, when deposited in the United States mail, first-class postage prepaid, addressed to a party as provided in this paragraph. Either party may change the party's address for the purpose of this paragraph by giving written notice of the change to the other party in the manner provided in this paragraph.

15. Binding Agreement. This lease and each of its provisions shall be binding on and shall inure to the benefit of the respective heirs, devisees, legatees, executors, administrators, trustees, successors, and assigns of the parties. Nothing contained in this paragraph shall be construed as a consent by the Lessor to any assignment of rights or interest by the Lessee.

16. Time of the Essence. Time is of the essence in this lease and each provision contained in it.

17. Amendment. This lease may be amended only by a writing signed by the party against whom, or against whose successors and assigns, enforcement of the change is sought.

18. Partial Invalidity. Each provision of this lease is made and declared to be a material, necessary, and essential part of this lease. Nevertheless, if any term or provision of this lease or any application of this lease be held invalid or unenforceable, the remainder of this lease and any application of its terms and provisions shall not be affected but shall be valid and enforceable pursuant to this lease and California law.

19. Governing Law. This agreement shall be governed by and construed in accordance with the laws of California.

[Include provision for binding arbitration if desired; see [1][m], above:]

20. Arbitration. Any dispute that arises between the Lessor and the Lessee relating to the provisions of this lease shall be submitted to arbitration on application by either party. The arbitration panel shall consist of three persons; one each shall be appointed by the Lessor and the Lessee, and the third shall be jointly appointed by the appointees of the Lessor and the Lessee. The arbitration shall be conducted in compliance with *Code of Civil Procedure Section 1280 et seq.* relating to arbitration. The cost of the arbitration shall be divided evenly between the Lessor and the Lessee.

[Include provision on acceptance of vehicle if vehicle is delivered when lease is executed:]

21. Acceptance of Vehicle. The Lessee accepts the vehicle in its present condition. The Lessee agrees with, and represents to the Lessor, that the vehicle has been inspected by the Lessee and that the Lessee has been assured by means independent of the Lessor or any agent of the Lessor of the truth of all facts material to this lease and that the vehicle is being leased by the Lessee as a result of its inspection and investigation and not as a result of any representations made by the Lessor or any agent of the Lessor.

[Insert or attach here Regulation M segregated disclosures; see § 47.220[3] or [5]. Itemization of gross capitalized cost, below, must appear immediately following or directly adjacent to Regulation M segregated disclosures; see [1][h], above.]

Itemization of Gross Capitalized Cost

The gross capitalized cost includes the following items:

1. Agreed value of the vehicle as equipped at signing of lease: \$ _____.
2. Agreed value of each accessory and item of optional equipment that lessor agrees to add to the vehicle after signing the lease:

_____ [description]: \$ _____.

_____ [description]: \$ _____.

_____ [description]: \$ _____.
3. Premium for each policy of insurance: \$ _____.
4. Amount charged for each service contract: \$ _____.
5. Charge for optional debt cancellation agreement: \$ _____.
6. Outstanding prior credit or lease balance: \$ _____.
7. [Itemize, by type and agreed-on value, each good or service included in the gross capitalized cost other than those items included in the disclosures required in items 1 through 6, above]: \$ _____.

Optional DMV Electronic Filing Fee

The Optional DMV Electronic Filing Fee to register or transfer the vehicle: \$ _____.

[Insert or attach here Regulation M nonsegregated disclosures; see § 47.220[4] or [6].]

[Insert notice below, which must be in 10-point boldface type, if lease transaction "is in or affects interstate commerce"; see [1][j], above:]

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

[Insert warning about public liability insurance if insurance is to be obtained by lessor and will not include public liability insurance coverage; see [1][l], above:]

WARNING--Any insurance policy obtained by the Lessor does not insure the Lessee against damages resulting from operation of the vehicle arising by reason of personal injury or death of any person, or from injury to property.

[Warning statements below must be in at least 8-point boldface type, above space provided for lessee's signature, and circumscribed by line; see [1][k], above.]

(1) Do not sign this lease before you read it or if it contains any blank spaces to be filled in.

(2) You are entitled to a completely filled in copy of this lease.

(3) Warning--Unless a charge is included in this lease for public liability or property damage insurance, payment for that coverage is not provided by this lease.

[Lessee's acknowledgment, if any, must be in at least 10-point boldface type, or written in equivalent size, and, if contained in contract, must appear directly above space reserved for lessee's signature; see [1][k], above:]

I have received a completely filled-in and signed copy of this lease agreement.

Signed _____ [date] at _____ [city], California.

_____ [signature of lessee]

_____ [typed name and address]

_____ [lessor's name]

By: _____ [signature]

_____ [typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionConsumer LeasingGeneral OverviewBanking LawConsumer ProtectionConsumer
LeasingDisclosureContracts LawTypes of ContractsLease AgreementsGeneral Overview

California Legal Forms--Transaction Guide

DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 47 AUTOMOTIVE FINANCING AND VEHICLE LEASING
PART IV. FORMS
B. Vehicle Leasing

§ 47.222 Notice to Cosigner of Vehicle Lease [Civ. Code § 1799.91]

This form may be used to comply with a notice requirement that applies to leases governed by the Vehicle Leasing Act [see *Civ. Code* § 2985.7 *et seq.*], when the lessee's financial obligation is to be secured by another person's guaranty [see *Civ. Code* § 1799.90(a)(6)]. Unless the persons in question are married to each other, the lessor under such a lease must deliver to each person who does not in fact receive the vehicle that is the subject of the lease (that is, each guarantor), before that person becomes liable on the lease, the notice in [2], below. The notice must be in both English and Spanish, or whatever other language the contract is written in, in at least 10-point type [*Civ. Code* § 1799.91(b),(d)]. The word "your" in the last sentence of the third paragraph of the notice in English must be italicized [*Civ. Code* § 1799.91(f)]. If the notice is not included with the text of the contract, it must be on a separate sheet, which must not contain any other text except as is necessary to identify the seller and the contract to which the statement refers and to provide for the date and the cosigner's acknowledgment of receipt [*Civ. Code* § 1799.92(b)].

The seller, or an assignee of the seller, failing to comply with this notice requirement is precluded from suing a cosigner or enforcing a security interest against that party. However, the rights of a bona fide purchaser for value of property sold after enforcement of a security interest are unaffected if the purchase was made without notice of the facts constituting a violation of the requirement [Civ. Code § 1799.95].

Notice to Cosigner of Vehicle Lease [Civ. Code § 1799.91]

Re: _____ Motor Vehicle Lease Dated _____ [date] Between
_____ [name and address of lessee] and _____ [name of lessor]

NOTICE TO COSIGNER

(Traducci'on en Ingl'es Se Requiere por La Ley)

You are being asked to guarantee this lease. Think carefully before you do. If the lessee doesn't pay, you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility.

You may have to pay up to the full amount owed on the lease if the lessee does not pay. You may also have to pay late fees or other collection costs, which increase this amount.

The lessor can collect on the lease from you without first trying to collect from the lessee. The lessor can use the same collection methods against you that can be used against the lessee, such as suing you, garnishing your wages, etc. If this lease is ever in default, that fact may become part of *your* credit record.

This notice is not the contract that makes you liable for the lease obligation.

AVISO PARA EL FIADOR

(Spanish Translation Required by Law)

Se le est'a pidiendo que garantice este arrendamiento. Pi'enselo con cuidado antes de ponerse de acuerdo. Si el arrendatario no paga, usted tendr'a que pagar. Est'e seguro de que usted podr'a pagar si sea obligado a pagar y de que usted desea aceptar la responsabilidad.

Si el arrendatario no paga, es posible que usted tenga que pagar la suma total debida en el contrato de arrendamiento, m'as los cargos por tardarse en el pago o el costo de cobranza, los cuales aumentan el total de esta suma.

La compa n'ia arrendadora puede cobrarle a usted por la suma debida en el arrendamiento, sin, primeramente, tratar de cobrarle al arrendatario. Los mismos m'etodos de cobranza que pueden usarse contra el arrendatario, podr'an usarse contra usted, tales como presentar una demanda en corte, quitar parte de su sueldo, etc. Si alguna vez no se cumpla con la obligaci'on del arrendamiento, se puede incluir esa informaci'on en la historia de credito de usted.

Este aviso no es el contrato mismo en que se le echa a usted la responsabilidad del arrendamiento.

Date: _____.

By signing below, you acknowledge receipt of this notice.

_____ [signature]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 47 AUTOMOTIVE FINANCING AND VEHICLE LEASING
PART IV. FORMS
B. Vehicle Leasing

20-47 California Legal Forms--Transaction Guide § 47.223

§ 47.223 Notice to Lessee Electing Early Termination of Lease [Civ. Code § 2987]

[1] Comment--Use of Form

This form is a notice for use by the lessor or holder of a vehicle lease entered into after 1997 [*see Civ. Code § 2987(i)*], in the event the lessee elects to terminate early. When the lessee does not purchase or trade in the leased vehicle on early termination of the contract, the lessee's liability under the contract is limited by statute, and the lessor or holder of the contract may be required to give the lessee a prescribed notice [*see Civ. Code § 2987*]. For further discussion, see § 47.32. The notice will necessarily identify the parties in an appropriate conventional manner (the form in [2], *below*, does not illustrate this) as well as the lease and the vehicle.

The notice must set forth the following [*Civ. Code § 2987(d)(2)(B)*]:

- The time and place of any public sale, the beginning time of a private sale or other intended disposition, or the date for determining the realized value of the vehicle pursuant to *Civ. Code § 2987(c)(3)* [*see § 47.32[6]*].
- The following amounts:
 - An itemization of all amounts claimed under *Civ. Code § 2987(b)(1)-(4)* [*see § 47.32[3]*].
 - The amount of the difference between the adjusted capitalized cost and the sum of all depreciation and other amortized amounts paid through the date of early termination as provided in *Civ. Code § 2987(b)(5)* [*see § 47.32[3]*].
 - The total of the foregoing amounts, identified as the "Gross Early Termination Amount."

■ When the realized value will be determined pursuant to *Civ. Code* § 2987(c)(3) [see § 47.32[6]], the following statement:

"The amount you owe for early termination will be no more than the difference between the Gross Early Termination Amount stated above and (1) the appraised value of the vehicle or (2) if there is no appraisal, the wholesale value specified in a recognized used vehicle value guide. You have the right to get a professional appraisal to establish the value of the vehicle for the purpose of figuring how much you owe on the lease. If you want an appraisal, you will have to arrange for it to be completed at least three days before the scheduled valuation date. The appraiser has to be an independent person acceptable to the holder of the lease. You will have to pay for the appraiser. The appraised value will be considered final and binding on you and the holder of the lease."

■ Whenever the statement in the preceding item is not required, the following statement instead:

"The amount you owe for early termination will be no more than the difference between the Gross Early Termination Amount stated above and (1) the appraised value of the vehicle or (2) if there is no appraisal, either the price received for the vehicle upon disposition or a greater amount established by the lessor or the lease. You have the right to get a professional appraisal to establish the value of the vehicle for the purpose of figuring how much you owe on the lease. If you want an appraisal, you will have to arrange for it to be completed at least three days before the scheduled sale date of the vehicle. The appraiser has to be an independent person acceptable to the holder of the lease. You will have to pay for the appraiser. The appraised value will be considered final and binding on you and the holder of the lease."

[2] FORM

Notice to Lessee Electing Early Termination of Lease [Civ. Code § 2987]

EARLY TERMINATION NOTICE TO LESSEE

This notice concerns the following-described vehicle ("the vehicle") and some of your liabilities under the lease for the vehicle that you executed on _____ [date] and terminated on _____ [date].

Make and model: _____

Identification number: _____

The Gross Early Termination Amount is \$ _____, which is the total of the following amounts:

1. Unpaid periodic lease payments that have accrued up to the date of termination: \$ _____.
2. All other amounts due and unpaid by you under the lease, other than excess wear and mileage charges and unpaid periodic lease payments: [itemize amounts].
3. Charges assessed in connection with termination: [itemize charges, which in aggregate must not exceed amount of any reasonable disposition fee disclosed in lease and assessed on termination of lease].
4. Fees paid by the lessor or holder of the contract for reconditioning of the vehicle and in connection with the repossession and storage of the vehicle: [itemize fees].

5. Difference between the adjusted capitalized cost and the sum of all depreciation and other amortized amounts paid through the date of early termination: \$ _____.

The lessor or holder of the contract ("the lessor") will take the following action (whichever is indicated by a check mark and the information inserted below):

_____ On _____ [date] at [place] the lessor will sell the vehicle in a public sale that will begin at [time]. The amount you owe for early termination will be no more than the difference between the Gross Early Termination Amount stated above and (1) the appraised value of the vehicle or (2) if there is no appraisal, either the price received for the vehicle upon disposition or a greater amount established by the lessor or the lease. You have the right to get a professional appraisal to establish the value of the vehicle for the purpose of figuring how much you owe on the lease. If you want an appraisal, you will have to arrange for it to be completed at least three days before the scheduled sale date of the vehicle. The appraiser has to be an independent person acceptable to the holder of the lease. You will have to pay for the appraiser. The appraised value will be considered final and binding on you and the holder of the lease.

_____ On or after _____ [date] the lessor will sell the vehicle in a private sale or dispose of the vehicle as follows: [specify]. The amount you owe for early termination will be no more than the difference between the Gross Early Termination Amount stated above and (1) the appraised value of the vehicle or (2) if there is no appraisal, either the price received for the vehicle upon disposition or a greater amount established by the lessor or the lease. You have the right to get a professional appraisal to establish the value of the vehicle for the purpose of figuring how much you owe on the lease. If you want an appraisal, you will have to arrange for it to be completed at least three days before the scheduled sale date of the vehicle. The appraiser has to be an independent person acceptable to the holder of the lease. You will have to pay for the appraiser. The appraised value will be considered final and binding on you and the holder of the lease.

_____ On or before _____ [date] the lessor will determine the realized value of the vehicle in accordance with *California Civil Code Section 2987(c)(3)*. The amount you owe for early termination will be no more than the difference between the Gross Early Termination Amount stated above and (1) the appraised value of the vehicle or (2) if there is no appraisal, the wholesale value specified in a recognized used vehicle value guide. You have the right to get a professional appraisal to establish the value of the vehicle for the purpose of figuring how much you owe on the lease. If you want an appraisal, you will have to arrange for it to be completed at least three days before the scheduled valuation date. The appraiser has to be an independent person acceptable to the holder of the lease. You will have to pay for the appraiser. The appraised value will be considered final and binding on you and the holder of the lease.

_____ [lessor's name]
By: _____ [signature]
_____ [typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:
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20-47 California Legal Forms--Transaction Guide § 47.224

§ 47.224 Notice of Lessor's Intent to Sell Vehicle After Open-End (Finance) Lease [Civ. Code § 2989.2]

[1] Comment--Use of Form

This form is a notice that may be used to comply with the Vehicle Leasing Act requirement for notifying lessees of the lessor's intent to sell a leased vehicle at the end of the lease, when the lessee is to bear the risk of the vehicle's depreciation on the scheduled expiration of the lease [*see Civ. Code § 2989.2; § 47.31[10][c]*]; that is, in the case of an open-end (finance) lease. Any provision in the lease to the contrary notwithstanding, the holder of the contract must give at least 10 days written notice of intent to sell the vehicle to each lessee and guarantor, unless the lessor and lessee have agreed in writing to the amount of the lessee's liability under the lease after the lessee returns the vehicle to the lessor, or the lessee has satisfied the lease obligations by payment to the lessor. The notice must set forth separately any charges or sums due, and must state that the lessee will be liable for the difference between the amount of liability imposed on the lessee at the expiration of the lease term and the actual cash value of the vehicle when it is sold. The notice also must state that the lessee has the right to submit a cash bid for the purchase of the vehicle. The notice must be personally served or be sent by certified mail, return receipt requested, directed to the address of the lessee shown on the contract, unless the lessee has notified the holder in writing of a different address [*Civ. Code § 2989.2(b)*].

[2] FORM

Notice of Lessor's Intent to Sell Vehicle After Open-End (Finance) Lease [Civ. Code § 2989.2]

Notice of Intent to Sell Leased Vehicle

Date: _____

To: _____ [*name of lessee*]

Address: [*lessee's address, as shown on contract or written notification*]

Pursuant to *Civil Code Section 2989.2* you are hereby notified of the sale of the [*specify year, make, and model of*

vehicle], license number _____, leased by you on _____[*date*]. The sale is scheduled to take place on _____[*specify date not less than 10 days from date of notice*]. Under the terms of the lease, the following charges are due and owing:

(1) [*e.g.*, Monthly payment]: \$ _____.

(2) [*e.g.*, Registration fees]: \$ _____.

You will be liable for the difference between the amount owed by you on the expiration of the lease term and the actual cash value of the vehicle when it is sold.

You have the right to submit a cash bid for the purchase of the vehicle.

_____ [*lessor's or contract holder's name*]

By: _____ [*signature*]

_____ [*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

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20-47 California Legal Forms--Transaction Guide § 47.225

§ 47.225 Automobile Rental Agreement--Term Less Than Four Months

[1] Comment

[a] Use of Form

This form is an automobile rental agreement to be used for rentals of passenger vehicles for periods not exceeding four months. Such an agreement is not subject to either the Vehicle Leasing Act [*Civ. Code* § 2985.7 *et seq.*] or the Consumer Leasing Act [15 U.S.C. § 1667 *et seq.*] and Regulation M [12 C.F.R. pt. 213] but is governed by the Uniform Commercial Code--Leases (UCC Division 10) [*Com. Code* § 10101 *et seq.*; see § 47.31[1][a]]. For discussion of the UCC--Leases, see Ch. 53, *Personal Property Leasing*.

[b] Damage Waiver Disclosures

This form includes a statutory example of disclosures that are required when a rental company offers a damage waiver for an additional charge [see *Civ. Code* § 1936(g)(3)]. See § 47.34 for discussion of the regulation of a damage waiver in a rental agreement for a passenger vehicle for up to 30 days. A rental company that offers or provides a damage waiver, for any consideration in addition to the rental rate, must clearly and conspicuously disclose the following information in the rental agreement (or in the holder in which the agreement is placed and, also, in signs posted where the renter signs the contract; and for renters enrolled in the company's membership program, in signs posted where their reserved cars are parked or near the exit for the bus transporting enrollees to their reserved cars) [*Civ. Code* § 1936(g)(1)]:

- The nature of the renter's liability (for example, liability for all collision damage regardless of cause).
- The extent of the renter's liability (for example, liability for damage or loss up to a specified amount).
- That the renter's personal insurance policy may provide coverage for all or a portion of the renter's potential liability.

- That the renter should consult with an insurer to determine the scope of insurance coverage, including the amount of the deductible, if any, for which the renter is obligated.
- That the renter may purchase an optional damage waiver to cover all liability, except liability for loss due to theft [*see Civ. Code § 1936(g)*; § 47.34[3][a]], subject to whatever permitted exceptions the rental company expressly lists [*see Civ. Code § 1936(f)*; § 47.34[3][b]].
- The range of damages for the damage waiver.

In addition to the disclosures listed above, a rental company that offers or provides a damage waiver must orally disclose to all renters, except those who are participants in the rental company's membership program, that the damage waiver may be duplicative of coverage that the customer maintains under his or her own motor vehicle insurance policy [*Civ. Code § 1936(g)(2)*; *see Civ. Code § 1936(a)(9)(A)* (membership program means service offered by rental company that permits customers to bypass rental counter and go directly to previously reserved car); *see also Civ. Code § 1936(a)(9)(A)-(E)* (membership program's requirements)]. The renters' receipt of the oral disclosure is demonstrated through the renter's acknowledgment near that part of the contract in which the renter indicates, by the renter's own initials, his or her acceptance or declination of the damage waiver. Adjacent to that same part, the contract also must state that the damage waiver is optional [*Civ. Code § 1936(g)(2)*; *see [2], below*]. Further, the contract must include a clear and conspicuous written disclosure that the damage waiver may be duplicative of coverage that the renter maintains under his or her own motor vehicle insurance policy [*Civ. Code § 1936(g)(2)*].

[c] Disclosures Required When Renting 15-Passenger Van

In addition to the disclosures discussed in [b], above, a rental company that rents a 15-passenger van must provide the renter with a copy of the National Highway Traffic Safety Administration's consumer advisory for 15-passenger vans entitled "Reducing the Risk of Rollover Crashes" (as updated from time to time). The renter must acknowledge receipt of it by signing an acknowledgment on the rental agreement or on an attached form [*Civ. Code § 1936.1(a)(1)*; *see [2], below*].

If the rental of the van is for a business purpose or use, the rental company must also state in the same document that only an employee with the proper licensing may drive that vehicle. The renter must acknowledge receipt of this information by signing an acknowledgment on the rental agreement or on an attached form [*Civ. Code § 1936.1(a)(2)*; *see Civ. Code § 1936.1(a)(1)* (manner of acknowledgment)].

A 15-passenger van is any van manufactured to accommodate 15 passengers, including the driver, regardless of whether that van has been altered to accommodate fewer than 15 passengers, except a 15-passenger van with dual rear wheels that has a gross weight rating of not less than 11,500 pounds [*Civ. Code § 1936.1(b)*].

[2] FORM

Automobile Rental Agreement--Term Less Than Four Months

AUTOMOBILE RENTAL AGREEMENT

1. Rental Company.

_____ [*name of rental company*]
 _____ [*address*]
 _____ [*city, state, zip code*]

2. Renter.

Name: _____
Residence address: _____
Home phone number: _____
Business phone number: _____
Local phone number or contact: _____
Date of birth: _____
Driver's license number: _____
State of issuance: _____
Expiration date: _____
Employer's name and address: _____
Corporate rate identification number: _____
Credit card name and number: _____
Expiration date: _____
Authorization number: _____
Amount authorized: \$ _____
Credit card imprint: _____

3. Additional Authorized Driver.

Name: _____
Residence address: _____
Home phone number: _____
Business phone number: _____
Local phone number or contact: _____
Date of birth: _____
Driver's license number: _____
State of issuance: _____
Expiration date: _____

4. Rented Vehicle.

Make and model: _____
License number: _____
Identification number: _____
Date of rental pickup: _____
Time of pickup: _____
Expected date of rental drop-off: _____
Actual date of rental drop-off: _____
Expected time of drop-off: _____
Actual time of drop-off: _____
Location of drop-off: _____
Odometer reading at drop-off: _____
Odometer reading at pickup: _____
Miles driven: _____

5. Rental Charges. The rental rate for the specified vehicle is as follows:

_____ hours at \$ _____ per hour: \$ _____

_____ days at \$ _____ per day: \$ _____
 _____ weeks at \$ _____ per week: \$ _____
 Mileage charges: _____ miles at \$ _____ per mile: \$ _____
 Drop-off charge: \$ _____
 Subtotal: \$ _____
 Applicable sales tax: \$ _____
 Subtotal: \$ _____
 Refueling charges: _____ gals. at \$ _____ per gal.: \$ _____
 Damage Waiver: _____ days at \$ _____ per day: \$ _____
 Total rental charges: \$ _____
 Less deposit: \$ _____
 Balance owing: \$ _____

Renter agrees to provide Rental Company with a deposit in the form of a validated credit card voucher in an agreed amount approximating the total rental charges for the Rented Vehicle. Renter agrees to pay any amount owed in excess of the deposit immediately on return of the Rented Vehicle.

6. Mileage Charges. The specified rental rate _____ [includes _____ free miles per day, and additional miles shall be charged a fee of \$ _____ per mile *or* includes unlimited free mileage *or* requires an additional charge of \$ _____ per mile].

7. Fuel. The rented vehicle shall be provided to Renter with a full tank of the appropriate grade of gasoline. Failure to return the vehicle with a full tank of the appropriate grade of gasoline shall result in an additional charge for the refueling of the vehicle.

8. Damage Waiver. NOTICE ABOUT RENTER'S FINANCIAL RESPONSIBILITY AND OPTIONAL DAMAGE WAIVER. _____ [state required disclosures about renter's potential liability and damage waiver (see [1][b], above); if renter is liable for collision damage to full value of vehicle, e.g., Renter is responsible for all collision damage to the rented vehicle even if someone else caused it or the cause is unknown. Renter is responsible for the cost of repair up to the value of the vehicle, loss of use, and towing, storage, and impound fees. Renter's own insurance may cover all or part of Renter's financial responsibility for the rented vehicle. Renter should check with Renter's insurance company, or credit card issuer to find out about Renter's coverage and the amount of the deductible, if any, for which Renter may be liable. Further, if Renter uses a credit card that provides coverage for his or her potential liability, Renter should check with the issuer to determine if Renter must first exhaust the coverage limits of his or her own insurance before the credit card coverage applies. Rental Company will not hold Renter responsible if Renter buys a damage waiver. A damage waiver will not protect Renter if _____ (specify exceptions, if any; see § 47.34[3][b] for permissible exceptions). The cost of the optional damage waiver is \$ _____ for every _____ (day or week)].

Renter acknowledges that oral disclosure has been made to Renter of the fact that the damage waiver may be duplicative of coverage Renter maintains under Renter's own vehicle insurance policy: _____ (Initials)

Renter understands that the purchase of the damage waiver is optional: _____ (Initials)

Renter accepts damage waiver: _____ (Initials)

Renter declines damage waiver: _____ (Initials)

RENTER UNDERSTANDS THAT THE DAMAGE WAIVER MAY BE DUPLICATIVE OF RENTER'S OWN MOTOR VEHICLE INSURANCE POLICY.

9. Liability Insurance Coverage. Renter and any authorized driver shall be protected against liability for causing any bodily injury to other persons and/or property damage to other than the Rented Vehicle under a standard automobile insurance policy provided by the Rental Company. The provisions of the policy are incorporated into this agreement by reference and the policy is available for the renter's inspection on request. Coverage shall be provided within these limits:

Bodily Injury: \$ _____ per person, to a maximum of \$ _____ per incident;

Property Damage: \$ _____

However, this liability protection shall not apply to any incident the cause of which is covered under the provisions of Paragraph 8. Renter must report any accident, theft, or damage involving the Rented Vehicle to the local police department and the rental company within 24 hours of the incident.

10. Condition and Return of Rented Vehicle. Rental Company warrants, and Renter hereby accepts, that the Rented Vehicle is in good operating condition. NO FURTHER WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, RELATING TO THE VEHICLE'S FITNESS OR MERCHANTABILITY OR OTHERWISE IS INTENDED. Renter agrees to return the Rented Vehicle in the same condition and to compensate the Rental Company for any damage not covered by other provisions of this agreement. Renter shall not make, or cause to be made, any repairs on the Rented Vehicle without the prior express approval of the Rental Company. Renter agrees to return the Rented Vehicle to the location designated in this agreement. If the location is other than the location where the Rented Vehicle was picked up, Renter agrees to pay the agreed on drop-off fee.

11. Authorized Drivers. Renter shall not allow the operation of the Rented Vehicle by any person other than drivers authorized by the Rental Company under this agreement.

12. Parking and Traffic Violations. Renter agrees to pay for any parking or traffic violation incurred during the rental term, and any subsequent fees or penalties for failure to pay for those violations.

[If rented vehicle is 15-passenger van, add:]

13. Rental of 15-Passenger Van. The Rented Vehicle is a 15-passenger van. Renter acknowledges receipt of a copy of the National Highway Traffic Safety Administration's consumer advisory for 15-passenger vans entitled "Reducing the Risk of Rollover Crashes" by signing here: *[renter's signature]*.

[If rental of 15-passenger van is for business use, add:]

14. Rental of Van for Business Use. The Rented Vehicle is being rented for a business purpose or use. Renter acknowledges that Rental Company has informed Renter that only an employee with the proper licensing may drive that vehicle. Renter acknowledges receipt of this information by signing here: *[renter's signature]*.

[CONTINUE:]

_____ *[signature of renter]*

_____ *[typed name and address]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral OverviewContracts LawTypes of ContractsLease
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20-47 California Legal Forms--Transaction Guide § 47.226

§ 47.226 Agreement to Finance Purchase of Automobiles for Leasing Purposes--Between Lender and Vehicle Leasing Business

[1] Comment--Use of Form

This form is an agreement between a lender and a person engaged in the business of leasing new automobiles. It provides in general that each time the lessor finds an acceptable prospective lessee interested in leasing a specific automobile, the lender will advance funds to the lessor for the purchase of the automobile.

[2] FORM

Agreement to Finance Purchase of Automobiles for Leasing Purposes--Between Lender and Vehicle Leasing Business

VEHICLE LEASE FINANCING PLAN

_____ [Name of lender] (the "Bank"), a [status, e.g., national banking corporation] having its principal place of business in _____ County, California, agrees from time to time to provide funds (the "Loans") to _____ [business name of lessor] (the "Lessor") [if lessor is corporation, add, a California corporation having its principal place of business] in _____ County, California, on the following terms and conditions.

1. **Purpose of Loans.** The purpose of each Loan shall be to enable Lessor to finance the acquisition of a new passenger or commercial vehicle for leasing in the ordinary course of its business to a Lessee acceptable to Bank.

2. **Amount of Loans.** The amount advanced by Bank on any Loan shall not exceed the sum computed as follows:

(a) The cost of the vehicle being financed to the dealer from whom it is being purchased by Lessor as shown on the manufacturer's invoice for the vehicle;

(b) Plus a get-ready fee equal to _____ [e.g., three] percent of the cost of the vehicle to the dealer or \$ _____ [e.g., \$75], whichever is greater, payable to the dealer;

(c) Less the amount of the deposit and first month's rent for the vehicle as set forth in the lease for the vehicle executed by Lessor with the acceptable Lessee. The amount advanced by Bank on any Loan may be increased or decreased by Bank, at the discretion of Bank, to the amount nearest the sum of the computation specified in this paragraph that is evenly divisible by \$ _____ [e.g., \$5].

3. **Terms of Loan.** Each Loan shall be evidenced by a promissory note, in the form attached and marked "Exhibit A," executed by Lessor payable to Bank or order at the address set forth following Bank's signature to this agreement, in equal monthly installments over a period not exceeding _____ months from the date of the note, with interest at the rate of _____ percent per annum on the unpaid principal balance payable monthly. Each promissory note shall be accompanied by a security agreement, in the form attached and marked "Exhibit B," executed by Lessor, conveying a security interest in the vehicle and lease being financed by the Loan to Bank.

4. **Request for Loan.** At the time of requesting any Loan, Lessor shall deliver to Bank:

- (a) A statement of the name, address, and marital status, if any, of the proposed lessee of the vehicle to be financed.
- (b) Any credit and financial reports and information concerning the proposed lessee of the financed vehicle that Bank may request.
- (c) A copy of the lease to be executed by the proposed lessee for the financed vehicle containing the provisions described in Paragraph 5 of this document.
- (d) A copy of the manufacturer's invoice or other evidence satisfactory to Bank establishing the cost of the financed vehicle to the dealer from whom it is being purchased by Lessor.

5. **Required Provisions of Leases.** Any vehicle lease submitted to Bank pursuant to Paragraph 4 of this document shall contain provisions as follows:

- (a) A lease term of _____ [e.g., 36 months];
- (b) Payment in advance in equal successive monthly installments of rent for the leased vehicle equal to the sum of:
 - (1) The monthly payments, including principal and interest, to become due to Bank from Lessor for the vehicle during the lease term; and
 - (2) All applicable sales and use taxes paid by Lessor on the purchase of the vehicle, pro rata.
- (c) An agreed value for the financed vehicle not less than the amount advanced by Bank to Lessor for the purchase of the vehicle plus _____ percent markup.
- (d) That the lessee, by giving _____ [e.g., 30 days] written notice in advance to Lessor, may terminate the lease term of the vehicle subject to the lease at any time after expiration of the first _____ [e.g., 12 months] of the lease term if the lessee:
 - (1) Is not in default in the performance of any provision of the lease;
 - (2) Returns the vehicle to the return place designated in the lease; and

(3) Pays all accrued rent and any pretermination rent adjustment charge that may be due or may become due on the vehicle.

(e) A monthly pretermination rent adjustment factor of not less than _____ percent of the agreed value for the leased vehicle;

(f) Determination of the amount of any pretermination rent adjustment charge if the lease term is terminated before its natural expiration is to be computed as the difference between the agreed value for the vehicle (after deducting therefrom an amount equal to the monthly pretermination rent adjustment factor for the vehicle multiplied by the number of months the lease for the vehicle has been in effect) and either:

(1) The net proceeds received by Lessor from the sale of the vehicle; or

(2) The net insurance proceeds received by Lessor if the vehicle suffers loss, damage, or destruction as a result of an insured peril;

(g) The lessee shall obtain and maintain for the term of the lease an insurance policy or policies with extended coverage endorsements and loss payable to Bank, in a form acceptable to Bank, insuring the financed vehicle for its full insurable value against theft and against loss, damage, or destruction by collision or fire;

(h) The lessee shall obtain and maintain for the term of the lease an automobile liability insurance policy complying with *Vehicle Code Section 16059* and naming Lessor as an additional insured for the financed vehicle;

(i) The lease and the rights of Lessee in the financed vehicle are subordinate and junior to the interest of Bank in the financed vehicle under any security agreement held by Bank.

(j) The lessee shall maintain the financed vehicle in good order and repair, free of all liens except the lien of Bank under the security agreement covering the financed vehicle, and shall pay all taxes and licenses required because of the operation, ownership, or leasing of the financed vehicle.

(k) The lessee shall pay to Lessor on execution of the lease a deposit in an amount not less than the last installment of rent to become due under the lease, as security for the performance of the lease by Lessee.

6. Rejection of Loan Requests by Bank. Bank may refuse to make any loan requested by Lessor pursuant to this agreement if Bank reasonably determines that any condition described below exists:

(a) The potential net income of the proposed lessee, after deducting all payments required to be made by the lessee on other obligations, will be less during any month of the lease term than _____ [number] times the amount required to be paid during that month to Lessor as rent under the lease.

(b) The proposed lessee will be unable, for any reason, to perform fully all of the terms and conditions of the lease.

(c) Either Lessor or the proposed lessee is more than _____ [number] months delinquent in the payment of any obligation owed by Lessor or the proposed lessee to any creditor.

(d) Lessor's liabilities, including obligations owed to Bank because of prior loans made pursuant to this agreement, exceed Lessor's assets by more than _____ percent.

(e) The vehicle proposed to be financed by the Loan is defective in any way.

(f) The driving privileges of the proposed lessee have been suspended or revoked, or the proposed lessee is unable to obtain automobile public liability insurance in an amount required to satisfy California financial responsibility laws under an assigned risk plan.

7. Warranties by Lessor. In requesting any Loan to be made by Bank pursuant to this agreement, Lessor represents, warrants, and covenants to and with Bank that each of the following is true:

(a) All information and representations made to or furnished to Bank by Lessor are true and correct.

(b) The financed vehicle and Bank's security interest in it are and will be in all respects as stated in the security agreement executed by Lessor securing the promissory note evidencing the Loan.

(c) The lease of the financed vehicle and the rent payable under it are and will remain in all respects as specified in the lease.

(d) Lessor will duly perform all of Lessor's obligations to be performed pursuant to the lease.

(e) Lessor on demand of Bank will promptly deliver to Bank any of the following:

(1) A promissory note and security agreement as described in Paragraph 3 of this agreement for the Loan duly executed by Lessor.

(2) The original lease for the financed vehicle duly executed by the proposed lessee.

(3) Insurance policies or certificates of insurance evidencing issuance of the insurance policies described in Paragraphs 5(g) and 5(h) of this agreement.

(4) A certificate of ownership issued by the California Department of Motor Vehicles or other governmental authority approved by Bank showing Bank as legal owner, secured party, or lienholder, and Lessor as registered owner of the financed vehicle.

(5) A guaranty of the loan duly executed by the dealer from whom Lessor is purchasing the financed vehicle if required by Bank.

(6) A consent to the lease executed by the dealer from whom Lessor is purchasing the financed vehicle if required by Bank.

(7) Other documents, instruments, and deposits, as Bank may require.

8. Acceptance of Insurance by Bank. The acceptance by Bank of any certificate of insurance or policy of insurance delivered to it pursuant to this agreement shall not be construed as any of the following:

(a) The making of any warranty or representation by Bank in respect to the policy of insurance represented by the certificate.

(b) The assumption of any liability or responsibility by Bank for the adequacy, amount, form, or content of the policy of insurance represented by the certificate.

(c) The assumption of any liability or responsibility by Bank for the solvency of, or the payment of losses, by the issuer

of the policy of insurance represented by the certificate.

9. Indemnity Against Public Liability. Lessor agrees to indemnify Bank against, and hold Bank and the property of Bank free and harmless from, any and all liability, including liability for any injuries suffered by employees of Lessor or employees of a lessee, caused by or connected with the ownership, leasing, operation, maintenance, or use of any financed vehicle.

10. Indemnity Against Damage to Vehicle. Lessor agrees to indemnify Bank for any loss suffered by it because of the theft, loss, damage, or destruction of any financed vehicle whether caused by the negligence of Lessor or other cause. Lessor shall indemnify Bank for any damages, expenses, or liabilities, including attorneys' fees, incurred by Bank in any litigation instituted by Bank on behalf of or for the benefit of Lessor.

11. Foreign Operation of Vehicles. Lessor shall not allow, without the prior written consent of Bank, any financed vehicle to be operated in such a manner outside California as to require the vehicle to be registered and licensed in another state or country or to exclude coverage of the vehicle by any insurance policy required by this agreement. If Bank consents, Lessor will, at Lessor's own cost and expense or at the cost and expense of the lessee of the vehicle, register the vehicle with a governmental agency as required by Bank, in a manner so as to provide Bank with a first and enforceable security interest in the vehicle. Lessor shall procure additional insurance covering the vehicle if and as Bank requires, and Lessor shall deliver evidence satisfactory to Bank of the registration and insurance to Bank.

12. Payments Received by Lessor. Bank shall not only have a security interest in each vehicle financed by it pursuant to this agreement but also have a security interest in all rent received for the leasing or rental of the financed vehicle, all proceeds received from the sale of the vehicle, and all insurance proceeds received because of the theft, loss, damage, or destruction of the vehicle. If Lessor receives any funds in which Bank has a security interest, Lessor shall immediately deliver the funds to Bank in the same form as they were received by Lessor, and Lessor shall have no right to use the funds or commingle them with other funds not the property of Bank.

13. Power of Attorney to Cash Checks. Lessor appoints Bank as Lessor's true and lawful attorney in fact to do any of the following acts at any time:

(a) Sign the name of Lessor to all checks, drafts, and evidences of indebtedness received by Bank in connection with any funds in which Bank has a security interest.

(b) Adjust, settle, and collect in the name of Lessor any amounts that may become due under any insurance policy insuring a financed vehicle.

14. Accountings to Lessor. As long as Lessor is not in default in the performance of any obligation, Bank does not deem itself insecure as to any obligation, Bank shall on the January 1, April 1, July 1, and October 1 of each year release to Lessor as much of the total rent payments and other amounts received by Bank pursuant to this agreement during the preceding calendar quarter as may exceed the total amount of all payments and other amounts that became due from Lessor to Bank during that period.

15. Default in Rent by Lessee. Within [number] days after a default by any lessee of a financed vehicle in the payment of the rent due for the vehicle, Bank shall serve written notice of default on Lessor and may, unless the default is cured within [number] days after giving the notice, declare the balance due on the Loan for the vehicle immediately due and payable.

16. Repossessions by Lessor. If any lessee of a financed vehicle defaults in the performance of any obligation under the lease covering the vehicle, Lessor shall, within [number] days after receiving a written request from Bank, repossess the vehicle and take other actions as Bank may deem necessary or appropriate to protect and preserve its security

interest in the vehicle.

17. Default of Lessor. On default by Lessor in the performance of any obligation under this agreement or any promissory note or security agreement executed pursuant to this agreement, Bank, at its election, may take any or all of the following actions:

- (a) Declare in whole or in part the unpaid balance of all indebtedness and obligations owing by Lessor to Bank immediately due and payable.
- (b) Apply all rent and other amounts received by Bank, including without limitation any proceeds received on termination of the lease term of any financed vehicle before the regular expiration of the lease term, toward payment of any indebtedness owing by Lessor to Bank.
- (c) Endorse, assign, or otherwise transfer, in the name of Lessor or otherwise, to Bank any evidence of title to any financed vehicle or other personal property that is security for any indebtedness owed by Lessor to Bank.
- (d) Exercise any and all rights, options, and remedies existing in favor of Lessor under any lease or other instrument covering property in which Bank has a security interest or providing for rent, proceeds, or other funds in which Bank has a security interest.

18. Termination of Lease. On termination of any lease for a financed vehicle, the full remaining unpaid principal balance of the promissory note and security agreement executed by Lessor pursuant to this agreement for the vehicle shall immediately become due and payable.

19. Vehicle Licenses and Taxes. Lessor shall pay all applicable sales and use taxes imposed on any financed vehicle, its use, operation, or leasing, and promptly pay as they become due all renewal license or registration fees for each financed vehicle. If Bank receives payment of any tax or fee from the lessee of a financed vehicle, Bank may pay the tax or fee to the appropriate taxing agency directly or remit it to Lessor, who shall promptly pay the tax or fee.

20. Notices. Any and all notices or other communications required or permitted by this agreement or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served or given when personally delivered to the party to whom it is directed, or in lieu of personal service, when deposited in the United States mail, first-class postage prepaid, addressed to Bank at _____[address], _____[city], California, or to Lessor at _____[address], _____[city], California. Either party may change its address for the purposes of this paragraph by giving written notice of any change to the other party in the manner provided in this paragraph.

21. Attorneys' Fees. If any litigation is commenced between the parties concerning any financed vehicle, this agreement, or any instrument executed by either of them pursuant to this agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees, costs, and necessary disbursements, in addition to any other relief to which that party may be entitled.

22. Approval of Instruments. The acceptance or approval by Bank of any document or instrument delivered to it pursuant to this agreement by Lessor, or the acceptance or approval by Lessor of any document or instrument delivered to Lessor by Bank, shall not be deemed a warranty by Bank or Lessor of the effectiveness, sufficiency, or legal effect of the instrument or document.

Executed on _____[date] at _____, California.

_____[lessor's name]

By: _____ [signature]
_____ [typed name and title]
_____ [lender's name]
By: _____ [signature]
_____ [typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty
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§ 48.02 California Statutes

§ 48.03 Federal Statutes

§ 48.04 Federal Regulations

§ 48.05 Law Reviews

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§ 48.07 Text References

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§ 48.10 Types of Agricultural Loans

§ 48.11 Sources of Agricultural Credit

§ 48.12 Commercial Banks and Other Private Lending Institutions

§ 48.13 Federal Farm Credit System

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[3] Production Credit Associations

[4] Bank for Cooperatives

§ 48.14 Farmers Home Administration

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[4] Loans for Disaster-Based Emergencies

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§ 48.15 Commodity Credit Corporation

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§ 48.17 Uniform Commercial Code Security Interests

[1] In General

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[5] Protection for Purchasers of Farm Products

§ 48.18 Deductibility of Interest Expenses

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§ 48.100 Facts

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§ 48.101 Documents

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§§ 48.102-48.119 [Reserved]

§ 48.120 Capacity of Parties to Contract

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§ 48.121 Feasibility of Loan

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§ 48.122 Appropriate Type, Source, and Collateral of Loan

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§§ 48.123-48.139 [Reserved]

§ 48.140 Preparation of Required Documents Incidental to Loan Documents

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§ 48.141 Contacting Appropriate Lender

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§ 48.200 FmHA Farm and Home Plan

[1] Comment

[a] Use of Form

[b] Contents of Form

[i] Balance Sheet

[ii] Accounting for Production and Sales of Crops and Livestock

[iii] Farm Improvements and Practices

[iv] Expenses, Summary of Year's Business, and Debt Repayment Portions of Plan

[2] FORM

FmHA Farm and Home Plan

§ 48.201 Loan Application--Agricultural Real Estate

[1] Comment

[a] Use of Form

[b] Security Requirements

[i] In General

[ii] Long-Term Mortgage Loans

[iii] Other Loans

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[2] FORM

FCB Loan Application--Agricultural Real Estate

§§ 48.202-48.219 [Reserved]

§ 48.220 Loan Agreement for Transaction Among Private Parties

[1] Comment

[a] Use of Form

[b] Negotiability of Loan Agreement

[c] Collateral Securing the Borrower's Obligation

[2] FORM

Loan Agreement for Transaction Among Private Parties

§ 48.221 Farmers Home Administration Promissory Note

[1] Comment--Use of Form

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Farmers Home Administration Promissory Note

§§ 48.222-48.239 [Reserved]

§ 48.240 Security Agreement

[1] Comment

[a] Use of Form

[b] Provision Requiring Debtor to Provide List of Potential Buyers, Commission Merchants, and Selling Agents

[2] FORM

Security Agreement

§ 48.241 Farm Credit System Deed of Trust

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Farm Credit System Deed of Trust

§§ 48.242-48.259 [Reserved]

§ 48.260 Alternative Provision Describing Collateral: Crops

[1] Comment

[a] Use of Form

[b] Sufficiency of Description of Crops as Collateral in Security Agreement or Financing Statement

[2] FORM

Alternative Provision Describing Collateral: Crops

§ 48.261 Alternative Provision Describing Collateral: Livestock

[1] Comment

[a] Use of Form

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Alternative Provision Describing Collateral: Livestock

§ 48.262 Alternative Provision Describing Collateral: Warehouse Receipts

[1] Comment

[a] Use of Form

[b] Warehouse Receipt Defined

[c] Value and Use of Warehouse Receipts as Collateral

[2] FORM

Alternative Provision Describing Collateral: Warehouse Receipts

§ 48.263 Alternative Provision Describing Collateral: Farm Equipment

[1] Comment

[a] Use of Form

[b] Farm Equipment as Collateral

[i] In General

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Alternative Provision Describing Collateral: Farm Equipment

§§ 48.264-48.279 [Reserved]

§ 48.280 Assignment to Lender of Proceeds From Sale of Farm Products

[1] Comment

[a] Use of Form

[b] Assignment of Proceeds

[c] Deduction of Processor's Fees

[2] FORM

Assignment to Lender of Proceeds From Sale of Farm Products

§ 48.281 Assignment of Proceeds From Sale of Dairy Products

[1] Comment--Use of Form

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Assignment of Proceeds From Sale of Dairy Products

§§ 48.282-48.299 [Reserved]

§ 48.300 Notice to Buyers, Commission Merchants, and Selling Agents Under the Food Security Act of 1985

[1] Comment

[a] Use of Form

[b] Food Security Act of 1985

[i] In General

[ii] Required Contents of Notice

[iii] Duration, Amendments, and Execution of Notice

[2] FORM

Notice to Buyers, Commission Merchants, and Selling Agents Under the Food Security Act of 1985

§ 48.301 Landlord Share Waiver

[1] Comment

[a] Use of Form

[b] Purpose of Landlord Share Waiver

[2] FORM

Landlord Share Waiver

§ 48.302 Bill of Sale Draft

[1] Comment

[a] Use of Form

[b] Method of Financing Using Bill of Sale Draft

[c] Consent of Secured Party

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Bill of Sale Draft



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Scope

Scope

This chapter covers the sources of loan funds and the application processes that a potential borrower can anticipate in dealing with various lenders. The Legal Background includes a discussion of the use of Uniform Commercial Code security interests in agriculture, as well as a discussion of the relevant tax considerations faced by agricultural borrowers. The Forms include a sample borrower's application, sample loan forms from the federal Farm Credit System, and miscellaneous forms relating to the creation of security interests.

This chapter discusses real property financing only as it relates to agriculture, with specific emphasis on the activities of the federal farm credit banks and federal land bank associations. For a discussion of real property financing, see Ch. 25, *Real Estate Loans* , and subsequent chapters. For coverage of personal property financing and commercial loans, see Ch. 42, *Secured Transactions* , and Ch. 43, *Commercial Loans* . For a general discussion of loans made by individuals, see Ch. 97, *Private Loans and Annuities* .

For discussion of agricultural contracts, see Ch. 49, *Agricultural Contracts* .



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A. Primary Sources

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§ 48.01 California Constitution

Interest rates. *Cal. Const., art. XV, § 1.*



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A. Primary Sources

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§ 48.02 California Statutes

Crops as fixtures. *Civ. Code § 660.*

Unruh Act (regulating retail installment sales). *Civ. Code § 1801 et seq.*

Loans. *Civ. Code § 1912 et seq.*

Mortgages. *Civ. Code § 2920 et seq.*

UCC Division 9, Secured Transactions.

Goods-Related Definitions. *Com. Code § 9102.*

Applicability and scope of division. *Com. Code § 9109.*

Requisites for creating valid security interest. *Com. Code § 9203.*

Perfection of security interests. *Com. Code §§ 9308-9314.*

Fixtures. *Com. Code § 9334.*

Filing to perfect security interest. *Com. Code § 9501.*

Requisites of financing statement. *Com. Code § 9502.*

Default by debtor and secured creditors' rights. *Com. Code § 9601 et seq.*

Debtor's right to redeem collateral. *Com. Code § 9623.*



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A. Primary Sources

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§ 48.03 Federal Statutes

Commodity Credit Corporation.

Provision authorizing price support. *7 U.S.C. § 1421.*

Producers' liability for deficiencies. *7 U.S.C. § 1425.*

Definitions of agricultural commodities. *7 U.S.C. § 1428.*

Advance recourse commodity loans. *7 U.S.C. § 1433c-1.*

Price support loans. *7 U.S.C. § 1441 et seq.*

Suspension of permanent price support authority for specified commodities, effective June 18, 2008 through December 31, 2012. *7 U.S.C. § 8782(a), (b).*

Farmers Home Administration.

Real estate loans. *7 U.S.C. § 1921 et seq.*

Farm operating loans. *7 U.S.C. § 1941 et seq.*

Emergency loans. *7 U.S.C. § 1961 et seq.*

Loan approvals. *7 U.S.C. § 1983a.*

Provision of information to borrowers. *7 U.S.C. § 1983c.*

Farm credit banks.

Lending authority. *12 U.S.C. § 2015.*

Borrower eligibility. *12 U.S.C. § 2017.*

Maximum amount of loans; required security. *12 U.S.C. § 2018.*

Purposes for which loans may be made. *12 U.S.C. § 2019.*

Production credit associations. *12 U.S.C. § 2071 et seq.*

Federal land bank associations. *12 U.S.C. § 2091 et seq.*

Bank for Cooperatives.

Stock of banks. *12 U.S.C. §§ 2124, 2130.*

Lending authority. *12 U.S.C. § 2128.*

Borrower eligibility. *12 U.S.C. § 2129.*

Farm Credit System borrowers' rights. *12 U.S.C. § 2199 et seq.*

Truth in Lending Act. *15 U.S.C. § 1601 et seq.*



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A. Primary Sources

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§ 48.04 Federal Regulations

Commodity Credit Corporation.

Regulations governing marketing assistance loans and loan deficiency payments for grains and similarly handled commodities. *7 C.F.R. § 1421.1 et seq.*

Farmers Home Administration.

Farm operating loans. *7 C.F.R. § 1941.1 et seq.*

Farm ownership loans. *7 C.F.R. § 1943.1 et seq.*

Soil and water loans. *7 C.F.R. § 1943.51 et seq.*

Disaster-based emergency loans. *7 C.F.R. §§ 1945.1 et seq., 1945.151 et seq.*

Production credit associations.

Lending authority. *12 C.F.R. § 614.4110.*

Loan terms and conditions. *12 C.F.R. § 614.4200.*

Collateral evaluation requirements. *12 C.F.R. § 614.4260.*

Interest rates and charges. *12 C.F.R. § 614.4160.*

Lending limits. *12 C.F.R. § 614.4350 et seq.*

Bank for Cooperatives

Lending authority. *12 C.F.R. § 614.4120.*

Loan terms and conditions. *12 C.F.R. § 614.4200.*

Collateral evaluation requirements. *12 C.F.R. § 614.4260.*

Lending limits. *12 C.F.R. § 614.4350 et seq.*



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§ 48.05 Law Reviews

Donaldson, *The Commercially Reasonable Disposition of Collateral Under Article 9 of the UCC: The Question of the Burden of Proof*, 20 U.C.C. L.J. 307 (1988).

Flick, III & Replansky, *The Elusive Article 9 First-Lien Security Interest: How Your Lien Position Can Be Eroded and How to Prevent It*, 20 U.C.C. L.J. 211 (1988).

Sanford, *The Reborn Farm Products Exception Under the Food Security Act of 1985*, 20 U.C.C. L.J. 3 (1987).

Witherby et al., *Wraparound Lease Financing of Personal Property*, 41 Bus. Law. 747 (1986).

Weber, *Representing California's Growers*, 5 Calif. Lawyer 34 (May 1985).

Meyer, *"Crops" as Collateral for an Article 9 Security Interest and Related Problems*, 15 U.C.C. L.J. 3 (1982).

O'Neill, *Secured Lender's Pitfalls in Proceeding Against Guarantor's Collateral*, 14 U.C.C. L.J. 367 (1982).

Meyer, *Financing Crops*, 4 ALI-ABA Course Materials J. 9 (Oct. 1979).

Clark, *The Agricultural Transaction: Livestock Financing*, 11 U.C.C. L.J. 106 (1978).

Clark, *The Agricultural Transaction: Equipment and Crop Financing*, 11 U.C.C. L.J. 15 (1978).



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§ 48.06 Annotations

Annot., What Constitutes "Family Farmer" Entitled to Relief Under Chapter 12 of Bankruptcy Code (*11 USCS § 1201 et seq.*), *101 A.L.R. Fed. 502 (1991)* .

Annot., Secured Transactions: Government Agricultural Program Payments as "Proceeds" of Agricultural Products Under UCC § 9-306, *79 A.L.R.4th 903 (1990)*.

Annot., Bank's Liability for Breach of Implied Contract of Good Faith and Fair Dealing, *55 A.L.R.4th 1026 (1987)*.

Annot., Construction and Effect of UCC § 9-311 Giving Debtor Right to Transfer His Interest in Collateral, *45 A.L.R.4th 411 (1986)*.

Annot., What Constitutes Secured Party's Authorization to Transfer Collateral Free of Lien Under UCC § 9-306(2), *37 A.L.R.4th 787 (1985)*.

Annot., Sufficiency of Debtor's Signature on Security Agreement or Financing Statement Under UCC §§ 9-203 and 9-402, *3 A.L.R.4th 502 (1981)*.

Annot., Sufficiency of Description of Collateral in Security Agreement Under UCC §§ 9-110 and 9-203, *100 A.L.R.3d 940 (1980)*.

Annot., Sufficiency of Description of Collateral in Financing Statement Under UCC §§ 9-110 and 9-402, *100 A.L.R.3d 10 (1980)*.

Annot., Determination of Purchase Price of Farm Equipment for Purposes of UCC § 9-302(1)(c) Excusing Filing of Financing Statement, *85 A.L.R.3d 1037 (1978)*.

Annot., Secured Transactions: What Constitutes "Inventory" Under UCC § 9-109(4), 77 A.L.R.3d 1266 (1977).

Annot., Equipment Leases as Security Interests Within Uniform Commercial Code § 1-201(37), 76 A.L.R.3d 11 (1977).

Annot., Sufficiency of Description of Crops Under UCC §§ 9-203(1)(b) and 9-402(1), 67 A.L.R.3d 308 (1975).

Annot., Construction and Operation of UCC § 9-505(2) Authorizing Secured Party in Possession of Collateral to Retain It in Satisfaction of Obligation, 55 A.L.R.3d 651 (1974).



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B. Secondary Sources

20-48 California Legal Forms--Transaction Guide § 48.07

§ 48.07 Text References

[1] Related Forms With Tax Analysis

Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 6, *Credit and Finance*, 6.01-6.16 (general security agreements), 6.59- 6.65 (financing statements), 6.109- 6.114 (long term loan agreements) (Matthew Bender).

[2] Related Forms

Warren's Forms of Agreements (Matthew Bender).

Ch. 30, *Commercial Loan Agreements*, Forms 30.4.01-30.16.13.

Ch. 31, *Security Agreements*, Forms 31.3.01-31.2.06.

[3] Related California Forms

California Legal Forms (Matthew Bender).

Ch. 25, *Real Estate Loans*.

Ch. 25A, *Security Instruments for Real Estate Financing*.

Ch. 42, *Secured Transactions*.

Ch. 43, *Commercial Loans*.

Ch. 49, *Agricultural Contracts*.

California Forms of Pleading and Practice (Matthew Bender).

Ch. 500, *Sales: Sales under the Commercial Code*.

Ch. 503, *Sales: Secured Transactions*.

[4] Additional Text References

Harl, *Agricultural Law* (Matthew Bender).

Ch. 90, *Commodity Credit Corporation*.

Ch. 91, *Production Control and Price Support Programs for Agricultural Commodities*.

Ch. 96, *Consolidated Farm and Rural Development Act*.

Ch. 100, *Farm Credit Administration; The Farm Credit System*.

Ch. 115, *Commercial Law: Uniform Commercial Code--Introduction*.

Ch. 117, *Article 9 of the Uniform Commercial Code: Secured Transactions Generally*.

Ch. 118, *Secured Financing: Farm Equipment, Crops, and Livestock*.

Ch. 119, *Secured Financing: Survey of Priorities*.

California Real Estate Law and Practice (Matthew Bender).

Ch. 100, *Methods of Financing*.

Ch. 101, *Conventional Financing (Loans)*.

Ch. 110, *Notes*.

Ch. 111, *Deeds of Trust and Mortgages*.

Coogan, Hogan & Vagts, *Bender's Uniform Commercial Code Service--Secured Transactions Under the Uniform Commercial Code* (Matthew Bender).

Hart & Willier, *Forms and Procedures Under the Uniform Commercial Code* (Matthew Bender).

Schlichting, Rice & Cooper, *Banking Law--Banks: Organization and Function* (Matthew Bender).

Whitley, Schlichting, Rice & Cooper, *Banking Law--National Banks* (Matthew Bender).

Witkin, *Summary of California Law*, vol. 4, *Secured Transactions in Personal Property*; vol. 4, *Security Transactions in Real Property* (10th ed. 2005).

Farm Ownership Loans (Farmers Home Administration Program Aid No. 62, 1987).

Soil and Water Loans (Farmers Home Administration Program Aid No. 972, 1987).

Limited Resource Farm Loans (Farmers Home Administration Program Aid No. 1398, 1987).

Farm Loan Guarantees (Farmers Home Administration Program Aid No. 1400, 1987).

Farm Operating Loans (Farmers Home Administration Program Aid No. 1002, 1985).



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§ 48.10 Types of Agricultural Loans

Agricultural lenders categorize loans by several different methods. Loans may be categorized by the property by which they are secured, for example, loans secured by agricultural real property, loans secured by farm products, loans secured by equipment, or loans secured by farm accounts. Loans may also be categorized by either the type of operation the borrower is engaged in, for example, crop loans, dairy loans, or livestock loans; or by the loan purpose and method of repayment.

The federal Farm Credit System and many commercial lenders categorize loans as "capital loans" and "operating loans." Capital loans are made for long-term financing needs, such as the purchase of replacement livestock, land acquisition, farm building construction, and equipment purchases. These loans are generally secured by deeds of trust covering the property purchased with the loan proceeds. Operating loans are made to finance all aspects of seasonal agricultural operations. Operating loans are normally secured by granting a security interest in the crops, livestock, or farm equipment purchased with the loan proceeds. For a discussion of these types of loans, see § 48.11 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGeneral Overview



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§ 48.11 Sources of Agricultural Credit

Agricultural credit may be obtained from a number of sources in both the private and government sectors.

Government lenders include the Farm Credit System institutions: farm credit banks, federal land bank associations, production credit associations, and the Bank for Cooperatives [see discussion in § 48.13 et seq.]. Other government lenders are the Farmers Home Administration and Commodity Credit Corporation [see discussion in §§ 48.14, 48.15]. The loan programs of each government lender are targeted to a specific lending purpose and require applicants to meet a variety of eligibility requirements. For a discussion of the eligibility requirements of each lender, see § 48.122.

Government financing is available for buying or improving farmland and farm buildings; purchasing livestock, equipment, and supplies; paying farm operating and family living expenses; refinancing farm debts; providing a residence for the farmer or rancher and his or her family; and providing facilities for processing, storing, and marketing farm products and handling farm equipment or supplies.

Attorneys counseling clients in loan-related matters should determine the most suitable government lender for the needs of the client [see § 48.122]. Any of the institutions discussed in this Legal Background may be contacted directly for information relating to their particular loan programs and requirements for borrower eligibility. Loan offices of production credit associations, federal land bank associations, and the Farmers Home Administration may be found in the local telephone directory of the area in which the farmer or rancher is in operation.

As an alternative to government lending programs, private individual lenders, including family members, local farmers or ranchers, and other persons involved in financing arrangements may be sources for agricultural financing. Although commercial and federal lenders ordinarily require the use of their own standard forms [see samples in §§ 48.221, 48.241], this chapter includes forms of loan and security agreements that may be used by private parties involved in agricultural financing [see §§ 48.220, 48.240]. For further discussion of loan arrangements between private parties, see Ch. 97, *Private Loans and Annuities*.

Insurance companies are also involved in agricultural financing and are estimated to hold approximately 6.5 percent of outstanding farm debt as of late 1988 [see Walraven and Rosine, *Agricultural Finance Databook*, Federal Reserve Board

Statistical Release E.15 (1989)]. Insurance companies are permitted to make loans secured by first or second liens on real property if certain requirements relating to the value of the collateral are met [*see Ins. Code §§ 1194.81, 1194.82*]. For coverage of insurance companies' permissible investments, see California Insurance Law and Practice, Ch. 6, *The Regulation of Insurer Investments* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewReal Property LawFinancingGeneral Overview



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§ 48.12 Commercial Banks and Other Private Lending Institutions

Commercial loans for land purchase and equipment financing are commonly available because they afford the lender fairly stable security interests in the land or equipment. However, inexpensive operating loans may be more difficult to obtain due to the speculative nature of farming and ranching, which subjects secured interests in crops and livestock to possible rapid devaluation.

Federally chartered banks have the authority to lend funds for real estate purchases [12 U.S.C. § 371], and for operating costs and equipment purchases [see 12 U.S.C. § 24]. These lenders are subject to restrictions on the amounts of secured and unsecured loans made to an individual borrower [see 12 U.S.C. § 84]. The total amount of unsecured indebtedness of one borrower must not exceed 15 percent of the unimpaired capital and surplus of the lender, and the total amount of an individual borrower's debt secured by readily marketable collateral must not exceed 10 percent of the unimpaired capital and surplus of the lender [12 U.S.C. § 84(a)]. These limitations are subject to exceptions depending on the type of collateral securing the loan [see 12 U.S.C. § 84(c); see also Whitley et al., *Banking Law--National Banks*, Ch. 28, *The Lending Limit* (Matthew Bender)].

Commercial banks [see *Fin. Code* § 105 (definition)] chartered or authorized to transact business by the state of California also operate with restrictions as to the amount of secured and unsecured indebtedness any one person can incur with that institution [see *Fin. Code* § 1221; see also *Fin. Code* § 1226 (maximum limit exceptions)]. A commercial bank also may lend on the security of a first lien on a farm or productive agricultural lands, or of an agricultural leasehold that expires not less than 10 years after the loan matures. However, the loan term must not exceed 30 years, the loan amount must be repayable in substantially equal installments not less often than annually, and the amount must not exceed 90 percent of the sound market value of the property or leasehold, including the improvements located on the premises made subject to the lien, as determined by proper appraisal [*Fin. Code* § 1227(d)].

Federal savings and loan associations, and federal savings banks, are organized under and governed by the Home Owner's Loan Act of 1933 [see 12 U.S.C. § 1461 *et seq.*]. These institutions are authorized to make a variety of secured and unsecured loans, including loans to and for the use of agricultural entities [see 12 U.S.C. § 1464(c)(2)(A)]. Loans made for commercial, corporate, business, or agricultural purposes may not exceed 10 percent of the institution's total assets [12 U.S.C. § 1464(c)(2)(A)].

California chartered savings and loan associations [see *Fin. Code* § 5102 (definition)] are governed by the provisions of the Savings Association Law [see *Fin. Code* § 5000 *et seq.*]. A California association may make, or otherwise deal in, secured and unsecured loans for agricultural, business, commercial, or corporate purposes, to the extent that the total of these loans does not exceed 10 percent of the assets of the association [*Fin. Code* § 7453; see *Fin. Code* § 7450 (association must make necessary determinations to assure financial soundness of loan)]. An association may not make or acquire total loans with respect to one borrower, or on one project, in an amount exceeding 25 percent of the net worth of the association, except as provided by the Commissioner of Financial Institutions [*Fin. Code* § 7451]. The term "one borrower" is defined as any person who is, or on making a loan will become, an obligor on the loan, including nominees of the obligor and persons, trusts, syndicates, partnerships, and corporations of which the obligor is a nominee, beneficiary, member, or general partner, or a limited partner, record stockholder, or beneficial stockholder with at least a 10 percent capital interest. Excluded from the definition are guarantors, if the primary obligor qualifies for the loan independently of the guarantor, and former debtors on loans assumed by third parties with the consent of the association [*Fin. Code* § 7453(e)].

For a general discussion of the basic powers of commercial lending institutions, see Schlichting, Rice & Cooper, *Banking Law*, Ch. 4, *Banking Powers* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 48.13 Federal Farm Credit System

[1] In General

In addition to the commercial and private sources of loan funds, the "cooperative" Farm Credit System established under the federal Farm Credit Act of 1971 is an important source of farm financing [*see 12 U.S.C. § 2001 et seq.*]. The Farm Credit System is cooperative in that it is composed of four separate lending entities working together and owned by its clientele [*see 12 U.S.C. § 2001(a), (b)*].

The four component parts of the Farm Credit System are the farm credit banks, the federal land bank associations, the production credit associations, and the banks for cooperatives [*12 U.S.C. § 2002*]. All of these Farm Credit System lenders are chartered and subject to supervision by the federal Farm Credit Administration [*12 U.S.C. § 2002*]. Their purpose is to improve the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected businesses necessary for efficient farm operations [*12 U.S.C. § 2001(a)*].

[2] Farm Credit Banks and Federal Land Bank Associations

Farm credit banks and federal land bank associations are components of the federal Farm Credit System [*see 12 U.S.C. §§ 2011, 2091*]. The primary purpose of these lenders is to make real estate mortgage loans to eligible borrowers [*see 12 U.S.C. §§ 2015(a), 2091(b)(1)*]. To be eligible, a prospective borrower must be, or become, a stockholder in the entity from which the loan is sought [*see 12 U.S.C. §§ 2017, 2021(c), 2154a(c)(1)(E)*].

Farm credit banks perform the merged operations of the former federal land banks and the federal intermediate credit banks, which existed under the Federal Farm Loan Act [*see former 12 U.S.C. §§ 2011, 2071*]. Farm credit banks may make long-term real estate mortgage loans in rural areas for terms of 5 to 40 years [*12 U.S.C. §§ 2015(a), 2091(b)(1)*] for agricultural or aquatic purposes, rural housing financing, and farm-related services [*12 U.S.C. § 2019*]. Loan applicants must be either bona fide farmers, ranchers, producers or harvesters of aquatic products; persons furnishing farm-related services to farmers and ranchers directly related to their on-farm operating needs; or owners of rural homes [*12 U.S.C. § 2017*]. Loans made by a farm credit bank to farmers, ranchers, and producers or harvesters of aquatic products may be for any agricultural or aquatic purpose, and other credit needs of the applicant, including financing for

basic processing and marketing directly related to the applicant's operations, and those of other eligible farmers, ranchers, and producers or harvesters of aquatic products. However, the applicant's operations must supply some portion of the total processing or marketing for which financing is extended [12 U.S.C. § 2019(a)(1)]. If the operations of the applicant supply less than 20 percent of the total processing or marketing for which financing is extended, the aggregate of the financing provided by any farm credit bank for basic processing and marketing directly related to the applicant's operations must not exceed 15 percent of the total of all outstanding loans of that bank [12 U.S.C. § 2019(a)(2)].

Farm credit banks must make loans through the federal land bank association chartered to serve the territory in which the real estate of the borrower is located, if an association has been established in that territory [12 U.S.C. § 2021(a)]. If no association has been established in the applicant's territory, the farm credit bank may make the loan directly or through a designated bank, trust company, or savings or other financial institution [12 U.S.C. § 2021(b)]. Federal land bank associations exist in most agricultural areas of California.

Instead of applying directly to the farm credit bank for a loan, an applicant may join with a minimum of nine other persons desiring to borrow money from the farm credit bank and they may form a federal land bank association for their territory [see 12 U.S.C. § 2091(b)(1)]. By forming an association, the potential borrowers acquire specific corporate powers that may be exercised in loan transactions and other financial-related services. Each land bank association has its own board of directors elected from its voting shareholders that conducts the affairs of the association [see 12 U.S.C. § 2092]. The association, through various departments and committees, has, among others, the power to review applicants for membership in the association, review and recommend loans to the farm credit bank, provide technical assistance to borrowers, and provide other appropriate financial services [12 U.S.C. § 2093]. In contrast to the centralized district farm credit bank, the land bank association may be better able to serve and respond to the financial needs of borrowers in its locale by operating at a local level and through a board comprising fellow agricultural producers.

For further discussion of the Farm Credit System, including federal land bank associations, see Harl, *Agricultural Law*, Ch. 100, *Farm Credit Administration; The Farm Credit System* (Matthew Bender).

[3] Production Credit Associations

Production credit associations are the second major branch of the federal Farm Credit System [see 12 U.S.C. § 2071]. The purpose of a production credit association (PCA) is to provide financing on a short and intermediate term basis [see 12 C.F.R. §§ 614.4110, 614.4200 (length of terms)] to bona fide farmers and ranchers and the producers or harvesters of aquatic products [see 12 U.S.C. § 2075(a)]. In contrast to federal land bank associations, a PCA's main lending purpose is to provide short and intermediate loans required for basic processing and marketing [see 12 U.S.C. § 2075(a)(1)]. A PCA may be organized by 10 or more farmers, ranchers, or producers or harvesters of aquatic products who desire to borrow money under the Farm Credit System [12 U.S.C. § 2071(b)(1)].

Loans made to eligible borrowers by a PCA may be used for agricultural and aquatic purposes, including basic processing and marketing directly related to the operations of the borrower and other eligible farmers, ranchers, and producers or harvesters of aquatic products [12 U.S.C. § 2075(a)(1)]. However, the operations of the borrowers must provide at least some portion of the processing or marketing for which financing is requested [12 U.S.C. § 2075(a)(1)]. If the operations of the loan applicant supply less than 20 percent of the total processing or marketing for which financing is extended, the aggregate of the financing provided by the association for marketing and processing will not exceed 15 percent of the total of all outstanding loans of all associations in the district at the end of its preceding fiscal year [12 U.S.C. § 2075(a)(1)]. Loans may also be made to rural residents for financing housing in rural areas, and to persons furnishing to farmers and ranchers farm-related services that are directly related to their on-farm operating needs [see 12 U.S.C. § 2075(a)(2), (3)].

To borrow from a PCA, the applicant must own voting stock or participation certificates of the PCA equal to the lesser

of \$1,000 or 2 percent of the loan [see 12 U.S.C. §§ 2074(a), 2154a(c)(1)(E)]. Production credit associations are located throughout the state and potential borrowers may contact the office of the nearest one for assistance in determining loan eligibility and availability [see § 48.122].

For a discussion of production credit associations, see Harl, Agricultural Law, Ch. 100, *Farm Credit Administration; The Farm Credit System* (Matthew Bender).

[4] Bank for Cooperatives

The Bank for Cooperatives is the third branch of the federal Farm Credit System and is primarily engaged in making loans to eligible cooperatives [see 12 U.S.C. § 2128; see also 12 C.F.R. § 614.4120]. A "cooperative" means any association of farmers, ranchers, or producers or harvesters of aquatic products involved in the processing and handling of farm or aquatic products, or providing equipment or services to farmers, ranchers, or producers or harvesters of aquatic products [see 12 C.F.R. § 613.3100(a)(1)]. The business of the cooperative must be conducted for the mutual benefit of the members as patrons [see 12 C.F.R. § 613.3100(a)(1)].

To be eligible to borrow from the Bank for Cooperatives, the applicant cooperative must not allow any member more than one vote because of the amount of stock or membership capital owned by that member, or the cooperative must not pay dividends on stock or membership capital in excess of the maximum allowable annual percentage [see 12 C.F.R. § 613.3100(b)(1)(iii) (maximum annual percentage)]. The applicant cooperative must not engage with nonmembers in business transactions relating to the processing and handling of farm or aquatic products, or providing equipment or services to farmers, ranchers, or producers or harvesters of aquatic products in an amount greater than the total amount of this same business transacted with members, excepting those transactions involving the United States or its agencies [12 U.S.C. § 2129(a)(3)]. The applicant cooperative also must meet minimum percentage voting control requirements [see 12 U.S.C. § 2129(a)(4); see also 12 C.F.R. § 613.3100(b)(1) (minimum percentage voting control requirements of cooperative held by farmers, ranchers, or producers and harvesters of aquatic products)]. Other entities eligible to borrow from Banks for Cooperatives include those cooperatives and entities already receiving loans, loan commitments, or loan guarantees from the Rural Electrification Administration, or loans or loan commitments from the Rural Telephone Bank, or legal entities in which an eligible utility [see 12 C.F.R. § 613.3100(c)(1)(ii)] has an ownership interest (or a subsidiary or other entity in which an eligible utility has an ownership interest) [12 C.F.R. § 613.3100(c)(1)]. Legal entities with more than 50 percent voting control held by otherwise eligible cooperatives [see 12 C.F.R. § 613.3100(b)(1)(iv)], or that hold more than 50 percent voting control of an otherwise eligible cooperative, may be eligible to borrow [12 C.F.R. § 613.3100(b)(2)(i)]. Finally, domestic lessors are eligible to borrow to finance facilities or equipment leased to eligible cooperatives [12 C.F.R. § 613.3110(e)].

At the time the loan is made, the borrower cooperative must own at least one share of voting stock issued by the Bank for Cooperatives [12 U.S.C. § 2130(a); see also 12 U.S.C. § 2124 (stock of banks for cooperatives)]. Loans for California-based cooperatives are made through the Bank for Cooperatives based in the office of the Farm Credit Banks of Sacramento [see 12 C.F.R. § 611.500].

Banks for cooperatives are subject to state income taxation [*Director of Revenue of Missouri v. CoBank ACB* (2001) 531 U.S. 316, 121 S.Ct. 941, 944-946, 148 L. Ed. 2d 830 ; see 12 U.S.C. § 2134].

For a discussion of the Bank for Cooperatives, see Harl, Agricultural Law, Ch. 100, *Farm Credit Administration; The Farm Credit System* (Matthew Bender). For a discussion of the requirements and formation of an agricultural cooperative, see Ch. 14, *Cooperative Corporations* .

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 48.14 Farmers Home Administration

[1] In General

The Farmers Home Administration (FmHA) is a federal agency responsible for making a variety of loans to eligible farmers and ranchers. In the field of agricultural operations, the FmHA makes loans in three major categories: farm ownership loans [see 7 U.S.C. § 1923], farm operating loans [see 7 U.S.C. § 1942], and loans for disaster-based emergencies [see 7 U.S.C. § 1961].

To qualify for loans in any of these categories, borrowers must be citizens of the United States and must have sufficient agricultural training or experience to assure reasonable prospects of success in the proposed farming operation. In addition, prospective borrowers must be or must become owner-operators of farms no larger than "family farms" [see 7 C.F.R. § 1943.4 (family farm defined)], and must be unable to obtain sufficient credit elsewhere to finance their actual needs, taking into account prevailing loan market conditions [see 7 U.S.C. § 1922(a)]. An applicant for a farm operating loan need only be an operator, rather than an owner-operator [7 U.S.C. § 1941(a)]. Generally, if borrowers are cooperatives, corporations, or partnerships, these eligibility requirements apply to the individuals holding the majority interest in the organization [see 7 U.S.C. §§ 1922(a), 1941(a)].

[2] Farm Ownership Loans

Farm ownership loans may be made or insured by the FmHA for acquiring, enlarging, or improving farms or ranches, making capital improvements to farms or ranches, paying for activities to promote soil and water conservation and protection [see 7 U.S.C. 1924], refinancing existing indebtedness, and loan closing costs [7 U.S.C. § 1923(a); see 7 C.F.R. § 1943.16]. In making loans in this category, preference is given to applicants who have dependent families, who are able to make initial down payments, or who are owners of livestock and implements necessary to carry on farming or ranching operations successfully [7 U.S.C. § 1923(b)]. Loans to one borrower made under this category may not exceed the smaller of either (1) the value of the farm or other security, or (2) in the case of a loan other than a loan guaranteed by the FmHA, \$200,000, or in the case of loan guaranteed by the FmHA \$700,000 (increased, beginning with the fiscal year 2000, by the inflation percentage applicable to the fiscal year in which the loan is guaranteed and reduced by the unpaid indebtedness of the borrower on specified loans guaranteed by the FmHA) [7 U.S.C. § 1925(a)].

[3] Farm Operating Loans

In the farm operating loan category, loans may be made for a variety of purposes. These include loans for paying costs incident to reorganizing the farming system for greater profits; purchasing livestock, poultry, and farm equipment; purchasing feed, seed, and supplies; financing land or water development, use, or conservation; paying loan closing costs; assisting a farmer or rancher in changing equipment, facilities, or methods of operation to comply with specified statutory standards; training a limited-resource borrower receiving a loan under 7 U.S.C. § 1934 in maintaining records of farming and ranching operations; providing other borrower training [see 7 U.S.C. § 2006a]; refinancing certain borrower indebtedness; and providing other farm, ranch, or home needs, including family subsistence [see 7 U.S.C. § 1942]. Loans to one borrower made under the farm operating loan category may not exceed \$700,000 (increased, beginning with the fiscal year 2000, by the inflation percentage applicable to the fiscal year in which the loan is guaranteed and reduced by the unpaid indebtedness of the borrower on specified loans guaranteed by the FmHA) if guaranteed by the FmHA, or \$300,000, if guaranteed by another lender [7 U.S.C. § 1943(a)(1)].

[4] Loans for Disaster-Based Emergencies

To be eligible for loans in the third category, disaster-based emergency loans, farmers and ranchers must have been substantially affected by a natural disaster in the United States as determined by the Secretary of Agriculture, or by a major disaster or emergency designated by the President under the Disaster Relief Act of 1974 [see 42 U.S.C. § 5121 *et seq.*]. The borrower must submit the application within eight months after the date on which the Secretary's determination or the President's designation is made [7 U.S.C. 1961(a)]. To determine the eligibility of applicants, the net worth of the applicant must be taken into account [7 U.S.C. § 1962(a)]. The applicant also must present at least one letter (or, for loans in excess of \$300,000, two letters) from a local legally organized lending institution within reasonable proximity to the applicant declining to extend credit to the applicant, including its reasons for the declination [7 U.S.C. § 1962]. However, this requirement may be waived for loans of \$100,000 or less, if it is determined that it would impose an undue burden on an applicant [7 U.S.C. § 1962(b)].

Loans for disaster-based emergencies may be made for the same purposes as those made for farm ownership or operation [7 U.S.C. § 1963]. The maximum amount of a loan made for a disaster-based emergency may not exceed the actual loss caused by the disaster, or cause the total indebtedness of the borrower for emergency loans to exceed [7 U.S.C. § 1964(a)].

[5] Other Loans

The FmHA also makes loans for development of water and waste disposal facilities, soil and water conservation and protection, and rural industrialization assistance [see 7 U.S.C. §§ 1924, 1926, 1932]. For a discussion of each of the loan programs administered by the Farmers Home Administration and related issues, see Harl, *Agricultural Law*, Ch. 96, *Consolidated Farm and Redevelopment Act* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 48.15 Commodity Credit Corporation

The Commodity Credit Corporation (CCC) is the part of the Department of Agriculture responsible for providing assistance in stabilizing, supporting, and protecting farm income and prices, and facilitating adequate production and orderly distribution of agricultural commodities [15 U.S.C. § 714]. One method by which the CCC supports prices is by making nonrecourse secured loans to producers of certain agricultural commodities [15 U.S.C. § 714c(a); 7 U.S.C. § 1425; see 7 C.F.R. § 1421.4(a) ("eligible producer" defined)]. Marketing assistance loans made by the CCC generally are short-term operating loans secured by the crops for which the loan is acquired [see 7 C.F.R. § 1421.6]. If the loan is not paid at maturity, the CCC may sell the pledged collateral and retain the proceeds [7 U.S.C. § 1425(a)]. The borrower is not personally liable for any deficiency arising from the sale of the collateral by the CCC unless the loan was obtained through fraudulent representations, the pledged collateral is deficient in grade, quality, or quantity, or the borrower fails or refuses to deliver the collateral [7 U.S.C. § 1425(a)]. As an alternative to a marketing assistance loan, a producer may obtain Loan Deficiency Payments (LDP) on their crop. An LDP is available to a producer who, although eligible to obtain a marketing assistance loan, agrees to forgo a marketing assistance loan for the commodity in return for an LDP [see 7 C.F.R. 1421.201-1421.203].

Applications for marketing assistance loans and loan deficiency payments are available from, and are submitted to, the local county office of the Agricultural Stabilization and Conservation Service [7 C.F.R. § 1421.7(a)]. For a discussion of the CCC and price support programs, see Harl, *Agricultural Law*, Ch. 90, *Commodity Credit Corporation*, and Ch. 91, *Production Control and Price Support Programs for Agricultural Commodities* (Matthew Bender).

In addition to marketing assistance loans and loan deficiency payments, the Secretary of Agriculture may make recourse loans available to eligible borrowers on a finding that the loans are necessary to ensure that adequate operating credit is available to producers [see 7 U.S.C. §§ 1433c, 1433c-1].

Under the Agricultural Adjustment Act of 1938, Congress mandated permanent price supports for specified agricultural commodities through the use of parity payments [see 7 U.S.C. §§ 1301-1303]. These payments, when appropriated by Congress, are based on a formula for computing the parity price [see 7 U.S.C. § 1301(a)]. However, subsequent legislation established payment programs based on fixed support prices, also known as target prices, that have temporarily superseded the parity payment programs [see 7 U.S.C. §§ 1421, 1441; see also 7 U.S.C. § 8782(a), (b) (7

U.S.C. §§ 1421 and 1441 are not applicable from 2008 through 2012 to crops of covered commodities, peanuts, and sugar)].

These payments, administered by the CCC, are subject to total amount limitations [*see 7 U.S.C. § 1308*] and limitations on eligibility [*see 7 U.S.C. § 1308-1; see also 7 U.S.C. § 1308-2* (denial of program benefits)]. Target price programs vary for each commodity and for each crop year. The availability of these programs may influence the decisions of a farmer or rancher client in relation to financing needs for the upcoming crop year. For detailed information about the current availability of target price programs, counsel may contact the local office of the Agricultural Stabilization and Conservation Service.

Legal Topics:

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§ 48.16 Loan Disclosures and Borrower's Rights

[1] Exemption From Federal Truth in Lending Act

Agricultural credit transactions are exempt from the provisions of the federal Truth in Lending Act [*see 15 U.S.C. § 1603(1); see also 12 C.F.R. § 226.3(a)*], which provide for disclosure of credit costs and terms to consumers [*see 15 U.S.C. § 1601(a)*]. The exemption applies to credit transactions involving governmental or private lenders [*12 C.F.R. § 226.2(a)(17), (22)*].

However, Farm Credit System lenders [*see § 48.13[2] et seq.*] must make specific disclosures and provide certain documents to borrowers for all loans exempt from the federal Truth in Lending Act. Before the time of the loan closing, the lender must disclose to the borrower the current rate of interest on the loan and, for an adjustable or variable interest loan, the amount and frequency by which the interest rate can be increased [*12 U.S.C. § 2199(a)(1), (2)*]. The lender must also disclose the factors that will be taken into account in determining the adjustments to the interest rate, and if there are no limitations on these adjustments, a statement to that effect [*12 U.S.C. § 2199(a)(2)*]. Additional required disclosures include the effect of any loan origination charges or purchases of stock or participation certificates on the effective interest rate, and any change in the interest rate applicable to the borrower's loan [*12 U.S.C. § 2199(a)(3), (4)*]. Finally, the lender must include a statement that purchases of stock in the lending institution are at risk, and a statement indicating the various types of loan options available to borrowers [*12 U.S.C. § 2199(a)(5), (6)*].

At the time of execution of a Farm Credit System loan, the Farm Credit System lender must provide the borrower with copies of all documents signed by the borrower [*12 U.S.C. § 2200*]. On request of the borrower, the lender must further provide additional copies of all documents signed by the borrower, a copy of the lender's articles of incorporation or charter and bylaws, and copies of each appraisal of the borrower's assets made or used by the lender [*see 12 U.S.C. § 2200*]. Loan applicants must be provided with prompt written notice of the action on the application, including the reasons for denial or reduction of the loan and the applicant's right to a review of the lender's actions regarding the application [*see 12 U.S.C. § 2201(a); see also 12 U.S.C. § 2202* (review of lender's actions)].

For further discussion of the federal Truth in Lending Act, see Ch. 45, *Consumer Installment Loans and Credit Sales*.

[2] Applicability of Unruh Act

In California, the Unruh Act regulates the retail installment sale of consumer goods and services [*see Civ. Code § 1801 et seq.*]. Sales of real property, including any site preparation incidental to the sale, and contracts for the construction or sale of an entire residence, are expressly exempt from the Act [*Civ. Code § 1801.4*]. Unlike the federal Truth in Lending Act [*see 15 U.S.C. § 1603(1)*], the Unruh Act does not expressly exempt credit transactions for agricultural purposes from its disclosure requirements. Generally, farm equipment is not considered to be consumer goods. "Goods" means tangible chattels bought for use primarily for personal, family, or household purposes; farm equipment purchased for use primarily in operating a farm or ranch business ordinarily does not fall within the scope of the Act [*Civ. Code § 1802.1*; *Crestwood Lumber Co. v. Citizens Sav. & Loan Assn.* (1978) 83 Cal. App. 3d 819, 823, 148 Cal. Rptr. 129 ((Unruh Act applies to consumer goods only) *overruled on other grounds by Southwest Concrete Products v. Gosh Constr. Corp.* (1990) 51 Cal. 3d 701, 274 Cal. Rptr. 404)].

The Unruh Act expressly exempts from its coverage transactions in the form of loans made by a supervised financial organization [*Civ. Code § 1801.6(b)*]. "Supervised financial organization" is defined as a person organized, chartered, or holding a license or authorization certificate to make loans pursuant to California or federal law and is subject to supervision by an official or agency of California or the federal government [*Civ. Code § 1801.6(c)(1)*; *see Civ. Code § 1802.15* ("person" includes individual, partnership, corporation, limited liability company, association, or other group, however organized)]. Thus, this section exempts loans obtained through commercial banks, savings and loans, and government lenders.

For further discussion of the Unruh Act, see Ch. 45, *Consumer Installment Loans and Credit Sales* .

Legal Topics:

For related research and practice materials, see the following legal topics:

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 48 AGRICULTURAL FINANCING
PART II. LEGAL BACKGROUND

20-48 California Legal Forms--Transaction Guide § 48.17

§ 48.17 Uniform Commercial Code Security Interests

[1] In General

Division 9 of the Uniform Commercial Code applies to transactions that are intended to create "security interests" in personal property or fixtures, including "goods" [see *Com. Code* §§ 1201(b)(35) ("security interest" defined) 9101 et seq.]. Ordinarily, when a borrower obtains an operating loan, he or she grants a security interest in the property for which the loan is sought. Crops, livestock, standing timber, and farm equipment are examples of "goods" in which security interests are commonly created [see *Com. Code* § 9102 (goods-related definitions)]. The Code contains a number of provisions specifically related to financing of agricultural operations [see, e.g., *Com. Code* §§ 9102(a)(34) ("farm products" defined), 9308(b) (perfection of agricultural lien), 9334(i) (priority of growing crops). Revised Division 9 [*Com. Code* § 9101 et seq.], adopted in 1999 and operative on July 1, 2001 [see 1999 Stats., ch. 991, § 35] also has been expanded to include nonpossessory statutory agricultural liens [see *Com. Code* § 9102(a)(5) (definition)] within its scope [see *Com. Code* § 9109(a)(2)].

Determining the appropriate category of goods to which collateral belongs is crucial for attaching and perfecting a security interest. Failure to identify collateral properly in the security agreement or financing statement may cause the creditor to lose its advantage in the event of default by the debtor [see *Com. Code* § 9203; Meyer, "Crops" as Collateral for an Article 9 Security Interest and Related Problems, 15 U.C.C. L.J. 3, 4 (1982) (discussing former Division 9)]. Within the definition of goods, the Code includes "equipment," which is defined as goods that are not included in the definitions of inventory, farm products, or consumer goods [*Com. Code* § 9102(a)(33)]. "Farm products" are goods, other than standing timber, with respect to which the debtor is engaged in a farming operation [see *Com. Code* § 9102(a)(35) (definition)] and which are one of the following [*Com. Code* § 9102(a)(34)]:

- Crops grown, growing, or to be grown, including crops produced on trees, vines, and bushes and aquatic goods produced in aquacultural operations.
- Livestock, born or unborn, including aquatic goods produced in aquacultural operations.
- Supplies used or produced in a farming operation.

- Products of crops or livestock in their unmanufactured states.

Goods are "inventory" if they are goods, other than farm products, that are leased by a person as lessor; held by a person for sale or lease or to be furnished under a contract of service; furnished by a person under a contract of service; or consist of raw materials, work in process, or materials used or consumed in a business (for example, fuel used in operations) [*Com. Code § 9102(a)(48)*; see *Com. Code § 9102* (UCC Comment P 4a)]. For further discussion of classification of agricultural collateral, see § 48.17[2] et seq.

With specified exceptions, a security interest attaches and is enforceable against the debtor and third parties with respect to the collateral only if each of following conditions is satisfied [*Com. Code § 9203(b)*; see *Com. Code § 9203(c)-(i)* (exceptions)]:

- Value has been given [*Com. Code § 9203(b)(1)*].
- The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party [*Com. Code § 9203(b)(2)*].
- There is an agreement, plus satisfaction of one of the following evidentiary tests [see *Com. Code § 9203(b)(3)*; *Com. Code § 9203* (UCC Comment PP 2-4)]:

- **Authenticated security agreement:** The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned [*Com. Code § 9203(b)(3)(A)*].

- **Possession pursuant to the agreement:** The collateral is not a certificated security and is in the possession of the secured party under *Com. Code § 9313* (perfection by possession or delivery without filing), in accordance with to the debtor's security agreement [*Com. Code § 9203(b)(3)(B)*].

- **Delivery pursuant to the agreement:** The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under *Com. Code § 8301* (delivery of security), in accordance with the debtor's security agreement [*Com. Code § 9203(b)(3)(C)*; see *Com. Code § 8102(a)(4)* ("certificated security" defined); *Com. Code § 8102(a)(16)* "security certificate" defined)].

- **Control pursuant to the agreement:** The collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents, and the secured party has control under *Com. Code §§ 7106 and 9104-9107*, in accordance with the debtor's security agreement [*Com. Code § 9203(b)(3)(D)*; see *Com. Code § 9102* (definitions)].

A security interest must also be perfected, or it is subordinate to several other classes of competing interests in the same collateral [see *Com. Code § 9317*]. A security interest in goods is perfected either by the acquisition of the collateral by the secured party, or by the filing of a financing statement in the proper location [see *Com. Code §§ 9310, 9313*].

A financing statement that covers timber *to be cut* is filed in the office designated for filing or recording of a mortgage on the related real property [*Com. Code § 9501(a)(1)(A)*; see *Com. Code § 9102(a)(44)* ("goods" includes standing timber that is to be cut and removed under conveyance or contract for sale)]. However, once cut, the timber is no longer timber to be cut, and the filing in the real property mortgage office ceases to be effective. The timber then becomes

ordinary goods, and filing in the office of the Secretary of States is necessary for perfection [see *Com. Code* § 9501(a)(2); *Com. Code* § 9501 (UCC Comment P 3)].

There are two ways in which a secured party may file a financing statement to perfect a security interest in goods that are or will become fixtures. A secured party may file in the Division 9 records, as with most other goods [see *Com. Code* § 9501(a)(2); *Com. Code* § 9501 (UCC Comment P 4); see also Ch. 42, *Secured Transactions*]. In these circumstances, the secured party files in the office of the Secretary of State [see *Com. Code* § 9501(a)(2)]. Alternatively, a secured party may file the financing statement as a "fixture filing" [see *Com. Code* § 9501(a)(1)(B)]. A "fixture filing" is the filing of a financing statement covering goods that are or will become fixtures and satisfying *Com. Code* § 9502(a), (b), governing the contents of the financing statement [*Com. Code* § 9102(a)(40); see *Com. Code* § 9102(a)(41) ("fixtures" defined)]. Filing is in the office in which the record of a mortgage on the related real estate would be filed [see *Com. Code* § 9501(a)(1)(B)].

Financing statements covering most other types of security interests must be filed in the Office of the Secretary of State [see *Com. Code* § 9501(a)(2); see also § 48.141, P 12].

A financing statement that covers timber to be cut or is filed as a fixture filing must satisfy conditions in addition to those required of a standard financing statement [see *Com. Code* § 9502(b); see also *Com. Code* § 9334 (priority of security interests in fixtures)]. For further discussion of these issues, see Ch. 42, *Secured Transactions* . For a copy of the official UCC financing statement and a discussion of the required contents and filing procedures, see Ch. 42, *Secured Transactions* .

Even though a creditor may perfect a secured interest in collateral belonging to the debtor, the secured party may not always have the first priority in claiming rights to the collateral [see *Com. Code* §§ 9317, 9322]. For information on the priorities among creditors, see generally Forms and Procedures Under the Uniform Commercial Code, Article 9, *Secured Transactions* (Matthew Bender).

For a discussion of secured transactions in general, see Ch. 42, *Secured Transactions* .

[2] Crops as Collateral

The UCC definition of "goods" includes growing crops [see *Com. Code* § 9102(a)(44)(iv)]. Goods include farm products if the debtor is engaged in farming operations with respect to the goods [see *Com. Code* § 9102(a)(34), (35)]. Products of crops remain farm products as long as they have not been subjected to a manufacturing process [see *Com. Code* § 9102 (UCC Comment P 4a)]. Goods that are farm products are not equipment or inventory [see *Com. Code* § 9102 (UCC Comment P 4a) (classes of goods are mutually exclusive); see § 48.17[1]]. As is the case with any other collateral, a security interest in crops is not enforceable unless the requirements for attachment are met [*Com. Code* § 9203(a); see § 48.17[1]]. Since the crops are ordinarily in the possession of the debtor, an agreement containing a description of the crops is necessary to enforce the security interest [see *Com. Code* § 9203(b)(3)(A); see Meyer, "Crops" as Collateral for an Article 9 Security Interest and Related Problems, 15 U.C.C. L.J. 3, 11 (1982) (discussing former Division 9)]. Although the debtor is required to have rights in the collateral pledged as security [see *Com. Code* § 9203(b)(2)], the debtor may pledge crops that are "to be grown" [see *Com. Code* §§ 9102(a)(34)(A), 9109(a)(1)].

A perfected security interest in crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in, or is in possession of, the real property *Com. Code* § 9334(i)].

[3] Livestock as Collateral

The definition of "goods" includes the unborn young of animals [see *Com. Code* § 9102(a)(44)(iii)]. "Goods" also

includes farm products that are livestock, born and unborn, including aquatic goods produced in aquacultural operations [see *Com. Code* § 9102(a)(34)]. Goods that are farm products are neither equipment nor inventory [see *Com. Code* § 9102 (UCC Comment P 4a) (classes of goods are mutually exclusive); see § 48.17[1]].

Livestock populations in farm operations are subject to changes in number and quality that require the parties to include an after-acquired property clause in the security agreement [see *Com. Code* § 9204]. Livestock covered by the agreement should cover those animals presently owned by the debtor, future acquisitions by purchase or otherwise, and natural increase due to present or future gestation [see Clark, *The Agricultural Transaction: Livestock Financing*, 11 U.C.C. L.J. 106 (1978); see § 48.261[1]]. Although the security interest ordinarily attaches after value has been given, the debtor has rights in the collateral, and there is an authenticated agreement, plus satisfaction of an evidentiary test [see *Com. Code* § 9203(b)(3); *Com. Code* § 9203 (UCC Comment PP 2-4)], the agreement may specify a later time for attachment to cover after-acquired collateral [see *Com. Code* §§ 9203, 9204].

[4] Farm Equipment as Collateral

Farm equipment is useful as collateral in purchase money loans for the equipment itself or for obtaining credit secured by equipment previously acquired. Included in the definition of goods is "equipment," which is defined as goods that are not included in the definitions of inventory, farm products, or consumer goods [*Com. Code* § 9102(a)(33); see § 48.17[1]].

Secured transactions in farm equipment are similar to those in business equipment, and security agreements covering these transactions should be drafted in a like manner [see *Forms and Procedures Under the Uniform Commercial Code*, Article 9, *Secured Transactions*, Part 2, *Security Agreements for Equipment*, PP 92.07, 92.08, and Part 3, *Security Agreements for Farm Products*, P 93.01 (Matthew Bender)]. For a form provision describing equipment as collateral, see § 48.263. Farm equipment qualifying as fixtures (for example, fixed irrigation systems) may require a fixture filing in addition to the financing statement [see *Com. Code* §§ 9102(a)(40), 9501(a)(1)(B); see § 48.17[1]].

[5] Protection for Purchasers of Farm Products

Various state laws permit secured lenders to enforce liens against purchasers of farm products, even though the purchaser has no knowledge of the secured lender's interest in the products, has no practical method for determining the existence of the interest, and has no means to ensure that the seller uses the sale proceeds to repay the lender [see 7 U.S.C. § 1631(a)(1)]. These liens force the purchaser to make double payments for the products and inhibit free competition in the market for farm products [see 7 U.S.C. § 1631(a)(2), (3)]. To remove this burden on interstate commerce in farm products, Congress has established that a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations takes free of a security interest created by the seller, even though the security interest is perfected and the buyer is aware of the security interest [7 U.S.C. § 1631(b), (d)]. However, a secured lender may protect its interest in the farm products, and a buyer will take subject to the security interest, if the lender or seller delivers a notice of the security interest to the buyer within one year before the sale of the farm products, and the buyer has failed to perform its payment obligations [7 U.S.C. § 1631(e)(1); see § 48.300]. Similar provisions apply to commission merchants and selling agents who sell farm products for others in the ordinary course of business [see 7 U.S.C. § 1631(g)]. The statute provides additional filing and notice mechanisms for protecting lenders' interests in states that have established a central filing system for that purpose [see 7 U.S.C. § 1631(e)(2), (3); 9 C.F.R. § 205.1 *et seq.*]. California has not enacted this type of system.

A security agreement under which a person engaged in farming operations creates a security interest in a farm product may require that person to provide the secured party with a list of the buyers, commission merchants, and selling agents to or through whom that person may sell the farm product [7 U.S.C. § 1631(h)(1)]. If an agreement contains such a provision and the person engaged in farming operations sells the farm product to or through a person not on the list, the seller must notify the secured party in writing at least seven days before the sale, or must account to the secured party

for the proceeds of the sale no later than 10 days after the sale [7 U.S.C. § 1631(h)(2)]. Violation of this requirement subjects the seller to a fine [see 7 U.S.C. § 1631(h)(3)].

For a further discussion of the notice and filing requirements of the federal law, including a form meeting the notice requirements currently applicable in California, see § 48.300. For a form provision requiring the debtor to provide the lender with a list of potential buyers, commission merchants, and selling agents, see § 48.240[2], P 7.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGoodsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGoodsEquipmentCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGoodsFarm ProductsCommercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsGeneral Overview



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20-48 California Legal Forms--Transaction Guide § 48.18

§ 48.18 Deductibility of Interest Expenses

If a debt is incurred or continued in connection with the conduct of a trade or business, interest paid or accrued on that debt is deductible from income [*I.R.C. § 163(a), (h); Rev. & Tax. Code § 17201*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Income Tax ComputationDeductions for Business ExpensesInterest (IRC sec. 163)



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20-48 California Legal Forms--Transaction Guide §§ 48.19-48.99

[Reserved]

§§ 48.19[Reserved]



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PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

20-48 California Legal Forms--Transaction Guide § 48.100

§ 48.100 Facts

1. Identity of borrower

a. If borrower is individual:

- (1) Name, address, and telephone number.
- (2) Social security number or Internal Revenue Service taxpayer identification number.
- (3) Citizenship.
- (4) Marital status.
- (5) Full name, address, and telephone number of spouse.

b. If borrower is general partnership or joint venture:

- (1) Full name of partnership as set forth in partnership agreement or statement of partnership.
- (2) Full name, address, and telephone number of each partner or joint venturer.
- (3) Citizenship and principal occupation of each partner.
- (4) Percentage of interest in partnership held by each partner.

NOTE:

Information relating to the individual partners is required by statute only from borrowers

seeking loans from the Farmers Home Administration [*see* 7 C.F.R. §§ 1941.11, 1943.11, 1945.161].

(5) Internal Revenue Service taxpayer identification number.

(6) County in which statement of partnership has been filed, if any [*see Corp. Code § 15010.5*].

c. If borrower is limited partnership:

(1) Full name of limited partnership as set forth in partnership agreement or certificate of limited partnership.

(2) Full name, address, and telephone number of each general and limited partner.

NOTE:

Information relating to the individual limited partners is required by statute only from borrowers seeking loans from the Farmers Home Administration [*see* 7 C.F.R. §§ 1941.11, 1943.11, 1945.161].

(3) Citizenship and principal occupation of each general and limited partner.

(4) Percentage of interest in partnership held by each general and limited partner.

(5) Internal Revenue Service taxpayer identification number.

(6) Counties in which certificate of limited partnership has been recorded, if any [*see Corp. Code § 15621(d)* (until 2010); *Corp. Code § 15902.01* (after 2009); *see also Corp. Code § 15502(1)(b)* (partnerships formed before July 1, 1984, not electing CRLPA coverage, repealed January 1, 2010)].

(7) If any general partner is itself corporation, same information required for corporation [*see* (d), *below*].

d. If borrower is corporation:

(1) Full name of corporation as set forth in articles of incorporation, address, and telephone number of principal office in California.

(2) Internal Revenue Service taxpayer identification number.

(3) Full name, address, and telephone number of each stockholder.

(4) Citizenship and principal occupation of each stockholder.

(5) Number of shares and percentage of ownership held by each stockholder.

NOTE:

Information relating to the individual stockholders is required by statute only from borrowers seeking loans from the Farmers Home Administration [*see* 7 C.F.R. §§ 1941.11, 1943.11, 1945.161].

(6) Full name and title, address, and telephone number of person handling financing arrangement.

(7) Date and state of incorporation.

(8) If foreign corporation, date qualified to transact business in California.

e. If borrower is agricultural cooperative:

NOTE:

For a discussion of agricultural cooperatives, see Ch. 14, *Cooperative Corporations* .

(1) Full name of cooperative as set forth in articles of incorporation, address, and telephone number of principal office in California.

(2) Internal Revenue Service taxpayer identification number.

(3) Full name, address, citizenship, and principal occupation of each member.

(4) Number of shares and percentage of ownership held in cooperative by each member.

NOTE:

Information relating to the individual cooperative members is required by statute only from borrowers seeking loans from the Farmers Home Administration [*see* 7 C.F.R. §§ 1941.11, 1943.11, 1945.161].

(5) Full name and title, address, and telephone number of person handling financing arrangement.

f. If borrower is estate or personal representative:

(1) Full name, address, and telephone number of representative.

(2) Name and location of court in which estate is being administered.

g. If borrower is guardian or conservator:

(1) Full name, address, and telephone number of guardian or conservator.

(2) Name and location of court having jurisdiction of guardianship or conservatorship.

h. Full name, address, and telephone number of counsel representing borrower, if any.

i. Full name, address, and telephone number of agent representing borrower, if any.

2. If already established, identity of lender:

a. If commercial bank or other private lender:

(1) Full name, address, and telephone number of institution.

(a) Commercial bank.

(b) Savings and loan association.

(c) Insurance company.

(d) Agricultural cooperative.

(e) Individual.

(2) Full name and title, address, and telephone number of person handling financing arrangement.

b. If federal lending authority:

(1) Full name, address, and telephone number of institution.

(a) Farm credit bank.

(b) Federal land bank association.

(c) Production credit association.

(d) Bank for Cooperatives.

(e) Farmers Home Administration.

(f) Commodity Credit Corporation.

(2) Full name and title, address, and telephone number of person handling financing arrangement.

c. Full name, address, and telephone number of counsel representing lender, if any.

d. Full name, address, and telephone number of agent representing lender, if any.

3. Type of agricultural operation borrower currently engaged in.

4. Amount of time borrower engages in agricultural operations.

NOTE:

Eligibility for federal Farm Credit System loans is partially based on the extent to which the borrower engages in the agricultural operations [*see* 12 C.F.R. § 613.3000 *et seq.*].

5. Description of responsibilities and length of time borrower has engaged in particular agricultural operations for which financing is sought.

6. Description of responsibilities and length of time borrower has engaged in agricultural operations other than those for which financing is sought.

7. Purpose for which financing is sought:

a. Farm acquisition.

- b. Farmland acquisition.
 - c. Building construction.
 - (1) Farmhouse.
 - (2) Barn.
 - (3) Crop storage facility.
 - (4) Equipment storage facility.
 - d. Crop production.
 - e. Livestock acquisition.
 - f. Equipment acquisition.
 - g. Additional working capital for farm operations.
8. Amount of funds sought.
9. Property of borrower that may be offered as security for loans.
- a. Marketable corporate or government securities, including stocks, bonds, notes, debentures, or certificates of deposit.
 - b. Cash value of life insurance policies.
 - c. Assigned savings accounts.
 - d. Farm products.
 - (1) Crops, including products and proceeds of crops.
 - (2) Livestock, including products and proceeds of livestock.
 - e. Farm accounts.
 - (1) Negotiable warehouse receipts for farm products delivered to processor.
 - (2) Net proceeds due for products delivered to cooperative association.
 - (3) Investment credit in agricultural cooperative association's revolving fund [see discussion in *Ch. 14A, Agricultural Nonprofit Cooperative Associations*, § 14A.201[1][e]].
 - (4) Milk check assignments [see § 48.281].

(5) Other accounts receivable of borrower.

f. Equipment used by borrower.

g. Real property held in fee simple by borrower.

h. Other property or rights held by borrower.

10. Borrower's sources of income for repayment of loan.

a. Proceeds from sale of particular crop or livestock for which financing is sought.

b. Expected profits from agricultural operations over period of years.

11. Borrower's status as stockholder in Farm Credit System institution.

NOTE:

Borrower's of Farm Credit System loans must be stockholders in the institution from which financing is sought [*see* 12 U.S.C. § 2154a(c)(1)(E)]. For a discussion of the eligibility requirements for Farm Credit System borrowers, see § 48.13[1] et seq.

12. Identification of premises on which farming operations have, or will be, commenced.

a. Address of premises.

b. Legal description of premises.

c. Full name(s) in which legal title to property is held.

d. Type of estate held by borrower.

(1) Fee simple.

(2) Life estate.

(3) Lease.

e. Improvements on premises where farm operations have, or will be, commenced.

(1) Dwellings.

(2) Barns, storage sheds, and other structures.

13. If premises on which farm operations are to be conducted are leased:

a. Name, address, and telephone number of lessor.

b. Name, address, and telephone number of lessor's counsel, if any.

14. If farm products will be security for loan, names and addresses of all potential buyers of farm products from debtor,

and names and addresses of all commission merchants and selling agents through whom the farm products may be sold.

NOTE:

Under the Food Security Act of 1985 [*see* 7 U.S.C. § 1631], a lender may require the borrower to furnish the names and addresses of all buyers, commission merchants, and selling agents to or through whom farm products may be sold, so that the lender may notify listed persons of its security interest in those products [7 U.S.C. § 1631(h)(1)]. Buyers, commission merchants, or selling agents may be able to take title to the products free of the security interest if they do not receive this notice from either the lender or the seller [7 U.S.C. § 1631(d), (e), (g); *see* § 48.17[5]; *see also* § 48.300[1], § 48.240[2], PP 7, 8].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingGeneral Overview



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A. Client Interview--Facts and Documents

20-48 California Legal Forms--Transaction Guide § 48.101

§ 48.101 Documents

1. Copies of borrower's financial records, including:

NOTE:

If a cooperative, corporate, partnership, or joint operator borrower is seeking a loan from the Farmers Home Administration, each member, stockholder, partner, or joint operator holding or controlling 10 percent or more of the entity must submit current personal financial statements [*see* 7 C.F.R. §§ 1941.11(b)(2), 1943.11(b)(2), 1945.161(d)(2)]. For a discussion and forms of financial records relating to corporations, see Ch. 7, ***Corporate Records and Reports***.

- a. Balance sheet for agricultural operations conducted in preceding five years.
 - b. Profit and loss statements for agricultural operations conducted in preceding five years.
 - c. Income and expense statements for agricultural operations conducted in preceding five years.
 - d. Borrower's personal income tax returns and financial summary.
2. Document showing title to premises on which farming operations have or will be commenced.
3. If borrower is corporation, copy of articles of incorporation.
4. If borrower is partnership, copy of partnership agreement.

5. If borrower is agricultural cooperative [*see Food & Agric. Code §§ 54001-54294*], copy of articles of incorporation.
6. Agreements for outstanding loans owed by borrower.
7. Agreements creating security interests in any of borrower's real or personal property, including fixtures and negotiable warehouse receipts.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law
Financing
General Overview



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[Reserved]

§§ 48.102[Reserved]



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PART III. TRANSACTION GUIDE

B. Preliminary Determinations

20-48 California Legal Forms--Transaction Guide § 48.120

§ 48.120 Capacity of Parties to Contract

1. Determine whether parties are of sufficient age and mental capacity to enter into loan agreement [see *Civ. Code* §§ 1556, 1557; see also *Civ. Code* §§ 38-41 (persons of unsound mind); *Fam. Code* §§ 6500-7143 (minors)].

NOTE:

For a discussion of capacity to contract, see *Ch. 75, Formation of Contracts and Standard Contractual Provisions*, § 75.11[1][a] and *Ch. 100B, Contracts and Employment of Minors*, § 100B.20 et seq.

2. If borrower is married:

a. Determine whether borrower's spouse has given written consent to encumbrance of community personal property used as family dwelling, or furniture, furnishings, or apparel of other spouse or minor children [see *Fam. Code* § 1100(c)].

b. Determine whether spouse having management and control of community personal property business has given prior written notice of encumbrance to nonmanaging spouse [see *Fam. Code* § 1100(d)].

3. If borrower is corporation:

a. Determine whether articles of incorporation limit borrowing activity [see *Corp. Code* § 207].

b. Determine whether board of directors has passed resolution authorizing financing arrangement [see *Ch. 43, Commercial Loans*].

4. If borrower is partnership:

- a. Determine whether partnership agreement forbids or restricts borrowing in course of partnership business.
- b. Determine whether partnership has filed or recorded any statement or certificate that explicitly or implicitly forbids or restricts borrowing in course of partnership business.

5. If borrower is agricultural cooperative:

- a. Determine whether articles of incorporation contain any restrictions on borrowing activity [*see Food & Agric. Code §§ 54081-54083*].
- b. Determine whether board of directors has passed resolution authorizing financing arrangement.

6. If borrower is personal representative or guardian or conservator of estate, determine whether court administering estate or supervising guardianship or conservatorship has granted order authorizing borrowing of funds [*see Prob. Code §§ 9800-9805; Prob. Code §§ 2550-2552*].

7. If agent is acting for borrower in execution of loan agreement requiring repayment period greater than one year, determine whether agent has written authority to act in that capacity [*see Civ. Code §§ 1624(a), 2309*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties General Overview Real Property Law Financing General Overview



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B. Preliminary Determinations

20-48 California Legal Forms--Transaction Guide § 48.121

§ 48.121 Feasibility of Loan

1. Determine whether borrower meets general requirements for agricultural loan.

NOTE:

Each lending institution adopts its own written standards for prudent lending and issues written policies and procedures for agricultural financing arrangements [*see* 12 C.F.R. § 614.4150]. However, lenders may consider extenuating circumstances that establish repayment of the loan, despite the failure to meet any one or more loan of the established underwriting standards [12 C.F.R. § 614.4150(i)]. In addition, the Farmers Home Administration makes loans to "limited resource" borrowers who may qualify although they have unproven credit histories [*see* § 48.122, P 2(e)(2)]. Counsel may refer to the information assembled in the Farm and Home Plan for assistance in making this preliminary determination [*see* § 48.200].

2. Determine whether borrower meets particular requirements for agricultural crop loan.

NOTE:

The following preliminary determinations relate to the suitability of the crop to the locale and the borrower's premises, the anticipated market for the crop, and the ability of the borrower to successfully produce the crop. Lenders may be reluctant to finance operations if there is little or no history of success for the crop in the farm or ranch locale. For assistance in determining the success rate and market conditions of the borrower's proposed crop, contact the local office of the University of California Cooperative Extension Service.

- a. Is crop for which borrower seeks financing typically grown in borrower's locale with

successful yields?

b. Has borrower had experience in growing crop for which financing is sought?

c. Has agricultural land on which proposed crop will be planted successfully produced proposed crop or similar crops in past?

d. Does market forecast for proposed crop indicate strong or weak price and demand?

e. Does borrower own or have access to sufficient equipment necessary for crop production and harvest?

f. Does borrower have sufficient fiscal reserves to carry operations beyond first harvest year and meet repayment schedule if crop fails?

g. If borrower is tenant under crop share lease arrangement, has landlord agreed to share waiver [*see* § 48.301]?

3. Determine whether borrower meets particular requirements for livestock loan.

NOTE:

See discussion in P 2 NOTE, *above*.

a. Does borrower have sufficient experience in livestock management to indicate likelihood of success?

b. If dairy farming:

(1) Is milk production sufficient to cover operating and living expenses of borrower?

(2) Is dairy certified by Department of Food and Agriculture [*see Food & Agric. Code* § 33222]?

(3) Has dairy passed required inspections [*see 3 Cal. Code Reg. § 602*]?

(4) Does dairy have contract with milk processor?

NOTE:

If the dairy has a contract with a milk processor, the right to payment under that contract may be used as security for the repayment of a debt [*see* § 48.281].

c. If raising range livestock:

(1) Does borrower have sufficient grazing land to support livestock for which financing is sought?

NOTE:

Questions regarding proper range management and grazing use may be directed to the local office of the University of California Cooperative Extension Service [*see also Developing Livestock Leases for Annual Grasslands*, Leaflet 21424 (Univ. of Cal. Coop. Ext. 1987)].

(2) Does the borrower's herd or flock have sufficient collateral value to cover the loan?

NOTE:

A formal appraisal of the herd or flock may be necessary to determine the value. Assistance in determining the value of the livestock may be obtained through the University of California Cooperative Extension Service.

4. Determine whether borrower meets particular requirements for equipment loan.

a. Is equipment usually required in agricultural operations borrower engaged in?

b. Is equipment custom built or modified in design?

NOTE:

If equipment is not of standard manufacture, its collateral value may be impaired by its decreased saleability.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewGovernmentsAgriculture & FoodGeneral OverviewReal Property
LawFinancingGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 48 AGRICULTURAL FINANCING

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

20-48 California Legal Forms--Transaction Guide § 48.122

§ 48.122 Appropriate Type, Source, and Collateral of Loan

1. If not already established, determine appropriate type of loan for borrower's needs.

NOTE:

This determination is necessary in deciding which lenders would be most likely to make the loan. Significant costs in preparation of loan applications and interviews can be saved by establishing the most likely sources for loans matched to the borrower's needs [*see* § 48.122, P 2].

- a. Short term operating loan for production of crops.

- (1) Ground preparation costs.

- (2) Planting costs.

- (3) Cultivation costs.

- (4) Irrigation costs.

- (5) Harvesting costs.

- (6) Marketing costs.

- (7) Farmland rental costs.

NOTE:

For a discussion of the leasing of farmlands on a cash or crop share basis, see *Ch. 37*,

Farm Leases, §§ 37.200, 37.201.

- (8) Taxes and insurance costs.
- (9) Living expenses.
- (10) Costs related to debt service on capital loans.

b. Intermediate or long term capital loan for production of crops.

- (1) Purchase of equipment required for efficient crop production and management.

NOTE:

For a discussion of agreements creating security interests in equipment used in business, including farm equipment, see Ch. 42, ***Secured Transactions*** .

- (2) Debt refinancing.
- (3) Purchase of farmland.

NOTE:

For a discussion of real property purchases and the methods of financing used, see Ch. 25, ***Real Estate Loans*** , and Ch. 25A, ***Security Instruments for Real Estate Financing*** .

c. Short-term operating loan for livestock production and management.

- (1) Feed costs.
- (2) Grazing land rental costs.

NOTE:

For a discussion of the leasing of annual grasslands for livestock grazing, see Ch. 37, ***Farm Leases, § 37.202.***

- (3) Labor costs.
- (4) Supplies.
- (5) Costs related to debt service on capital loans.
- (6) Taxes and insurance costs.
- (7) Living expenses.

d. Intermediate or long-term capital loan for livestock production.

- (1) Purchase of replacement or breeding herd or flock.
- (2) Purchase of equipment related to livestock production and management.

NOTE:

For a discussion of agreements creating security interests in equipment used in business, including farm equipment, see Ch. 42, ***Secured Transactions*** .

(3) Debt refinancing.

(4) Purchase of grasslands.

NOTE:

For a discussion of real property purchases and the various methods of financing used, see Ch. 25, ***Real Estate Loans*** , and Ch. 25A, ***Security Instruments for Real Estate Financing*** .

2. If not already established, determine appropriate source of loan matching borrower's needs.

NOTE:

For a discussion of the variety of sources of agricultural financing, see § 48.11 et seq.

a. Commercial lender, including banks and savings and loans.

NOTE:

Financing for land and equipment acquisition is easily obtainable if the borrower demonstrates soundness [*see* § 48.121] and if the collateral offered is the land or equipment for which financing is sought. Commercial and other private lenders are more reluctant to lend funds for crop production purposes when the collateral offered is the crop or its proceeds, and costs related to these loans may therefore be prohibitive. For a discussion of availability of credit from commercial banking lenders, see § 48.12.

b. Insurance company lenders.

NOTE:

Insurance companies are heavily restricted as to the types of loan they may make or participate in. Generally, loans may be made if secured by a lien on real property held in fee simple or, with certain restrictions, under a leasehold [*see Ins. Code* §§ 1194.81, 1194.82]. For a discussion of insurance companies' permissible investments, see California Insurance Law and Practice, Ch. 6, ***The Regulation of Insurer Investments*** (Matthew Bender).

c. Farm credit banks, federal land bank associations, and production credit associations.

NOTE:

Farm credit banks and federal land bank associations primarily make loans for the acquisition of agricultural real property for terms of 5 to 40 years [*see 12 C.F.R. § 614.4000*], although farm credit banks are permitted to make loans for any agricultural purpose [*see 12 U.S.C. § 2019*]. Production credit associations primarily make operating and capital loans for short and intermediate terms [*see 12 C.F.R. § 614.4040*]. For a discussion of these federal lenders, see § 48.13[2], [3].

(1) Determine whether applicant is eligible for loan in one of following categories [12

C.F.R. § 613.3020(a)]:

NOTE:

The authority of farm credit banks and federal land bank associations to finance eligible farm-related service businesses under *12 C.F.R. § 613.3020(b)(1), (2)* is limited to necessary capital structures, equipment, and initial working capital [*12 C.F.R. § 613.3020(c)*]; *see Independent Bankers Ass'n of Am. v. Farm Credit Admin. (D.C. Cir. 1999) 164 F.3d 661, 664* (establishing this limitation as consistent with Federal Farm Credit Act)].

(a) Person satisfies either of the following:

NOTE:

"Person" is a legal entity or an individual who is a citizen of the United States or a foreign national who has been lawfully admitted into the United States either for permanent residency [*see 8 U.S.C. § 1101(a)(20)*] or on a visa pursuant to a provision in *8 U.S.C. § 1101(a)(15)* that authorizes the individual to own property or operate or manage a business or a legal entity [*12 C.F.R. § 603.3000(a)(3)*]. "Legal entity" is any partnership, corporation, estate, trust, or other legal entity that is established under the laws of the United States, or of any state, the Commonwealth of Puerto Rico, the District of Columbia, or any tribal authority and is legally authorized to conduct a business [*12 C.F.R. § 603.3000(a)(2)*]. "Eligible borrower" is a bona fide farmer or rancher, or producer or harvester of aquatic products for any agricultural or aquatic purpose and for other credit needs [*12 C.F.R. § 603.3000(b)*].

(i) Is bona fide farmer, rancher, or producer or harvester of aquatic products [*see 12 C.F.R. § 613.3010(a)(1), (4)* (definitions)].

(ii) Qualifies for financing of basic processing and marketing activities of eligible farmers, ranchers, or producers or harvesters of aquatic products [*see 12 C.F.R. § 613.3045* (qualification)].

(b) Rural resident [*see 12 C.F.R. § 613.3040(a)(1)* (definition)].

(c) Farm-related business [*see 12 C.F.R. § 613.3050(a)* (definition)].

(2) If applicant is legal entity in which eligible borrower [*see 12 C.F.R. § 613.3000(b)*, Note, *above*] meets one of following requirements:

(a) Owns more than 50 percent of voting stock or equity and regularly produces some portion of throughput used in processing or marketing operation [*12 C.F.R. § 613.3010(a)(2)*].

(b) Owns 50 percent or less of the voting stock or equity, regularly produces some portion of throughput used in processing or marketing operation and:

(i) Exercises majority voting control over legal entity; or

(ii) Constitutes majority of directors of corporation, general partners of limited

partnership, or managing members of limited liability company who exercise control over legal entity by determining and overseeing policies, business practices, management, and decision-making process of legal entity [12 C.F.R. § 613.3010(a)(3)].

(c) Meets all of following criteria [12 C.F.R. § 613.3010(a)(4)]:

(i) Owns at least 25 percent of voting stock equity in processing or marketing operation;

(ii) Regularly produces 20 percent or more of throughput used in processing or marketing operation; and

(iii) Maintains representation on board of directors or in applicable management structure of entity.

(d) Meets all of following criteria [12 C.F.R. § 613.3010(a)(4)]:

(i) Was created primarily for processing or marketing eligible borrower's throughput and would not exist but for eligible borrower's involvement;

(ii) Fulfills business need and supports operation of eligible borrower through product branding or other value-added business activity directly related to eligible borrower's operations;

(iii) Legal entity and eligible borrower coordinate to operate in functionally integrated manner; and

(iv) Legal entity regularly receives throughput produced by eligible borrower representing either:

(A) At least 20 percent of throughput used by legal entity in processing or marketing operation; or

(B) At least 50 percent of eligible borrower's total output of commodity processed or marketed.

d. Bank for Cooperatives.

NOTE:

Eligible agricultural cooperatives may apply to the Bank for Cooperatives for loans to finance operations related to the processing and handling of farm products [see 12 C.F.R. § 613.3100(b); see § 48.13[4]]. For a discussion of the requirements and formation of agricultural cooperatives, see Ch. 14A, *Agricultural Nonprofit Cooperative Associations*.

(1) Determine whether borrower cooperative is stockholder in Bank for Cooperatives [see 12 U.S.C. § 2130].

NOTE:

At the time a loan is made by the Bank for Cooperatives, the borrower must own at least

one share of the bank's stock and may be required to own as much as 10 percent [*see* 12 U.S.C. § 2130(a); *see* § 48.13[4]].

(2) Determine if agricultural cooperative borrower is eligible for participation in loan program.

(a) Does cooperative meet one of following requirements [12 U.S.C. § 2129(a)(1)-(2); *see* 12 C.F.R. § 613.3100(b)]?

(i) Does not permit any member more than one vote because of amount of stock held;
or

(ii) Does not pay dividends on stock or membership capital in excess of 10 percent per year.

(b) Does cooperative deal in farm products with or for members in amount at least equal in value to total amount of similar business conducted with or for nonmembers [*see* 12 U.S.C. § 2129(a)(3); *see* 12 C.F.R. § 613.3100(b)]?

NOTE:

In making this calculation, exclude the amount of business in farm products transacted with the United States or any its agencies or instrumentalities [*see* 12 U.S.C. § 2129(a)(3)].

(c) Is 80 percent of voting control of cooperative held by farmers, ranchers, or other eligible cooperatives [*see* 12 U.S.C. § 2129(a)(4); *see* 12 C.F.R. § 613.3100(b)(1)]?

NOTE:

For certain types of cooperatives, a 60 percent voting requirement applies [*see* 12 U.S.C. § 2129(a)(4)(A)-(C)].

(d) Has cooperative received loan, loan commitment, or loan guarantee from the Rural Electrification Administration or loan or loan commitment from Rural Telephone Bank [12 U.S.C. § 2129(b)(1)(A)]?

(e) Has cooperative or other entity or subsidiary been certified by Administrator of Rural Electrification Administration to be eligible for loan, loan commitment, or loan guarantee [12 U.S.C. § 2129(b)(1)(A)]?

(f) Does legal entity hold more than 50 percent of voting control of association or other entity that is eligible to borrow from bank for cooperatives [*see* 12 U.S.C. § 2129(a), (b)(1)(A)] and borrow for purpose of making funds available to that association or entity, and make funds available to that association or entity under same terms and conditions that funds are borrowed from bank for cooperatives [12 U.S.C. § 2129(b)(1)(B)]?

(g) Is cooperative or other entity one described in 12 U.S.C. § 2128(b) [12 U.S.C. § 2129(b)(1)(C)]?

(h) Is creditworthy private entity one that satisfies requirements for service cooperative under paragraphs 12 U.S.C. § 2129(a), as specified, and subsidiaries of entity, if entity is organized to benefit agriculture in furtherance of welfare of its farmer-members and is operated on not-for-profit basis [12 U.S.C. § 2129(b)(1)(D)]?

e. Farmers Home Administration.

NOTE:

Loans are made by the FmHA in three agricultural production areas: farm ownership, farm operation, and natural disaster-based emergency loans. For a discussion of the Farmers Home Administration's loan programs, see § 48.14.

(1) Determine whether borrower meets general eligibility requirements for FmHA loans [see 7 U.S.C. §§ 1922(a), 1941(a), 1961(a); 7 C.F.R. §§ 1941.12(a), 1943.12(a), 1945.162(b)].

(a) Is borrower lawful resident or citizen of United States?

(b) Does borrower possess legal capacity to incur obligations of loan?

NOTE:

To determine the legal capacity necessary to enter into a binding contract, see § 48.120.

(c) Does borrower have sufficient training or farming experience, character, and managerial ability and industry to assure reasonable prospects of success in proposed operation?

NOTE:

For the relevant factors used in making this determination, see § 48.121. The applicant or borrower must honestly endeavor to carry out his or her undertakings and obligations. This includes, but is not limited to, providing current, complete, and truthful information when applying for assistance, and making every reasonable effort to meet the conditions and terms of the loan [7 C.F.R. § 1945.162(h); see 7 C.F.R. § 1941 (general loan eligibility requirements); 7 C.F.R. § 1943 (farm ownership loan eligibility requirements)]. When the applicant is an entity, this requirement must be met also by individual members, stockholders, partners, or joint operators [7 C.F.R. § 1945.162(h)].

(d) Has borrower been unable to obtain sufficient credit elsewhere to finance actual needs at reasonable rates and terms?

NOTE:

In making this determination the FmHA considers private and cooperative rates and terms available in the borrower's community for loans for similar purposes and periods of time [7 C.F.R. §§ 1941.12(a)(5), 1943.12(a)(5), 1945.162(a)].

(e) Is borrower the operator, or in case of farm ownership loan, owner-operator, of family farm?

NOTE:

A "family farm" is one that will produce agricultural commodities for sale in sufficient quantities so that it is recognized in the community as a farm rather than a rural residence and provides enough agricultural income to support the family and operation, and pay debts. The farm must be managed by the borrower and a substantial amount of the labor requirements must be provided by the borrower and the borrower's family [see 7 C.F.R. §§ 1941.4(d), 1943.4(d), 1945.154(a)(10)].

(2) Does borrower qualify as limited resource borrower?

NOTE:

In addition to the eligibility requirements listed above, a limited resource borrower may qualify by

meeting any of the following requirements. Those qualifying for limited resource status are eligible for farm operation or ownership loans at reduced interest rates [7 C.F.R. §§ 1941.4(h), 1941.18(a)(1), 1943.18(c)]. A "limited resource applicant" is a farmer or rancher who is an operator of a small or family farm (including a new operator) with a low income who demonstrates a need to increase farm or ranch income. A limited resource applicant must meet the eligibility requirements for a farm ownership or operating loan, but must be unable to pay the regular interest on those loans due to low income. These applicants require special assistance to achieve a standard of living comparable to other residents of the surrounding community [7 C.F.R. §§ 1941.4(h), 1943.4(h)].

(3) Determine whether borrower cooperative, corporation, partnership, or joint operation meets specific eligibility requirements for FmHA loans [see 7 C.F.R. §§ 1941.12(b), 1943.12(b), 1945.162(a)].

NOTE:

These nonindividual borrowers must meet the following additional requirements for FmHA loans. For a general discussion of agricultural cooperatives, see Ch. 14A, ***Agricultural Nonprofit Cooperative Associations***.

(a) Are all members of cooperative, stock-holders, partners, and joint operators, as individuals, unable to obtain sufficient credit elsewhere?

NOTE:

See § 48.122, P 2(e)(1)(e) NOTE.

(b) Is entity controlled by farmers or ranchers engaged primarily and directly in farming or ranching in United States?

(c) If applying for farm ownership or operating loan, do any members, stockholders, partners, or joint operators, as individuals, have outstanding FmHA loan for farm ownership or operation?

NOTE:

FmHA loans for farm ownership or operation will not be made to entities whose members, stockholders, partners, or joint operators, as individuals, already have outstanding FmHA loans for these purposes. This restriction further applies if the borrowing entity's members, stockholders, partners, or joint operators are members of or have an interest in another entity obligated for a farm ownership or operating loan to the FmHA [see 7 C.F.R. §§ 1941.12(b)(3), 1943.12(b)(3)].

(4) Determine whether borrower meets additional requirements for disaster-based emergency loan.

NOTE:

In addition to these general requirements for receiving FmHA loans [see § 48.122, P 2(e)(1)], a borrower applying under the disaster-based emergency loan program must comply with the following requirements:

(a) Is borrower's operation located in county designated for emergency loan disbursement [see 7 C.F.R. § 1945.162(d)]?

NOTE:

Areas may be designated for emergency loan purposes by the Federal Emergency

Management Agency after the issuance of an order of the President of the United States, Secretary of Agriculture, or the Administrator of the FmHA [7 C.F.R. § 1945.20].

(b) Has borrower suffered qualifying losses [see 7 C.F.R. § 1945.162(e)]?

NOTE:

Qualifying losses are divided into "physical losses" and "production losses" [7 C.F.R. § 1945.6(c)(3)(ii), (iii)]. Loss values are calculated according to formulas established by the FmHA [see 7 C.F.R. § 1945.163].

(c) Does borrower intend to continue farming operation after disaster [see 7 C.F.R. § 1945.162(j)]?

(d) If cooperative, corporation, partnership, or joint operation, is more than 50 percent of entity held by citizens or lawful residents of United States [7 C.F.R. § 1945.162(b)(2)]?

(e) Is over 50 percent of the entity's gross income derived from its farming operation and is at least one principal member, stockholder, partner, or joint operator managing farming operation [7 C.F.R. § 1945.162(c)]?

(f) Is entity ineligible because it is an estate or trust, or a corporation, partnership, or joint operation with over 50 percent of ownership held by an estate or trust [7 C.F.R. § 1945.162(c)(1)]?

f. Commodity Credit Corporation.

NOTE:

The Commodity Credit Corporation (CCC) makes marketing assistance loans and loan deficiency payments for grains and similarly handled commodities to agricultural producers, as one method of price support for agricultural commodities [see § 48.15].

(1) Determine whether borrower is engaged in production of eligible commodity [see 7 C.F.R. § 1421.5(a)(1)-(3)].

(a) Barley.

(b) Corn.

(c) Canola.

(d) Oats.

(e) Peanuts.

(f) Rice.

(g) Oil seeds.

(h) Dual purpose Sorghum varieties as determined by CCC.

- (i) Soybeans.
- (j) Dry peas.
- (k) Wheat.
- (l) Lentils.
- (m) Small chickpeas.
- (n) Other crops designated by CCC and produced mechanically in United States.
- (o) Wool and mohair produced and shorn from live animals in United States.

(2) Determine whether borrower is eligible producer.

(a) Is borrower an individual, partnership, association, corporation, estate, trust, state or political subdivision or agency of that entity, or other legal entity that [7 C.F.R. § 1421.4(a)]:

- (i) Produces commodity as landowner, landlord, tenant, or sharecropper?

NOTE:

In the case of rice, an eligible producer is one that furnishes land, labor, water, or equipment for a share of the rice crop. With respect to wool and mohair, the producer must own, other than through a security interest mortgage, or lien, the sheep and goats that produced the wool and mohair respectively for a period of not less than 30 days [7 C.F.R. § 1421.4(a)(1)].

(ii) Meets eligibility requirements to receive marketing assistance loans or loan deficiency payments [see 7 C.F.R. § 1421.4]?

(iii) Meets additional specific eligibility requirements [see 7 C.F.R. pts. 12, 718, 1400, 1403, 1405]?

(b) Does borrower have beneficial interest in crops for which marketing assistance loan or loan deficiency payments are sought [see 7 C.F.R. § 1421.6(c)]?

NOTE:

The beneficial interest in the commodity for which the marketing assistance loan or loan deficiency payments are sought must be, and have always been, in the producer/borrower, except in cases where the borrower succeeded to the original producer's interest before the commodity was harvested, sheared, or slaughtered in the case of unshorn pelts [7 C.F.R. § 1421.6(a)(1)].

g. Other lender, including individuals, equipment dealers, and finance companies.

3. If not already established, determine appropriate collateral necessary for securing loan.

NOTE:

Security transactions involving personal property and fixtures are governed by Division 9 of the California Commercial Code [see *Com. Code* § 9101 et seq.; see Ch. 42, **Secured Transactions**]. For a discussion of secured transactions relating to agriculture, see § 48.17 et seq. For a discussion of the use

of real property as security, see Chs. 25 through 25D.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)General
OverviewReal Property LawFinancingGeneral OverviewReal Property LawFinancingFederal RegulationsFarm Credit
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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 48 AGRICULTURAL FINANCING

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B. Preliminary Determinations

20-48 California Legal Forms--Transaction Guide §§ 48.123-48.139

[Reserved]

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 48 AGRICULTURAL FINANCING

PART III. TRANSACTION GUIDE

C. Procedural Guide to Obtaining Financing

20-48 California Legal Forms--Transaction Guide § 48.140

§ 48.140 Preparation of Required Documents Incidental to Loan Documents

1. If borrower is tenant under lease granting interest in crops to landlord, obtain landlord share waiver [see § 48.301].

2. If borrower is corporation, prepare corporate resolution authorizing loan [see *Corp. Code* § 207].

NOTE:

For a corporate resolution authorizing borrowing, see Ch. 43, ***Commercial Loans***, § 49.204; Ch. 5, ***Directors Meetings, Actions, and Resolutions***, § 5.246.

3. If borrower is partnership, prepare resolution stating authority of partners to enter into financing arrangement and granting personal guaranties of partners [see Ch. 43, *Commercial Loans* § 43.205].

4. If borrower is agricultural cooperative, prepare corporate resolution authorizing financing arrangement [see Ch. 43, *Commercial Loans*, § 49.204; Ch. 5, *Directors Meetings, Actions, and Resolutions*, § 5.246.].

5. If borrower is personal representative, guardian, or conservator, obtain court order authorizing loan [see *Prob. Code* §§ 2550, 9800].

6. Prepare power of attorney for agent to execute loan agreement providing for repayment period greater than one year [see *Civ. Code* §§ 1624(a), 2309].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewBusiness & Corporate LawCorporationsDirectors & OfficersScope of

AuthorityGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of
PartnersAuthority to Act



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 48 AGRICULTURAL FINANCING

PART III. TRANSACTION GUIDE

C. Procedural Guide to Obtaining Financing

20-48 California Legal Forms--Transaction Guide § 48.141

§ 48.141 Contacting Appropriate Lender

NOTE:

For assistance in determining appropriate sources of financing for the borrower's needs, see § 48.122.

1. Assemble borrower's financial records for inspection by loan officer [*see* § 48.101, P 1].
2. Arrange loan interview with loan officer at appropriate office of lender.

NOTE:

Relevant aspects of the loan officer interview are discussed in Ch. 43, **Commercial Loans**

a. Local branch office of commercial bank or other private institutional lender.

b. Farm Credit Administration lending institutions:

(1) Contact the Farm Credit Bank of Sacramento at 3636 American River Drive, P.O. Box 13106, Sacramento, CA., 95813-4106, (916) 485-6000.

NOTE:

The Farm Credit Bank of Sacramento makes individual loans for agricultural real estate acquisition if there is no federal land bank association in the district where the real estate is located [*see* 12 U.S.C. § 2021; *see* discussion in § 48.13[2]].

(2) Federal land bank associations may be contacted by consulting telephone directory for locale in which real property is located.

(3) Production credit associations may be contacted by consulting telephone directory for locale in which borrower's operation is located.

(4) Contact the Bank for Cooperatives at 3636 American River Drive, P.O. Box 13106, Sacramento, CA., 95813-4106, (916) 485-6000.

c. Farmers Home Administration loans.

(1) For farm ownership loans, contact FmHA office in county where real estate is located.

(2) For farm operation loans, contact FmHA office in county where farm operation will be conducted.

d. For Commodity Credit Corporation loans, contact office of Agricultural Stabilization and Conservation Service of United States Department of Agriculture in county of borrower's residence [see 7 C.F.R. § 1421.7(a)].

3. Prepare loan agreement.

NOTE:

Commercial banks and other lending institutions, and federal agricultural lenders, normally require the use of their own prepared forms of loan agreements. For a form for a loan agreement that may be used by a private lender, see § 48.220.

4. Prepare agreement creating security interest including appropriate description of collateral:

NOTE:

Commercial banks and other lending institutions, and federal agricultural lenders, normally require the use of their own prepared forms of security agreements. For a form for a security agreement that may be used by a private lender, see § 48.240.

a. Crops as collateral [see § 48.260].

NOTE:

If the collateral includes timber to be cut, a description of the land on which the timber is grown must be included [Com. Code § 9203(b)(3)(A)].

b. Livestock as collateral [see § 48.261].

c. Equipment as collateral [see § 48.263].

d. Warehouse receipts as collateral [see Com. Code §§ 1201(b)(16), 9109(a)(1); see § 48.262].

5. Prepare financing statement with appropriate description of collateral.

NOTE:

For a copy of the official Uniform Commercial Code financing statement, see Ch. 42, **Secured Transactions**.

6. Prepare notice of security interest for compliance with Food Security Act of 1985 [see 7 U.S.C. § 1631; see § 48.300].

NOTE:

Buyers in the ordinary course of business, commission merchants, and selling agents take free of a security interest created in farm products unless the secured party complies with specific notice requirements [*see* 7 U.S.C. § 1631; *see* § 48.17[5]; *see* § 48.300[1]].

7. If necessary, obtain bill of sale draft from lender [*see* § 48.302[1]].

NOTE:

Often in financing arrangements relating to livestock purchases, the transaction is concluded at a location distant from the lender's office. In such a case, the lender issues a negotiable bill of sale draft covering the purchase up to a pre-arranged limit.

8. If necessary, prepare assignment of proceeds and notice of assignment [*see* §§ 48.280, 48.281].

NOTE:

Processors and marketers of agricultural products may be directed to submit payments owed the borrower to the lender if the borrower has granted an assignment to the lender and the lender has properly noticed the processor or marketer.

9. Have parties execute documents.

a. If borrower is partnership, partner possessing authority to bind partnership must sign [*Corp. Code* §§ 16301, 16302].

b. If borrower is corporation, documents must be signed by person empowered by corporate bylaws or resolution of board of directors.

c. If party executing documents on behalf of principal is attorney in fact, have that person subscribe principal's name and his or her own as attorney in fact [*see Civ. Code* § 1095].

10. Prepare sufficient copies of documents.

a. One copy of each for both lender and borrower.

b. One copy of each for counsel of both lender and borrower.

c. Additional copies, as required.

d. Original and first copy of financing statement for filing.

11. File completed deed of trust or mortgage in recorder's office of county where real property is located.

12. File financing statement in proper location, including proper filing fees.

NOTE:

For discussion of filing a financing statement covering timber to be cut and filing a financing statement filed as a fixture filing, covering goods that are or will become fixtures, *see* § 48.17[1].

If the equipment offered as collateral is a vehicle subject to motor vehicle registration, perfect is made by indication on the certificate showing title to the vehicle [*see Com. Code* § 9311(a)(2), (3)].

Separate fees are charged for filings using official forms and filings using other types of statements [*see Com. Code § 9525*]. For procedural guides and forms relating to the filing of the official Uniform Commercial Code financing statement, including a form for a cover letter to accompany the financing statement, see *Ch. 42, Secured Transactions*, §§ 42.211, 42.213.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Bank Activities General Overview Commercial Law (UCC) Secured Transactions (Article 9) Perfection Methods Filings Financing Statements General Overview Real Property Law Financing Federal Regulations Farm Credit Act



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 48 AGRICULTURAL FINANCING

PART III. TRANSACTION GUIDE

C. Procedural Guide to Obtaining Financing

20-48 California Legal Forms--Transaction Guide §§ 48.142-48.199

[Reserved]

§§ 48.142[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 48 AGRICULTURAL FINANCING

PART IV. FORMS

A. Borrower's Application Materials

20-48 California Legal Forms--Transaction Guide § 48.200

§ 48.200 FmHA Farm and Home Plan

[1] Comment

[a] Use of Form

This form is a sample of the Farmers Home Administration (FmHA) Farm and Home Plan, which is required by the FmHA for loan applicants under any of the FmHA loan programs. It is illustrated here to assist counsel in assembling a complete portrait of the borrower [see § 48.200[1][b][i]]. For a discussion of Farmers Home Administration loan programs, see § 48.14.

This Form is of particular value in situations where the borrower is seeking loan funds for the first time and has not previously assembled comprehensive data on the status of his or her farming or ranching operation. The different parts of the Plan call for specific information relating to the assets and liabilities, and management practices of the farmer or rancher, including their relative specific dollar values. The information gathered for the completion of this form may be useful in making the preliminary determinations relating to the feasibility of the loan. For a listing of the preliminary determinations necessary for this and other conclusions relating to loans, see § 48.121.

[b] Contents of Form

[i] Balance Sheet

The first part of the Farm and Home Plan is a balance sheet reflecting the assets and liabilities of the borrower. To be included in the assets portion of this section are the relative dollar values of the borrower's holdings in real estate, livestock, machinery and equipment, and other personal property. The amounts of the borrower's debt obligations on the listed assets, other outstanding liens or judgments, and taxes due are also included in the section covering the borrower's liabilities. The bottom portion of the balance sheet section is set aside for an accounting of the borrower's cash assets and a calculation of the net worth of the borrower.

[ii] Accounting for Production and Sales of Crops and Livestock

The fourth and fifth parts of the Plan require an accounting of the borrower's production and sales of crops and livestock. The categories are divided into the "Planned" and "Actual" amounts of production and sales. The borrower's projected operational figures should be inserted under the "planned" portion at the beginning of the crop or livestock growing term, and the "actual" figures should be entered after the crop or livestock year has ended.

To complete the portion of the Plan covering the production and sale of crops, first enter the applicable figures for the number of acres and yields per acre for each crop in production. Of the total yields produced, enter the quantity amounts (for example, bushels or tons) owned by the borrower for use on the farm and those held for sale. Of the amounts held for sale, enter the quantity sold and the average price obtained for a total cash income for each crop. The borrower should exclude any crop shares paid under a crop share lease arrangement from the calculations for the quantities consumed on the farm or ranch and held for sale. For a discussion of crop share leases, see *Ch. 37, Farm Leases*, § 37.201. Total the cash incomes from each type of crop and enter in Part (J) of the Plan [see § 48.200[1][b][iv]].

Under the livestock production and sale portion of the Plan enter the relative numbers of livestock head and the production per animal (for example, wool clip, fryer chickens, or cattle for slaughter). For livestock production and sales, enter the figures for farm use and for amounts sold at the average price for a total cash income per type of livestock. At the bottom of this portion of the Plan enter the amounts of production of milk and eggs, if applicable. Total the cash incomes from each type of livestock and enter in Part (J) of the Plan [see § 48.200[1][b][iv]].

[iii] Farm Improvements and Practices

Part (C) of the Plan is for a listing of the improvements and major farming or ranching practices planned during the course of the crop year. This section is an important element in the overall evaluation of the borrower's agricultural standing. A clear and comprehensive list of the improvements and practices that may build on or establish a farming or ranching operation serve to show a loan officer the intentions of the borrower. Realistic assessments by the borrower of what may be accomplished in the course of the year are an essential element in the determination of the likelihood for successful operations and repayment of the loan made by the lender.

[iv] Expenses, Summary of Year's Business, and Debt Repayment Portions of Plan

Under Parts (F) through (H) of the Plan, enter the relative amounts of expenses necessary for the support of the farm and the borrower's family and capital expenditures for the farm or ranch. For all these expenses listed enter the amounts of financing necessary to reasonably meet the expense. Although the Plan calls for a separate listing of credit to be sought from the Farmers Home Administration, for general purposes counsel may enter an abbreviation for the probable lender of funds. That is, list the abbreviation for the Farmers Home Administration (FmHA), Production Credit Association (PCA), Federal Land Bank Association (FLBA), or other institution from whom the borrower may be eligible to obtain these funds. For a listing of the eligibility requirements for various lenders, see § 48.122, P 2. For a discussion of the various lenders of funds for agricultural purposes, see § 48.11 et seq.

Part (J) of the Plan calls for a computation of the various figures calculated under Parts (A) through (H) to reach the gross cash income of the farm or ranch operation. Enter the necessary figures and make the additions and subtractions as called for in the listing [see form].

The final portion of the Plan, Part (K), calls for a detailed listing of the types of indebtedness for which the borrower is obligated. Enter the name of the party to whom the money is owed, the amount of principal and interest owing in the forthcoming year, and a projection of the amounts that will be paid in the same period. Although the Plan does not call for them, the borrower should probably include the total amount and interest rate for each loan for informational purposes.

[2] FORM

FmHA Farm and Home Plan

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral OverviewReal Property LawFinancingGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 48 AGRICULTURAL FINANCING

PART IV. FORMS

A. Borrower's Application Materials

20-48 California Legal Forms--Transaction Guide § 48.201

§ 48.201 Loan Application--Agricultural Real Estate

[1] Comment

[a] Use of Form

This form is a sample application for an agricultural loan. The form reproduced here was supplied by the Farm Credit Bank of Sacramento. This particular form was designed for use in financing transactions involving agricultural real estate, but the information solicited on the form is typical of basic loan applications used by governmental and commercial lenders. It is included here to illustrate the types of information typically included in agricultural financing transactions.

[b] Security Requirements

[i] In General

Of primary interest to a lender is the borrower's ability to repay the loan according to the terms of the agreement; adequate security is always a factor. Borrowers must provide detailed information covering the type and value of collateral they will offer as security for the loan.

[ii] Long-Term Mortgage Loans

Long-term real estate mortgage loans made by farm credit banks must be secured by a first lien on an interest in agricultural real estate, an eligible farm-related business, an eligible rural residence, or real estate used as an integral part of an eligible aquatic operation. Additional security may be required, but that security is considered only supplementary protection, and is not included in the value of the security for purposes of applying loan-to-value limitations for mortgages [12 C.F.R. § 614.4210(a)]. No funds may be advanced if the outstanding loan balance exceeds a specified percentage of the appraised value of the real estate taken as primary security [12 C.F.R. § 614.4210(b)].

[iii] Other Loans

Short-term and intermediate-term operating loans may be unsecured only when the creditworthiness of the borrower warrants [12 C.F.R. § 614.4220(b)]. Non-farm rural home loans for the purchase, construction, or refinancing of rural residences must be secured by a first lien on the residence [12 C.F.R. § 614.4222]. Loans to eligible cooperatives may or may not be secured, depending on the circumstances, but loans to be repaid over an extended period should normally be secured [12 C.F.R. § 614.4230(b)]. Seasonal loans to finance commodities that qualify for special interest rate and lending limit consideration must be secured by a chattel mortgage, factor's lien, warehouse receipt, or other security [12 C.F.R. § 614.4231(b); *see* 12 C.F.R. § 614.4231(a)(1) (definition of "commodities")].

[iv] Farmers Home Administration Loans

Loans made by the Farmers Home Administration (FmHA) for farm ownership are secured by real estate, or by real estate and a combination of chattels and other security [7 C.F.R. § 1943.19]. FmHA loans are secured by the best lien obtainable on all assets owned by the applicant [7 C.F.R. § 1943.19(a)(1)]. When available, a first lien is required on real estate. Loans may be secured by junior liens on real estate in certain circumstances [7 C.F.R. § 1943.19(a)(4)]. Other security may include liens on fixtures, machinery, livestock, crops, products, supplies, cash, leases, copyrights, and third party pledges of security [*see* 7 C.F.R. § 1943.19(a)(2), (3), (c)]. The FmHA does not take liens on certain types of property [*see* 7 C.F.R. § 1943.19(b)].

For further discussion of FmHA loans, *see* § 48.14[1] *et seq.*

[v] Emergency Loans

Emergency loans for operating purposes must be secured by a first lien on the crops, livestock, or livestock products being financed with the loan funds, and by the best lien obtainable on all other assets owned by the loan applicant. Emergency loans for real estate purposes are secured by a lien on all assets [7 C.F.R. § 1945.169(a)].

[2] FORM

FCB Loan Application--Agricultural Real Estate

[Please see Original Source or contact Editorial Support for assistance.]

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral OverviewReal Property LawFinancingGeneral OverviewReal Property LawFinancingFederal RegulationsFarm Credit Act



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A. Borrower's Application Materials

20-48 California Legal Forms--Transaction Guide §§ 48.202-48.219

[Reserved]

§§ 48.202[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 48 AGRICULTURAL FINANCING

PART IV. FORMS

B. Loan Agreements

20-48 California Legal Forms--Transaction Guide § 48.220

§ 48.220 Loan Agreement for Transaction Among Private Parties

[1] Comment

[a] Use of Form

This form is a negotiable loan agreement that may be used by private parties entering into a basic financing arrangement. Commercial lending institutions and federal agricultural lenders usually require the use of their own forms; counsel assisting borrowers in these financing arrangements should consult with the prospective lender for samples of the required agreements. For a discussion of the various lenders of funds for agricultural purposes, see § 48.11. For more detailed coverage of loans between private individuals, see Ch. 97, *Private Loans and Annuities*.

This form contains provisions describing the parties' contractual obligations in detail. Its use may be of greatest benefit when the parties have had no prior dealings, the loan term is for an extended duration, or the parties require greater specificity than is normally provided in a simple promissory note. As an alternative, the sample FmHA promissory note may be adapted for use when the parties obligations can be established in a short form document [see § 48.221].

The pertinent provisions contained in this form are a recital of the parties, the principal amount of the loan, the method of calculating and paying interest, the security for the borrower's obligations, and the representations, warranties, and covenants of the borrower. Also, the circumstances of the borrower's default and the remedies for default are provided for. For a discussion of the late payment charge provisions included in this form, see Ch. 55, *Negotiable Instruments*.

The maximum interest rate that may be charged by a lender in California depends on the status of the lender. Under the California Constitution, the maximum rate is 10 percent unless the lender is exempted by statute [Cal. Const., art. XV, § 1; see Ch. 55, *Negotiable Instruments*]. Minimum interest rates are governed by tax considerations. Insufficient interest may subject the transaction to imputed interest rules [see I.R.C. §§ 483, 1271-1275] or to treatment as a loan with a below-market interest rate [see I.R.C. § 7872; see also Ch. 97, *Private Loans and Annuities*].

If the loan is to be secured by collateral, the parties should execute a security agreement. For a sample deed of trust covering real property as security for the loan, see § 48.241. For a security agreement covering personal property,

including crops, livestock, or equipment, see § 48.240.

[b] Negotiability of Loan Agreement

This form is a loan agreement that is designed to be negotiable. The primary benefit of negotiability is that the transfer of the instrument transfers all the rights that were held by the transferor [*Com. Code* §§ 3201, 3203]. A note is a written promise to pay money signed by the person promising to pay [*Com. Code* § 3103(a)(9); see *Com. Code* § 3104(e) (definition of "note")]. A note is negotiable if it is an unconditional promise to pay a fixed amount of money, with or without interest or other charges; if it is payable to bearer or to order at the time it is issued or first comes into the holder's possession; if it is payable on demand or at a definite time; and (with limited exceptions) if it does not state any other undertaking or instruction by the person promising or ordering payment [*Com. Code* § 3104(a); see *Com. Code* § 3104(b), (c) (exceptions)].

The promissory note in § 48.221 may also be negotiated. For a discussion of the negotiability of promises to pay, see Ch. 55, *Negotiable Instruments*.

[c] Collateral Securing the Borrower's Obligation

Lenders may make both secured and unsecured loans depending on the principal amount of the loan and the ability of the borrower to repay the loan. Usually, however, a lender demands a security interest in property of the borrower that will satisfy the borrower's obligation in the event of default or bankruptcy. For a discussion of real property security interests, see Ch. 25A, *Security Instruments for Real Estate Financing*. Personal property security interests are subject to Division 9 of the California Commercial Code [see *Com. Code* § 9101 et seq.]. For a discussion of security interests relating to agricultural financing arrangements, see § 48.17[1] et seq. [see also §§ 48.240, 48.260-49.32]. For a discussion of the basic security requirements of Farm Credit System and Farmers Home Administration loans, see § 4.201[1].

[2] FORM

Loan Agreement for Transaction Among Private Parties

LOAN AGREEMENT

This LOAN AGREEMENT is made and entered into on _____ [date], between _____ [name(s)], _____ [status, e.g., a California corporation or husband and wife], _____ [address or principal place of business in California], California (Lender), and _____ [name(s)], _____ [status, e.g., a California corporation, or husband and wife], _____ [address or principal place of business in California], California (Borrower), subject to the following terms and conditions:

Loan

1. Lender agrees to lend to Borrower, subject to and in accordance with the terms and conditions of this Agreement and in reliance on the representations, warranties, and covenants set forth in it, the principal sum of \$_____ (Loan).

[Optional provision]

Promissory Note

2. The Loan shall be evidenced by a promissory note substantially in the form of the attached exhibit executed and delivered by Borrower to Lender on closing of the Loan.

[Optional provision]

Security

3. The Loan and the Note shall be secured pursuant to the _____ [specify security instrument, e.g., mortgage or security agreement covering crops and their proceeds] dated _____, and recorded with the _____ [specify location where security instrument is to be filed, e.g., Secretary of State's office or Office of the Recorder for Yolo County].

Interest

4. Borrower agrees to pay interest on the unpaid principal balance of the Loan at the fixed rate of _____ [specify interest rate, e.g., 10] percent per annum.

Repayment

5. Borrower agrees to repay the Loan principal together with accrued interest on the unpaid principal payable in monthly installments of \$_____ on the _____ [specify day that payment is due, e.g., first or fifteenth] day of each month commencing on _____ [date], and ending on _____ [date]. Borrower has the right to prepay the Loan with interest, with these prepayments credited against the installments due on the Loan in the inverse order of their maturity. The prepayment of any amount due under the Loan shall not reduce or abate the obligation of the Borrower to make the required monthly payments of outstanding principal remaining under the Loan.

Late Payments

6. Should any required monthly installment due under the terms of this Agreement not be paid when due, the unpaid monthly installment shall accrue interest at the rate of _____ [specify interest rate, e.g., 10] percent per annum until Lender receives the late payment together with the specified late interest charge.

Insurance

7. Borrower shall maintain insurance [if loan covers land acquisition, add:, including title insurance,] with established insurers reasonably approved by the Lender. Insurance coverage shall be for all risks and perils associated with the operations and premises involved in Borrower's _____ [farming or ranching] operations, and specifically covering any property offered as Collateral by Borrower. Insurance coverage shall not at any time be for amounts less than the outstanding amount of principal and interest due under this Agreement. Proof of the insurance coverage obtained by the Borrower shall be given to the Lender within _____ days after execution of this Agreement. Any contract entered into by the Borrower for insurance coverage under this Agreement shall include a provision requiring timely notice to the Lender in the event of cancellation of coverage by the insurer.

[Use if loan term is greater than one year]

Financial Reports

8. Borrower agrees that during the term of the Loan it shall provide the Lender with financial reports stating the financial condition of the Borrower within _____ days of the end of the Borrower's fiscal year. These reports shall include profit and loss statements for the preceding fiscal year, including comparative figures for the fiscal year preceding the one for which the report is prepared and projected revenues and expenses for the forthcoming fiscal year. The Lender reserves the right to require the Borrower to provide reports relating to the financial condition of the Borrower on a quarterly basis if the Lender reasonably determines that the information is necessary to protect the Lender's position in the Loan. Borrower further agrees to provide the Lender with other documents that the Lender may reasonably require for the purpose of carrying out the intent of this Agreement.

Covenants of Borrower

9. Borrower covenants and agrees that so long as any obligation under this Agreement remains due and until the full and final payment of all indebtedness incurred under this agreement is made, Borrower shall:

(a) Repay the Loan in accordance with the terms of this Agreement and the Note;

(b) Not use the proceeds of this Loan for any purpose other than the following without the prior written consent of the Lender: _____ [describe specific uses of loan proceeds].

[Use if Paragraph 8 is included:]

(c) Provide the Lender with all of the information and documents reasonably requested under Paragraph 8 of this Agreement;

[Continue as follows:]

(d) Allow the Lender to inspect the Borrower's financial records at the Borrower's place of business on the reasonable request of the Lender;

(e) Allow the Lender to inspect the premises of the Borrower's _____ [farming or ranching] operations on the reasonable request of the Lender;

(f) Notify the Lender in writing of any event of default as defined in Paragraph 10 of this Agreement or any agreement or contract arrangement entered into by the Borrower and any other party, or of any event that would become an event of default on the lapse of time or the giving of notice or both;

(g) Not sell, assign, transfer, lease, exchange or otherwise dispose of, or abandon any property granted as security pursuant to a _____ [security agreement or mortgage] entered into under this Agreement, without the prior written consent of the Lender, or leave the property unprotected, unguarded, or otherwise subject to unreasonable waste, destruction, or disrepair. Borrower further agrees to take affirmative measures to maintain the property offered as security in accordance with the best practices of the local community;

(h) Comply with the requirements of all applicable laws and orders of any governmental agency, noncompliance with which could materially adversely affect the _____ [farming or ranching] operations of the Lender, financially or otherwise;

(i) Promptly pay and discharge all lawfully due taxes, assessments, and other governmental charges or levies imposed on the Borrower's personal and real property or income.

Events of Default

10. Borrower shall be in default under the terms of this Agreement if any one or more of the following events occurs, whatever the reason for the occurrence and whether it is voluntary or involuntary or is effected by the operation of law or pursuant to any judgment, decree, rule, or regulation of any court, administrative agency, or other governmental entity with these powers:

(a) Borrower fails to pay on the date due any installment of interest or principal due under the terms of this Agreement or the Note;

(b) Borrower fails to comply with any covenant made under this Agreement within _____ days after notice of the failure by the Lender;

(c) Any representation or warranty made by or on behalf of the Borrower to the Lender in connection with the application for and borrowing of funds from the Lender proves to be false as of the date of its making;

(d) Any default occurs under any other agreement, contract, or instrument involving the borrowing of funds or the advance of credit to which the Borrower is a party as a borrower and involving the property securing the Borrower's obligation under this Agreement. The borrowing of funds includes other financing arrangements involving the Lender or any other party from whom the Borrower has acquired loaned funds;

(e) Any default occurs under the Note or any instrument prepared under the terms of this Agreement, including any security instrument involving Collateral pledged by the Borrower for the loaned funds;

(f) The Borrower:

(1) Is adjudicated a bankrupt or insolvent;

(2) Is unable or states in writing its inability to pay its debts as they become due;

(3) Makes a general assignment for the benefit of creditors;

(4) Applies for or consents to the appointment of a receiver, trustee, conservator, or similar officer for the Borrower or for any or all of its real or personal property; or a receiver, trustee, conservator, or similar officer is appointed without application or consent by the Borrower and the appointment continues without discharge or stay for _____ days;

(5) Institutes or consents to any bankruptcy, insolvency, reorganization, arrangement, readjustment of debt, dissolution, conservatorship, liquidation, rehabilitation, or other similar proceeding relating to the Borrower or any or all of its personal or real property under the laws of any jurisdiction;

- (6) Is subject to any similar proceeding commenced under the laws of any jurisdiction;
- (7) Is subject to any similar proceeding commenced without the consent or application of the Borrower and the proceeding continues without discharge or stay for _____ days;
- (8) Is subject to any judgment, writ, warrant of attachment or execution, or similar process issued or levied against all or any part of the Borrower's real or personal property and the judgment, writ, warrant, or similar process is not released, vacated, or fully bonded within _____ days after its issue or levy.

Remedies on Default

11. On the occurrence or during the continuation of each and every event of default as defined in Paragraph 10 of this Agreement, the Lender may invoke any of the following remedies in addition to any remedy provided by state or federal law:

- (a) On notice to the Borrower, the Lender may declare the entire unpaid balance of all notes, all interest accrued and unpaid on those notes, and all other amounts payable under this Agreement and all similar amounts outstanding under any other agreement by and between the Lender and the Borrower to be due and payable, without protest, presentment, demand, or further notice of any kind, all of which are waived by the Borrower;
- (b) On the acceleration of the amounts payable under Paragraph 11(a), without notice or demand, the Lender may exercise its right of offset as to all monies, properties, and accounts of the Borrower in the possession of the Lender as a result of any assignment of proceeds or other similar instrument executed by the borrower in favor of the Lender;
- (c) The Lender may proceed to protect, exercise, and enforce its rights under any _____ [security agreement or mortgage] pertaining to the Collateral securing the Borrower's obligation under this Agreement and any other rights as may be provided by law either without judicial process or by an action at law, suit in equity, or other appropriate legal or equitable proceeding;
- (d) The Lender may determine in its sole discretion the order and manner in which the Lender's rights and remedies are to be exercised.

Expenses of Enforcement

12. Should any litigation be commenced between the Lender and the Borrower for the enforcement of any rights of either party against the other pursuant to the provisions of this Agreement, or by reason of any alleged breach of any of the provisions of this Agreement, the party prevailing in the litigation shall be entitled to receive from the unsuccessful party all costs incurred in connection with the litigation, including a reasonable allowance for attorneys' fees incurred by the prevailing party.

Notices

13. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this Agreement or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served and given when personally delivered to _____ [designate recipient, e.g., the party or the designated agent of the party] to whom they are directed, or instead of such personal service, when deposited in the United States mail, first-class postage prepaid, addressed to the Borrower at _____ [address], or to the

Lender at _____[*address*]. Either party may change its address for the purpose of this Paragraph by giving written notice of the change to the other party in the manner provided in this Paragraph.

Effect on Heirs and Successors

14. This Agreement and each of its provisions shall be binding on and shall inure to the benefit of the respective heirs, devisees, legatees, executors, administrators, trustees, successors and assigns of the parties to this Agreement.

Time of Essence

15. Time is of the essence of this Agreement and of each provision contained in it.

Amendments to Agreement

16. This Agreement may be amended only by a writing signed by the party or parties against whom or against whose successors and assigns enforcement of the change is sought.

Effect of Partial Invalidity

17. If any term or provision of this Agreement or any application thereof shall be held invalid or unenforceable, the remainder of this Agreement and any application of the terms and provisions shall not be affected thereby, but shall remain valid and enforceable.

Governing Law

18. This agreement shall be governed by and construed in accordance with the laws of _____ [*specify jurisdiction, e.g., California*].

Cumulative Remedies and Waiver

19. The rights, powers, and remedies provided in this Agreement or in any Note or security agreement prepared pursuant to this Agreement are cumulative and not exclusive of any right, power, or remedy provided by law or equity. The waiver of any breach of any of the provisions of this Agreement by the Lender shall not constitute a continuing waiver or a waiver of any subsequent breach by the Borrower either of the same or any other provision of this Agreement.

Executed on _____[*date*], at _____, California.

BORROWER

_____ [*signature of borrower*]

[*typed name*]

_____ [*address*]

LENDER

_____ [*signature of lender*]

[*typed name*]

_____ [*address*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Security AgreementsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 48 AGRICULTURAL FINANCING

PART IV. FORMS

B. Loan Agreements

20-48 California Legal Forms--Transaction Guide § 48.221

§ 48.221 Farmers Home Administration Promissory Note

[1] Comment--Use of Form

This form is a sample of a promissory note used by the Farmers Home Administration for all loans made under its farm ownership, farm operating, or disaster-based emergency loan programs. It is included here to illustrate the use of a promissory note as the total loan agreement evidencing the borrower's indebtedness. Ordinarily a promissory note will be accompanied by a separate instrument evidencing the security interest held by the lender [see § 48.240]. A simplified version of this form may be drafted in private party transactions to supplement a more complex loan agreement [see § 48.220].

For a discussion of the general attributes of promissory notes, see Ch. 55, *Negotiable Instruments*. For a discussion of the Farmers Home Administration loan programs, see § 48.14[1] et seq.

[2] FORM

Farmers Home Administration Promissory Note

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Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsTypesPromissory Notes



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PART IV. FORMS

B. Loan Agreements

20-48 California Legal Forms--Transaction Guide §§ 48.222-48.239

[Reserved]

§§ 48.222[Reserved]



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 48 AGRICULTURAL FINANCING

PART IV. FORMS

C. Agreements for Creating Security Interests

20-48 California Legal Forms--Transaction Guide § 48.240

§ 48.240 Security Agreement

[1] Comment

[a] Use of Form

This form is an agreement for creating a secured interest under the Uniform Commercial Code [*see Com. Code § 9101 et seq.*]. It should be used when the parties agree to use personal property or fixtures as collateral for an agricultural loan commitment. For form provisions describing various types of collateral found in agricultural financing arrangements, see § 48.260-48.262. For forms to be used in secured transactions pertaining to financing arrangements other than agricultural operations, see Ch. 42, *Secured Transactions*. For a security agreement that may be used when the collateral is real property, see § 48.241.

If the debtor is conducting farming operations on leased land under a crop share lease [*see § 37.201* in Ch. 37, *Farm Leases*], the creditor may request a landlord share waiver from the lessor. The landlord share waiver subordinates any interest the lessor has in the debtor's crops grown on the premises to the creditor's lien. For a discussion and form of a landlord share waiver, see § 48.301.

For a copy of the official UCC financing statement [*see Com. Code § 9521(a)*] and a discussion of the contents and filing requirements, see Ch. 42, *Secured Transactions*, § 42.211.

For a security agreement creating a nonpossessory security interest in equipment, which includes farm equipment used in business, see Ch. 42, *Secured Transactions*, § 42.201. For a discussion of the form and use of security agreements, see Ch. 42.

[b] Provision Requiring Debtor to Provide List of Potential Buyers, Commission Merchants, and Selling Agents

This form includes a provision requiring the debtor to create and send a list of all potential buyers, commission merchants, and selling agents [*see P 7 of form*]. Pursuant to the Food Security Act of 1985 [*see 7 U.S.C. § 1631*] a

buyer, commission merchant, or selling agent takes free of a security interest in farm products created by the seller unless properly noticed by the secured party [see 7 U.S.C. § 1631(e), (g)]. To help protect his or her security interest, the secured party may require that the security agreement include a provision requiring the debtor to furnish to the secured party a list of the buyers, commission merchants, and selling agents to or through whom the debtor may sell the farm products described as collateral in the security agreement [see 7 U.S.C. § 1631(h)(1)].

If required to furnish a list, the debtor may not sell to a buyer or through a commission merchant or selling agent not included on that list, unless the debtor properly notifies the secured party. To meet this notice requirement, the debtor must either notify the secured party in writing of the identity of the buyer, commission merchant, or selling agent at least 7 days in advance of the sale, or must account to the secured party for the proceeds of the sale not later than 10 days after the sale [7 U.S.C. § 1631(h)(2)]. A debtor who fails to comply with this notice requirement is subject to a fine of \$5,000 or 15 percent of the value or benefit received from the sale of the collateral, whichever is greater [7 U.S.C. § 1631(h)(3)].

For the notice that may be used to inform buyers, commission merchants, and selling agents of the lender's security interest, see § 48.300.

[2] FORM

Security Agreement

SECURITY AGREEMENT

Creation of Security Interest

1. _____ [name(s)], of _____ County, California (Debtor), grants to _____ [name(s)], of _____ County, California (Secured Party), a present security interest in the Collateral and its proceeds described in Paragraph 3 of this Agreement.

Attachment and Obligation Secured

2. This security interest is intended to secure Debtor's obligation and indebtedness to Secured Party. Debtor's obligation and indebtedness to Secured Party is evidenced by _____ [describe instrument, e.g., a promissory note executed by the parties on this date], and includes any further advances to Debtor by Secured Party.

Description of Collateral

3. The Collateral in which this security interest is granted and transferred to Secured Party is described as follows:

_____ [describe collateral specifically].

[For a discussion and forms for alternative provisions describing collateral, see § 48.260-48.262.]

Debtor's Covenants Relating to Loan

4. Debtor agrees to perform the following:

(a) To pay to Secured Party the amounts indicated in the _____ [describe document evidencing obligation, e.g., promissory note executed on this date] specified in this Agreement according to the terms of this Agreement and the obligation described above; and

(b) To use the proceeds of loans made by Secured Party to it for the purposes set forth in the loan agreement.

Debtor's Warranties

5. Debtor represents and warrants to Secured Party that Debtor is the full legal and equitable owner of the Collateral, except for the security interest created by this Agreement, and no other lien or security interest enforceable against the Collateral exists. Debtor also represents and warrants to Secured Party that the Collateral is now located at _____ [specify location], and that while this Agreement is in effect, Debtor will not remove Collateral from that location without the prior written consent of Secured Party.

Care of Collateral

6. Debtor shall maintain the collateral in the following manner:

(a) Debtor shall keep the Collateral free from any unpaid claims and demands, including rent and taxes, and not allow any interest in the Collateral to be created or transferred to or by any third person without the prior written consent of Secured Party;

[If collateral is crops, livestock, or farm products:]

(b) Debtor shall keep the Collateral in good condition and in an unmanufactured state. Debtor shall care for and attend to the Collateral, and take necessary measures to properly raise, grow, and maintain the Collateral in a manner consistent with the best course of husbandry practiced in the _____ [farm or ranch] locale;

[Or, if collateral is equipment:]

(b) Debtor shall maintain the Collateral, and each part thereof, in good order and repair at the Debtor's sole cost and expense, and shall never use the Collateral in any manner resulting, or likely to result, in waste or unreasonable deterioration of the Collateral;

[Continue with the following:]

(c) Debtor shall at all times keep the Collateral and the proceeds from any authorized disposition of the Collateral identifiable and separate from any other property belonging to the Debtor or any other party.

(d) If the value of the Collateral is substantially affected by any event, or the ability to market or dispose the Collateral is substantially impaired by any event, the Debtor shall notify the Secured Party immediately. Also, Debtor shall notify Secured Party immediately if the Collateral becomes subject to any impairment that may affect Secured Party's rights and remedies in relation to the Collateral. The notice required by this Paragraph shall be given in the manner set forth in Paragraph 13 of this Agreement.

List of Potential Buyers

7. Pursuant to the Food Security Act of 1985 as codified in *Section 1631 of Title 7 of the United States Code*, Debtor shall furnish to Secured Party the names and addresses of all persons to whom Debtor may sell any of the Collateral, and all Commission Merchants and Selling Agents, as defined in the Act, to whom Debtor may sell the Collateral or otherwise engage in any transaction relating to it. The lists required under this Paragraph shall be submitted to Secured Party within _____ days of the execution of this Agreement, and shall thereafter be supplemented with any additional names and addresses of potential buyers, Commission Merchants, or Selling Agents on the first day of each month this Agreement is in force.

Sale of Collateral to Party Not Listed

8. Before the sale or contract to sell any part of the Collateral to a person whose name and address has not been provided to Secured Party under Paragraph 7, and before any transaction relating to the Collateral conducted between Debtor and a Commission Merchant or Selling Agent, as defined by the Food Security Act of 1985 [7 U.S.C. § 1631], Debtor shall give notice of the intended transaction and provide Secured Party with the name and address of the person with whom the Debtor intends to contract. Notice under this Paragraph shall be given in the manner provided for in Paragraph 13 of this Agreement, and with sufficient time so that Secured Party is notified not less than _____ days before the transaction.

Insurance

9. During the continuation of this Security Agreement, Debtor, at Debtor's own cost and expense, shall keep the Collateral, and all parts thereof, insured against all hazards for the full amount of indebtedness owed to Secured Party. Insurance policies procured pursuant to this Paragraph shall be made payable to both Debtor and Secured Party to the extent of their respective interests in the Collateral. Proof of the insurance coverage obtained by Debtor shall be given to Secured Party within _____ days after execution of this Security Agreement. Any contract entered into by Debtor for insurance coverage on the Collateral shall include a provision requiring timely notice to Secured Party in the event of cancellation of coverage by the insurer.

Inspection by Secured Party

10. Secured Party, or any designated agent of Secured Party, shall have the right to enter the premises on which the Collateral is located for the purpose of inspecting the Collateral at any reasonable times and intervals.

Default

11. Any of the following events constitute a default under this Agreement:

(a) A breach by Debtor of any of the terms, provisions, covenants, warranties, or representations of this Agreement, of the note [*or other obligation*] that this Agreement secures, or of any other agreement between Debtor and Secured Party;

(b) If Debtor fails to make any payment owed Secured Party covered by this security Agreement;

(c) If debtor should die, dissolve, become insolvent or unable to pay debts as they become due, or if a trustee or receiver is appointed to take all or a substantial portion of Debtors assets, or if Debtor makes a general assignment for the benefit of creditors;

(d) If there is issued against the Collateral any levy of attachment, execution, tax assessment, or other similar process and it is not released within _____ days of the date of issuance; or

(e) If Debtor furnishes to Secured Party any financial statement, profit and loss statement, or other document relating to this transaction that is false or incorrect in any material respect.

Remedies on Default

12. If any of the above events of default occurs, in addition to the statutory remedies provided under *Section 9601 et seq. of the California Commercial Code*, the Secured Party may do any of the following:

(a) Declare any obligation or indebtedness of Debtor to the Secured Party secured by this Agreement to be immediately due and payable.

(b) Enter the Debtor's premises to assemble and take possession of the Collateral.

(c) Require the Debtor to assemble the Collateral and make its possession available to the Secured Party at a place designated by the Secured Party that is reasonably convenient to both Secured Party and Debtor.

[If collateral is crops, livestock, or farm products:]

(d) Take any measures that Secured Party may reasonably consider necessary for the care, growing, raising, protection, preservation, and marketing of the Collateral.

[Or, if collateral is equipment:]

(d) Enter the Debtor's premises and render the Collateral unusable and dispose of it in a manner provided by *Section 9609(a)(2) of the California Commercial Code*.

[Continue with the following:]

(e) Apply the proceeds received from the sale or other disposition of the Collateral on default of Debtor, in addition to the items specified in *Section 9615(a) of the California Commercial Code*, to the payment of reasonable attorneys' fees and legal expenses incurred by the Secured Party as a result of Debtor's default.

Notices

13. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this Agreement or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served and given when personally delivered to _____ *[designate recipient, e.g., the party or*

the designated agent of the party] to whom they are directed, or instead of such personal service, when deposited in the United States mail, first-class postage prepaid, addressed to the Borrower at _____[*address*], or to the Lender at _____[*address*]. Either party may change its address for the purpose of this Paragraph by giving written notice of the change to the other party in the manner provided in this Paragraph.

Time of Essence

14. Time is of the essence of this Agreement and of each provision contained in it.

Effect on Heirs and Successors

15. This Agreement and each of its provisions shall be binding on and shall inure to the benefit of the respective heirs, devisees, legatees, executors, administrators, trustees, successors, and assigns of the parties to this Agreement. Nothing contained in this Paragraph shall be construed as a consent by Secured Party to any assignment of the Collateral or any interest therein by Debtor.

Amendments to Agreement

16. This Agreement may be amended only by a writing signed by the party against whom or against whose successors and assigns enforcement of the change is sought.

Effect of Partial Invalidity

17. If any term or provision of this Agreement or any application thereof shall be held invalid or unenforceable, the remainder of this Agreement and any application of the terms and provisions shall not be affected thereby, but shall remain valid and enforceable.

Governing Law

18. This Agreement shall be governed by and construed in accordance with the laws of _____ [*specify jurisdiction, e.g., California*].

Waiver

19. Neither the acceptance of any partial or delinquent payment by Secured Party nor Secured Party's failure to exercise any of its rights or remedies on default by Debtor shall be a waiver of the default, a modification of this Agreement, or a waiver of any subsequent default by Debtor.

Executed on _____[*date*] at _____, California.

DEBTOR

_____[*signature of debtor*]
[*typed name*]

SECURED PARTY

_____ [*signature of secured party*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application &

ConstructionDefinitionsCollateralGoodsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Security AgreementsGeneral Overview



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PART IV. FORMS

C. Agreements for Creating Security Interests

20-48 California Legal Forms--Transaction Guide § 48.241

§ 48.241 Farm Credit System Deed of Trust

[1] Comment--Use of Form

This form is a sample of a deed of trust and assignment of rents used by the farm credit banks of Sacramento for financing transactions for the purchase of agricultural real estate. It is included here for illustrative purposes and provides counsel assisting borrower clients with a reference to the type of security document required by the farm credit bank or federal land bank associations within the district. Counsel assisting clients privately engaged in making or obtaining loans for agricultural real estate may rely on this sample form as a guideline for the common practice in this area.

For a general discussion of the Farm Credit System lenders involved in agricultural real estate financing, see § 48.13[2]. For a security agreement covering a security interest in personal property, see § 48.240. For a discussion of real property financing and deeds of trust, see Ch. 25A, *Security Instruments for Real Estate Financing* .

[2] FORM

Farm Credit System Deed of Trust

[Please see Original Source or contact Editorial Support for assistance.]

Legal Topics:

For related research and practice materials, see the following legal topics:
 Real Property Law Financing Federal Regulations Farm Credit Act



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20-48 California Legal Forms--Transaction Guide §§ 48.242-48.259

[Reserved]

§§ 48.242[Reserved]



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D. Alternative Security Agreement and Financing Statement Provisions

20-48 California Legal Forms--Transaction Guide § 48.260

§ 48.260 Alternative Provision Describing Collateral: Crops

[1] Comment

[a] Use of Form

This form is an alternative provision that may be used to describe the collateral in a security agreement when the collateral is crops. It may be substituted for Paragraph 3 of § 48.240, or renumbered and inserted into the official UCC financing statement provision describing collateral [see *Ch. 42, Secured Transactions*, § 42.211]. For an alternative provision describing livestock as collateral, see § 48.261. For an alternative provision describing negotiable warehouse receipts as collateral, see § 48.262. For an alternative provision describing equipment as collateral, see § 48.263.

For a security agreement creating a nonpossessory security interest in equipment, which includes farm equipment used in business, see *Ch. 42, Secured Transactions*, § 42.201.

[B] Sufficiency of Description of Crops as Collateral in Security Agreement or Financing Statement

The description of the personal or real property collateral that must be included in a security agreement does not need to be specific. With specified exceptions, the description is sufficient, whether or not it is specific, if it reasonably identifies the collateral described [*Com. Code* § 9108(a); see *Com. Code* § 9108(c)-(e) (exceptions)]. The test of the sufficiency of the description is whether the description provides information adequate to lead a reasonable inquirer to the identity of the collateral [*In re Amex-Protein Dev. Corp.* (9th Cir. 1974) 504 F.2d 1056, 1060-1061 (decided under prior law); see *Com. Code* § 9108 (UCC Comment P 2) (test is that "the description ... make possible the identification of the collateral described")]. However, if the security interest covers timber to be cut, the agreement must contain a description of the land concerned [*Com. Code* § 9203(b)(3)(A)]. Moreover, if the description identifies the location of the property, it must do so accurately [see, e.g., *Matter of California Pump & Mfg. Co., Inc.* (9th Cir. 1978) 588 F.2d 717, 719 (description is insufficient when collateral is not located in city identified in description, decided under prior law)].

There are a variety of ways in which a description may reasonably identify collateral. With specific exceptions not

relevant here [see *Com. Code* § 9108(d) (exceptions related to security entitlement, securities account, or commodity account)], a description reasonably identifies the collateral if it describes it by any of the following [*Com. Code* § 9108(b)]:

- Specific listing.
- Category.
- A type of collateral defined in the Commercial Code [see *Com. Code* § 9108(e) exception for commercial tort claim or consumer transaction].
- Quantity.
- Computational or allocational formula or procedure.
- Except as otherwise provided in *Com. Code* § 9108(c) (see below), any other method, if the identity of the collateral is objectively determinable.

A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or similar words does not reasonably identify the collateral and is *not* sufficient for purposes of a security agreement [see *Com. Code* § 9108(c)]. Note, however, that under *Com. Code* § 9504, a financing statement sufficiently indicates collateral if it "covers all assets or all personal property" [see *Com. Code* § 9504(2)].

Under the Food Security Act of 1985, however, a notice of security interest given to potential buyers, commission merchants, or selling agents must contain a greater degree of specificity than what is required for a valid security agreement or financing statement [7 U.S.C. § 1631(e), (g)]. For further discussion, and for a form for notice of a security agreement that meets those more stringent requirements, see § 48.300.

Although former Division 9 required that the security agreement or financing statement contain a description of real property on which crops are grown [see former *Com. Code* § 9203(1)(a), that requirement has been retained in the revised division only when the security interest covers timber to be cut [see *Com. Code* § 9203(b)(3)(A); see also *Com. Code* § 9102(a)(34) (revised definition of "farm products" clarifies distinction between crops and standing timber); *Com. Code* § 9102 (UCC Comment P 4a)]. However, regardless of the minimum legal requirements for specificity, it is ordinarily advisable to be as specific as possible in describing the collateral covered by the security agreement to avoid confusion.

The description of collateral in this form provision includes proceeds from any authorized sale of the collateral [see *Com. Code* § 9102(a)(12) (security interest may be created in proceeds to which a security interest attaches); *Com. Code* § 9102(a)(64) ("proceeds" defined)]. As a general rule, a security interest attaches to any identifiable proceeds of collateral [see *Com. Code* § 9315(a)(2)]. A security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected [*Com. Code* § 9315(c)]. A security interest in proceeds is automatically perfected for 20 days. Generally, a security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds, unless specified statutory conditions are satisfied [see *Com. Code* § 9315(d), (e); see also *Com. Code* § 9322(b)(1) (priority in proceeds--general rule); *Cassel v. Kolb* (1999) 72 Cal. App. 4th 568, 577, 84 Cal. Rptr. 2d 878 (under former *Com. Code* § 9306(3)(a), now see *Com. Code* § 9315(d)(1), security interest in stock was perfected by operation of law)]. For further discussion of the perfection and priority rules relating proceeds, see Ch. 42, *Secured Transactions*.

Although a security interest generally attaches to any identifiable proceeds of collateral [see *Com. Code* § 9513(a)(2)], the borrower ordinarily executes a separate form assigning the proceeds to the secured party [see §§ 48.280, 48.281

J. For a general discussion of the inclusion of proceeds in the description of the collateral, see § 48.280[1][b].

The description of collateral given in this provision also includes after-acquired property. A security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral [Com. Code § 9204]. For further discussion of after-acquired collateral, see Ch. 42, *Secured Transactions* .

[2] FORM

Alternative Provision Describing Collateral: Crops

Description of Collateral

3. The Collateral in which this security interest is granted and transferred to Secured Party is farm products of the following description: all of the [*identify crop, e.g., wheat*] planted, growing, raised, or harvested, or that shall be planted, grown, raised, or harvested, including, where authorized by Secured Party, the proceeds of sale of those crops, on the real property described below:

[_____ *include legal description of real property*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application &
ConstructionDefinitionsCollateralGoodsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article
9)PerfectionMethodsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article
9)PerfectionMethodsFilingsFinancing StatementsGeneral Overview



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PART IV. FORMS

D. Alternative Security Agreement and Financing Statement Provisions

20-48 California Legal Forms--Transaction Guide § 48.261

§ 48.261 Alternative Provision Describing Collateral: Livestock

[1] Comment

[a] Use of Form

This form is an alternative provision that may be used to describe the collateral in a security agreement when the collateral is livestock. It may be substituted for Paragraph 3 of § 48.240, or may be inserted into the official UCC financing statement provision describing collateral [see *Ch. 42, Secured Transactions*, § 42.211]. For an alternative provision describing negotiable warehouse receipts as collateral, see § 48.262. For an alternative provision describing crops as collateral, see § 48.260. For an alternative provision describing equipment as collateral, see § 48.263.

For a security agreement creating a nonpossessory security interest in equipment, which includes farm equipment used in business, see *Ch. 42, Secured Transactions*, § 42.201.

[b] Description of Livestock as Collateral

For discussion of the sufficiency of a description of collateral in a security agreement or financing statement, see § 48.260[1][b]. It is ordinarily advisable to as specific as possible in describing the collateral covered by the security agreement to avoid confusion.

This form provision includes both a general description of the debtor's livestock and poultry, and a provision for describing the debtor's livestock by brand markings. Brands may be registered with the Bureau of Livestock Identification [*Food & Agric. Code* §§ 20602, 20663, 20691], and are evidenced by a registration certificate bearing a number [*Food & Agric. Code* § 20697].

Other methods of describing livestock include listings by cattle record brands [see *Food & Agric. Code* § 20901 *et seq.*], and description by breed, kind or class, age, location, and other identifying marks. Specificity in the description of the collateral may prevent conflicts over the extent of the coverage of the security agreement and accompanying financing statement, and provide adequate notice to third party creditors.

This provision includes as collateral the farmer's accounts arising from the sale of livestock products, including eggs or milk [see *Com. Code* § 9102(a)(12); see Form]. The borrower ordinarily executes a separate form assigning the proceeds to the secured party [see §§ 48.280, 48.281]. For a general discussion of the inclusion of proceeds in the description of the collateral, see § 48.280[1][b].

[2] FORM

Alternative Provision Describing Collateral: Livestock

Description of Collateral

3. The Collateral in which this security interest is granted and transferred to Secured Party is farm products described as follows: all of the livestock and poultry raised, grazed, fattened, or otherwise held by Debtor, and any additional acquisitions by, but not limited to, natural increase, replacement, or subsequent purchase including, where authorized by Secured Party, the farm accounts and proceeds arising from the sale of those livestock or the products thereof, including, but not limited to, eggs and milk. This description includes, but is not limited to, the following:

All cattle, horses, mules, burros, sheep, and swine bearing a brand registered with the State of California under brand registration certificate number _____ [state debtor's cattle brand registration certificate number];

All cattle bearing the cattle record brand number _____ [state cattle record brand number used by debtor]; and,

The livestock and poultry described as follows:

_____ [Describe by breed the number, kind or class, age, and any identifying marks or brands of animals].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application &
ConstructionDefinitionsCollateralGoodsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral Overview



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D. Alternative Security Agreement and Financing Statement Provisions

20-48 California Legal Forms--Transaction Guide § 48.262

§ 48.262 Alternative Provision Describing Collateral: Warehouse Receipts

[1] Comment

[a] Use of Form

This form is an alternative description of collateral for use when the debtor's obligation is secured by negotiable warehouse receipts. This form provision may be added to another alternative provision for the description of collateral [see §§ 48.260, 48.261] or, if the security interest covers only the negotiable warehouse receipts, inserted in the description of collateral paragraph of a general security agreement and financing statement [see § 48.240, P 3 and § 42.211 in Ch. 42, *Secured Transactions*]. For discussion of negotiable and nonnegotiable warehouse receipts, see Ch. 54A, *Storage of Goods*, § 54A.200.

[b] Warehouse Receipt Defined

A "warehouse receipt," which is also a document of title [see *Com. Code* § 1201(b)(16)], is a receipt issued by a person engaged in the business of storing goods for hire [*Com. Code* § 1201(b)(42); see *Com. Code* § 7102(a)(13) ("warehouse" defined); *Com. Code* § 7102(a)(8) ("issuer" defined), *Com. Code* § 7202 (forms of receipt); *Com. Code* § 7102(a)(9) ("person entitled under the document" defined)]. If goods, including distilled spirits and agricultural commodities, are stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, a receipt issued for the goods is deemed to be a warehouse receipt, even if issued by a person that is the owner of the goods and is not a warehouse [*Com. Code* § 7201(b); see *Com. Code* § 7012(a)(13) ("warehouse" means person engaged in business of storing goods for hire)].

[c] Value and Use of Warehouse Receipts as Collateral

It is common practice in agricultural operations for farm products to be stored in warehouse facilities either before or after the completion of a secured transaction and the advancement of funds pursuant to a loan agreement. If the perfected security agreement covers the farm products as "goods," the secured party will be protected; however, if the debtor has or acquires negotiable warehouse receipts for the farm products, the debtor may cut off the secured party's

rights in the collateral by negotiating the warehouse receipts [*see Com. Code §§ 7502, 7503, 9320, 9331(a)*].

For the secured party to be adequately protected, the security agreement and financing statement should include the negotiable warehouse receipts in the description of the collateral.

Negotiable documents may be, and usually are, delivered to the secured party [*see Com. Code § 9312* (UCC Comment P 3)]. The secured party's act of taking possession will suffice as a perfection step [*see Com. Code § 9313(a)*]. However, a security interest in a negotiable document may be perfected by filing a financing statement [*see Com. Code § 9312(a)*]. For discussion of filing a financing statement, and the national financing statement form, see Ch. 42, *Secured Transactions*.

[2] FORM

Alternative Provision Describing Collateral: Warehouse Receipts

Description of Collateral

3. The Collateral in which this security interest is granted and transferred to Secured Party includes the negotiable warehouse receipts covering the farm products delivered by Debtor to any warehouse storage facility and any subsequent negotiable warehouse receipts issued for the delivery of debtor's farm products during the term of this security agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview Commercial Law (UCC) Secured Transactions (Article 9) Application & Construction Definitions Collateral General Overview Commercial Law (UCC) Secured Transactions (Article 9) Perfection Methods Filings Financing Statements General Overview



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D. Alternative Security Agreement and Financing Statement Provisions

20-48 California Legal Forms--Transaction Guide § 48.263

§ 48.263 Alternative Provision Describing Collateral: Farm Equipment

[1] Comment

[a] Use of Form

This form is an alternative provision that may be used to describe the collateral in a security agreement when the collateral is farm equipment. It may be substituted for Paragraph 3 of § 48.240 or may be inserted into the official UCC financing statement provision describing collateral [see *Ch. 42, Secured Transactions, § 42.211*]. For an alternative provision describing negotiable warehouse receipts as collateral, see § 48.262. For an alternative provision describing crops as collateral, see § 48.260. For an alternative provision describing livestock as collateral, see § 48.261.

[b] Farm Equipment as Collateral

[i] In General

If the goods are not included in the definitions of inventory, farm products, or consumer goods, they are "equipment" [*Com. Code § 9102(a)(33)*]. It is advisable to be specific in describing the equipment covered by the security agreement to avoid confusion.

[ii] Financing Statements

Security interests in farm equipment are perfected in a similar manner as other goods by filing a financing statement in the proper location [see *Com. Code § 9310(a)*; see discussion in the Legal Background]. Security interests created in vehicular farm equipment are subject to certain exceptions to this rule. Generally, security interests in vehicles subject to registration under motor vehicle laws are perfected by notation on the certificate of title [see *Com. Code § 9311(a)(2), (3)*]. However, the Vehicle Code exempts from registration certain types of farm use vehicles [see *Veh. Code §§ 36100-36109*]. Security interests in these types of vehicles are perfected by filing a financing statement with the Secretary of State [see *Com. Code § 9501(a)(2)*].

Certain pieces of farm equipment may be fixtures (for example, irrigation systems affixed to real property) [*see Com. Code § 9102(a)(41)* ("fixtures" defined)]. If there may be confusion over whether the goods are fixtures or equipment, the secured party may protect itself by filing in the appropriate place for goods and fixtures [*see Com. Code § 9501*]. A fixture filing is made by filing a financing statement in the office where a mortgage on real property would be recorded [*Com. Code § 9501(a)(1)(B)*; *see Com. Code § 9334* (priority of security interests in fixtures)].

[2] FORM

Alternative Provision Describing Collateral: Farm Equipment

Description of Collateral

3. The Collateral in which this security interest is granted and transferred to Secured Party is equipment used in the _____ [farming or ranching] operations of Debtor described as follows:

_____ [*describe individual pieces of equipment, including identifying brand names, numbers, or marks*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application &
ConstructionDefinitionsCollateralGoodsEquipmentCommercial Law (UCC)Secured Transactions (Article
9)PerfectionMethodsFilingsFinancing StatementsGeneral Overview



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D. Alternative Security Agreement and Financing Statement Provisions

20-48 California Legal Forms--Transaction Guide §§ 48.264-48.279

[Reserved]

§§ 48.264[Reserved]



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E. Assignments

20-48 California Legal Forms--Transaction Guide § 48.280

§ 48.280 Assignment to Lender of Proceeds From Sale of Farm Products

[1] Comment

[a] Use of Form

This form is an assignment of the proceeds from the sale of farm products that may be made by the borrower to the lender. This form both effects the assignment and serves as notice of the assignment to persons who deal with the borrower. The form is not sufficiently specific, however, to comply with the notice requirements of the Food Security Act of 1985 for buyers, commission merchants, and selling agents to take free of a security interest created in farm products [see 7 U.S.C. § 1631(e), (g)]. For a discussion of those requirements and a notice complying with the Food Security Act of 1985, see §§ 48.240, 48.300.

[b] Assignment of Proceeds

The California Commercial Code provides that as a general rule, a security interest attaches to any identifiable proceeds of collateral [see *Com. Code* § 9315(a)(2); see also *Com. Code* § 9102(a)(12) (security interest may be created in proceeds to which a security interest attaches); *Com. Code* § 9102(a)(64) ("proceeds" defined)]. A security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected [*Com. Code* § 9315(c)]. A security interest in proceeds is automatically perfected for 20 days. However, a perfected security interest in the proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds unless any of the following conditions are satisfied [*Com. Code* § 9315(d)]:

- The filed financing statement covers the original collateral, and the proceeds are collateral in which a security interest may be perfected by filing in the office where the original financing statement was filed, and the proceeds are not acquired with cash proceeds [*Com. Code* § 9315(d)(1); see *Com. Code* § 9315(e)];
- The proceeds are identifiable cash proceeds; or

- The security interest in the proceeds is perfected other than under *Com. Code § 9315(c)* (providing for perfection of a security interest in proceeds if the security interest in the original collateral is perfected) when the security interest attaches to the proceeds or within 20 days thereafter.

For further discussion of the perfection and priority rules relating proceeds, see Ch. 42, *Secured Transactions*. In the absence of an assignment or other agreement regarding proceeds, the failure to perfect the security interest in proceeds may cause the lender to lose its priority in the collateral [see *Com. Code § 9317*].

Because of the limitations discussed above on a secured party's security interest in proceeds, and because farm products, particularly crops, are contracted for sale before the date of harvest, lenders often require the borrower of operating or production loans secured by farm products to execute an assignment of the proceeds from the sale of those farm products. The lender may also require the debtor to provide the lender with the names of any buyers of the debtor's farm products [7 U.S.C. § 1631(h)(1); see § 48.240, P 7]. On receipt of the buyer's name, the lender will serve a copy of the assignment on the buyer and have the buyer acknowledge and accept the assignment directing payment of the proceeds to the lender [see 7 U.S.C. § 1631(e)(1)(A)(v), (g)(2)(A)(v)].

[c] Deduction of Processor's Fees

Processors who handle agricultural products for farmers usually deduct the costs of processing from the amounts owed the farmer. In drafting assignments of proceeds counsel should take this practice into account and provide an acceptable method for the lender and processor to receive the amounts owed them. In the absence of language instructing the offset by the processor, the processor may be allowed priority to the extent that the funds were advanced for costs related to the production of the crop [see *Fricker v. Uddo & Taormina Co. (1957) 48 Cal. 2d 696, 701, 312 P.2d 1085*].

[2] FORM

Assignment to Lender of Proceeds From Sale of Farm Products

Crop Assignment and Order

For consideration given, _____ [name of debtor] (Assignor) assigns to _____ [name of secured party] (Assignee) all proceeds currently due or to become due from _____ [name of obligor] (Processor) as a result of Assignor's delivery of agricultural products consisting of _____ [describe crop, e.g., wheat or sugar beets]. Proceeds shall include all monies and payments of any kind, refunds, returns, dividends, capital returns, benefits, and negotiable certificates evidencing Assignor's right to receive payments from the Processor.

Assignor hereby authorizes and directs the Processor to deliver all proceeds to Assignee at _____ [address], for which, on delivery, Assignee shall accept and execute releases for the receipt of the proceeds. Except with the prior written consent of the Assignee this Assignment shall not be revoked for any reason. Assignor hereby warrants and represents that no other assignment of proceeds has been granted.

Except with the prior written consent of the Assignee, Assignor shall not remove the agricultural products covered by this Assignment held by the Processor, nor sell or deliver any agricultural products covered by this Assignment to any party other than the Processor, nor create or allow any encumbrance to be created on them, nor allow any lien, other than Assignee's, to attach to the agricultural products covered by this Assignment.

Executed on _____ [date] at _____, California.

ASSIGNOR

_____ [signature of assignor]

[typed name]

ASSIGNEE

_____ [signature of assignee]

[typed name]

Acceptance of Assignment

_____ [name of obligor] (Processor) acknowledges receipt of the foregoing assignment, and certifies that there are no other assignments or advances of which the Processor has notice relating to the account of the Assignor.

[Use if processor will deduct amounts owed from payments of proceeds:]

Processor agrees to be bound by the terms and conditions of this Assignment subject to a deduction for whatever amounts the Processor may be owed for the warehousing, processing, selling, or other costs to which the Processor may be entitled under contractual agreements with the Assignor.

[Or, if the processor's rights will be subordinated to those of the secured party:]

Processor agrees to be bound by the terms and conditions of this Assignment and subordinates to this Assignment, to the extent that Assignor is, and in the future becomes, indebted to the Assignee, all liens, claims, and indebtedness owed to the Processor by the Assignor now or in the future.

[Continue with the following:]

Executed on _____ [date] at _____, California.

PROCESSOR

_____ [signature of processor]

[typed name]

ASSIGNEE

_____ [signature of assignee]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application &
ConstructionDefinitionsCollateralGoodsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article
9)PriorityCreditor PrioritiesProceedsGovernmentsAgriculture & FoodGeneral Overview



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E. Assignments

20-48 California Legal Forms--Transaction Guide § 48.281

§ 48.281 Assignment of Proceeds From Sale of Dairy Products

[1] Comment--Use of Form

This form is a specific type of assignment used in financing arrangements involving dairy farm operators. The use of this "milk check assignment" is common in situations in which the dairy farmer has a contractual agreement with a milk processor/marketer. These contracts often call for specific payments on specific dates to farmers for milk deliveries, and it is this right to payment that may be assigned.

Although proceeds arising from the sale of collateral generally are protected under the security agreement [*see Com. Code § 9315(a)(2); see also § 48.280*], the use of the milk check assignment will avert any possible conflicts in priority stemming from the failure of the secured party to comply with perfection requirements for proceeds [*see § 48.280[1][b]*]. The common use of the milk check assignment in the dairy industry will facilitate smooth relations with processor/marketers of milk.

For a general discussion of the use of assignments in agricultural financing, see *§ 48.280[1]*.

[2] FORM

Assignment of Proceeds From Sale of Dairy Products

Assignment of Proceeds of Sale of Dairy Products

In consideration of advances given or to be given by _____ [*name of lender*] (Assignee) to _____ [*name of debtor*] (Assignor), Assignor assigns and transfers the right to collect all amounts of money to the extent described in this Assignment now due or to become due to Assignor on account of the processing or marketing on Assignor's behalf of any milk or milk-related products of any kind delivered by Assignor to _____ [*name of obligor*] (Processor) pursuant to an agreement entered into between Assignor and Processor on _____ [*date*].

The amounts assigned and times of payment are as follows:

\$ _____ on _____ [date]
 \$ _____ on _____ [date]
 \$ _____ on _____ [date]
 \$ _____ on _____ [date]

Payments in the amount of \$ _____ per month, payable on the _____ day of each month thereafter, shall be made until the indebtedness of the Assignor to Assignee has been paid in full. On the satisfaction of Assignor's obligation, Assignee shall give prompt written notice to the Processor indicating the termination of this Assignment. Assignor authorizes the payment to Assignee of all amounts payable to Assignee as set forth in this Assignment.

This Assignment incorporates by reference the terms and conditions of any security agreement executed by the Assignor in favor of the Assignee.

Executed on _____ [date] at _____, California.

ASSIGNOR

_____ [signature of assignor]
 [typed name]

ASSIGNEE

_____ [signature of assignee]
 [typed name]

Acceptance of Assignment

_____ [name of obligor] (Processor) acknowledges receipt of and accepts the foregoing assignment, and certifies that there are no other assignments or advances of which the Processor has notice relating to the account of the Assignor.

[Use if processor will deduct amounts owed from payments of proceeds:]

Processor agrees to be bound by the terms and conditions of this Assignment, subject to a deduction for whatever amounts the Processor may be owed for the warehousing, processing, selling, or other costs to which the Processor may be entitled under contractual agreements with the Assignor.

[Or, if the processor's rights will be subordinated to those of the secured party:]

Processor agrees to be bound by the terms and conditions of this Assignment and subordinates to this assignment, to the extent that Assignor is, and in the future becomes, indebted to the Assignee, all liens, claims, and indebtedness owed to the Processor/Marketer by the Assignor now or in the future.

[Continue with the following:]

Executed on _____[*date*] at _____, California.

PROCESSOR

_____[*signature of processor*]
[*typed name*]

ASSIGNEE

_____[*signature of assignee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application &
ConstructionDefinitionsCollateralGoodsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article
9)PriorityCreditor PrioritiesProceeds



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E. Assignments

20-48 California Legal Forms--Transaction Guide §§ 48.282-48.299

[Reserved]

§§ 48.282[Reserved]



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20-48 California Legal Forms--Transaction Guide § 48.300

§ 48.300 Notice to Buyers, Commission Merchants, and Selling Agents Under the Food Security Act of 1985

[1] Comment

[a] Use of Form

This form is a notice of security interest as required by the Food Security Act of 1985 [*see 7 U.S.C. § 1631*]. It should be used by secured parties or sellers of farm products to give notice to potential buyers in the ordinary course of business, commission merchants, or selling agents of the security interest held by the secured party [*7 U.S.C. § 1631(e)(1), (g)(2)(A); see 7 U.S.C. § 1631(c)* (definitions)]. For a general discussion of the effect of the Act, see § 48.17[5]. For discussion of and provisions for a security agreement requiring a debtor to provide the secured party with a list of potential buyers, commission merchants, or selling agents, and requiring the debtor to supplement the list and notify the secured party of any sale of the collateral to a party not on the list, see § 48.240[1][b], [2], PP 7, 8. For an assignment of the proceeds from the sale of farm products to the secured party, see § 48.280.

[b] Food Security Act of 1985

[i] In General

Buyers, commission merchants, and selling agents take farm products free of a security interest created in them, unless the secured party complies with the notice requirements of the Food Security Act of 1985 [*see 7 U.S.C. § 1631(e), (g)*]. The Act provides for two different methods of providing notice to potential buyers, commission merchants, and selling agents. The first provides for direct notification by the secured party to all potential buyers, and others, of the security interest [*see 7 U.S.C. § 1631(e)(1), (g)(2)(A)*]. The alternate method of notice involves a central filing system [*see 7 U.S.C. § 1631(c)(2)* (definition)] that is handled by the office of the Secretary of State and is similar to, but separate from, a filing system for financing statements [*see 7 U.S.C. § 1631(e)(2), (3), (g)(2)(C), (D)*].

California has not adopted the central filing system provided for by the Act. Secured parties and sellers of farm products in California therefore must comply with the direct notice provisions of the Act to preserve a perfected security interest on sale to a buyer, commission merchant, or selling agent.

[ii] Required Contents of Notice

Although the Act does not prescribe any specific form, the notice must contain certain information relating to the secured interest. The notice must be organized according to farm product and must contain the names and addresses of the secured party and the debtor. It must state the social security number of the debtor, or, if the debtor is not an individual, the Internal Revenue Service taxpayer identification number. Relating to the collateral covered by the security interest, the notice must state a description of the collateral, including the amount of the products if applicable, the year in which the crop is produced, the name of each county or parish in which the farm products are produced or located, and a reasonable description of the property on which the farm product is produced [see 7 U.S.C. § 1631(e)(1)(A)(ii), (g)(2)(A)(ii)].

The Act provides for an optional provision stating the conditions that must be met by the buyer for the release of the secured party's interest in the collateral [see 7 U.S.C. § 1631(e)(1)(A)(v), (g)(2)(A)(v)]. The effect of the inclusion of this provision is to place the payment obligation created by a debtor on the buyer, commission merchant, or selling agent [see Bender's Uniform Commercial Code Service, Art. 9, *Secured Transactions*, Part 3, *Security Agreements for Farm Products* (Matthew Bender)]. This form includes a sample optional provision illustrating the kinds of payment obligations that a buyer might be required to meet to release the secured party's interest in the collateral.

[iii] Duration, Amendments, and Execution of Notice

The Act provides that a buyer, commission merchant, or selling agent takes title to farm products subject to the security interest created by the seller if a notice containing the required information is received by the buyer within one year before the sale of the farm products [see 7 U.S.C. § 1631(e)(1)(A), (g)(2)(A); see § 48.300[1][b][ii]]. Thus, if the security interest is intended to cover a period greater than one year, the secured party must renew the notice on a yearly basis [see Sanford, *The Reborn Farm Products Exception Under the Food Security Act of 1985*, 20 U.C.C. L.J. 3, 19 (1987)]. The notice lapses at the expiration of the one-year period or on the transmission of a notice signed by the secured party stating that the notice has lapsed, whichever comes first [7 U.S.C. § 1631(e)(1)(A)(iv), (g)(2)(A)(iv)].

If there are any material changes in the information provided in the notice, a writing must be sent to potential buyers, commission merchants, and selling agents amending the original notice within three months from the date of those changes. Although there is no provision for the execution of the original notice, the Act requires that the writing indicating amendments be "similarly signed, authorized, or otherwise authenticated and transmitted" [see 7 U.S.C. § 1631(e)(1)(A)(iii), (g)(2)(A)(iii)]. A conservative approach would have the original notice, and any subsequent writing describing amendments to that notice, be executed by both the debtor and the secured party [see Sanford, *The Reborn Farm Products Exception Under the Food Security Act of 1985*, 20 U.C.C. L.J. 3, 20 (1987)].

[2] FORM**Notice to Buyers, Commission Merchants, and Selling Agents Under the Food Security Act of 1985**

Notice of Security Interest

To: _____ [name]
 _____ [street address]
 _____ [city, state, zip code]

Notice is hereby given pursuant to Section 1631 of Title 7 of the United States Code that _____ [name of secured party] (Secured Party), whose address is _____, has a security interest in the farm products described as Collateral in this notice.

The debtor whose obligations are secured is _____ [name of debtor] (Debtor), whose address is

_____. The Debtor's [Social Security number or taxpayer identification number] is _____.

Description of Collateral

1. Crops:

Description of Crop: _____ [e.g., wheat]

Crop Year: _____

County Where Crop Is Grown: _____

Description of Property Crop Is Grown On: _____ [insert legal description.]

Amount of Crops Subject to Security Interest: _____

[Repeat the above language for each type of crop included as collateral.]

2. Livestock:

Description of Livestock _____ [e.g., Hereford steers]

Crop Year: _____

County Where Livestock Is Raised: _____

Description of Property Livestock Is Raised On: _____ [insert legal description]

Number of Livestock Subject to Security Interest: _____

[Repeat the above language for each type of livestock included as collateral.]

3. Products of Livestock:

Description of Livestock Product: _____ [e.g., eggs]

Crop Year: _____

County or Parish Where Livestock Product Is Produced: _____

Description of Property Livestock Is Raised On: _____ [insert legal description]

Amount of Livestock Product Subject to Security Interest: _____

[Repeat the above language for each type of livestock product included as collateral.]

If as a buyer you purchase, or as a commission merchant or selling agent you transact any business involving the collateral described in this notice, you may remove the security interest in the collateral by complying with the following requirements.

If you are a buyer of the collateral, any payment made by you for the purchase of the collateral must be made by check, bank draft, or money order made payable to the Secured Party.

If you are a commission merchant or selling agent, all funds that you are to remit to Debtor as a result of any transaction that you take part in on Debtor's behalf must be made by check, bank draft, or money order made payable to the Secured Party.

All payments made pursuant to this notice must be sent to the Secured Party at the address given above or as given in any subsequent writing, signed by Debtor and Secured Party, indicating a change of address. The security interest held by the Secured Party in the goods described in this document shall be released only upon the full payment of any outstanding balance due the Secured Party by Debtor.

Executed on _____[*date*] at _____, California.

DEBTOR

_____ [*signature of debtor*]

[*typed name*]

SECURED PARTY

_____ [*signature of secured party*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewGovernmentsAgriculture & FoodGeneral Overview



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20-48 California Legal Forms--Transaction Guide § 48.301

§ 48.301 Landlord Share Waiver

[1] Comment

[a] Use of Form

This form is a landlord share waiver that may be used if the debtor operates a farm on leased real property. The use of this form is generally tied to a financing arrangement by which the party advancing funds has taken a secured interest in farm products [see *Com. Code § 9102(a)(34)* (definition); see also § 48.240 (security agreement)]. For a discussion of leases of agricultural real property and acknowledgment and recordation instruments, see Ch. 37, *Farm Leases*.

[b] Purpose of Landlord Share Waiver

When a relationship of lessor and lessee exists, the title to the crops grown on the leased premises is held by the lessee, and not by both parties as tenants in common [*Cox v. Miller* (1936) 15 Cal. App. 2d 494, 498, 59 P.2d 628]. However, by the terms of a lease agreement, the parties may be made cotenants in the crops grown [see *Woodsend v. Chatom* (1923) 191 Cal. 72, 76, 214 P. 965]. A provision creating a cotenancy in the crops grown on leased premises is not uncommon to share basis leases [see Ch. 37, *Farm Leases*].

The tenant in a crop or livestock share leasing arrangement may have difficulty procuring financing because of the landlord's interest in the crops or livestock. If the landlord signs a share waiver, the tenant can offer the first lien to a party advancing funds under a security agreement. The landlord share waiver also serves to inform the secured party of the extent to which the tenant can encumber the crops or livestock.

[2] FORM

Landlord Share Waiver

Landlord Share Waiver

To: _____ [name of secured party] (Secured Party)
 _____ [street address]
 _____ [city, state, zip code]

This is to inform you that _____ [name of landlord] (Landlord) of _____ County, California, is the lawful owner of the following described premises leased to _____ [name of tenant/debtor] (Debtor). The leased premises are located at _____ [address, city or county], California and are described as follows:

_____ [insert legal description]

The leased premises are also described in a Security Agreement between Debtor and Secured Party dated _____, covering farm products described in that Agreement. The interest in that Agreement secures the Debtor's obligation in the amount of \$_____.

In consideration of funds advanced by Secured Party enabling Debtor to _____ [describe tenant's operations on premises, e.g., plant and raise crops or raise and maintain livestock] on the described leased premises, Landlord consents to the waiver and relinquishment to Secured Party, and its successors and assigns, all rights, liens, or priorities that Landlord may have in those _____ [crops or livestock] and their proceeds. This waiver and relinquishment extends only to the indebtedness due Secured Party, and its successors and assigns, under the Security Agreement and shall not exceed the sum of total indebtedness indicated above. This waiver expires at the time Debtor satisfies the obligation due Secured Party.

Executed on _____ [date] at _____, California.

LANDLORD

_____ [signature of landlord]
 [typed name]

Acknowledgment

[Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):]

_____))
 State of California)
 County of _____)

On _____ [date], before me, _____ [name and title of officer taking acknowledgment], personally appeared _____ [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is or are] subscribed to the within instrument and acknowledged to me that _____ [he or she or they] executed the same in _____ [his or her or their] authorized _____ [capacity or capacities], and that by _____ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____[*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGoodsFarm
ProductsReal Property LawLandlord & TenantGeneral Overview



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20-48 California Legal Forms--Transaction Guide § 48.302

§ 48.302 Bill of Sale Draft

[1] Comment

[a] Use of Form

This form is a bill of sale draft for use in financing arrangements involving the purchase of livestock. The circumstances of the sale may require the debtor/buyer to have greater flexibility than is usual in financing arrangements: the debtor/buyer may be unable to describe the livestock specifically until the purchase, the particular livestock sought by the debtor/buyer may become unavailable if standard loan approval methods are followed, or purchases of livestock may take place in locations far from the offices of the lender. By the use of a bill of sale draft, the debtor/buyer has the flexibility to purchase only the livestock that meets his or her approval at the time of purchase and the lender is protected by a previously executed security agreement covering all after-acquired property [*see Com. Code § 9204(a)*].

The bill of sale draft in this form is a negotiable instrument within the definition of the Uniform Commercial Code [*see Com. Code § 3104*]. For a discussion of negotiable instruments and the statutory provisions affecting them, see Ch. 55, *Negotiable Instruments*.

[b] Method of Financing Using Bill of Sale Draft

When using the bill of sale draft system for financing a purchase of livestock, the borrowing rancher arranges in advance of any purchases for the lender to lend up to a specified sum of money for the purchase of livestock over a limited time period. For a loan agreement that may be adapted for this purpose, see § 48.220. The lender and rancher then usually execute a security agreement specifying the purpose of the loan, the maximum amount to be loaned to the rancher, and the general type of livestock for which the loan is made. For a general form for a security agreement that may be used for this purpose, see § 48.240. The executed financing statement should then be filed in the office of the Secretary of State [*see Com. Code § 9501(a)(2)*; *see Ch. 42, Secured Transactions*].

Because the livestock will not be identified before the sale, the description of the collateral that must be included in the security agreement and financing statement should describe the livestock in general terms [*see § 48.261*]. The security

agreement must specify that the collateral securing the debt will include the livestock purchased under the bill of sale as after-acquired collateral [*see Com. Code § 9204(a)*]. After purchase of the livestock by the debtor, the lender may file an amended financing statement with a detailed description of the livestock purchased [*see Com. Code § 9512; see also Ch. 42, Secured Transactions*].

When the rancher makes a purchase of livestock financed under the bill of sale draft system, the rancher completes the upper portion of the form providing the necessary information relating to the seller and the lender who will cover the draft. The seller of the livestock then completes the lower portion of the form, which constitutes a bill of sale transferring title to the livestock being purchased to the buyer. The seller then retains the bill of sale draft, which on presentation to the lender will be paid in full.

[c] Consent of Secured Party

If the livestock to be purchased by the rancher under the bill of sale draft is the subject of an outstanding lien or secured interest, the consent of that lienholder or secured party to the sale of the livestock should be obtained. This draft contains an optional provision for that consent. The consent of the lienholder or secured party is made conditional to the payment of the balance owed under the outstanding obligation.

[2] FORM

Bill of Sale Draft

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGoodsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 49 AGRICULTURAL CONTRACTS

20-49 California Legal Forms--Transaction Guide 49.syn

§ 49.syn Synopsis to Chapter 49: AGRICULTURAL CONTRACTS

§ 49.01 California Statutes

§ 49.02 Federal Statutes

§ 49.03 California Regulations

§ 49.04 Federal Regulations

§ 49.05 Law Reviews

§ 49.06 Annotations

§ 49.07 Text References

[1] Related Forms With Tax Analysis

[2] Related Forms

[3] Related California Forms

[4] Additional Text References

§§ 49.08-49.09 [Reserved]

§ 49.10 Types of Agricultural Contracts

§ 49.11 Federal Laws Affecting Agricultural Contracts

[1] Federal Marketing Agreements and Orders

[2] Marketing Quotas and Acreage Allotments

[3] Unlawful Practices: Perishable Agricultural Commodities

[4] Unlawful Practices: Packers and Stockyards

§ 49.12 California Laws Affecting Agricultural Contracts

[1] State Marketing Orders and Agreements

[2] Marketing Programs for Proration Zones

[3] Regulation of Farm Products Processors

[4] Regulation of Produce Resellers

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This chapter covers federal and state laws regulating parties to common agricultural contracts. The Transaction Guide contains drafting guides for assistance in assembling specific agricultural contracts and includes coverage of the regulations governing the specific agricultural commodities covered by those contracts. Additionally, coverage of the procedural steps necessary in preserving a seller's rights in statutory trusts of sales proceeds is included in the Transaction Guide. Forms illustrated include contracts for the sale of farm products by producers to processors and resellers, marketing contracts for farm products involving cooperative associations, and livestock feeding contracts.

For a general discussion of the formation of contracts, their required elements, and forms, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* . For a discussion of the general application of the Commercial Code to contracts for the sale of goods, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

This chapter does not include coverage of agricultural contracts involving real property or farm equipment and implements. For contracts relating to the sale of real property, see Ch. 23, *Real Property Sales Agreements* . For various forms of agreements used in leasing agricultural lands, see Ch. 37, *Farm Leases* . Personal property leasing in general is covered in Ch. 53, *Personal Property Leasing* .

Ch. 48, *Agricultural Financing*, covers the various forms of agricultural financing. An examination of those materials will provide additional background to attorneys assisting clients in transactions involving sales and purchases of agricultural commodities.



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§ 49.01 California Statutes

Farm products as fixtures. *Civ. Code § 660.*

Water rights. *Civ. Code §§ 1410a-1422.*

Obligations. *Civ. Code §§ 1427, 1428.*

Contracts in general.

Definition. *Civ. Code § 1549.*

Essential elements. *Civ. Code § 1550.*

Capacity and identity of parties. *Civ. Code §§ 1556-1559.*

Consideration. *Civ. Code §§ 1605-1615.*

Statute of Frauds. *Civ. Code § 1624.*

UCC provisions governing sales of goods. *Com. Code § 2101 et seq.*

Licensing for sale of livestock feeds. *Food & Agric. Code §§ 15051-15062.*

Cooperative association marketing contracts. *Food & Agric. Code §§ 54261-54266.*

Cooperative bargaining associations. *Food & Agric. Code § 54401 et seq.*

Processors of farm products.

Licensing. *Food & Agric. Code §§ 55521-55530.*

Sale of farm products by weight. *Food & Agric. Code § 55581.*

Time for payment. *Food & Agric. Code §§ 55601, 55601.4.*

Packout basis contracts. *Food & Agric. Code §§ 55602-55603.*

Consigned basis contracts. *Food & Agric. Code §§ 55605, 55606.*

Producer's liens. *Food & Agric. Code § 55631 et seq.*

Livestock liens. *Food & Agric. Code §§ 55701-55704.*

Produce dealers.

Licensing. *Food & Agric. Code §§ 56181-56196.*

Commission merchants. *Food & Agric. Code §§ 56271-56283.*

Records of produce dealers. *Food & Agric. Code § 56301.*

Time for payment. *Food & Agric. Code § 56302.*

Farm Products Trust Fund. *Food & Agric. Code §§ 56701-56716.*

Marketing in general.

Direct marketing of agricultural products of farmers to consumers. *Food & Agric. Code § 47000 et seq.*

Contracts injuring or destroying competition. *Food & Agric. Code § 58351.*

California Marketing Act of 1937. *Food & Agric. Code § 58601 et seq.*

Agricultural Producers Marketing Law. *Food & Agric. Code § 59501 et seq.*

Marketing of milk and related products. *Food & Agric. Code § 61301 et seq.*

Milk producers security trust fund. *Food & Agric. Code § 62500 et seq.*

Marketing of edible nuts. *Food & Agric. Code § 62801 et seq.*

Formation and regulation of irrigation districts. *Water Code § 20500 et seq.*



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§ 49.02 Federal Statutes

Packers and Stockyards Act. *7 U.S.C. § 181 et seq.*

Cooperative marketing. *7 U.S.C. §§ 451-457.*

Licensing for sale of perishable agricultural commodities. *7 U.S.C. § 499c.*

Federal marketing agreements. *7 U.S.C. § 608b.*

Federal marketing orders. *7 U.S.C. § 608c.*

Marketing quotas.

Wheat. *7 U.S.C. §§ 1331-1340.*

Cotton. *7 U.S.C. §§ 1341-1350.*

Notice of farm marketing quotas. *7 U.S.C. § 1362.*

Commodity Credit Corporation purchase contracts.

"Basic agricultural commodities" defined. *7 U.S.C. § 1428(c).*

"Nonbasic agricultural commodities" defined. *7 U.S.C. § 1428(d).*

Price support levels for basic agricultural commodities. *7 U.S.C. § 1441 et seq.*

Price support levels for nonbasic agricultural commodities. *7 U.S.C. § 1446 et seq.*



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§ 49.03 California Regulations

Specifications of marketable eggs and fresh fruits, nuts, and vegetables. *3 Cal. Code Reg. § 1351 et seq.*

Marketing of milk and dairy products. *3 Cal. Code Reg. § 1801 et seq.*



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§ 49.04 Federal Regulations

Regulations for marketing quotas under Agricultural Adjustment Act of 1938. *7 C.F.R. §§ 711.1-720.1.*

Marketing orders.

General regulations. *7 C.F.R. § 900.1 et seq.*

Navel oranges. *7 C.F.R. § 907.1 et seq.*

Valencia oranges. *7 C.F.R. § 908.1 et seq.*

Lemons. *7 C.F.R. § 910.1 et seq.*

Nectarines. *7 C.F.R. § 916.1 et seq.*

Peaches, plums, and pears. *7 C.F.R. § 917.1 et seq.*

Kiwifruit. *7 C.F.R. § 920.1 et seq.*

Tokay grapes. *7 C.F.R. § 926.1 et seq.*

Pears. *7 C.F.R. § 927.1 et seq.*

Olives. *7 C.F.R. § 932.1 et seq.*

Potatoes. *7 C.F.R. § 947.1 et seq.*

Almonds. *7 C.F.R. § 981.1 et seq.*

Walnuts. *7 C.F.R. § 984.1 et seq.*

Spearmint oil. *7 C.F.R. § 985.1 et seq.*

Dates. *7 C.F.R. § 987.1 et seq.*

Raisins. *7 C.F.R. § 989.1 et seq.*

Prunes. *7 C.F.R. § 993.1 et seq.*

Regulations governing marketing assistance loans and loan deficiency payments for grains and similarly handled commodities through Commodity Credit Corporation. *7 C.F.R. § 1421.1 et seq.*



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§ 49.05 Law Reviews

Willingham and Olchyk, *TAMRA Changes to Agriculture Are Not Completely Beneficial*, 70 J. Tax'n 226 (1989).

Knight and Knight, *Deferred Payment Farm Contracts Can Delay Recognition of Income*, 17 Tax'n for Law. 98 (1988).

Hawkland, *Sale Contract Terms Under the UCC*, 17 UCC L.J. 195 (1985).

Note, *The California Agricultural Producer's Lien, Processing Company Insolvencies, and Federal Bankruptcy Law: An Evaluation and Alternative Methods of Protecting Farmers*, 36 Hastings L.J. 609 (1985).



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§ 49.06 Annotations

Annot., Conveyance of Land as Including Mature but Unharvested Crops, 51 A.L.R.4th (1987).

Annot., What Constitutes "Goods" Within UCC Article 2, 4 A.L.R.4th 912 (1981).

Annot., Farmers as "Merchants" Within Provisions of UCC Article 2, Dealing With Sales, 95 A.L.R.3d 484 (1979).

Annot., Construction and Application of UCC § 2-305 Dealing With Open Price Term Contracts, 91 A.L.R.3d 1237 (1979).

Annot., Sufficiency of Description of Crops Under UCC §§ 9-203(1)(b) and 9-402(1), 67 A.L.R.3d 308 (1975).

Annot., Validity, Construction, and Effect of Contract Between Grower of Vegetable or Fruit Crops, and Purchasing Processor, Packer, or Canner, 87 A.L.R.2d 732 (1963).

Annot., Effectiveness of Reservation of Vendor's Crop Rights in Land Contract in Absence of Such Reservation in Deed Later Executed, 8 A.L.R.2d 565 (1949).



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§ 49.07 Text References

[1] Related Forms With Tax Analysis

Rabkin & Johnson, *Current Legal Forms with Tax Analysis* (Matthew Bender), Ch. 24, *Agricultural Transactions and Natural Resources*, Forms 24.07, 24.08 (citrus fruit sale contracts), 24.09, 24.10 (marketing agreements), 24.11-24.14 (livestock feeding, management, and feed purchase contracts).

[2] Related Forms

Warren's *Forms of Agreements* (Matthew Bender).

Ch. 11, *Franchising*, Forms 11.24.05-11.24.09 (cooperative association marketing agreements).

Ch. 12A, *Sales of Personal Property*, Form 12A.4.01 (sale of goods contract).

[3] Related California Forms

California Legal Forms (Matthew Bender).

Ch. 14, *Consumer Cooperative Corporations*.

Ch. 14A, *Agricultural Nonprofit Cooperative Associations*.

Ch. 23, *Real Property Sales Agreements*, § 23.200 (general use land sale contract), §§ 23.260-23.264 (farmland contract provisions).

Ch. 37, *Farm Leases*.

Ch. 48, *Agricultural Financing*.

Ch. 52, *Sales of Goods Under the Uniform Commercial Code*.

Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, §§ 75.200, 75.201 (sample contracts), §§

75.210-75.215 (forms for offer and acceptance), § 75.220 et seq. (standard contract provisions).

Ch. 76, *Assignment of Obligations*.

Ch. 91, *Contracts With Sales Representatives*, § 91.271 (agreement with commission merchant for sale of farm products).

California Forms of Pleading and Practice (Matthew Bender).

Ch. 140, *Contracts*.

Ch. 315, *Irrigation*.

Ch. 342, *Liens and Wage Preferences* (agricultural lien forms).

Ch. 500, *Sales: Sales Under the Uniform Commercial Code*.

Ch. 502, *Sales: Warranties*.

Ch. 503, *Sales: Secured Transactions*.

California Points and Authorities (Matthew Bender).

Ch. 50 *Contracts*.

[4] Additional Text References

Harl, *Agricultural Law* (Matthew Bender).

Ch. 63, *United States Department of Agriculture: Organization; Programs and Activities*.

Ch. 70, *Agricultural Marketing Agreement Act of 1937*.

Ch. 71, *The Packers and Stockyards Act*.

Ch. 72, *Perishable Agricultural Commodities Act*.

Ch. 78, *The Agricultural Marketing Act of 1946*.

Ch. 90, *Commodity Credit Corporation*.

Ch. 91, *Production Control and Price Support Programs for Agricultural Commodities*.

Ch. 113, *State Agricultural Agencies; Organization; Functions and Activities*.

Ch. 114, *State Regulation of Agriculture*.

California Real Estate Law and Practice, Ch. 90, *Representing Clients in Sales Transactions*, § 90.92 (Matthew Bender).

Witkin, *Summary of California Law*, Vol. 1, *Contracts*; Vol. 4, *Sales*; Vol. 12, *Real Property*, §§ 915-961 (water rights) (10th ed. 2005).

University of California Cooperative Extension, Leaflet No. 21425, *Regulations Governing Contracts Between Growers and Handlers of Agricultural Produce: A Primer for Small-Scale Producers* (1987).



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§ 49.10 Types of Agricultural Contracts

Agricultural contracts are employed in a wide variety of transactions relating to the sale and procurement of goods and services in the field of agriculture. As in other types of businesses, agricultural contracts serve to stabilize the relationships between buyers and sellers of either goods or services. Contractual arrangements involving agricultural transactions are commonly employed in sales of crops and livestock [*see* §§ 49.300, 49.301], including price support purchasing contracts, individual and cooperative marketing of farm products [*see* §§ 49.340, 49.341], crop and livestock processing, livestock feeding or fattening [*see* § 49.360], and sales of feed [*see* § 49.361], fertilizer, seed, and other production materials.

One of the most common types of agricultural contracts is a producer-processor agreement, in which a processor of crops contracts with a producer for the purchase of a specified quantity of a particular commodity [*see* § 49.300]. A variation of this contract is a producer-reseller agreement, in which the grower sells the commodity to a dealer or broker. This type of transaction varies from the producer-processor contract, among other ways, in that the producer may have the responsibility for sorting, grading, and packing prior to delivery [*see* § 49.301[1]].

Another common type of agreement is the agricultural cooperative marketing agreement [*see* Ch. 14A, *Agricultural Nonprofit Cooperative Associations*, §§ 14A.203, 14A.204], in which a producer contracts with a cooperative association to process and market the producer's commodity. Individual producers benefit from the collective resources and marketing abilities of agricultural cooperatives while maintaining their independent operations. For a discussion of the formation and function of agricultural cooperatives, see Ch. 14A, *Agricultural Nonprofit Cooperative Associations* .

Contracts providing for the feeding of livestock and for the purchase of livestock feeds are commonly employed in California. Specific issues concerning the care and sale of livestock, including an animal's age, weight, health, and dietary requirements, necessitate separate contractual treatment of transactions concerning these agricultural commodities. Ranchers often contract with feedlot operators for the purpose of fattening cattle before sale [*see* § 49.360]. Ranchers also contract for the purchase of livestock feeds to supplement their own stores [*see* § 49.361]. Both types of livestock-related agreements may provide beneficial tax attributes for certain income taxpayers [*see* §§ 49.360[1], 49.361[1]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral OverviewGovernmentsAgriculture & FoodGeneral Overview



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§ 49.11 Federal Laws Affecting Agricultural Contracts

[1] Federal Marketing Agreements and Orders

The Agricultural Adjustment Act [*see 7 U.S.C. §§ 601-625*] is intended to prevent the impairment of the purchasing power of farmers caused by the disruption of the orderly exchange of commodities by establishing and maintaining orderly market conditions [*7 U.S.C. §§ 601, 602*]. The Act provides for the control of production and distribution of specified agricultural commodities through the use of marketing agreements and marketing orders [*see 7 U.S.C. §§ 608b, 608c*]. Marketing agreements and orders restrict the flow of agricultural commodities in the marketplace, rather than on the farm or ranch; marketing orders are not applicable to producers in their capacity as producers [*7 U.S.C. § 608c(13)(B)*]. In other words, producers generally are not restricted by a marketing agreement or order as to the amounts of agricultural commodities they produce; instead, the handlers of agricultural commodities are restricted in the amounts of their purchases of the covered commodity.

Under the Act, the Secretary of Agriculture may enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity for any purpose allowed under the Act. The Secretary must give due notice and opportunity for hearing to those affected by the agreement before it is enforceable. The agreements must pertain only to those agricultural commodities or their products that are handled in the current of interstate or foreign commerce or that directly burden, obstruct, or affect interstate or foreign commerce [*7 U.S.C. § 608b(a)*].

In practice, very few independent marketing agreements have been established. However, the Act requires the adoption of a marketing agreement covering the commodity to be regulated by a marketing order before that order can take effect [*7 U.S.C. § 608c(8)*; *but see 7 U.S.C. § 608c(9)* (limited exception to requirement for marketing agreement)].

Marketing orders issued under the Agricultural Adjustment Act cover a wide variety of specified fruits and vegetables produced in California [*see 7 C.F.R. §§ 907.1-993.602*; *see also § 49.121*]. Counsel assisting in negotiations and contract drafting should be aware that an order may impose specific regulations limiting or allotting the quantity or amount of the commodity marketed, and the grade, size, or quality of the commodity [*see 7 U.S.C. § 608c(6)(A)-(C)*]. Marketing orders may also include the means for determining the existence and extent of any surplus of the commodity,

and for providing for the control and disposition of that surplus [7 U.S.C. § 608c(6)(D)]. Also permitted are terms establishing reserve pools of the commodity, providing for the equitable distribution of the net returns derived from the sale of the commodity, and providing for the fixing of size, capacity, weight, dimensions, or pack of the containers used to ship or contain the commodity [see 7 U.S.C. § 608c(6)(E), (H)].

Among the collective activities that Congress authorized for certain specific commodities is "production research marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production" of any of the specified commodities or products [7 U.S.C. § 608c(6)(I)]. This marketing promotion includes paid advertising [7 U.S.C. § 608c(6)(I)]. In a case in which California tree fruit growers, handlers, and processors challenged the validity of various regulations contained in marketing orders that imposed assessments covering the expenses of administering the orders, including the cost of generic advertising of California nectarines, plums, and peaches, the United States Supreme Court held that imposing the assessments did not violate the First Amendment [*Glickman v. Wileman Bros. & Elliott* (1998) 521 U.S. 457, 117 S. Ct. 2130, 2137-2142, 138 L. Ed. 2d 585]. The Court stated that it was reviewing a type of economic regulation that should enjoy the same strong presumption of validity accorded to other policy judgments made by Congress. The mere fact that one or more producers did not wish to foster generic advertising of their product was not a sufficient reason for overriding the judgment of the majority of market participants who find these types of programs beneficial [*Glickman v. Wileman Bros. & Elliott* (1998) 521 U.S. 427, 117 S. Ct. 2130, 2142, 138 L. Ed. 2d 585].

Marketing orders apply to all processors, associations of producers, and handlers involved in the handling of specified agricultural commodities within the specified production areas as set forth in the marketing order covering the commodity [7 U.S.C. § 608c(1)]. Violations of the terms of marketing orders subject the violator to fines and penalties [see 7 U.S.C. § 608c(14)]. Marketing orders may be terminated on the determination by the Secretary of Agriculture that the order no longer effectuates the intent of the Act [7 U.S.C. § 608c(16)(A)].

For a discussion of marketing orders issued by the California Department of Food and Agriculture regulating the intrastate production and distribution of agricultural commodities, see § 49.12[1].

[2] Marketing Quotas and Acreage Allotments

The Agricultural Adjustment Act of 1938 [7 U.S.C. §§ 1281-1393] regulates interstate and foreign commerce in wheat, cotton, and peanuts to the extent necessary to provide an orderly, adequate, and balanced flow of those commodities [7 U.S.C. § 1282; see 7 U.S.C. §§ 1331-1340 (wheat), 1341-1350 (cotton), 1357-1359 (peanuts)]. Two of the most important ways by which the Act accomplishes this purpose are marketing quotas and acreage allotments [7 U.S.C. § 1282]. When these controls are in effect, a producer's or handler's ability to meet contractual demands may be restricted, so counsel assisting in contract negotiation or drafting should be aware of current production restrictions.

The specific amounts of marketing quotas and acreage allotments are determined by the Secretary of Agriculture. Generally, national marketing quotas may be announced by the Secretary for years in which the Secretary has determined that an excess quantity of the commodity has been produced [see 7 U.S.C. §§ 1332(b) (wheat), 1342 (cotton)]. After announcing a national marketing quota, the Secretary must conduct a referendum of farmers engaged in production of the crop to determine whether they oppose the quota or favor it by a margin sufficient to put it into effect [see 7 U.S.C. §§ 1336 (wheat), 1343 (cotton)].

Marketing quotas are implemented through a system of acreage allotments that, based on an average rate of crop production per acre, restrict the overall amount of production [see 7 U.S.C. §§ 1334 (wheat), 1344 (cotton), 1358(a) (peanuts)]. National acreage allotments (or, in the case of wheat, the national marketing quotas) are apportioned among the various states by the Secretary [7 U.S.C. §§ 1333-1334b, 1379b (wheat), 1344 (cotton)].

All acreage allotments and farm marketing quotas must be kept freely available for public inspection in the appropriate

county or other local administrative area. Notice of the acreage allotment and farm marketing quota established for each farm must be mailed to the farmer [7 U.S.C. § 1362]. For a more detailed discussion of the use and implementation of marketing quotas and acreage allotments, see Harl, *Agricultural Law*, Ch. 91, *Production Control and Price Support Programs for Agricultural Commodities* (Matthew Bender).

[3] Unlawful Practices: Perishable Agricultural Commodities

The Perishable Agricultural Commodities Act [see 7 U.S.C. §§ 499a-499s; 7 C.F.R. §§ 46.1-47.68] regulates the activities of licensed commission merchants, dealers, and brokers of perishable agricultural commodities involved in interstate or foreign commerce transactions with other persons [7 U.S.C. § 499b]. The term "perishable agricultural commodities" means fresh fruits and vegetables of every kind or character, whether or not frozen or packed in ice, and specifically includes cherries in brine [7 U.S.C. § 499a(b)(4); see 7 C.F.R. § 46.2(t)-(w)].

Under the Act, commission merchants, dealers, and brokers are prohibited from engaging in or using any unfair, unreasonable, discriminatory, or deceptive practices in connection with weighing, counting, or in any way determining or representing the quantity or quality of commodities involved in a transaction [7 U.S.C. § 499b(1), (5); 7 C.F.R. § 46.45]. Commission merchants, dealers, and brokers must not make any fraudulent misrepresentations or statements for fraudulent purposes in connection with a transaction involving a perishable agricultural commodity, and they must not fail or refuse either to account and make full payment promptly in connection with a transaction or to perform any related specification or duty [7 U.S.C. § 499b(4); 7 C.F.R. § 46.2(y)-(aa)]. Commission merchants, dealers, and brokers must not remove or alter for a fraudulent purpose any card, stencil, tag, or other notice placed on containers of perishable agricultural commodities by state or federal inspectors regarding the grade or quality of the commodity [7 U.S.C. § 499b(6)]. In addition, commission merchants, dealers, and brokers must not make or allow any change in the contents of a load of any perishable agricultural commodity without the consent of an inspector, except for re-sorting and removing inferior produce [see 7 U.S.C. § 499b(7)].

Dealers and commission merchants are subject to additional restrictions. A dealer must not without reasonable cause reject or fail to deliver in accordance with the terms of the contract any perishable agricultural commodity bought or sold, or contracted to be bought, sold, or consigned in interstate or foreign commerce [7 U.S.C. § 499b(2); 7 C.F.R. § 46.2(bb)]. A commission merchant must not discard, dump, or destroy without reasonable cause any perishable agricultural commodity received by the commission merchant in interstate or foreign commerce [7 U.S.C. § 499b(3); see 7 C.F.R. §§ 46.21-46.23].

Recognized perishable agricultural commodities subject to a federal marketing order receive special name protection [7 U.S.C. § 499b-1]. For perishable agricultural commodities traditionally identified as being produced in a distinct geographic area, state, or region that have a unique identity based on the geographic area and promoted with funds collected through producer contributions pursuant to the marketing order, no one may use the unique name or geographical designation to promote the sale of a similar commodity produced outside the area, state, or region [7 U.S.C. § 499b-1(a)].

All perishable agricultural commodities received by a commission merchant, dealer, or broker, all inventories of food or other products derived from those commodities, and any receivables or proceeds from the sale of those commodities or products must be held in trust by the commission merchant, dealer, or broker for the benefit of any unpaid supplier, seller, or agents involved in the transaction until full payment has been received by the supplier, seller, or agent [7 U.S.C. § 499e(c)(2); see 7 C.F.R. § 46.46]. Failure to maintain this trust as required by law is a prohibited practice under the Act [7 U.S.C. § 499b(4)]. To avoid losing the benefits of the trust, the unpaid supplier, seller, or agent must give written notice of its intent to preserve those benefits to the commission merchant, dealer, or broker and must file the notice in a timely manner with the Secretary of Agriculture [7 U.S.C. § 499e(c)(3); see 7 C.F.R. § 46.46(g); see also § 49.380].

A commission merchant, dealer, or broker who commits an unfair practice under the Act will be liable to the person injured as a result of the unfair practice for the full amount of the damages sustained [7 U.S.C. § 499e(a)]. Liability may be enforced by a complaint to the Secretary of Agriculture demanding reparation [see 7 U.S.C. §§ 499f, 499g; 7 C.F.R. §§ 47.6-47.25] or by a suit in any court of competent jurisdiction [7 U.S.C. § 499e(b)]. If the licensee fails to comply with a reparation order or to appeal that order, his or her license will be suspended automatically [7 U.S.C. §§ 499g(d), 499h; 7 C.F.R. § 46.9].

The Act does not apply to producers of perishable agricultural commodities when selling their own crops, or to persons purchasing perishable agricultural commodities for sale at retail with an invoice cost of \$230,000 or less in any one calendar year [7 U.S.C. § 499a(b)(6)(A), (B); 7 C.F.R. § 46.2(m)]. Also excluded from the application of the Act are persons purchasing perishable agricultural commodities other than potatoes for processing or canning within the state in which the crop is grown, unless the commodity is to be shipped frozen or packed in ice, or is cherries in brine [7 U.S.C. § 499a(b)(6)(C); 7 C.F.R. § 46.2(m)]. In addition, the Act does not apply to persons acting as independent agents negotiating sales, for and on behalf of a vendor, of frozen fruits and vegetables with an invoice value of less than \$230,000 in any calendar year [7 U.S.C. § 499a(b)(7); 7 C.F.R. § 46.2(n)]. Trust requirements under the Act do not apply to transactions between a cooperative association and its members [7 U.S.C. § 499e(c)(2)].

[4] Unlawful Practices: Packers and Stockyards

The Packers and Stockyards Act of 1921 regulates the activities of packers, stockyard owners, market agencies, livestock dealers, and live poultry dealers in interstate or foreign transactions involving livestock and livestock products [7 U.S.C. §§ 181-229]. The term "livestock" means cattle, sheep, swine, horses, mules, or goats, whether alive or dead; "livestock products" means all products and by-products (other than meats and meat food products) of the slaughtering and meat-packing industry derived in whole or in part from livestock [7 U.S.C. § 182(5); see 7 U.S.C. §§ 182, 191, 201 (additional definitions)].

Under the Act, it is unlawful for any packer with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to perform any of the following practices [7 U.S.C. § 192; see 9 C.F.R. §§ 201.53-201.70]:

- Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device.
- Give unreasonable advantage to any person or locality, or subject any person or locality to unreasonable disadvantage.
- Engage in any course of business or any act for the purpose or with the effect of manipulating or controlling prices, creating a monopoly, or restraining commerce.
- Conspire with any other person to do any of these acts.

In the absence of an express written agreement providing for an alternative manner of payment, any packer, market agency, or livestock dealer purchasing livestock must deliver the full amount of the purchase price to the seller, or to the seller's representative, before the close of the next business day after the purchase and transfer of possession of the livestock [7 U.S.C. § 228b(a); see 7 U.S.C. § 228b(b) (waiver)]. In the case of livestock purchased for slaughter where the purchase price is based on the grade and yield of the carcass, the full purchase price must be paid no later than the close of the first business day following the determination of the purchase price [7 U.S.C. § 228b(a)]. If the seller or its representative is not present to receive payment at the point of transfer of possession, the packer, market agency, or livestock dealer must wire the funds or place a check in the mail within the specified time limits [7 U.S.C. § 228b(a)].

Live poultry dealers purchasing live poultry in a cash sale must make full payment to the seller before the close of the

next business day following the purchase of the poultry [7 U.S.C. § 228b-1(a), (c)]. A live poultry dealer purchasing poultry under a poultry growing arrangement must remit payment in full before the close of the 15th day following the week in which the poultry is slaughtered [7 U.S.C. § 228b-1(a); see 7 U.S.C. § 182(9)].

Any delay or attempt to delay the collection of funds as required by law is an unfair practice under the Act [7 U.S.C. §§ 228b(c), 228b-1(b)].

Any packer or live poultry dealer found to be in violation of the Act is subject, following notice and a hearing, to a cease and desist order and a civil penalty imposed by the Secretary of Agriculture [7 U.S.C. §§ 193, 194]. Those failing to obey an order of the Secretary are subject to additional fines and imprisonment [7 U.S.C. § 195; see 9 C.F.R. §§ 202.101-202.123 (practice rules)].

Stockyard owners and market agencies are required to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices concerning stockyard practices. Under the Act, every unjust, unreasonable, or discriminatory regulation or practice is prohibited [7 U.S.C. § 208]. Violators are liable to the person or persons injured by the violation, enforceable by a complaint to the Secretary of Agriculture or by a suit in any district court of competent jurisdiction [7 U.S.C. § 209; see 7 U.S.C. §§ 210-217]. Those found to have engaged in discriminatory or unfair practices in connection with determining whether persons should be authorized to operate at the stockyards, or in connection with dealing with livestock at the stockyards, are subject to a cease and desist order from the Secretary and civil penalties [7 U.S.C. §§ 213]. Failure to obey an order of the Secretary subjects the violator to additional fines [7 U.S.C. § 215; see 9 C.F.R. §§ 202.101-202.123 (practice rules)].

In addition to the provisions outlined above, the Act requires packers whose average annual cash purchases of livestock equal or exceed \$500,000 to hold all livestock purchased, as well as all inventories of or receivables or proceeds from meat, meat food products, or livestock products, in trust for the benefit of all unpaid cash sellers of that livestock until the sellers have received full payment [7 U.S.C. § 196(b)]. Similar statutory trust requirements, for the benefit of unpaid sellers and poultry growers, apply to live poultry dealers having \$100,000 or more in average annual sales of live poultry or in average annual value of live poultry obtained by purchase or by poultry growing arrangement [7 U.S.C. § 197(b)].

To preserve the benefits of the trust, the unpaid cash seller of livestock or poultry or the unpaid poultry growers must give written notice to the packer or live poultry dealer and file the notice with the Secretary of Agriculture. The notice must be given no later than 30 days after the final date for making payment, which is generally before the close of the next business day after which the livestock or poultry is delivered [7 U.S.C. §§ 196(b), 197(d); see 7 U.S.C. §§ 228b, 228b-1]. However, if payment is made by an instrument later dishonored, notice must be served no later than 15 business days from the date on which the unpaid seller has received notice that the instrument has been dishonored [7 U.S.C. §§ 196(b), 197(d); see § 49.380].

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral OverviewGovernmentsAgriculture & FoodPackers & Stockyards ActGovernmentsAgriculture & FoodPerishable Agricultural Commodities Act



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 49 AGRICULTURAL CONTRACTS
PART II. LEGAL BACKGROUND

20-49 California Legal Forms--Transaction Guide § 49.12

§ 49.12 California Laws Affecting Agricultural Contracts

[1] State Marketing Orders and Agreements

The California Marketing Act of 1937 [*see Food & Agric. Code §§ 58601-59293*] was enacted to aid producers within California in preventing economic waste in the marketing of their commodities, to develop more efficient and equitable methods in the marketing of commodities, and to aid producers in restoring and maintaining their purchasing power at a more adequate, equitable, and reasonable level [*Food & Agric. Code § 58652*]. The legislature has adopted a scheme similar to that enacted by Congress [*see § 49.11[1]*], using marketing orders and marketing agreements as the primary tools with which to accomplish those purposes [*see Food & Agric. Code §§ 58741, 58745*].

The California Department of Food and Agriculture issues marketing orders to regulate producer marketing, processing, distributing, and handling in any manner of any commodity within California [*Food & Agric. Code § 58741*]. The department may issue marketing orders that regulate California agricultural commodities for which federal marketing regulatory powers are not being exercised [*Food & Agric. Code § 58742*], and intrastate marketing orders that are compatible with existing federal marketing orders covering interstate and foreign commerce in the same commodity [*Food & Agric. Code § 58743*].

Marketing orders may contain any or all of the following provisions permitted by statute, but no others [*Food & Agric. Code § 58881*]:

- Provisions for determining the existence and extent of any surplus of any commodity, for the control and disposition of the surplus, and for equalizing the burden of any surplus elimination or control among the affected producers, processors, distributors, or other handlers, including provisions establishing surplus, stabilization, or by-product pools [*Food & Agric. Code §§ 58882, 58887*].
- Provisions uniformly limiting the total quantity or quality of any commodity produced for market during a specified period [*Food & Agric. Code § 58883*].
- Provisions for allotting the quantity of any commodity equally among its producers during any

specified period, based on a prior period or on the current season's crop [*Food & Agric. Code* §§ 58884, 58885].

- Provisions that regulate the period during which a commodity may be processed or marketed [*Food & Agric. Code* § 58886].
- Provisions establishing grading standards for commodities [*Food & Agric. Code* § 58888].
- Provisions regarding advertising, sales promotion, and unfair trade practices [*Food & Agric. Code* §§ 58889-58890].
- Provisions for the payment of production adjustment benefits [*Food & Agric. Code* § 58891].
- Provisions for carrying on research studies or educational programs [*Food & Agric. Code* §§ 58892, 58893.1].
- Provisions establishing and regulating official board brands, trade names, or labels [*Food & Agric. Code* § 58894].
- Provisions to control insects, predators, diseases, or parasites [*Food & Agric. Code* § 58895].
- Provisions for the gathering and dissemination of weather data [*Food & Agric. Code* § 58896].

If the director of the department has reason to believe that a marketing order, or amendments to an existing order, may promote the purposes of the Act with respect to any commodity, he or she ordinarily must give at least 30 days' notice of a public hearing on the proposed marketing order or amendment [*Food & Agric. Code* § 58771; see *Food & Agric. Code* §§ 58773-58788 (notice and hearing requirements)]. After notice and hearing, and before the issuance of a marketing order or amendment, the director must make specific findings regarding the necessity, effectiveness, and legality of the proposed order or amendment, and whether the required producer assent to the order must be determined by written assents or by referendum [*Food & Agric. Code* § 58787; see *Food & Agric. Code* §§ 58811-58814 (required findings), 58991-59000 (assent requirements)].

Marketing orders are administered generally by the director of the Department of Food and Agriculture [*Food & Agric. Code* § 58711], but each order must establish an advisory board to assist the director in that duty. Members of advisory boards are appointed by the director; however, a marketing order may provide for the appointment of members from nominees made by producers and handlers [*Food & Agric. Code* § 58841; see *Food & Agric. Code* §§ 58842-58852]. The boards' administrative duties include making recommendations to the director regarding rules and regulations, violations of the marketing order, amendments to the marketing order, and establishment of seasonal marketing regulations [*Food & Agric. Code* § 58846; see *Food & Agric. Code* §§ 59171-59176 (seasonal marketing regulations)].

Violation of any provision of the Act or of any marketing order is a misdemeanor, punishable by a fine or imprisonment or both [*Food & Agric. Code* § 59233], and by additional civil penalties and forfeitures [*Food & Agric. Code* §§ 59234, 55235; see *Food & Agric. Code* §§ 59231-59252, (actions and penalties), 59281-59293 (inspection and abatement)].

The director may enter into marketing agreements with processors, distributors, producers, and others engaged in the handling of any commodity, after due notice and opportunity for hearing. These agreements regulate the preparation for market and handling of the covered commodity, and are binding only on the signatories [*Food & Agric. Code* § 58745]. The provisions of the Act governing marketing orders apply equally to marketing agreements, except certain provisions regarding producer lists, written assents, termination and reapproval of orders, and misdemeanor liability [*Food & Agric. Code* § 58746; see *Food & Agric. Code* §§ 58779 (lists of producers), 58991-59000 (written assents),

59082-59086 (termination and reapproval), 59233 (offense and punishment)].

A marketing order can provide that producers of the covered commodity will be assessed to fund a generic advertising campaign by an advisory board or by the Department of Food and Agriculture, such as the "Real California Cheese" campaign for which milk producers are assessed. If a producer challenges such a funding scheme on the ground that it violates the producer's free-speech rights under the California Constitution, then the court may appropriately decide the issue by following the reasoning of the U.S. Supreme Court in a case [see *Johanns v. Livestock Marketing Ass'n* (2005) 544 U.S. 550, 125 S. Ct. 2055, 161 L. Ed. 2d 896] in which the validity of such commodity advertising was upheld under the U.S. Constitution [*Gallo Cattle Co. v. Kawamura* (2008) 159 Cal. App. 4th 948, 952, 72 Cal. Rptr. 3d 1] .

[2] Marketing Programs for Proration Zones

The California Agricultural Producers Marketing Law [see *Food & Agric. Code §§ 59501-60016*] authorizes the establishment and administration of marketing programs to aid producers of agricultural commodities in improving and expanding existing markets and marketing conditions, to develop more efficient and equitable marketing methods, and to aid agricultural producers to achieve and maintain an adequate, reasonable purchasing power [Food & Agric. Code § 59542]. Marketing programs may be established for specific districts known as "proration zones" [Food & Agric. Code § 59513]. The term "commodities" includes all horticultural, viticultural, and vegetable products of the soil, aquaculture, livestock and livestock products, and poultry and poultry products; the term excludes milk and milk products [Food & Agric. Code § 59504].

Generally, a marketing program may be established to minimize the effect of any surplus or any other adverse market effect [Food & Agric. Code § 59801]. Marketing programs may correlate the supply of a commodity with the demand [see Food & Agric. Code §§ 59655, 59656, 59815], regulate the flow of the commodity, establish uniform grading standards, or provide for advertising and trade promotion [see Food & Agric. Code §§ 59657, 59658]. To accomplish these purposes, a marketing program may authorize the establishment of stabilization and surplus pools [Food & Agric. Code §§ 59802-59807]; diversion or substandard pools [Food & Agric. Code §§ 59808-59810]; or facilities for storing, financing, grading, packing, servicing, processing, preparing for market, selling, or disposing of the contents of pools [Food & Agric. Code § 59811]. In addition, a marketing program may authorize the creation of an equalization fund [Food & Agric. Code §§ 59813, 59814]; the stimulation of educational and trade efforts [Food & Agric. Code §§ 59816-59820]; or the institution of production adjustments by tree or vine pulling and acreage adjustment payments [Food & Agric. Code §§ 59821, 59822].

Under the Act, 10 or more producers of an agricultural commodity may petition the director of the Department of Food and Agriculture for the establishment of a proration zone and the institution of a marketing program to affect that commodity within the proposed zone [Food & Agric. Code § 59641]. If the director determines that the petition is consistent with the provisions of the Act, the director must hold a public hearing to consider the matter at some central point within the proposed zone [Food & Agric. Code § 59643]. After notice and hearing, the director must make specific findings regarding the necessity, effectiveness, and legality of the proposed marketing program [see Food & Agric. Code §§ 59655-59659]. The director must then submit the program for the written assent of the producers of the commodity in the proposed proration zone [Food & Agric. Code § 59851; see Food & Agric. Code §§ 59852-59857].

The affairs of each proration zone are managed by a marketing program committee whose members are appointed by the director from a list of eligible producers established by vote of the producers of the commodity in the district [Food & Agric. Code §§ 59721-59723; see Food & Agric. Code §§ 59724-59738]. The director may also appoint handlers to serve on the committee at the request of producer-members [Food & Agric. Code § 59727].

Any person who violates any provision of an approved marketing program or regulation is subject to an injunction and civil penalties [Food & Agric. Code §§ 60012, 60013]. Other specified offenses are punishable as misdemeanors [see

Food & Agric. Code § 60014].

[3] Regulation of Farm Products Processors

Processors of farm products in California are regulated under Chapter 6 of Division 20 of the Food and Agricultural Code [see *Food & Agric. Code* §§ 55401-55922]. "Processors" are persons engaged in the business of processing or manufacturing any farm product, who solicit, buy, contract to buy, or otherwise take title to or possession of any farm product from a producer for the purpose of processing or manufacturing it and selling it in any preserved or processed form. The term excludes any retail merchant with a fixed or established place of business in California who does not sell at wholesale any farm product that he or she processed or manufactured [*Food & Agric. Code* § 55407]. "Farm products" means every agricultural, horticultural, viticultural, or vegetable product of the soil; honey and beeswax; oilseeds; poultry; poultry product; livestock product; and livestock for immediate slaughter. The term does not include timber, timber products, milk or milk products, or any aquacultural products [*Food & Agric. Code* § 55403].

Under the Act, processors are required to make payment for the receipt of farm products in the time and manner specified in the contract. If a time is neither stated in the contract nor established at the time of delivery, the processor must pay for the farm product within 30 days of delivery or taking of possession [*Food & Agric. Code* § 55601]. Processors must make full payment for purchases of livestock for slaughter within two business days from the delivery of the livestock to the processor [*Food & Agric. Code* § 55601.4]. Any delinquent payment must include a late charge of 5 percent of the unpaid balance for the first month, calculated on a daily basis, and an additional 1 percent per month thereafter, unless waived in writing by the seller after the delinquency has occurred [*Food & Agric. Code* § 55881]. A processor must notify the seller (on a form prescribed by the department) of these requirements on the delinquency of a contract, or when payment is not made within the required 30 days if (1) the contract does not specify time of payment, (2) there is no contract, or (3) the contract is oral, irrespective of the agreed time of payment [*Food & Agric. Code* § 55601.3].

A producer of farm products retains a lien on farm products sold to a processor under an express or implied contract and in the processor's possession [*Food & Agric. Code* §§ 55631, 55634]. The lien is to the extent of the agreed-on price for the farm products delivered; if the price is not agreed on in advance, the lien is for the value of the farm products as of the date of delivery [*Food & Agric. Code* § 55631; see *Food & Agric. Code* § 55633 (lien priority)]. The lien attaches on the date of delivery [*Food & Agric. Code* § 55632]. A processor may secure a release of the lien by any of the following means [*Food & Agric. Code* §§ 55637, 55639]: (1) paying the agreed-on or actual value of the farm product within 20 days from the date of its delivery; (2) depositing a surety bond with the director conditioned on payment of all claims within 35 days after the date of the bond; (3) depositing a cash sum with the director guaranteeing payment of all claims within 35 days after the date of the deposit; (4) depositing a quantity of processed farm products in a public warehouse and endorsing and delivering the warehouse receipt to the director as a guarantee of payment within 35 days from the deposit of all existing related claims; or (5) securing a release from the director after paying for the farm product in full. A producer does not release its agricultural producer's lien by agreeing to a deferred payment arrangement or by agreeing to a demand-payment program in connection with the sale of its produce [*In re T.H. Richards Processing Co.* (9th Cir. 1990) 910 F.2d 639, 645-647] .

This statutory lien is in addition to the statutory trust imposed on the interstate or foreign sale or delivery of perishable agricultural commodities under the federal Perishable Agricultural Commodities Act [see *Food & Agric. Code* § 55631; see § 49.11[3]].

One who sells or furnishes livestock to a meatpacker has a statutory lien, not dependent on possession, on the livestock and on the identifiable proceeds and products of that livestock, for the unpaid part of the purchase price or, if no purchase price has been agreed on, for the unpaid value of the livestock at the time of transfer of possession [*Food & Agric. Code* § 55702(a)]. Liens are not available if the buyer is a buyer in the ordinary course of business [*Food & Agric. Code* § 55702(b)], or if the sale was made on credit terms [*Food & Agric. Code* § 55702(d)]. The lien

commences on the date of the transfer of the livestock, and has priority over all other liens without regard to the time of their attachment or perfection [*Food & Agric. Code* § 55702(a)]. If a notice of the lien is filed with the Secretary of State and the Director of the Department of Food and Agriculture within 21 days from the date of delivery of the livestock, the lien is valid for five years or until a lien foreclosure suit is determined [*Food & Agric. Code* § 55703]; otherwise, the lien expires after 21 days from the date of delivery [*Food & Agric. Code* §§ 55702(c); see *Food & Agric. Code* § 55702(e) (required contents of notice)].

This statutory lien is in addition to the statutory trust created under the federal Packers and Stockyards Act [see *Food & Agric. Code* § 55704; see § 49.11[4]]. For a discussion of the procedural requirements necessary in obtaining the lien, see § 49.180.

Violation of any provision of the Act may be enjoined, and the violator subjected to civil penalties. Additional offenses, including acting as a processor or agent without a license and knowingly employing an unlicensed agent, are punishable as misdemeanors [see *Food & Agric. Code* §§ 55901-55922].

[4] Regulation of Produce Resellers

Brokers, commission merchants, and dealers of farm products are regulated by California law in a similar manner as are those persons when conducting agricultural transactions in interstate or foreign commerce [see § 49.11[3], [4]]. Under California law, the term "farm product" includes every agricultural, horticultural, viticultural, and vegetable product of the soil; poultry and poultry products; livestock products and livestock not for immediate slaughter; bees and apiary products; hay; dried beans; honey; and cut flowers. The term does not include any timber or timber product, flower or agricultural or vegetable seed not purchased from a producer, milk product subject to the licensing and bonding provisions of *Food and Agricultural Code Section 61801 et seq.*, or any aquacultural product [*Food & Agric. Code* § 56109].

Persons engaged in the business of buying, receiving on consignment, soliciting for sale on commission, or negotiating the sale of farm products for resale must obtain a license under these provisions [*Food & Agric. Code* § 56181; see *Food & Agric. Code* § 55610 (exemption of processors reselling raw products)]. Excepted from the Act are nonprofit cooperative associations; processors; retail merchants with fixed places of business in California; purchasers of farm products for personal consumption; licensed distributors and handlers of milk and milk products purchasing farm products from a dealer, broker, or commission merchant; and licensed landscape contractors [*Food & Agric. Code* § 56161; see § 49.12[3]].

Persons otherwise exempt from the licensing requirements of the Produce Dealers Act [see *Food & Agric. Code* § 56101 *et seq.*] who buy or acquire any farm product from a nonprofit cooperative association that has processed the farm product are also exempt from the licensing requirements [*Food & Agric. Code* § 56161(g)].

Licensees are subject to additional restrictions. They are prohibited from deducting excessive commissions or brokerages, and from diverting to their own use the proceeds of sales of farm products handled by them [*Food & Agric. Code* § 56251]. Licensed commission merchants and dealers must keep detailed records of the sales transactions in which they participate [see *Food & Agric. Code* §§ 56271-56277, 56301], must make payments in a timely manner [see *Food & Agric. Code* §§ 56273, 56302], and must notify their consignors or sellers of their obligations under the law [see *Food & Agric. Code* §§ 56280, 56281, 56302.5]. Proof of the sale of any farm product by a commission merchant for less than current market price to one with whom the merchant has a financial connection establishes a rebuttable presumption of fraud [*Food & Agric. Code* § 56278]. Brokers involved in sales transactions for farm products must issue to both the buyer and seller a memorandum of sale that may not be altered without the consent of both parties [*Food & Agric. Code* §§ 56331, 56332].

Violation of any provision of the Act may be enjoined, and the violator subjected to civil penalties [*Food & Agric. Code*

§§ 56651, 56652]. Additional offenses, including acting without a license, are punishable as misdemeanors [see *Food & Agric. Code* §§ 56631-56639].

[5] Farm Products Trust Fund

Farm products creditors are afforded payment protection under provisions of a statutory trust known as the Farm Products Trust Fund [see *Food & Agric. Code* §§ 56701-56716]. "Farm products creditors" means either (1) persons who produced and sold a farm product produced in California to a licensed processor or produce dealer who failed to pay for the product; or (2) persons licensed as produce dealers who sold a farm product produced in California to a licensed processor who failed to pay for the product [*Food & Agric. Code* § 56702.5; see *Food & Agric. Code* § 56711 (license required at time transaction is entered into); see also § 49.12[3], [4]]. The fund is financed by farm products processors and produce dealers from fees charged as a condition to the issuance or renewal of a license [*Food & Agric. Code* § 56703].

Farm products processors and produce dealers who pay the full purchase price in cash at the time of obtaining title to those goods, and processors or other licensed purchasers of livestock who are bonded under the federal Packers and Stockyards Act, are exempted from the trust provisions [*Food & Agric. Code* § 56703; see 7 U.S.C. §§ 181-229]. For perishable agricultural commodities sold to commission merchants, dealers, or brokers by transactions involving interstate or foreign commerce, a federally mandated statutory trust assures payment to sellers and suppliers if properly preserved by filing notices with the appropriate parties [see § 49.183; see also § 49.380].

Claims on the fund must be filed in accordance with specific statutory restrictions to be processed [see *Food & Agric. Code* § 56705.5]. A farm products creditor may file a verified statement of his or her respective claim after notification and request for the claimant's verified statement by the director [see *Food & Agric. Code* § 56705]. Additionally, a farm products creditor may file a verified complaint under *Food & Agric. Code* § 55751 or 56451. The director is relieved of further liability to the farm products creditor if, after 60 days from the date of request for a verified statement of the claim, the farm products creditor fails, refuses, or neglects to file his or her claim [*Food & Agric. Code* § 56706].

Payment of individual claims will be made after ascertainment of all claims against a processor or produce dealer if (1) a verified claim is filed with the Department of Agriculture; (2) the amount due the claimant has been determined by an audit or investigation by the Department, and the amount of indebtedness has been fully substantiated by the claimant and verified by the director; and (3) the amount is not disputed by the processor or produce dealer, or, if disputed, an amount has been adjudicated by an administrative hearing and decision [*Food & Agric. Code* § 56707]. An individual claim may be paid up to 50 percent, and the total amount paid to all claimants as a result of the acts of one licensee may not exceed \$50,000 [*Food & Agric. Code* § 56708].

[6] Effect of the Uniform Commercial Code

Contracts for the sale of goods in California are governed by Division 2 of the Commercial Code [*Com. Code* § 2102; see *Com. Code* §§ 2101-2801]. Under the Commercial Code, a "sale" takes place when the title to goods passes from the seller to the buyer for a price [*Com. Code* § 2106(1)]. "Goods" are all things that are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities, and things in action. The term includes the unborn young of animals and growing crops [*Com. Code* § 2105(1)].

A contract for the sale of goods may be made in any manner sufficient to show an agreement, including conduct by both parties that recognizes the existence of a contract [*Com. Code* § 2204(1)]. However, a contract for sale of goods for \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought, or that party's authorized agent or broker [*Com. Code* § 2201(1); see *Com. Code* § 2201(4) (exception for qualified financial contract); see also *Civ. Code* § 1624(b)(2) ("qualified financial contract" defined)]. The Code establishes different

requirements for contracts made by or between merchants than for contracts in general [see, e.g., *Com. Code* §§ 2201(2), 2205, 2207(2), 2209(2), 2314(1), 2327(1)(c), 2603, 2605]. For example, a contract between merchants complies with the Statute of Frauds if within a reasonable time a written confirmation of a contract, sufficient against the sender, is received by the other party and if that party, having reason to know of its contents, fails to give written notice objecting to the contents of the confirmation within 10 days of its receipt [*Com. Code* § 2201(2)]. Farmers or ranchers held to be merchants may also be liable for warranties of merchantability [see *Com. Code* § 2314]; unless excluded or modified by contract, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind [*Com. Code* § 2314(1)].

Under the Code, a "merchant" is a person who deals in goods of the kind involved in the transaction, or who otherwise by occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction, or to whom that knowledge or skill may be attributed by his or her employment of an agent, broker, or other intermediary who by occupation holds himself or herself out as having that knowledge or skill [*Com. Code* § 2104(1)]. If both parties to a transaction are chargeable with the knowledge or skill of merchants, that transaction is deemed to be between merchants [*Com. Code* § 2104(3)].

Although no California court has determined the issue, the majority of courts in other jurisdictions have found that a farmer or rancher is not a merchant under either the "dealer in goods" or "knowledge and skill" language [see *Com. Code* § 2104(1)] for purposes of applying the Statute of Frauds. The majority position holds that farmers and ranchers do not qualify as merchants because they are usually engaged in limited sales of their own crops, and their knowledge and skills are equal to that of a casual seller. A significant minority holds farmers or ranchers to be merchants based on a pattern of prior business dealings and an implied necessity of the knowledge and skill required to be successful in farming or ranching.

California courts have also not decided the issue of whether ranchers or farmers are merchants for purposes of liability under implied warranties of merchantability. The criteria for merchant status under the implied warranty of merchantability are much narrower than those required under the Statute of Frauds, requiring a professional status as to particular kinds of goods [see *Com. Code* § 2104, comment 2]. Courts in other jurisdictions have reached conflicting conclusions depending on the pattern of prior business dealings [see *Fear Ranches, Inc. v. Berry* (10th Cir. 1972) 470 F.2d 905 (all prior livestock sales to meat packers distinguished from one sale to breeder); *Woodruff v. Clark County Farm Bureau Coop. Ass'n* (1972) 153 Ind. App. 31, 286 N.E.2d 188 (defendant regularly engaged in sale of chickens liable for implied warranty in sale of chickens for egg production)]. In drafting contracts for the sale of agricultural products, counsel may expressly exclude or modify any implied warranties to prevent litigation concerning the farmer's or rancher's liability for implied warranties [see *Com. Code* §§ 2314, 2316; see, e.g., § 49.300, P 15].

For a discussion of the farmer-as-merchant issue, including coverage of the out-of-state cases representing these majority and minority views, see Harl, *Agricultural Law*, Ch. 116, *The Farmer or Rancher as a Merchant Under the UCC* (Matthew Bender). For further discussion of the application of the Commercial Code to sales contracts, including a discussion of remedies available to parties in the event of a breach, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code*, § 52.10.

[7] Marketing Laws Regarding Particular Products

In addition to the laws discussed above, the California Legislature has enacted several laws tailored to the requirements of particular agricultural products. Among those products are milk and dairy products [see *Food & Agric. Code* § 61301 et seq.], edible nuts [see *Food & Agric. Code* § 62801 et seq.], avocados [see *Food & Agric. Code* § 63001 et seq.], and strawberries [see *Food & Agric. Code* § 63101 et seq.].

Several commissions have been established under California law to encourage the effective promotion and sale of specific crops. Their powers include advertising of the commodity and dissemination of information concerning the

current production and handling practices to persons in the industry. These commissions may require that producers, handlers, and shippers of the covered commodity maintain records of production and handling [see *e.g.*, *Food & Agric. Code* §§ 64221, 64222]. Failure to comply with the regulations of these commissions may subject the producer, handler, or shipper to criminal and/or civil penalties [see *e.g.*, *Food & Agric. Code* § 68111].

Promotional commissions have been established for the following commodities:

- Dairy products [see *Food & Agric. Code* § 64001 et seq.].
- Beef [see *Food & Agric. Code* § 64501 et seq.].
- Grapes and wine [see *Food & Agric. Code* § 65500 et seq., 74001 et seq.].
- Lettuce [see *Food & Agric. Code* § 66501 et seq.].
- Avocados [see *Food & Agric. Code* § 67001 et seq.].
- Kiwifruit [see *Food & Agric. Code* § 68001 et seq.].
- Pistachios [see *Food & Agric. Code* § 69001 et seq.].
- Peaches [see *Food & Agric. Code* § 70000 et seq.].
- Wheat [see *Food & Agric. Code* § 72001 et seq.].
- Navel oranges [see *Food & Agric. Code* § 73001 et seq.].
- Eggs [see *Food & Agric. Code* § 75001 et seq.].
- Cherries [see *Food & Agric. Code* § 76001 et seq.].
- Sheep [see *Food & Agric. Code* § 76201 et seq.].
- Salmon [see *Food & Agric. Code* § 76501 et seq.].
- Walnuts [see *Food & Agric. Code* § 77001 et seq.].
- Peppers [see *Food & Agric. Code* § 77201 et seq.].
- Cut flowers [see *Food & Agric. Code* § 77901 et seq.].
- Forest products [see *Food & Agric. Code* § 77501 et seq.].
- Asparagus [see *Food & Agric. Code* § 78201 et seq.].
- Apples [see *Food & Agric. Code* § 75501 et seq.].
- Dates [see *Food & Agric. Code* § 77701 et seq.].
- Seafood [see *Food & Agric. Code* § 78401 et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)General OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation &
ReadjustmentStatutes of FraudsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article
9)PriorityLiensGovernmentsAgriculture & FoodGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 49 AGRICULTURAL CONTRACTS
PART II. LEGAL BACKGROUND

20-49 California Legal Forms--Transaction Guide §§ 49.13-49.99

[Reserved]

§§ 49.13[Reserved]



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CHAPTER 49 AGRICULTURAL CONTRACTS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

20-49 California Legal Forms--Transaction Guide § 49.100

§ 49.100 Facts Required for Sale of Farm Products

1. Name, address, and telephone number of seller and buyer.
2. Legal status of seller and buyer.
 - a. If either is married individual, name and address of spouse.
 - b. If either is general or limited partnership:
 - (1) Full name of partnership as set forth in partnership agreement or statement of partnership.
 - (2) Name, address, and telephone number of:
 - (a) Each partner, for general partnerships.
 - (b) Each general partner, for limited partnerships.
 - (3) If any general partner is itself a corporation, same information required for corporation [*see* (c), *below*].
 - c. If either is corporation:
 - (1) Full name of corporation as set forth in articles of incorporation, address, and telephone number of principal office in California.
 - (2) Name and title, address, and telephone number of person handling sale arrangement.

- (3) Date and state of incorporation.
- (4) If foreign corporation, date qualified to transact business in California.
- d. If seller is estate or personal representative:
 - (1) Name, address, and telephone number of representative.
 - (2) Name and location of court in which estate is being administered.
- e. If seller is guardian or conservator:
 - (1) Name, address, and telephone number of guardian or conservator.
 - (2) Name and location of court having jurisdiction of guardianship or conservatorship.
- f. Name, address, and telephone number of contact in governmental entity or agency.
- g. Name, address, and telephone number of counsel representing parties, if any.
- h. Name, address, and telephone number of agents representing parties, if any.
- 3. License status of buyer.
 - a. Processor [*see Food & Agric. Code § 55407*].
 - b. Produce dealer.
 - (1) Commission merchant [*see 7 U.S.C. § 499a(b)(5); Food & Agric. Code § 56105*].
 - (2) Dealer [*see 7 U.S.C. § 499a(b)(6); Food & Agric. Code § 56107*].
 - (3) Broker [*see 7 U.S.C. § 499a(b)(7); Food & Agric. Code § 56103*].
 - (4) Agent [*see Food & Agric. Code §§ 55402, 56102*].
- 4. Type of farm product to be sold.
- 5. Any outstanding security interests, liens, or other encumbrances against farm products.
- 6. Location where farm products are produced or stored.
- 7. Quantity of farm product to be sold.
- 8. Grade or quality of farm product to be sold.
- 9. Price to be paid for farm products.
- 10. Manner of payment.

11. Manner of harvest or preparation.

12. Terms of delivery.

13. Information regarding existence of any federal or state marketing order or agreement affecting client [*see* §§ 49.11[1], 49.12[1]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)General OverviewGovernmentsAgriculture & FoodGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 49 AGRICULTURAL CONTRACTS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

20-49 California Legal Forms--Transaction Guide § 49.101

§ 49.101 Documents Required for Sale of Farm Products

1. Document showing title to premises where farm products are produced.
2. Copies of any outstanding security agreements, liens, or other encumbrances on farm products.
3. If seller is guardian or conservator, court order authorizing sale [*see Prob. Code § 2540*].
4. Copy of any marketing agreement to which client is party [*see §§ 49.11[1], 49.12[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)General OverviewGovernmentsAgriculture & FoodGeneral Overview



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CHAPTER 49 AGRICULTURAL CONTRACTS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

20-49 California Legal Forms--Transaction Guide § 49.102

§ 49.102 Facts Required for Cattle Feeding Contract

NOTE:

See § 49.360.

1. Name, address, and telephone number of owner and feeder.

2. Legal status of owner and feeder.

NOTE:

See § 49.100, P 2.

3. License status of feedlot operator.

4. Location of feedlot.

5. Contract term.

6. Method of payment.

a. "Custom feeding" basis.

b. "Rate of gain" basis.

(1) Method of determining weight prior to commencement of feeding.

(2) Method of determining weight on conclusion of feeding.

7. Length of feeding period per animal.
8. Manner of delivery of cattle to feedlot.
9. Party responsible for providing veterinary services and supplies to cattle.
10. Special dietary feed or supplement requirements of cattle.
11. Any outstanding security interests, liens, or other encumbrances against cattle.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewGovernmentsAgriculture & FoodGeneral Overview



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A. Client Interview--Facts and Documents

20-49 California Legal Forms--Transaction Guide § 49.103

§ 49.103 Documents Required for Cattle Feeding Contract

1. Document showing title to cattle being placed on feedlot.
2. Cattle brand registration certificate showing owner's registered brand.

NOTE:

The proper branding of livestock and the subsequent recording of the livestock brand with Department of Food & Agriculture will establish conclusive evidence of ownership in the event of dispute [*Food & Agric. Code § 20609*].

3. Copy of instrument creating security interest in farm products to be covered by contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewGovernmentsAgriculture & FoodGeneral Overview



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A. Client Interview--Facts and Documents

20-49 California Legal Forms--Transaction Guide § 49.104

§ 49.104 Facts Required for Cooperative Association Marketing Contract

NOTE:

This chapter includes two types of forms of marketing contracts for use by cooperative associations [*see* §§ 49.340, 49.341]. For a discussion of the organization and formation of cooperative associations, see Ch. 14, *Cooperative Corporations* .

1. Full name, legal status, address, and telephone number of member/producer.
2. Full name, address of principal office, and telephone number of cooperative association.
3. Name and title of person designated to handle contract arrangements for association.
4. Type of products covered by contract.
5. Any outstanding security interests, liens, or other encumbrances against farm products.
6. Location where farm products are produced or stored.
7. Quantity of farm product to be sold.
8. Grade or quality of farm product to be sold.
9. Price to be paid for farm products.
10. Manner of payment.

11. Manner of harvest or preparation.

12. Terms of delivery.

13. Information regarding existence of any federal or state marketing order or agreement affecting client
[*see* §§ 49.11[1], 49.12[1]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Cooperatives General Overview Governments Agriculture & Food General Overview



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CHAPTER 49 AGRICULTURAL CONTRACTS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

20-49 California Legal Forms--Transaction Guide § 49.105

§ 49.105 Documents Required for Cooperative Association Marketing Contract

1. Copy of association's bylaws.
2. Copy of association's articles of incorporation.
3. Copy of instrument creating security interest in farm products to be covered by contract.
4. Copy of any marketing agreement to which client is party [*see* §§ 49.11[1], 49.12[1]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Cooperatives General Overview



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CHAPTER 49 AGRICULTURAL CONTRACTS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

20-49 California Legal Forms--Transaction Guide §§ 49.106-49.119

[Reserved]

§§ 49.106[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 49 AGRICULTURAL CONTRACTS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

20-49 California Legal Forms--Transaction Guide § 49.120

§ 49.120 Capacity of Parties to Contract

1. Determine whether parties are of sufficient age and mental capacity to enter into contract [*see Civ. Code §§ 1556, 1557; see also Ch. 75, Formation of Contracts and Standard Contractual Provisions ; Ch. 100B, Contracts and Employment of Minors*].

2. If seller is married, determine:

a. Whether property is real or personal.

NOTE:

Things that are affixed to land are deemed to be real property, including trees, vines, or shrubs [*Civ. Code §§ 658, 660*]. Annual crops, including those planted and harvested every year and periodical fruit crops [*see Congdon v. G.M.H. Wagner & Sons (1929) 207 Cal. 373, 378, 278 P. 863*], are treated as personal property for sale purposes. Growing crops that are agreed to be severed before sale or under contract of sale are treated as personal property [*Civ. Code §§ 658, 660; Com. Code § 2107(2)*].

b. Whether property is separate or community property.

c. If community real property, whether seller's spouse has or will give consent to sale.

NOTE:

Both spouses must join in executing a contract by which community real property, or an interest in community real property, is sold, conveyed, encumbered, or leased for longer than one year. The contract may be executed by the spouses personally or by their agents [*Fam. Code § 1102(a)*]. This rule does not apply to transactions between the spouses [*Fam. Code § 1102(b)*].

3. If either party is corporation:

- a. Determine whether articles of incorporation limit contract activity [*see Corp. Code § 207*].
- b. Determine whether board of directors has passed resolution authorizing contract.

4. If either party is partnership:

- a. Determine whether partnership agreement forbids or restricts making contract in question in course of partnership business.
- b. Determine whether partnership has filed or recorded any statement or certificate that explicitly or implicitly forbids or restricts making contract in question in course of partnership business.

5. If seller is guardian or conservator of estate, determine whether court administering estate or supervising guardianship or conservatorship has granted order authorizing sale of personal property.

NOTE:

Subject to certain exceptions, a sale of real or personal property of the estate is subject to the authorization, confirmation, or direction of the supervising court [*Prob. Code § 2540; see Prob. Code §§ 2541-2548; see also California Forms of Pleading and Practice, Ch. 290A, **Guardianship and Conservatorship: Asset Management and Investment**, § 290A.15 (Matthew Bender)*].

6. If seller is personal representative of estate, determine whether sale of personal property is authorized by statute [*see Prob. Code §§ 10000-10002*].

7. If agent is acting for either party in execution of contract required to be in writing [*see Civ. Code § 1624; Com. Code § 2201*], determine whether agent has written authority to act in that capacity [*see Civ. Code § 2309; see also Ch. 85, **Employment Agreements***].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsDirectors & OfficersScope of AuthorityGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersAuthority to ActContracts LawFormationCapacity of PartiesGeneral Overview



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CHAPTER 49 AGRICULTURAL CONTRACTS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

20-49 California Legal Forms--Transaction Guide § 49.121

§ 49.121 Marketing Orders, Agreements, or Other Forms of Restrictions on Distribution of Crop

NOTE:

For a discussion of marketing orders and agreements, *see* §§ 49.11[1], 49.12[1].

1. Determine whether commodity under consideration for purchase or sale is regulated by federally issued marketing order or agreement, such as:

- a. Navel oranges [*see* 7 C.F.R. pt. 907].
- b. Valencia oranges [*see* 7 C.F.R. pt. 908].
- c. Lemons [*see* 7 C.F.R. pt. 910].
- d. Nectarines [*see* 7 C.F.R. pt. 916].
- e. Pears, plums, and peaches [*see* 7 C.F.R. pt. 917].
- f. Kiwifruit [*see* 7 C.F.R. pt. 920].
- g. Desert grapes [*see* 7 C.F.R. pt. 925].
- h. Tokay grapes [*see* 7 C.F.R. pt. 926].
- i. Pears [*see* 7 C.F.R. pt. 927].
- j. Olives [*see* 7 C.F.R. pt. 932].

k. Irish potatoes [*see* 7 C.F.R. pt. 947].

l. Almonds [*see* 7 C.F.R. pt. 981].

m. Walnuts [*see* 7 C.F.R. pt. 984].

n. Spearmint oil [*see* 7 C.F.R. pt. 985].

o. Dates [*see* 7 C.F.R. pt. 987].

p. Raisins [*see* 7 C.F.R. pt. 989].

q. Prunes [*see* 7 C.F.R. pt. 993].

2. Determine whether commodity under consideration for purchase or sale is regulated by California issued marketing order or agreement.

NOTE:

California marketing orders are promulgated pursuant to the provisions of either the California Marketing Act of 1937 [*see Food & Agric. Code §§ 58601-59293*] or the Agricultural Producers Marketing Law [*see Food & Agric. Code §§ 59501-60016*]. For copies of the specific marketing orders, contact the Marketing Branch of the State of California Department of Food and Agriculture in Sacramento.

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral OverviewGovernmentsAgriculture & FoodProduct Promotion



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CHAPTER 49 AGRICULTURAL CONTRACTS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

20-49 California Legal Forms--Transaction Guide §§ 49.122-49.139

[Reserved]

§§ 49.122[Reserved]



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CHAPTER 49 AGRICULTURAL CONTRACTS

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C. Procedural Guide to Drafting Agricultural Contracts

20-49 California Legal Forms--Transaction Guide § 49.140

§ 49.140 Necessary Resolutions and Court Orders

1. If representing corporate party, obtain or have client obtain resolution authorizing contract [see *Corp. Code* § 207; see also Ch. 5, *Directors' Meetings, Actions, and Resolutions*].
2. If representing seller that is guardian or conservator, obtain court order authorizing contract.

NOTE:

Subject to certain exceptions, a sale of real or personal property of the estate is subject to the authorization, confirmation, or direction of the supervising court [*Prob. Code* § 2540; see *Prob. Code* §§ 2541-2548; see also *California Forms of Pleading and Practice*, Ch. 290A, ***Guardianship and Conservatorship: Asset Management and Investment***, § 290A.15 (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 49 AGRICULTURAL CONTRACTS

PART III. TRANSACTION GUIDE

C. Procedural Guide to Drafting Agricultural Contracts

20-49 California Legal Forms--Transaction Guide § 49.141

§ 49.141 Preparation and Execution of Contract

1. Draft contract [*see* § 49.160 et seq.]:
2. Have parties execute contract.
 - a. If property to be sold is community real property, have both husband and wife sign [*see Fam. Code* § 1102].
 - b. If property to be sold belongs to partnership, have partner possessing authority to bind partnership sign [*see Corp. Code* §§ 16301, 16303].
 - c. If either party is a corporation, have contract signed by person empowered by corporate bylaws or resolution of board of directors.
 - d. If party executing contract on behalf of principal is attorney-in-fact, have that person subscribe principal's name and his or her own as attorney-in-fact [*see Civ. Code* § 1095].
3. Prepare sufficient copies of contract.
 - a. Original for recording, if recording desired [*see* § 49.142].
 - b. One copy for each party.
 - c. One copy for counsel of each party.
 - d. Additional copies, as required.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawFormationGeneral OverviewContracts LawFormationExecution



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C. Procedural Guide to Drafting Agricultural Contracts

20-49 California Legal Forms--Transaction Guide § 49.142

§ 49.142 Acknowledgment and Recordation of Contract

NOTE:

A contract for the sale of goods involving growing crops or goods to be severed from realty may be recorded in the same manner as a document transferring an interest in land [*Com. Code § 2107(3)*]. Any instrument entitled to be recorded must be recorded [*see Gov. Code § 27280*] with the recorder of the county in which the affected property is situated [*Civ. Code § 1169*].

1. Add statutory provision for acknowledgment to contract for sale of goods [*see Civ. Code § 1189(a)*].
2. Have parties acknowledge their execution of agreement in presence of notary public or other qualified official [*see Civ. Code §§ 1180-1183.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Subject MatterGoodsGoods Severed From Realty



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PART III. TRANSACTION GUIDE

C. Procedural Guide to Drafting Agricultural Contracts

20-49 California Legal Forms--Transaction Guide §§ 49.143-49.159

[Reserved]

§§ 49.143[Reserved]



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D. Drafting Guide for Agricultural Contracts

20-49 California Legal Forms--Transaction Guide § 49.160

§ 49.160 Contracts for Sale of Farm Products

1. Draft introductory provision stating [*see* §§ 49.300, 49.301, P 1]:
 - a. Names of parties.
 - b. Legal and/or marital status.
 - c. Addresses.
2. Draft provision stating seller's recitals, including, where appropriate [*see* §§ 49.300, 49.301, P 2]:
 - a. Seller's interest in premises.
 - b. Legal description of premises.

NOTE:

If buyer wishes to include right of entry [*see* § 49.301, P 8] for inspection of crops, the legal description assures buyer of precise location of crops. If parties wish to have the contract recorded [*see* *Com. Code* § 2107(3)], the legal description also provides notice to third parties of location and extent of land concerning contract.

- c. Type, grade, and size of farm product to be produced by seller.
 - d. Statement of seller relating to seller's legal capacity to contract and that contract is sole contract for sale of specified farm products [*see* §§ 49.300, 49.301, P 2(c)].
3. Draft provision stating buyer's recitals, including [*see* §§ 49.300, 49.301, P 3]:

- a. Buyer's license status, if applicable.

NOTE:

Processors and resellers of farm products must be licensed under California law [*see Food & Agric. Code §§ 55481-55493, 55521-55530, 56181*]. Commission merchants, dealers, and brokers of perishable agricultural commodities, and livestock dealers and market agencies engaged in interstate or foreign transactions must be licensed under federal law [*see 7 U.S.C. §§ 203, 499c(a)*].

- b. Buyer's agreement to purchase specified farm products.
- c. Buyer's agreement to provide seed for crop to be grown, if applicable.

4. Draft provision, if applicable, for purchase of and payment for seed [*see § 49.300*, P 4].

5. Draft provision for payment for farm products.

NOTE:

If the parties have already negotiated the amount to be paid for the farm products, counsel may insert a description of the pricing method. If the parties seek advice on a pricing method, counsel should consult the local office of the Cooperative Extension for assistance in determining the appropriate method.

- a. Market price of farm products on date of delivery [*see § 49.300[2]*, P 5 (first alternative)].
- b. Predetermined pricing method [*see § 49.300[2]*, P 5 (second alternative), 49.301[2], P 5].
- c. Statement relating to manner of certifying weight of farm products when payment method is based on weight.
- d. Provision for buyer to advance funds for certain production-related expenses, if applicable [*see § 49.301[2]*, P 5].

6. Draft provisions describing seller's duties relating to planting, cultivation, harvest, preparation, and delivery.

- a. Seller to prepare and cultivate premises, irrigate, and fertilize crops in manner consistent with farming practices in farm locale [*see §§ 49.300, 49.301[2]*, P 6].
- b. Provision for party responsible for costs and expenses of raising crop.
- c. Provision for manner of preparation of crop.
 - (1) Seller to raise, maintain, and package crop [*see § 49.301[2]*, P 7 (first alternative)].
 - (2) Buyer to spray, thin, and prepare crop for harvest [*see § 49.301[2]*, P 7 (second alternative)].
- d. Provision for harvest of crop.

(1) Seller to harvest crop and place in containers provided by buyer at appropriate time for harvest [*see* §§ 49.300, 49.301[2], P 7].

(2) Buyer to harvest crop [*see* § 49.301[2], P 7 (second alternative)].

e. Delivery of crop.

(1) Buyer to receive delivery of crop at seller's premises [*see* § 49.301[2], P 7 (first alternative)].

(2) Seller to deliver crop to buyer's designated location [*see* § 49.300[2], P 8].

7. Draft provisions relating to specifications, grading, and right of rejection of farm products.

a. Specify requirements for condition of farm product at harvest or delivery [*see* § 49.300, P 9].

b. Include provision reserving buyer's right to reject products not conforming with specifications, if applicable [*see* § 49.300, P 10].

c. Include provision relating to grading and inspection of farm products [*see* § 49.300, P 11].

8. Include provision covering passage of title, including identification of goods and assumption of risk [*see* §§ 49.300[2], P 12, 49.301[2], P 10].

NOTE:

See § 49.300[1][d].

9. If contract involves farm products entering into interstate or foreign commerce, include specific provisions relating to applicable federal laws [*see* § 49.300[1][e], [f]].

a. Provision requiring compliance with federal regulation of pesticide chemicals [see 21 U.S.C. §§ 301-394 (Food, Drug, and Cosmetic Act); 7 U.S.C. §§ 136-136y (Insecticide, Fungicide, and Rodenticide Act); *see also* § 49.300[2], P 13].

b. Provision requiring compliance with federal Fair Labor Standards Act [see 29 U.S.C. §§ 201-219; *see also* § 49.300, P 14].

10. Select and draft provision governing seller's warranty of goods sold [*see* §§ 49.300[2], P 15, 49.301[2], P 12].

11. Draft provision for buyer's remedy on seller's default, if applicable [*see* § 49.301, P 9].

12. Include general contractual provisions [*see* Ch. 75, *Formation of Contracts and Standard Contractual Provisions*]:

a. Indemnification clause [*see* § 49.301, P 11].

b. Force majeure clause [*see* §§ 49.300[2], P 16, 49.301[2], P 13].

c. Payment for costs related to litigation [*see* §§ 49.300[2], P 17, 49.301[2], P 14].

d. Manner of giving notice [*see* §§ 49.300[2], P 18, 49.301[2], P 15].

- e. Time of the essence clause [*see* §§ 49.300[2], P 19, 49.301[2], P 16].
- f. Assignment and transfer of contract rights and responsibilities [*see* §§ 49.300[2], P 20, 49.301[2], P 17; *see also* Ch. 76, *Assignment of Obligations*].
- g. Modification [*see* §§ 49.300[2], P 21, 49.301[2], P 18; *see also* Ch. 77, *Discharge of Obligations*].
- h. Saving clause [*see* §§ 49.300[2], P 22, 49.301[2], P 19].
- i. Jurisdiction of governing law [*see* §§ 49.300[2], P 23, 49.301[2], P 20].
- j. Waiver of breach [*see* §§ 49.300[2], P 24, 49.301[2], P 21].
- k. Arbitration [*see* §§ 49.300[2], P 25, 49.301[2], P 22].

13. Provide space for signatures of parties [*see* §§ 49.300[2], 49.301.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Subject MatterGoodsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Subject MatterGoodsGoods Severed From RealtyGovernmentsAgriculture & FoodGeneral Overview



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CHAPTER 49 AGRICULTURAL CONTRACTS

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D. Drafting Guide for Agricultural Contracts

20-49 California Legal Forms--Transaction Guide § 49.161

§ 49.161 Contracts for Purchase of Manufacturing Milk

NOTE:

A contract for the purchase of manufacturing milk [*see Food & Agric. Code §§ 32509, 32510* (definition)] must be in writing. A signed copy of the contract must be filed with the Director of the Department of Food and Agriculture within five days of its execution [*Food & Agric. Code § 61411*]. Certain exemptions from the contract requirements provision apply for purchases of manufacturing milk due to unanticipated shortages or increases in demand and purchases on a cash on delivery basis [*see Food & Agric. Code §§ 61411.2, 61411.3*].

For further discussion and a form illustrating the statutory requirements for manufacturing milk contracts, see § 49.320[1].

1. Include provision identifying parties [*see § 49.160, P 1*].
2. Include provision stating amount of manufacturing milk to be purchased for any period [*see Food & Agric. Code § 61411(a)*].
3. Include provision stating amount to be paid for any manufacturing milk received [*see Food & Agric. Code § 61411(b)*; *see § 49.320[1]*].
4. Include provision stating date and method of payment [*see Food & Agric. Code § 61411(c)*].

NOTE:

Payment must be made for the amount of manufacturing milk delivered during the first 15 days of any calendar month not later than the first day of the next following month, and for the amount delivered during the remainder of the month not later than the 15th day of

the next following month [*Food & Agric. Code* § 61411(c); **see** *Food & Agric. Code* § 61411.2 (exceptions)].

5. Include provision stating charges for transportation [*see Food & Agric. Code* § 61411(d)].

NOTE:

Payment for transportation must be the lower of either a rate not in excess of that charged for actual or reasonably similar services by highway carriers, or the actual amount paid by a handler for the transportation [*Food & Agric. Code* § 61411(d)].

6. Include general provisions for contract for purchase and sale of farm products contracts [*see* § 49.160, PP 4-10].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewGovernmentsAgriculture & FoodGeneral Overview



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CHAPTER 49 AGRICULTURAL CONTRACTS

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D. Drafting Guide for Agricultural Contracts

20-49 California Legal Forms--Transaction Guide § 49.162

§ 49.162 Contracts for Purchase of Market Milk

NOTE:

A contract for the purchase of market milk [*see Food & Agric. Code §§ 32510, 61828* (definition)] must be in writing [*Food & Agric. Code § 62191(a)*]. A signed copy of the contract must be filed with the Director of the Department of Food and Agriculture within five days of its execution [*Food & Agric. Code § 62191(c)*]. Certain exemptions from the contract requirements provision apply for purchases of market milk due to unanticipated shortages or increases in demand and purchases on a cash on delivery basis [*see Food & Agric. Code §§ 62193, 62194*].

For further discussion and a form illustrating the statutory requirements for market milk contracts, see § 49.320.

1. Include provision identifying parties [*see § 49.160*, P 1].
2. Include provision stating amount of market milk to be purchased for any period [*see Food & Agric. Code § 62191(b)(1)*; *see § 49.320*].

NOTE:

Specific requirements relating to the amounts of various classes of milk products must be followed [*see Food & Agric. Code § 62191(b)(2)*].

3. Include provision stating amount to be paid for any market milk received [*see Food & Agric. Code § 62191(b)(3)*].
4. Include provision stating date and method of payment [*see Food & Agric. Code § 62191(b)(4)*].

NOTE:

Payment must be made for the amount of market milk delivered during the first 15 days of any calendar month not later than the first day of the next following month, and for the amount delivered during the remainder of the month not later than the 15th day of the next following month. However, if the milk is subject to an authorized pooling plan [*see Food & Agric. Code §§ 62700-62731*], the date and method of payment must be in accordance with the plan [*Food & Agric. Code § 62191(b)(4)*; *see Food & Agric. Code § 62193* (exceptions)].

5. Include provision stating charges for transportation [*see Food & Agric. Code § 62191(b)(5)*].
6. Include provision stating that price for market milk received within total quantity to be purchased under contract will not be less than minimum price for market milk used for class 2 purposes [*see Food & Agric. Code §§ 61933, 62191(b)(6)*].
7. Include general provisions for contract for purchase and sale of farm products contracts [*see § 49.160*, PP 4-10].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewGovernmentsAgriculture & FoodGeneral Overview



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20-49 California Legal Forms--Transaction Guide § 49.163

§ 49.163 Contracts for Sale of Edible Nuts

NOTE:

Unless the parties agree otherwise, and excepting contracts between a cooperative association and its member/producers, a contract for the sale of edible nuts must be in writing, and must include specific provisions [*see Food & Agric. Code §§ 62801, 62803*].

For further discussion and a form illustrating the statutory requirements for edible nut contracts, see § 49.321[1].

1. Include provision identifying parties [*see § 49.160, P 1*].
2. Include provision stating full purchase price in definite sum [*see § 49.321*].

NOTE:

If the price is to be paid on the basis of units or measures, the contract must state the unit and unit price [*Food & Agric. Code § 62801*].

3. Include provision stating method by which purchase price is to be determined [*see Food & Agric. Code § 62801*].
4. Include general provisions for contract for purchase and sale of farm products contracts [*see § 49.160, PP 4-10*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewGovernmentsAgriculture & FoodGeneral Overview



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20-49 California Legal Forms--Transaction Guide § 49.164

§ 49.164 Cooperative Association Marketing Contract

NOTE:

For a discussion of the formation of agricultural cooperative corporations, see Ch. 14A, ***Agricultural Nonprofit Cooperative Associations*** .

Agricultural cooperative associations are exempt from the provisions regulating the activities of farm products processors and produce dealers except when the transaction is between the cooperative and a nonmember [*Food & Agric. Code* §§ 55461, 56161(a); **see** § 49.12[3], [4]].

1. Draft introductory provision stating [*see* §§ 49.340, 49.341[2], P 1]:

- a. Names of parties.
- b. Legal and/or marital status.
- c. Addresses.

2. Draft provision stating term of duration of contract, including, if appropriate [*see* §§ 49.340, 49.341[2], P 2]:

NOTE:

Marketing contracts between a cooperative association, including cooperative bargaining associations, and its member/producers may not be entered into for a period exceeding 15 years [*Food & Agric. Code* § 54261; **see** *Food & Agric. Code* § 54401].

- a. Provision for termination of contract by producer [*see* § 49.340[2], P 2(a)].
 - b. Provision for termination of contract by association [*see* § 49.340[2], P 2(b)].
3. Draft provision designating type of contract to be entered into [*see* §§ 49.340, 49.341[2], P 3].

NOTE:

Contracts between an agricultural cooperative and its member/producers may be on an agency or purchase and sale basis. Contracts between an agricultural cooperative bargaining association and its member/producers are normally entered into on an agency basis. For a discussion of both types of contracts, see §§ 49.340[1], 49.341[1].

- a. Agency contract.
 - b. Purchase and sale contract.
4. If purchase and sale contract, draft provisions establishing obligations of both parties.
- a. Type of farm products covered by contract [*see* § 49.340[2], P 3 (first alternative)].
 - b. Obligation of producer to deliver farm products to association [*see* § 49.340[2], P 4 (first alternative)].
 - c. Transfer of title to farm products [*see* § 49.340[2], P 5 (first alternative)].

NOTE:

The contract may provide that the association may sell or resell the farm products with or without taking title to them [*Food & Agric. Code* § 54262].

- d. Obligation of association to resell products [*see* § 49.340[2], P 6 (first alternative)].
5. If contract involves cooperative association serving as agent, draft provisions establishing obligations of both parties.
- a. Type of farm products covered by contract [*see* § 49.340[2], P 3 (second alternative)].
 - b. Obligation of producer to deliver farm products to association [*see* § 49.340[2], P 4 (second alternative)].
 - c. Right of association to transfer title on its behalf and enter premises and harvest farm products when appropriate [*see* § 49.340[2], P 5 (second alternative)].

NOTE:

The contract may provide that the association may sell or resell the farm products with or without taking title to them [*Food & Agric. Code* § 54262].

- d. Obligation of association to market products [*see* § 49.340[5], P 6 (second alternative)].
- e. Power of association to pledge products as security [*see* § 49.340[2], P 14].

6. For either purchase and sales or agency contract involving cooperative association, include following:

- a. Provision establishing association's authority to make rules, regulations, and standards relating to farm products under contract [*see* § 49.340[2], P 7].
- b. Provision granting right to pool farm products [*see* § 49.340[2], P 8].

NOTE:

For a discussion of the association's right to "pool" farm products, *see* § 49.340[1][e].

7. If contract involves cooperative bargaining association serving as agent, draft provisions establishing obligations of both parties.

- a. Appointment of association as exclusive agent [*see* § 49.341[2], P 3].
- b. Obligation of association to negotiate on behalf of member/producer [*see* § 49.341[2], P 4].
- c. Producer's obligation to sell on contracts approved by association [*see* § 49.341[2], P 5].

8. Draft payment provision for contracts involving cooperative association or cooperative bargaining association.

NOTE:

The association may deduct from the gross amount received from the sale of farm products all necessary selling, overhead, and other costs and expenses, including interest on preferred stock not exceeding 8 percent per annum, and reserves for retiring the stock, other proper reserves, and interest not exceeding 8 percent per annum on common stock [*Food & Agric. Code* § 54262].

- a. Association to pay net proceeds to producer [*see* § 49.340[2], P 9].
- b. Purchaser to pay producer, after deducting allowable costs and expenses for association [*see* § 49.341[2], P 6].

9. If necessary, include provision directing to whom deliveries are to be made and proceeds are to be payable [*see* § 49.340[2], P 13].

10. Draft provision requiring producer to furnish information relating to farm products under contract to association [*see* § 49.341[2], P 7].

11. Select and draft general provisions [*see* § 49.160, P 10].

12. Provide space for signatures of parties [*see* §§ 49.340, 49.341].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Cooperatives General Overview Governments Agriculture & Food General Overview



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20-49 California Legal Forms--Transaction Guide §§ 49.165-49.179

[Reserved]

§§ 49.165[Reserved]



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E. Related and Subsequent Procedures

20-49 California Legal Forms--Transaction Guide § 49.180

§ 49.180 Notice of Lien on Livestock Sold to Meatpackers

NOTE:

For a discussion of producers' and livestock sellers' liens, see § 49.12[3].

1. Prepare written notice of claim, including following [*see Food & Agric. Code § 55702(e)*]:
 - a. Name and address of person filing.
 - b. Amount demanded by person filing after deducting all credits and offsets.
 - c. Name and address of meatpacker who received livestock.
 - d. Description of livestock delivered and date of delivery.
 - e. Statement that amount claimed is true and bona fide existing debt as of statement date.
 - f. Statement that amount claimed is true and bona fide existing debt as of date on which payment was due for livestock.
2. Include proper fees [*see Food & Agric. Code § 55702(f)*].
3. File verified notice in office of Secretary of State, Uniform Commercial Code Division, P.O. Box 942835, Sacramento, CA 94235-0001.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensGovernmentsAgriculture & FoodGeneral
Overview



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E. Related and Subsequent Procedures

20-49 California Legal Forms--Transaction Guide § 49.181

§ 49.181 Farm Products Trust Fund Claim

NOTE:

For discussion of the Farm Products Trust Fund in general, see § 49.12[5].

1. Complete farm products creditor's statement of claim, including following [*see Food & Agric. Code § 56707*]:

NOTE:

The Director will notify any ascertained farm products creditors so that a proper claim may be submitted [*Food & Agric. Code § 56705*; **see** *Food & Agric. Code § 56705.5*].

a. Evidence of claimant's sale of farm products to licensee.

b. Evidence substantiating amount of indebtedness due claimant.

NOTE:

The Director may pay up to 50 percent of any claim from the farm products trust fund; the maximum amount payable to all claimants against any one licensee is \$50,000 [*Food & Agric. Code § 56708*].

2. File verified statement of claim with Director of Department of Food and Agriculture [*see Food & Agric. Code § 56705*].

NOTE:

A creditor must submit the claim within 60 days from the date of notification by the Director [*see Food*

& Agric. Code § 56706].

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral Overview



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E. Related and Subsequent Procedures

20-49 California Legal Forms--Transaction Guide § 49.182

§ 49.182 Claim Under Milk Producers Security Trust Fund

NOTE:

The California Legislature has found that the marketing of milk requires producers to receive prompt payment [*Food & Agric. Code § 62501*] and has assured payment by means of a milk producers security trust fund [*Food & Agric. Code § 62502*]. Eligible producers that do not receive payment for milk shipments may file a claim with the Director of the Department of Food and Agriculture for payment from the fund [*see Food & Agric. Code §§ 62580-62587*]. For a discussion of the livestock servicer's lien available to persons providing feeding, care, and other services to livestock, see § 49.360[1][d].

1. Determine eligibility for coverage [*see Food & Agric. Code § 62580*]:

a. Was milk shipment made after December 31, 1986?

b. Was valid contract between producer and handler filed with Director of Department of Food and Agriculture before date of shipment [*see Food & Agric. Code §§ 61411, 62191* (contract requirements)]?

NOTE:

This requirement does not apply if shipment was made within five days after execution of contract [*Food & Agric. Code § 62580(b)*].

c. Was handler licensed and bonded as of date contract filed with director [*see Food & Agric. Code §§ 61405, 61492, 62143, 62182*]?

d. Was milk produced in and delivered to plant within California?

e. Has director issued prior notice that shipments would not be covered by fund [*see Food & Agric. Code § 62582*]?

NOTE:

Director's notification precludes coverage under the Fund.

f. Was shipment made under custom processing arrangement with producer retaining title?

NOTE:

Shipments under custom processing arrangements are not covered under the Fund.

g. Was producer's contract with handler directly?

NOTE:

In the case of a cooperative, only the members' milk shipped under contract is covered. Milk shipped under a contract held by an intermediary, broker, or agent is not covered, nor is milk shipped by a cooperative produced by nonmembers [*Food & Agric. Code § 62580(g)*].

h. Does producer have beneficial ownership in handler to whom shipments were made?

NOTE:

Beneficial interest in handler precludes coverage under Fund.

i. Is producer in compliance with applicable statutory provisions [*see Food & Agric. Code §§ 61301-62731*]?

2. Notify director of handler's failure to make payment as required by statute [*Food & Agric. Code § 62600; see Food & Agric. Code §§ 61411(c), 62191(b)(4)*].

NOTE:

On notification of the handler's failure to make payment to the producer, the director will investigate. If the director determines that a default has occurred, he or she will notify the handler that it has one business day to make the payment [*Food & Agric. Code §§ 62601, 62603*]. If the handler fails to correct the payment deficiency the director shall notify the produce of its right to file a claim and provide a claim form [*Food & Agric. Code § 62604*].

3. Return verified claim form to Director within 60 days from date of receipt [*Food & Agric. Code § 62620*].

NOTE:

The Director makes the determination of the amount owed and makes the distribution after allowed deductions have been made [*see Food & Agric. Code §§ 62622-62625*].

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral Overview



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E. Related and Subsequent Procedures

20-49 California Legal Forms--Transaction Guide § 49.183

§ 49.183 Notice of Seller's Intent to Preserve Rights in Statutory Trust for Interstate Sales of Perishable Agricultural Commodities, Livestock, and Live Poultry

NOTE:

For coverage of the Perishable Commodities Act and the Packers and Stockyards of 1921, see § 49.11[3], [4].

1. Determine eligibility for coverage by trust.

NOTE:

Coverage under the trust is limited to products transacted in interstate or foreign commerce [*see* 7 U.S.C. §§ 183, 499a(b)(8)].

2. Draft notice of intent to preserve rights in trust assets [*see* § 49.380], including following [*see* 7 C.F.R. § 46.46(g)(3)]:

a. Statement that notice is intended to preserve right in trust.

b. As to each shipment:

(1) Name and address of trust beneficiary, seller, supplier, or agent.

(2) Name and address of commission merchant, broker, dealer, packer, or live poultry dealer, as applicable.

(3) Date of transaction, commodity involved, contract terms, invoice, price, and date payment was due.

(4) If applicable, date of receipt of notice that payment instrument was dishonored.

(5) Amount past due and unpaid.

3. Provide notice to appropriate purchasing party [*see* 7 U.S.C. § 499e(c)(3); 7 C.F.R. § 46.46(g)(1)].

4. File notice with headquarters office or regional office of P.A.C.A. Branch of Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, within 30 days after [*see* 7 U.S.C. § 499e(c)(3); 7 C.F.R. § 46.46(g)(1)]:

a. Expiration of time by which payment must be made as prescribed by regulation [*see* 7 C.F.R. § 46.2(z), (aa)];

b. Expiration of other time for payment as expressly agreed to by parties in writing before entering into transaction;

NOTE:

The maximum time for payment to which the seller, supplier, or agent can agree and still qualify for coverage is 30 days after receipt and acceptance of the commodities [7 C.F.R. § 46.46(f)(2); *see* 7 C.F.R. §§ 46.2(dd), 46.46(b)(1)].

c. After time supplier, seller, or agent has received notice that payment instrument properly presented has been dishonored.

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral OverviewGovernmentsAgriculture & FoodPerishable Agricultural
Commodities Act



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E. Related and Subsequent Procedures

20-49 California Legal Forms--Transaction Guide § 49.184

§ 49.184 Broker's Memorandum of Sale

NOTE:

Every licensed produce dealer operating as a broker, on negotiating a sale of farm products, must issue a written memorandum to the parties to the transaction [*Food & Agric. Code § 56331(a)*]. For a form and a discussion of the required provisions, see § 49.302.

1. If client is licensed produce dealer operating as broker, draft and give to parties memorandum of sale that includes all of following required provisions [*see Food & Agric. Code § 56331*; *see also § 49.302*]:

- a. Price and quality of farm products.
- b. Date of delivery.
- c. All other details of transaction.
- d. Identifying number on memorandum.

NOTE:

The memorandum must have an identifying number printed on it. The numbers must be organized and printed so that each memorandum can be identified and accounted for sequentially. Unused or damaged memoranda must be retained by the broker for accounting purposes [*Food & Agric. Code § 56331(b)*].

2. If broker wishes to alter terms of transaction [*Food & Agric. Code § 56332*]:

- a. Obtain consent of both parties.

b. Issue clearly marked corrected memorandum.

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral Overview



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20-49 California Legal Forms--Transaction Guide §§ 49.185-49.299

[Reserved]

§§ 49.185[Reserved]



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PART IV. FORMS

A. Sales Agreements

20-49 California Legal Forms--Transaction Guide § 49.300

§ 49.300 Agreement for Sale of Farm Products by Producer to Processor

[1] Comment

[a] Use of Form

This form is an agreement for the sale of crops by a producer to a processor. It is intended for use by a farmer or rancher and a person engaged in the business of processing or manufacturing any farm product and selling, reselling, or redelivering it in any dried, canned, extracted, fermented, distilled, frozen, eviscerated, or other preserved or processed form [see *Food & Agric. Code* § 55407]. The form contemplates the distribution of the farm products in interstate commerce, and therefore includes applicable provisions stemming from federal regulations of the use of pesticides and farm labor [see § 49.300[2], PP 13, 14].

For a form of a contract for sale of farm products from a producer to a licensed reseller of agricultural commodities, see § 49.301. For a discussion of the specific statutory regulations relating to contracts for the sale of milk and its related products, and edible nuts, see §§ 49.161, 49.162.

[b] Regulation of Processors

California processors of agricultural products and their agents must be licensed by the California Department of Food and Agriculture [*Food & Agric. Code* §§ 55521, 55481]. Licensees are required to make prompt payment for purchases of farm products. If the contract fails to state the time and manner of payment, and if no time is set at the time of delivery, the processor must pay for the farm product within 30 days of the delivery or taking possession of the farm product [*Food & Agric. Code* § 55601]. Processors of livestock for slaughter must make full payment within two business days from the date of delivery [*Food & Agric. Code* § 55601.4].

A lien is imposed on the farm products sold to a processor, and on all processed or manufactured forms of the product, for labor, care, and expense in growing and harvesting the product. The lien is to the extent of the agreed price, if any, for the product, or to the extent of the value of farm products on the date of delivery [*Food & Agric. Code* § 55631]. A similar lien is imposed on livestock furnished to a meatpacker and on identifiable proceeds and products of the livestock

[see *Food & Agric. Code* § 55702]. For further discussion of the regulations of processors, including producer's liens, see § 49.12[3].

Processors transacting business in interstate or foreign commerce as packers of livestock are subject to restrictions regarding unfair practices, statutory trust protections, and prompt payment requirements [see 7 U.S.C. §§ 191, 196, 228b]. For further discussion of the regulations of packers involved in foreign or interstate business transactions, see § 49.11[4]. For a form of the required notice necessary for preserving the seller's rights in the statutory trust, see § 49.380.

[c] Sale of Farm Products by Weight

If any farm product is sold to and purchased by a processor on the basis of weight, the farm product must be weighed by a weighmaster licensed by the state [*Food & Agric. Code* § 55581; see *Bus. & Prof. Code* § 12730]. This form includes payment provisions with alternative language calling for payment of farm products by weight or volume [see § 49.300[2], P 5].

[d] Passage of Title Provision

This form contains a provision governing the passage of title and the allocation of risk of loss [see § 49.300[2], P 12]. The passage of title to goods under sales contracts is governed by Division 2 of the California Commercial Code. Title to goods cannot pass under a contract for sale prior to their identification to the contract, and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by the Code [*Com. Code* § 2401(1)]. The goods may be identified at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs in the following situations [*Com. Code* § 2501(1)]:

- If the contract is for the sale of goods already existing and identified, when the contract is made;
- If the contract is for the sale of future goods other than the unborn young or future crops, when the goods are shipped, marked, or otherwise designated by the seller as goods to which the contract refers; or
- If the contract is for the sale of unborn young or future crops, when the crops are planted or otherwise become growing crops or the young are conceived.

Subject to Division 2 and Division 9 of the California Commercial Code, title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties [*Com. Code* § 2401(1)]. Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his or her performance with reference to the physical delivery of the goods [*Com. Code* § 2401(2)].

The parties may agree on the allocation of the risk or burden between the parties. In the absence of agreement, the Code provides for the assignment of the risk of loss [see *Com. Code* § 2509].

For further discussion of the passage of title and the allocation of risk of loss, see *Ch. 52, Sales of Goods Under the Uniform Commercial Code*, § 52.10.

[e] Regulation of Pesticide Chemicals

The Federal Food, Drug, and Cosmetic Act [see 21 U.S.C. § 301 *et seq.*] prohibits the introduction or delivery for introduction into interstate commerce of any food that is adulterated, misbranded, or processed in violation of a permit issued to regulate contamination in a designated locality [21 U.S.C. §§ 331(a), (d), 344]. Among the definitions of "adulterated" foods are foods, whether or not canned or otherwise processed, that have been treated with a pesticide chemical and the residue of that pesticide in or on the food exceeds the limits prescribed by the Environmental

Protection Agency [21 U.S.C. §§ 342(a)(2)(B), 346(a); see 40 C.F.R. § 180.1 *et seq.* (EPA tolerances and exemptions)]. "Misbranded food" includes insufficiently labeled raw agricultural commodities containing a pesticide chemical applied after harvest [21 U.S.C. § 343(l)]. A "pesticide chemical" is defined as any substance that is a pesticide within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act, including all active and inert ingredients of that pesticide. The term pesticide also includes ethylene oxide and propylene oxide when those substances are applied to food [21 U.S.C. § 321(q)(1)(A); 7 U.S.C. § 136(u); see 21 U.S.C. § 321(q)(1)(B) (exceptions)].

There are both criminal and civil penalties for violations of these restrictions [see 21 U.S.C. §§ 332-334]. However, a buyer of agricultural commodities is excused from criminal liability when he or she can establish a guaranty or undertaking signed by the person from whom the buyer received the adulterated or misbranded commodity stating that the commodity is not adulterated or misbranded [see 21 U.S.C. § 333(c)]. This form includes a provision restricting the use of pesticides and requiring the seller to provide notice to the buyer of the use of pesticides [see § 49.300[2], P 13].

California regulations for pesticide chemical tolerances and exemptions are identical to those adopted by the federal government [see 3 Cal. Code Reg. § 6490]. Under California law, it is unlawful for any person to pack, ship, or sell any produce that carries pesticide residue in excess of the permissible tolerances established [Food & Agric. Code § 12671].

[f] Fair Labor Standards Act

The Fair Labor Standards Act [see 29 U.S.C. § 201 *et seq.*] regulates a number of labor practices, including minimum wage, maximum hours, and the use of child labor, when the employee is engaged in interstate commerce or in the production of goods for interstate commerce [see 29 U.S.C. §§ 206 (minimum wage), 207 (maximum hours), 212 (child labor)]. Exemptions from these statutory requirements exist for many agricultural employees [see 29 U.S.C. § 213].

The Act prohibits any producer, manufacturer, or dealer from shipping or delivering into commerce any goods produced in a domestic establishment where within 30 days prior to their removal from the establishment any "oppressive child labor" has been employed [29 U.S.C. § 212]. "Oppressive child labor" includes the employment of a child younger than 16 years of age in any occupation, or a child between 16 and 18 years of age in an occupation deemed to be particularly hazardous for children of that age or detrimental to their health or well-being [29 U.S.C. § 203(l)].

Persons found to have shipped or delivered goods in violation of the child labor restrictions may be subject to civil penalties [see 29 U.S.C. § 216(e)]. However, if the purchaser of goods produced with oppressive child labor took possession of the goods in good faith, for value, without notice of the violation, and in reliance on the seller's written assurance of compliance with the child labor provisions of the Act, shipment or delivery of the goods is not barred by the Act [29 U.S.C. § 212(a)]. This form contains a provision requiring the seller to comply with all applicable sections of the Act, and to provide the buyer with written assurance of its compliance [see § 49.300[2], P 14].

For further discussion of the applicability of the Fair Labor Standards Act to employees of agricultural operations, see Harl, Agricultural Law, Ch. 17, *The Fair Labor Standards Act* (Matthew Bender).

[2] FORM

Agreement for Sale of Farm Products by Producer to Processor

CONTRACT FOR SALE OF AGRICULTURAL PRODUCTS

Identification of Parties

1. This Agreement is made on _____ [date], by and between _____ [name(s)] (Seller), _____ [status, e.g., a California corporation or a partnership or a sole proprietor], of

_____[*address or principal place of business in California*], California, and
 _____[*name(s)*] (Buyer), _____[*status, e.g., a California corporation, or a*
 partnership, or a sole proprietor], of _____[*address or principal place of business in California*],
 California.

Seller's Recitals

2. Seller represents the following to be true and accurate:

(a) Seller is the _____[*owner or lessee*] of _____ acres of real property (the premises) that shall be used for the sowing, growing, and harvesting of the crop(s) specified in Subparagraph 2(b), described as follows:

_____ [*insert legal description of land*].

(b) Seller agrees to grow _____[*size and grade of crop, e.g., U.S. Extra Fancy or U.S. # 1 Size A*], _____[*type of crop(s), e.g., peas*] on the premises in accordance with the stated terms and conditions of this Agreement. Seller agrees not to deliver or tender for delivery to Buyer under this Agreement any crop(s) of any kind grown anywhere other than on the premises.

(c) Seller possesses the legal capacity to enter into this Agreement and has not sold or contracted to sell the crop(s) described above to anyone other than Buyer.

Buyer's Recitals

3.(a) Buyer is currently a licensed processor under the laws of the State of California, License Number _____, and shall maintain this status during the existence of this Agreement;

(b) Buyer agrees to purchase all of the crop(s) described in Subparagraph 2(b) in accordance with the stated terms and conditions of this Agreement.

[*Optional:*]

(c) Buyer agrees to provide seed to Seller for production of the crop(s) specified in Subparagraph 2(b) as provided in Paragraph 4;

[*Optional:*]

Seed Provision

4. Seller agrees to purchase seed from the Buyer for the crop(s) to be grown under this Agreement. The price for seed shall be agreed on at the time planting is to commence. The cost of the seed shall be posted to the Seller's account and deducted from any amounts owing Seller on delivery of the crop(s) in accordance with this Agreement. Buyer makes no warranty, express or implied, as to the description, quality, or germination rate of any seed provided by Buyer.

[*Continue with the following:*]

Payment for Crop(s)

[Use when the price determination will be made on delivery:]

5. On delivery of the crop(s) to be grown under this Agreement, Buyer shall pay Seller the total amount owing for the crop(s) and delivery charges *[optional: minus any amounts advanced Seller for seed]*. The price for the crop(s) shall be based on the current market price for sales of the crop(s) to processors in the farm locale.

[Or, use when the parties have already agreed on price formula:]

5. On delivery of the crop(s) to be grown under this Agreement, Seller shall be paid \$_____ per _____ *[specify measure, e.g., ton or bushel]* based on the following method of determination:

_____ *[describe method of price calculation]*.

Preparation and Cultivation of Crop(s)

6. Seller shall prepare and cultivate the premises, and sow and maintain the crop(s), including irrigation, fertilizing, and control of weeds and insect infestations, in accordance with principles of good husbandry and the best practices of the farming community in which the premises are situated. Prior to delivery, Seller shall prepare the crop(s) specified in Subparagraph 2(b) in the manner necessary for _____ *[specify manner of processing, e.g., freezing, canning, drying]*.

Harvesting of Crop(s)

7. Buyer shall provide Seller with pallets, boxes, crates, or other containers, delivered to the premises, as may be required for the proper harvest of the crop(s). At the appropriate time for harvest, Seller shall commence harvest of the crop and package the crop(s) for delivery to Buyer at the delivery point designated in Paragraph 8. Buyer shall not, however, be liable for failing to furnish containers in sufficient quantities provided Buyer has made reasonable efforts to do so.

Delivery of Crop(s)

8. On harvest of the crop(s), Seller shall deliver crop(s) packaged in containers provided by Buyer to Seller's processing facility located at _____ *[address]*, California. Seller shall receive a credit to its account for the cost of transportation in the amount of _____ dollars per _____ *[specify measure, e.g., ton or bushel]* of the crop(s), which includes the return transportation of Buyer's unused containers. Buyer may from time to time designate any other delivery point within reasonable proximity to that designated in this Paragraph 8, provided that notice is given pursuant to Paragraph 18 of this Agreement.

Specifications of Harvested Crop

9. Promptly after harvesting, Seller shall deliver the crop(s) to point of delivery specified in Paragraph 8 in a condition suitable for Buyer's processing requirements, as specified in Paragraph 6 of this Agreement. The crop(s) must be free from doubles, worms, worm damage, insect bites, or other pest infestations; frost, hail, rain, or other meteorologically caused damage; and rot, mildew, mold, shrivel, scab, or other foreign matter or imperfections. In addition, the crop(s) must meet the following specifications:

_____ [describe special requirements for color, texture, quality, state of maturity, etc.].

Right of Rejection

10. Buyer reserves the right to reject any quantity of the crop(s) delivered under this Agreement that does not meet the specifications and requirements described in this Agreement. On rejection, Buyer may charge to Seller's account all costs, freight charges, and expenses paid or incurred by it in connection with the receipt and return of the rejected crop(s) to Seller or Seller's agent. The rejection or regrading of any of the delivered crop(s) by Buyer shall not relieve the Seller's duty to provide Buyer with the remaining amount of the crop(s) due under this contract. Buyer shall provide Seller with notice of the rejection of any crop(s) in accordance with Paragraph 18 of this Agreement.

Crop Grading

11. Seller shall grade the crop(s) before delivery, and shall deliver crop(s) only of the size and grade described in Subparagraph 2(b). In the event Buyer reasonably determines from a representative sampling that the delivered crop(s) are of an inferior size and/or grade, Buyer may, as an alternative to the rejection remedy provided in Paragraph 10, retain and pay Seller the sum of _____ dollars per _____ [specify measure, e.g., ton or bushel] for the nonconforming crop(s). Buyer shall provide Seller with notice of the regrading of any crop(s) in accordance with Paragraph 18 of this Agreement.

Passage of Title

12. The crops sold under this Agreement shall be identified as soon as possible. Title to any crop now in existence passes to Buyer on execution of this contract, and title to any crop not now in existence passes to Buyer as soon as that crop comes into existence. All risk of loss, depreciation, and damage shall remain with Seller until actual delivery of the crop to Buyer.

Pesticide Chemicals

13. Seller agrees not to apply to the crop(s) or the land on which they are grown any pesticide chemical, as defined in *Section 321(q) of Title 21 of the United States Code*, except as may be permitted under the tolerance levels for application of pesticide chemicals promulgated by the Environmental Protection Agency. Seller shall not adulterate or misbrand the crop(s), as defined by *Sections 342 and 343 of Title 21 of the United States Code*. On delivery, Seller shall provide Buyer with an undertaking signed by Seller guaranteeing that the crop(s) have not been so adulterated or misbranded.

On application of any permitted pesticide chemical, Seller shall provide notice of the application to Buyer in accordance with Paragraph 18 of this Agreement. Failure of Seller to provide notice of any pesticide application is a breach of this contract, giving Buyer the option to refuse delivery of the crop(s).

Fair Labor Standards Act

14. Seller warrants and represents that the crop(s) delivered pursuant to this Agreement have been or will be produced in compliance with all applicable provisions of the Fair Labor Standards Act of 1938. On delivery of the crop(s) produced pursuant to this Agreement, Seller shall provide Buyer with written assurance executed by Seller of its compliance with those provisions.

Limitation on Warranties

15. The goods sold to Buyer under this Agreement are sold subject only to the implied warranty of title described in *Section 2312(1) of the California Commercial Code* and the implied warranty of merchantability described in *Section 2314 of the California Commercial Code* as existing on the date of execution of this contract. Seller makes no express warranties concerning the goods sold under this Agreement and any affirmations or representations made by Seller or Seller's agents concerning the goods were made for illustrative purposes only and do not constitute warranties of the goods. SELLER MAKES NO WARRANTY THAT THE GOODS SOLD UNDER THIS CONTRACT ARE FIT FOR ANY PARTICULAR PURPOSE OR PURPOSES.

Force Majeure Clause

16. Should the performance of the obligations of either party under this Agreement be prevented or delayed by an act of God, war, civil insurrection, fire, flood, storm, strikes, lockouts, or by any law, regulation, or order of any federal, state, county, or municipal authority, or by any other cause beyond the control of the party to be excused, that party's performance under this Agreement, to the extent it is prevented or delayed, shall be excused.

Expenses of Enforcement

17. Should any litigation be commenced between the Buyer and Seller for the enforcement of any rights of either party against the other pursuant to the provisions of this Agreement, or by reason of any alleged breach of any of the provisions of this Agreement, the party prevailing in the litigation shall be entitled to receive from the unsuccessful party all costs incurred in connection with the litigation, including a reasonable allowance for attorneys' fees incurred by the prevailing party.

Notices

18. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this Agreement or by law to be served on or given to either party by the other party shall be in writing, and shall be deemed duly served and given when personally delivered to _____ [designate recipient, e.g., the party or the designated agent of the party] to whom they are directed, or instead of such personal service, when deposited in the United States mail, first-class postage prepaid, addressed to the Borrower at _____ [address], or to the Lender at _____ [address]. Either party may change its address for the purpose of this Paragraph 18 by giving written notice of the change to the other party in the manner provided in this Paragraph.

Time of Essence

19. Time is of the essence of this Agreement and of each provision contained in it.

Assignment and Transfer

20. Seller shall not assign or transfer this Agreement to any person without the prior express written consent of the Buyer.

Amendments to Agreement

21. This Agreement may be amended only by a writing signed by the party against whom or against whose successors and assigns enforcement of the change is sought.

Saving Clause

22. If any term or provision of this Agreement or any application hereof shall be held invalid or unenforceable, the remainder of this contract and any application of its terms and provisions shall not be affected thereby but shall be valid and enforceable.

Governing Law

23. This Agreement shall be governed by and construed in accordance with the laws of _____
[specify jurisdiction, e.g., California].

Waiver

24. The waiver of any breach of any of the provisions of this Agreement by Buyer shall not constitute a continuing waiver or a waiver of any subsequent breach by Seller either of the same or any other provision of this Agreement.

Arbitration

25. Any dispute that arises between Seller and Buyer relating to the provisions of this Agreement shall be submitted to arbitration on application by either party. The arbitration panel shall consist of three persons, one each appointed by Seller and Buyer, and the third shall be jointly appointed by the appointees of Seller and Buyer. The arbitration shall be conducted in compliance with *Code of Civil Procedure Sections 1280 through 1294.2* relating to arbitration. The cost of the arbitration shall be divided evenly between Seller and Buyer.

Executed on _____[date] at _____, California.

SELLER

_____[signature of seller]
[typed name]

BUYER

_____ [signature of buyer]
 [typed name]

[Add if contract is to be recorded:]

Acknowledgment

[Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

_____)
 State of California)
 County of _____)

On _____ [date], before me, _____ [name and title of officer taking acknowledgment], personally appeared _____ [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is or are] subscribed to the within instrument and acknowledged to me that _____ [he or she or they] executed the same in _____ [his or her or their] authorized _____ [capacity or capacities], and that by _____ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) Title, Creditors & Good Faith Purchasers Passing of
 Title Governments Agriculture & Food General Overview Governments Agriculture & Food Federal Food, Drug &
 Cosmetic Act Labor & Employment Law Discrimination Retaliation Statutory Application Fair Labor Standards Act



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 49 AGRICULTURAL CONTRACTS
PART IV. FORMS
A. Sales Agreements

20-49 California Legal Forms--Transaction Guide § 49.301

§ 49.301 Agreement for Sale of Farm Products by Producer to Licensed Reseller

[1] Comment

[a] Use of Form

This form is an agreement for the sale of farm products by a producer or a licensed reseller to a reseller of farm products. It differs from the sales agreement in § 49.300 in that this form is designed for use when the buyer is a reseller of the farm product and not involved in any form of processing [*see* § 49.12[3]].

This form does not contemplate that the reseller of farm products is involved in interstate or foreign commerce. For a discussion of regulations regarding those resellers, see § 49.11[3]. If this form is to be adapted for use in transactions involving interstate or foreign commerce, counsel should consider including provisions relating to the use of pesticide chemicals and the application of the Fair Labor Standards Act [*see* § 49.300[1]].

For a general discussion of the California regulations pertaining to persons involved in the reselling of farm products, including a discussion of licensing requirements, see § 49.12[4]. For a description of the passage of title provision of this form, see § 49.300[1][d].

[b] Contracts Involving Resellers of Farm Products

[i] In General

Licensed resellers of farm products include dealers, cash buyers, and their agents [*see Food & Agric. Code* §§ 56107, 56104, 56102 (definitions)]. Brokers are involved solely in the negotiation for the sale or purchase of farm products and therefore should not be parties to a contract of this type [*see Food & Agric. Code* § 56103 (definition)]. Commission merchants may use this contract as sellers [*see Food & Agric. Code* § 56105 (definition); *see* § 49.301[1][b][iii]].

A reseller must not refuse to accept without reasonable cause any farm product contracted for, or fail to provide packing, harvesting, or hauling services contracted to be done in connection with the acceptance, handling, or

harvesting of the farm product [*Food & Agric. Code* § 56612]. Failure or refusal to carry out a lawful contract with a producer or another licensee is a punishable violation [*Food & Agric. Code* § 56617].

Licensed resellers are required to prepare and preserve detailed records that fully and correctly disclose all transactions in which they are involved. At minimum, licensees must maintain records of cash received and disbursed, a general ledger or its equivalent, and a record of amounts due California producers and all others [*Food & Agric. Code* § 56255(a)]. The records must also disclose the true ownership and management of the business [*Food & Agric. Code* § 56255(b)]. All required records must be maintained for a period of four years [*Food & Agric. Code* § 56255(c)].

Failure to keep the required records subjects the violator to license suspension or revocation, injunction, and civil penalties [*Food & Agric. Code* §§ 56618, 56651 (injunction), 55922 (civil penalties)]. The required records are subject to examination by the director on a verified complaint or on the director's motion [*Food & Agric. Code* §§ 56381 (general examination), 56275 (commission merchants)]. Failure or refusal to produce records for examination by the director is also grounds for suspension or revocation of a license [*Food & Agric. Code* § 56383]. For a discussion of the additional records required of dealers and commission merchants, see § 49.301[1][b][ii], [iii].

[ii] Dealers

Dealers of farm products must promptly make and keep records of any purchase of farm products from a producer or another licensee for resale purposes [*Food & Agric. Code* § 56301; see *Food & Agric. Code* § 56107 ("dealer" defined)]. The records must include the name and address of the producer or other licensee, the date on which the farm products are received, the price to be paid, and an itemized statement of any charges paid by the dealer for the account of the seller [*Food & Agric. Code* § 56301(a)-(d)].

A dealer must pay for any farm product purchased at the time and in the manner specified in the contract [*Food & Agric. Code* § 56302]. If the contract does not specify a time for payment, the dealer must pay for the farm product within 30 days from the delivery or taking possession [*Food & Agric. Code* § 56302]. Any delinquent payment for the purchase of a farm product is subject to a statutory late charge of 5 percent per month of the unpaid balance calculated on a daily basis for the period of the delinquency for the first month, and an additional 1 percent per month for the remaining period. The late charge may be waived by the seller in writing after the delinquency has occurred [*Food & Agric. Code* § 56620].

In connection with the first contract between a seller and a dealer during any calendar year, the dealer must notify the seller, on a form prescribed by the department, of his or her obligations regarding timely payment and late charges. The notice is due on the delinquency of the contract, or if payment is not made with 30 days when the contract does not specify time of payment, when there is no contract, or when the contract is oral [*Food & Agric. Code* § 56302.5].

It is a violation for a dealer to obtain title to, or possession, control, or delivery of, any farm product from any producer or other licensee without having executed either a sales contract or a contract agreeing to purchase the farm product at a designated price [*Food & Agric. Code* § 56619].

[iii] Commission Merchants

Although "commission merchants," unlike dealers, receive farm products on consignment from producers and other licensed resellers rather than by direct purchase, this form may be used by commission merchants acting as sellers of farm products to other resellers. For a form of a contract establishing a relationship between a consignor and a commission merchant, see Ch. 91, *Contracts With Sales Representatives* .

Commission merchants must keep records relating to handling, sale, or storage of the farm products received by them [*Food & Agric. Code* § 56271; see *Food & Agric. Code* § 56105 ("commission merchant" defined)]. The record must

include the name and address of the person consigning the farm products to the commission merchant, the date the farm product was received, its condition and quality on arrival, the date of the sale for the account of the consignor, and the selling price [*Food & Agric. Code* § 56271(a)-(e)]. The records must also include an itemized statement of the charges to be paid by the consignor, and the names and addresses of all purchasers who have any financial interest in the business of the commission merchant, or in whose business the commission merchant has any financial interest [*Food & Agric. Code* § 56271(f), (g)]. Other records relating to identification of farm products and the filing of claims against the commission merchant must also be maintained [*see Food & Agric. Code* § 56271(h), (i)].

Unless otherwise agreed to in writing, the commission merchant must remit to the consignor in full the amount realized from the sale, including all collections, overcharges, and damages, less the commission due, within 10 days after receipt of the funds, along with a complete account of the sale [*Food & Agric. Code* § 56273]. If requested by its consignors, a commission merchant must provide a true written report of the quantity sold and the selling price of the farm products, before the close of the next business day following the request [*Food & Agric. Code* § 56272].

Neither state law nor federal law precludes a common law action in conversion. Although a statute specifically proscribes a conversion action [*Food & Agric. Code* § 56623], nothing in the state statutory scheme precludes a plaintiff from pursuing a claim for conversion at common law, instead of a statutory remedy [*Fischer v. Machado* (1996) 50 Cal. App. 4th 1069, 1074-1075, 58 Cal. Rptr. 2d 213 (commission merchant commingled general accounts and sale proceeds of farm products that merchant sold as agent for farmer, then merchant went out of business; held, that merchant converted proceeds)].

Commission merchants must provide notice to consignors of agricultural products with whom they transact business of certain duties imposed on the consignor by statute [*Food & Agric. Code* § 56281]. These duties relate to recordkeeping and reports of sales by the commission merchant [*see Food & Agric. Code* §§ 56271, 56272], charges against the consignor's account as a result of a breach of contract [*see Food & Agric. Code* § 56280], adjustments on transactions [*see Food & Agric. Code* § 56281], disallowance of adjustments by the director [*see Food & Agric. Code* § 56282], and claims against consignors by commission merchants [*see Food & Agric. Code* § 56351]. For a complete discussion of the records requirements of commission merchants, see Ch. 91, *Contracts With Sales Representatives* .

For a notice preserving the producer's rights in the statutory trust for perishable agricultural commodities, livestock, and poultry and the proceeds of sales of these in foreign or interstate commerce, see § 49.380.

[c] Inspection and Grading of Produce

This contract contains alternative provisions governing the harvest and delivery of the crops grown under the agreement [*see* § 49.301[2] P 7]. Farming practice varies among crops and locales regarding the harvest and delivery and counsel may consult the client or the University of California Cooperative Extension for assistance in determining the proper alternative.

Under either alternative, the seller and buyer are both subject to state and federal law regarding the standards for farm products. Detailed standards for preparation and packing of fruits, vegetables, and nuts have been promulgated by the Department of Food and Agriculture pursuant to the Food and Agricultural Code [*see Food & Agric. Code* § 42501 *et seq.*; 3 Cal. Code Reg. § 1359 *et seq.*]. Under California law, it is unlawful for any person to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported, or sell any fruits, nuts, or vegetables in bulk, or in any container or subcontainer unless the produce and containers comply with state standards [*Food & Agric. Code* § 42941]. Farm products found to be in violation of the standards may be condemned and abated as a nuisance [*see Food & Agric. Code* § 43031 *et seq.*].

Federal standards promulgated by the Department of Agriculture apply to farm products entering into interstate or foreign commerce [*see 7 U.S.C. § 1622(h)*]. Federal regulations govern the standards of marketable fruits and

vegetables [see 7 C.F.R. pt. 51].

[2] FORM

Agreement for Sale of Farm Products by Producer to Licensed Reseller

CONTRACT FOR SALE OF AGRICULTURAL PRODUCTS

Identification of Parties

1. This Agreement is made on _____ [date], by and between _____ [name(s)] (Seller), _____ [status, e.g., a California corporation or a partnership or a sole proprietor], of _____ [address or principal place of business in California], California, and _____ [name(s)] (Buyer), _____ [status, e.g., a California corporation or a partnership or a sole proprietor], of _____ [address or principal place of business in California], California.

Seller's Recitals

2. Seller represents the following to be true and accurate representations:

(a) Seller is the _____ [owner or lessee] of the _____ acres of real property (the premises) that shall be used for the sowing, growing and harvesting of the crop(s) specified in Subparagraph 2(b), described as follows:

_____ [insert legal description of land].

(b) Seller agrees to grow _____ [specify size and grade of crop, e.g., U.S. Extra Fancy or U.S. # 1 Size A] _____ [type of crop(s), e.g., peas], on the premises for sale to the buyer as specified in this Agreement. Seller agrees not to deliver or tender for delivery to Buyer under this Agreement any crop(s) of any kind grown anywhere other than on the premises.

(c) Seller warrants that it is the sole legal owner of the crop(s) to be grown on the premises under this Agreement, that it has the full capacity to enter into this Agreement and sell the crop(s) to Buyer, and that the crop(s) is free and clear of all liens and encumbrances. Seller further warrants that it will not permit any lien or encumbrance to attach to the premises or crop(s) by reason of any act of Seller or Seller's agents prior to the harvest and removal of the crop(s) from the premises by Buyer.

Buyer's Recitals

3. Buyer represents the following to be true and accurate representations:

(a) Buyer is a licensed _____ [specify type of reseller, e.g., dealer or cash buyer] in good standing under the laws of the State of California;

(b) Buyer agrees to purchase all of the crop(s) described in Subparagraph 2(b) in accordance with the stated terms and conditions of this Agreement.

Sale of Farm Products

4. Seller hereby agrees to sell to Buyer and Buyer agrees to purchase from Seller all of the farm products described in Subparagraph 2(b) to be grown and produced on the premises during the growing season that commences on _____[*date*], and ends on or about _____[*date*], under the terms and conditions specified in this Agreement.

Price

5. The purchase price for the farm products described in Subparagraph 2(b) is the sum of \$_____ per _____[*specify measure, e.g., ton or bushel*]. Buyer agrees to advance Seller \$_____ against the final amount owing to provide Seller with adequate capital for planting, maintaining, and harvesting the crop(s). Advanced funds shall be paid on the execution of this Agreement.

Duties of Seller

6. Seller shall irrigate, fertilize, cultivate, and grow the crop(s) in a manner consistent with good husbandry and farming practices in the locale. Seller, at its own cost and expense, shall furnish all labor, water, fertilizer, and other materials necessary for the proper growth, cultivation, and irrigation of the crop(s).

Harvest and Delivery

[Use when the seller will harvest crop(s):]

7. Seller, in a manner consistent with the farming practice in the locale, shall harvest the crop on its market maturity or as specified by Buyer. Seller agrees to provide Buyer with _____ days notice as provided for in this agreement prior to the date of harvest. Buyer shall provide Seller with adequate containers of Buyer's choice, which Seller shall use for preparing the crop(s). Buyer shall accept the crop(s) at Seller's premises and remove at its own expense.

[Or, use when the buyer will harvest the crop:]

7. Buyer shall spray, thin, and otherwise prepare the crop for harvest, and thereafter harvest the crop(s) on market maturity. Buyer shall provide containers and transport at its own cost and expense.

[CONTINUE]

Right of Entry

8. Seller grants to Buyer the right to enter the premises and inspect the crop for the purposes of determining Seller's compliance with the terms of this agreement, the maturity of the crop(s), and to harvest the crop(s).

Seller's Default

9. If Seller for any reason fails to perform within 24 hours after receiving written notice of a deficiency in the manner of care and maintenance of the crop(s), any reasonable act required according to the best course of husbandry practiced in the farm locale, Buyer may enter the premises, perform the necessary act and deduct the expense from the final amount owed Seller.

Passage of Title

10. The crops sold under this Agreement shall be identified as soon as possible. Title to any crop now in existence passes to Buyer on execution of this contract, and title to any crop not now in existence passes to Buyer as soon as that crop comes into existence. All risk of loss, depreciation, and damage shall remain with Seller until actual delivery of the crop to Buyer.

Indemnification Clause

11. During the existence of this agreement, each party shall indemnify and hold the other party harmless from all damages, injuries, or claims arising in or about the premises or arising from either party's operations on the premises.

Limitation on Warranties

12. The goods sold to Buyer under this Agreement are sold subject only to the implied warranty of title described in *Section 2312(1) of the California Commercial Code* and the implied warranty of merchantability described in *Section 2314 of the California Commercial Code* as existing on the date of execution of this Agreement. Seller makes no express warranties concerning the goods sold under this Agreement and any affirmations or representations made by Seller or Seller's agents concerning the goods were made for illustrative purposes only and do not constitute warranties of the goods. SELLER MAKES NO WARRANTY THAT THE GOODS SOLD UNDER THIS CONTRACT ARE FIT FOR ANY PARTICULAR PURPOSE OR PURPOSES.

Force Majeure Clause

13. Should the performance of the obligations of either party under this Agreement be prevented or delayed by an act of God, war, civil insurrection, fire, flood, storm, strikes, lockouts, or by any law, regulation, or order of any federal, state, county, or municipal authority, or by any other cause beyond the control of the party to be excused, that party's performance under this Agreement, to the extent it is prevented or delayed, shall be excused.

Expenses of Enforcement

14. Should any litigation be commenced between the Buyer and Seller for the enforcement of any rights of either party against the other pursuant to the provisions of this Agreement, or by reason of any alleged breach of any of the provisions of this agreement, the party prevailing in the litigation shall be entitled to receive from the unsuccessful party all costs incurred in connection with the litigation, including a reasonable allowance for attorneys' fees incurred by the prevailing party.

Notices

15. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this Agreement or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served and given when personally delivered to _____ [*designate recipient, e.g., the party or the designated agent of the party*] to whom they are directed, or, instead of such personal service, when deposited in the United States mail, first-class postage prepaid, addressed to the Borrower at _____ [*address*], or to the Lender at _____ [*address*]. Either party may change its address for the purpose of this Paragraph by giving written notice of the change to the other party in the manner provided in this Paragraph.

Time of Essence

16. Time is of the essence of this Agreement and of each provision contained within.

Assignment and Transfer

17. Seller shall not assign or transfer this Agreement to any person without the express prior written consent of the Buyer.

Amendments to Contract

18. This Agreement may be amended only by a writing signed by the party against whom or against whose successors and assigns enforcement of the change is sought.

Saving Clause

19. If any term or provision of this Agreement or any application hereof shall be held invalid or unenforceable, the remainder of this Agreement and any application of its terms and provisions shall not be affected thereby but shall be valid and enforceable.

Governing Law

20. This Agreement shall be governed by and construed in accordance with the laws of _____ [*specify jurisdiction, e.g., California*].

Waiver

21. The waiver of any breach of any of the provisions of this Agreement by either party shall not constitute a continuing waiver or a waiver of any subsequent breach by Buyer or Seller of either the same or any other provision of this Agreement.

Arbitration

22. Any dispute that arises between Seller, or Seller's agent, and Buyer, relating to the provisions of this Agreement, shall be submitted to arbitration on application by either party. The arbitration panel shall consist of three persons, one each appointed by Seller, or Seller's agent, and Buyer, and the third jointly appointed by the appointees of Seller, or Seller's agent, and Buyer. The arbitration shall be conducted in compliance with *Code of Civil Procedure Sections 1280 through 1294.2* relating to arbitration. The cost of the arbitration shall be divided evenly between Seller and Buyer.

Executed on _____ [date] at _____, California.

SELLER

_____ [signature of seller or seller's agent]
[typed name]

BUYER

_____ [signature of buyer]
[typed name]

[Add if contract is to be recorded:]

Acknowledgment

[Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

_____)
State of California)
County of _____)

On _____ [date], before me, _____ [name and title of officer taking acknowledgment], personally appeared _____ [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is or are] subscribed to the within instrument and acknowledged to me that _____ [he or she or they] executed the same in _____ [his or her or their] authorized _____ [capacity or capacities], and that by _____ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) General Overview Governments Agriculture & Food General
Overview Governments Agriculture & Food Product Quality



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 49 AGRICULTURAL CONTRACTS

PART IV. FORMS

A. Sales Agreements

20-49 California Legal Forms--Transaction Guide § 49.302

§ 49.302 Broker's Memorandum of Sale

[1] Comment

[a] Use of Form

This form is a broker's memorandum of sale to be used in a negotiated sale of farm products. Every licensed produce dealer operating as a broker [*see Food & Agric. Code § 56103* (definition of "broker"); *see also Food & Agric. Code § 56181* (person dealing in farm products must be licensed)], on negotiating a sale of farm products, must issue a written memorandum to the buyer and seller before the close of the next business day [*Food & Agric. Code § 56331(a)*].

[b] Contents of Form

The written memorandum must show the price and quality of the farm products, date of delivery, and all other details of the transaction [*Food & Agric. Code § 56331(a)*]. The memorandum must also have an identifying number printed on it. The numbers must be organized and printed so that each memorandum can be identified and accounted for sequentially. Unused or damaged memoranda must be retained by the broker for accounting purposes [*Food & Agric. Code § 56331(b)*].

[c] Alteration of Terms

The broker may not alter the terms of the transaction as specified in the original memorandum without the consent of both parties to the transaction. On making a change, the broker must issue a clearly marked corrected memorandum, which must clearly indicate the date and time when the adjustment or change was made. The broker must give the corrected memorandum to both buyer and seller before the close of the next business day [*Food & Agric. Code § 56332*].

[2] FORM

Broker's Memorandum of Sale

MEMORANDUM OF SALE

Date: _____

Memorandum of Sale No. _____

This is a Memorandum of Sale pursuant to *Food and Agricultural Code Section 56331* to record the sale of _____ [*type of products sold*] between _____ [*name of seller*] and _____ [*name of buyer*], to be delivered on _____ [*date*]. This sale is for _____ [*quantity and unit of goods*] of _____ [*type and quality of goods*], at a price of \$_____. The sale was negotiated by _____ [*name of broker*]. [*Specify other details of transaction, if any.*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)General OverviewGovernmentsAgriculture & FoodGeneral Overview



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PART IV. FORMS

A. Sales Agreements

20-49 California Legal Forms--Transaction Guide §§ 49.303-49.319

[Reserved]

§§ 49.303[Reserved]



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CHAPTER 49 AGRICULTURAL CONTRACTS

PART IV. FORMS

B. Sales Agreements: Alternative Form Provisions

20-49 California Legal Forms--Transaction Guide § 49.320

§ 49.320 Form Provision: Agreements for Sale of Market or Manufacturing Milk

[1] Comment

[a] Use of Form

This form illustrates provisions that must be included in a contract for the sale of market or manufacturing milk. The form may be adapted for either commodity and incorporated into either of the complete sales contracts illustrated in this chapter [*see* §§ 49.300, 49.301]. For a form illustrating required provisions for an agreement for the sale of edible nuts, *see* § 49.321.

[b] Milk Contracts

[i] Required Provisions

"Market milk" is milk that conforms to the standards provided in *Food & Agric. Code* §§ 35751-36123 [*Food & Agric. Code* § 32510]. Those standards cover bacteria counts, temperature, milk fat and solids, and grades [*see Food & Agric. Code* §§ 35781-35788]. "Manufacturing milk" is defined as milk that does not conform to the requirements of market milk [*Food & Agric. Code* §§ 61307, 32509].

Generally, it is unlawful to purchase manufacturing or market milk in excess of 1000 gallons per month from a milk producer without a written contract that complies with statutory requirements. The contract must contain the following information [*Food & Agric. Code* §§ 61411, 62191]: (1) the amount of milk to be purchased for any period; (2) the price to be paid for all milk received; (3) the date and method of payment for the milk [*see* § 49.320[1][b][iii]]; and (4) the charges for transportation, if hauled by the handler [*see* § 49.320[1][b][iv]].

Contracts for the sale of market milk are more stringent; they must also contain the minimum quantity of the market milk to be paid for as Class 1, if any. The quantity must be stated in pounds of market milk, pounds of market milk fat, or gallons of market milk. However, if the price to be paid for Class 1 milk is established separately for market milk fat and market skim milk, quantity may be stated separately in pounds of market milk fat and pounds of market skim milk.

The minimum quantity to be paid for as Class 1 must not be less than 70 percent of the total quantity to be purchased at a milk products plant, and not less than 60 percent of the total quantity of market milk fat, or market skim milk components (but not necessarily both), to be purchased at a country plant [*Food & Agric. Code* § 62191(b)(2); see *Food & Agric. Code* § 61932 (Class 1 milk)]. Additionally, market milk contracts must contain a provision that market milk received within the total quantity to be purchased for any period must not be paid for at less than the minimum price for market milk used for Class 2 [*Food & Agric. Code* § 62191(b)(6); see *Food & Agric. Code* § 61933 (class 2 milk)]. However, neither of these requirements applies if the milk is subject to an equalization pool [*Food & Agric. Code* § 62191(d); see *Food & Agric. Code* §§ 62700-62731].

The contract requirements for manufacturing milk do not apply to the purchase of milk that does not meet market milk standards if the milk has been processed on a dairy farm that held a valid market milk permit during the 30 day period preceding the purchase [*Food & Agric. Code* § 61411; see *Food & Agric. Code* §§ 35751-36123]. Contract requirements do not apply to the purchase of manufacturing or market milk that is necessary to meet an unanticipated increase in demand or an unanticipated shortage in supply of a handler if the quantity purchased from one producer does not exceed 5000 gallons in any one month, provided that in the case of market milk, the handler keeps a complete record of these purchases, and the price paid for the milk by the handler is not less than the price established in the applicable stabilization and marketing plan for the usage to which the milk is applied. If the producer is a cooperative association acting as a producer, the total quantity purchased must not exceed 30,000 gallons per month [*Food & Agric. Code* §§ 61411.2, 62193]. The contract requirements also do not apply to manufacturing or market milk purchased under cash-on-delivery terms [*Food & Agric. Code* §§ 61411.3, 62194].

Milk contracts may contain additional provisions not in conflict with the statutory requirements. The producer must file a signed copy of the contract with the director with five days of its execution [*Food & Agric. Code* §§ 61411, 62191(c)].

[ii] Voidability of Contract

Any contract between a producer and a handler is voidable by the producer for a 45-day period following the occurrence of either of the following [*Food & Agric. Code* §§ 61411.4, 62198]:

- The handler's failure to pay the producer the full price specified in the contract or failure to comply with the payment requirement contained in *Food & Agric. Code* § 61411 or 62191, if the failure has not been corrected by the handler within one business day after notification by the producer or the Director of the Department of Food and Agriculture. The 45-day period commences on the day after payment was due; or
- The handler's failure on three separate occasions within a 12-month period to pay the producer the full price specified in the contract or failure to comply with the payment requirement contained in *Food & Agric. Code* § 61411 or 62191. The 45-day period commences on the day after the third occurrence.

A contract between a producer and a handler is also voidable by the producer if a notice has been issued by the director stating that the future deliveries to the handler will not be covered by the Milk Producers Security Trust Fund. Producers have the option to void their contracts for a 45-day period from the date the notice is issued or until the date the director establishes for reinstatement of the handler's eligibility under the trust fund, whichever is later [*Food & Agric. Code* §§ 61411.5, 62199; see § 49.182].

[iii] Payment for Milk

Handlers must pay producers for purchases of milk either by check or cash; promissory notes do not constitute payment. Handlers paying in cash must obtain a dated, signed receipt from each producer. Cash receipts must be made a part of the permanent records of the handler. Handlers paying by check must issue checks that are reducible to cash by the

producer in no more than one business day [*Food & Agric. Code* §§ 61415.1, 62200].

Payment must be made for the amount of manufacturing milk delivered during the first 15 days of any calendar month not later than the first day of the next following month, and for the amount delivered during the remainder of the month not later than the 15th day of the next following month [*Food & Agric. Code* §§ 61411(c), 62191(b)(4)]. However, in the case of market milk subject to a pooling plan, the payment must be made in accordance with the provisions of the plan, if any [*Food & Agric. Code* § 62191(b)(4); see *Food & Agric. Code* §§ 62700-62731].

For an unanticipated single transaction between a producer and handler, payment must be made for the amount of milk delivered during the first 15 days of any calendar month not later than the first day of the next following month, and for the amount delivered during the remainder of the month not later than the 15th day of the next following month. However, if the milk is subject to an authorized pooling plan [see *Food & Agric. Code* §§ 62700-62731], the date and method of payment must be in accordance with the plan [*Food & Agric. Code* § 61411.2].

A handler is subject to a 12 percent interest penalty on unpaid balances [*Food & Agric. Code* §§ 61415.2, 62201]. The director also may assess additional monetary penalties against handlers for failing to properly pay for milk purchases [see *Food & Agric. Code* §§ 61415.3, 62202]. In transactions involving manufacturing milk, the director may refuse to grant or renew a handler's license for failing to properly pay for manufacturing milk purchases [*Food & Agric. Code* § 61416.1].

The failure of any handler to pay for market milk delivered to him or her at the time and in the manner specified in the contract with the producer is an unlawful trade practice, except as provided in *Food & Agric. Code* § 62074 (exception for market milk received by pool handlers under pooling plan) [*Food & Agric. Code* § 62196]. It is also an unlawful trade practice for a handler to pay a producer less than the minimum prices established by the director for market milk for the marketing area [*Food & Agric. Code* § 62195].

[iv] Hauling Charges for Milk

A contract for the sale of manufacturing or market milk must contain the charges for the hauling of the milk, if hauled by the handler [*Food & Agric. Code* §§ 61411(d), 62191(b)(5)]. The charge for the hauling of manufacturing milk by the handler must be the lower of (1) a rate not in excess of the rate charged for actual or reasonably similar services by highway carriers; or (2) the actual amount paid by a handler for that transportation [*Food & Agric. Code* § 61411(d)].

[2] FORM

Form Provision: Agreements for Sale of Market or Manufacturing Milk

Quantity and Price

The following disclosures are made pursuant to Food and Agricultural Code Section _____ [specify appropriate statute: 61411 (manufacturing milk) or 62191 (market milk)].

(a) The parties agree to the sale and purchase of _____ [specify amount of purchase, e.g., 2000 pounds or 2000 gallons] per _____ [specify period, e.g., month] of _____ [manufacturing milk or market milk].

[If market milk agreement involves Class 1 milk, select appropriate provision (see *Food & Agric. Code* § 62191(b)(2)), either:]

The minimum quantity of market milk to be paid for as Class 1 _____ [market milk or market milk

fat] is _____ [(specify quantity, e.g. 500 pounds or 500 gallons)]. The price to be paid for all Class 1 _____ [market milk or market milk fat] shall be \$_____ per _____ [gallon or pound]. The price to be paid for all Class 2 market milk shall be \$_____ per _____ [gallon or pound].

[Or, if desired, for market milk contract establishing separate price for market milk fat and market skim milk:]

The minimum quantity of market milk to be paid for as Class 1 is _____ [specify quantity, e.g. 500 pounds] of market milk fat and _____ [specify quantity, e.g., 500 pounds] of market skim milk. The price to be paid for all Class 1 market milk fat shall be \$_____ per pound. The price to be paid for all Class 1 market skim milk shall be \$_____ per pound. The price to be paid for all Class 2 market milk shall be \$_____ per _____ [gallon or pound].

[Continue with the following:]

(b) The total price to be paid for all of the _____ [manufacturing milk or market milk] shall be \$_____.

(c) Payment shall be made by _____ [cash or check] and delivered to the Producer _____ [specify method of payment, e.g., by the _____ day of each month or for deliveries during the first 15 days of the calendar month by first day of the next following month, and for deliveries during the remainder of the month by the 15th day of the next following month] during which the Agreement is in force.

[Add if market milk agreement:]

(d) The price to be paid for any market milk within the total specified in this Agreement, during any period under this Agreement, shall not be less than the minimum price for market milk used for Class 2.

[Add if hauling under milk agreement is by handler:]

(e) Producer agrees to pay Handler \$_____ for the hauling of the _____ [manufacturing or market] milk under this Agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) General Overview Contracts Law Formation General Overview Governments Agriculture & Food General Overview



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CHAPTER 49 AGRICULTURAL CONTRACTS

PART IV. FORMS

B. Sales Agreements: Alternative Form Provisions

20-49 California Legal Forms--Transaction Guide § 49.321

§ 49.321 Form Provision: Agreements for Sale of Edible Nuts

[1] Comment

[a] Use of Form

This form illustrates provisions that must be included in a contract for the sale of edible nuts. The form may be incorporated into either of the complete sales contracts illustrated in this chapter [*see* §§ 49.300, 49.301]. For a form provision illustrating the required elements of a contract for the sale of market or manufacturing milk, see § 49.320.

[b] Edible Nut Contracts

Except when the parties agree otherwise, or when the agreement is between a cooperative agricultural marketing association and a member of that association, a contract for the sale of edible nuts must be in writing [*Food & Agric. Code* § 62801; *see Food & Agric. Code* § 62803]. A written contract for the sale of edible nuts must state (1) the full purchase price in a definite sum to be paid in accordance with the terms of the contract; (2) if the price is to be paid on the basis of units or measures, a statement or description of the unit and the full unit price; and (3) the method by which the price is to be determined [*Food & Agric. Code* § 62801].

Regarding edible nut contracts entered into on or after September 7, 1983, purchasers who violate the contract requirement provisions are liable to the seller for the reasonable value of the nuts at the time of delivery, plus a penalty of twice the difference between any amounts paid to the seller and the reasonable value of the nuts at the time of delivery [*Food & Agric. Code* § 62802; *see Tos v. Mayfair Packing Co. (1984) 160 Cal. App. 3d 67, 206 Cal. Rptr. 459*].

[2] FORM

Form Provision: Agreements for Sale of Edible Nuts

Quantity and Price

The following disclosures regarding quantity and price are made pursuant to *Food & Agricultural Code Section 62801*.

(a) The parties agree to the sale and purchase of _____ [*amount of purchase, e.g., 2000 pounds*] of _____ [*type of edible nut, e.g., walnuts*].

(b) The total price to be paid for all of the _____ [*type of nut, e.g., walnuts*] shall be \$_____, determined on a _____ [*specify method for determining price, e.g., gross weight basis or unit price basis of \$_____ per _____ (specify unit)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral OverviewGovernmentsAgriculture & FoodGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 49 AGRICULTURAL CONTRACTS

PART IV. FORMS

B. Sales Agreements: Alternative Form Provisions

20-49 California Legal Forms--Transaction Guide §§ 49.322-49.339

[Reserved]

§§ 49.322[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 49 AGRICULTURAL CONTRACTS

PART IV. FORMS

C. Marketing Agreements

20-49 California Legal Forms--Transaction Guide § 49.340

§ 49.340 Cooperative Association Marketing Agreement

[1] Comment

[a] Use of Form

This form is an agreement for use between an agricultural cooperative association and a member-producer of that association. It requires the member-producer to exclusively provide the association with farm products that will be marketed by the association. For a discussion of the formation and operation of agricultural cooperative associations, see Ch. 14A, *Agricultural Nonprofit Cooperative Associations*.

Marketing contracts may be entered into on a purchase and sale or an agency basis [*see 5 Ops. Cal. Atty. Gen. 247, 249 (1945)*; *Irvine Co. v. McColgan (1945) 26 Cal. 2d 160, 164, 157 P.2d 847*]. "Purchase and sale" contracts grant the association title to the products produced by the member and allow the association to handle, process, and market them. "Agency" contracts generally are used when the association is to perform marketing rather than processing services for the member, and are similar to arrangements involving commission merchants or brokers [*see Food & Agric. Code §§ 54261, 54171, 54173*; *see also* discussion in § 49.301[1]]. This form contains alternative provisions pertaining to each kind of contract, as appropriate.

For a form of a marketing contract between a producer-member and an agricultural cooperative bargaining association, see § 49.341.

[b] Statutory Authorization for Contract

Agricultural cooperative associations and their members may enter into marketing contracts that require the members to sell, for any duration not greater than 15 years, all or any specified part of any product or commodity exclusively to or through the association, or any facilities created by the association. Under a contract for a sale to the association, title passes absolutely and unreservedly, except for recorded liens, on delivery of the product or at any other time specified in the contract [*Food & Agric. Code § 54261*]. Marketing contracts between an association and its members are not illegal, in restraint of trade, or contrary to any statute enacted against pooling or combinations [*Food & Agric. Code §*

54039].

Statutory provisions regulating the activities of processors and produce dealers do not apply to agricultural cooperative associations, except when the association is transacting business with a nonmember [*Food & Agric. Code* §§ 55461 (processors), 56161(a) (produce dealers)]. For a discussion of the requirements pertaining to processors and produce dealers, see § 49.12[3], [4] [*see also* §§ 49.300[1], 49.301[1]].

[c] Disposition of Proceeds

The contract may provide that the association sell or resell any product delivered by its members, with or without taking title to the product, and pay the member-producer the resale price after making allowable deductions. Deductions are allowed for (1) necessary selling, overhead, and other costs and expenses, including interest on preferred stock, not exceeding 8 percent per year, and reserves for retiring the stock, if any; (2) other proper reserves; and (3) interest not exceeding 8 percent per year on common stock [*Food & Agric. Code* § 54262].

[d] Income Tax Consent

In computing taxable income, agricultural cooperative associations are entitled to deduct amounts paid to patrons as patronage dividends, per-unit retain allocations, and nonpatronage distributions [*see I.R.C. §§ 1382(b)(1), 1381(a); Treas. Reg. § 1.1382-1(a)*]. To do so, payment must be made in money, property, or a qualified written notice of allocation or per-unit retain certificate by the fifteenth day of the ninth month following the close of the taxable year [*see I.R.C. § 1382(b)-(d)*]. A notice is qualified if it is redeemable at face value within 90 days, or if the patron has consented to include the allocated amount in gross income for the year [*I.R.C. § 1388(c); see I.R.C. § 1385(a)*]. This form includes a provision for the member-producer's consent to include allocations in gross income, to ensure that any payments in the form of allocations will be qualifiable and thus deductible to the association. For a more detailed discussion of the need for the consent provision, see discussion in Ch. 14A, *Agricultural Nonprofit Cooperative Associations* .

[e] Pooling of Products

This form contains a provision authorizing the association to pool products of individual producers [*see* § 49.340[2], P 6]. Pooling systems allow the association to receive products from individual producers and, after crediting the individual accounts, mix together individual producer's fungible products. Sales are then made out of the pool without regard for the original source. When the products in the pool are sold, the pool is closed and the individual producer's accounts are credited with the proceeds from the sale of the products on a pro rata basis. The system minimizes risk for all members, and permits them to share in price fluctuations [*see Wiles, Taxation of Farmers' Cooperatives and Their Patrons*, 18 So. Cal. Tax. Inst. 449, 457 (1966)].

For purposes of deducting patronage dividends [*see* § 49.340[1][d]], patronage of products marketed under pooling arrangements is treated as occurring during the taxable year in which the pool closes, and marketing of products is treated as occurring during any of the taxable years in which the pool is open [*I.R.C. § 1382(e); see* Ch. 14A, *Agricultural Nonprofit Cooperative Associations*].

[f] Action on Contract

[i] Specific Performance and Injunction

Any marketing contract entered into by a member of an association that calls for the delivery of products produced or acquired by the member may be specifically enforced in an action by the association [*Food & Agric. Code* § 54263]. If there is a breach or a threatened breach of a marketing contract by a member, the association may bring an action for an injunction to prevent further breach and a decree of specific performance of the contract. On the filing of a verified

complaint and filing of a sufficient bond, the association may obtain a temporary restraining order and preliminary injunction against the member [*Food & Agric. Code* § 54265]. For further discussion of the availability of these remedies to the association, see California Forms of Pleading and Practice, Ch. 528, *Specific Performance*.

[ii] Presumption of Producer's Ability to Deliver Products

In any action commenced by an association on a marketing contract, it is conclusively presumed that a member who is also a landowner, landlord, or lessor is able to control the delivery of any product that is produced on that member's land by tenants or others whose tenancy, possession, or work on the land, or the terms of whose tenancy, possession, or work were created or changed after the member's execution of the marketing contract [*Food & Agric. Code* § 54266].

[iii] Liquidated Damages

This form contains a provision fixing liquidated damages in the event of breach by the member-producer [see § 49.340[2], P 11]. The association's bylaws or the marketing contract may contain a provision fixing, as liquidated damages, specific sums to be paid by the member-producer to the association in the event of breach by the member-producer regarding the sale, delivery, or withholding of any product. The clause may provide that the member will pay all costs, premiums for bonds, expenses, and fees. These liquidated damages provisions are valid and enforceable, and are not regarded as penalties [*Food & Agric. Code* § 54264].

[2] FORM

Cooperative Association Marketing Agreement

MARKETING AGREEMENT

Identification of Parties

1. This Agreement is made on _____ [date], by and between _____ [name(s)] (Producer), _____ [status, e.g., a California corporation or a partnership or a sole proprietor], of _____ [address or principal place of business in California], California, and _____ [name of association] (Association), a nonprofit cooperative association organized under the laws of the State of California, of _____ [address or principal place of business in California], California.

Term of Agreement

2. The term of this Agreement shall be _____ years commencing on _____ [date]. This Agreement may, however, be terminated prior to the end of the term as follows:

_____ [describe methods of termination, e.g.:

(a) By Producer's giving written notice to the Association, as provided for in this Agreement, of its decision to terminate this Agreement between the _____ day of _____ (specify month) and the _____ day of _____ (specify month) of any year, in which case the Agreement will be terminated as of _____ (specify date) of that year;

(b) By the Association's giving written notice to the Producer, as provided for in this Agreement, of its decision to terminate this Agreement between the _____ day of _____ (specify month) and the

_____ day of _____ (*specify month*) of any year, in which case the Agreement will be terminated as of _____ (*specify date*) of that year.]

[*Use for a sales contract:*]

Purchase and Sale

3. Producer agrees to sell and Association agrees to buy all _____ [*specify type of crop*] (the products), produced by or for Producer, or acquired by or for Producer, as landlord, tenant, lessor, or lessee in the State of California during the existence of this Agreement. This Agreement is intended as a contract for purchase and sale and not as an agency contract.

[*Or, use for an agency contract:*]

Agency

3. Producer appoints and designates the Association as exclusive sales agent for, and agrees to market through the facilities of the Association, all _____ [*specify type of crop*] (the products), produced by or for Producer or acquired by or for Producer as landlord, tenant, lessor, or lessee in the State of California during the existence of this contract.

[*CONTINUE*]

[*Use for a sales contract:*]

Producer to Harvest and Deliver

4. Producer agrees to cultivate, care for, harvest, haul, and deliver the products, at Producer's own cost and expense, to the Association at the warehouses, packing stations, or other places at the time and in the manner designated by the Association by written notice as provided in Paragraph 17 of this Agreement at least _____ days before the date of delivery.

[*Or, use for an agency contract:*]

Producer to Deliver

4. Producer agrees to deliver the products to the Association at the warehouses, packing stations, or other places at the time and in the manner designated by the Association by written notice as provided in Paragraph 17 of this Agreement at least _____ days prior to the date of delivery.

[*CONTINUE*]

[Use for a sales contract:]

Title to Products

5. This Agreement is intended to pass to and vest in the Association present title and right of possession to all of the products covered by this Agreement. The Association shall at all times have the right to enter on any premises where the products are located and remove them; but the right of the Association to enter and remove the products shall not affect the obligation of the Producer to harvest, haul, and deliver them as provided in this Agreement and the loss of the products prior to their delivery to the Association shall be borne by the Producer. The Association may pay any liens that, in the opinion of the Association, have attached to the products prior to their delivery to the Association.

[Or, use for an agency contract:]

Association's Right to Pick

5. Producer irrevocably authorizes and empowers the Association to transfer title to the products, and to take possession of them when they are ready for harvest by entering on the premises where the products are located and removing them. However, the right of the Association to enter and remove the products shall not affect the obligation of the Producer to harvest, haul, and deliver them as provided in this Agreement. In the event the Association elects to enter the premises and remove the products, the Association may deduct from any sums that are then or later become payable to the Producer from the Association a sufficient amount to cover the Association's reasonable expenses in harvesting or otherwise removing and hauling the products.

[CONTINUE]

[Use for a sales contract:]

Obligation of Association to Resell Products

6. The Association agrees to resell the products delivered to it by the Producer on the terms and in the form determined by the Association, and to pay the Producer as the purchase price of the products the net proceeds of the sale (Net Resale Proceeds), determined as provided in this Agreement and in the bylaws of the Association now existing or as may be amended.

[Or, use for an agency contract:]

Obligation of Association to Market Products

6. The Association agrees to receive, *[add if appropriate: pack,]* market, and sell the products delivered to it by Producer on the terms and in the form the Association may determine, and to pay to Producer the net proceeds of the sale (Net Resale Proceeds), determined as provided in this Agreement and in the bylaws of the Association now existing

or as may be amended.

[Continue with following for either a sales or an agency contract:]

Rules, Regulations, and Standards

7. The Association shall make rules and regulations regarding the picking, harvesting, and delivery of the products covered by this Agreement, and, if necessary, provide inspectors and graders to standardize, grade, and classify them. Producer agrees to observe and conform to those rules and regulations and to accept the grading standards and classifications established by the Association. The Association may reject or refuse to accept delivery of any or all products that in its judgment do not conform to the standards established by it. All products shall be at the Producer's risk until delivered to the Association.

Right to Pool Products

8. Pursuant to the rules and regulations the Board of Directors of the Association may from time to time prescribe, the Association shall have the right to pool products delivered to it by the Producer with products delivered to it by other growers, whether members or nonmembers of the Association. These pools shall open and close at the times the Board of Directors of the Association may decide. The Board of Directors may, at any time, for reasons deemed sufficient by it, close any pool or extend the time for the closing of any pool. The Board of Directors may also exclude from any pool any products because of differences in quality or damage by the elements, or for other reasons satisfactory to the Board of Directors. Each Producer whose products are included shall share ratably in the net proceeds received from the sale of the pool according to the amount of Producer's products included in the pool.

Determination of Net Proceeds Payable to Producer

9. The Association shall determine the net resale proceeds received by it from the sale of products covered by this Agreement and payable to Producer by deducting from the gross amount received by it from the resale of the products, the following items:

(a) The specific expenses reasonably incurred by the Association in marketing the products, such as the cost of receiving, grading, cleaning, packing, shipping, and selling the products;

(b) A ratable portion of the general operating costs and expenses of the Association, including, among other things, depreciation on property, losses, salaries, wages, insurance, taxes, *[add if appropriate: interest not exceeding 8 percent per annum on its issued and outstanding preferred stock, reserves for retiring preferred stock, interest not exceeding 8 percent per annum on its issued and outstanding common stock,]* and interest on debt obligations incurred by the Association;

(c) To provide capital for its corporate purposes, the Association shall also deduct and temporarily retain from the resale proceeds due Producer any amounts, called "retains," that the Board of Directors of the Association may determine annually in accordance with Article _____, Section _____ of the bylaws of the Association. The retains shall be credited to the account of the Producer and deposited in the revolving fund of the Association as provided in the Association's bylaws.

Articles of Incorporation and Bylaws Part of Agreement

10. The articles of incorporation and bylaws of the Association constitute a part of this Agreement, and any amendment to the articles, made in the manner provided by law, or to the bylaws, made as provided therein, shall automatically modify and amend this Agreement.

Liquidated Damages

11. In the event that Producer sells, markets, or disposes of any product covered by this Agreement contrary to the provisions of this Agreement, or otherwise fails to deliver the products to the Association or to perform any other duty in accordance with the provisions of this Agreement, that act or omission will injure the Association in an amount that will be extremely difficult to ascertain and establish. Therefore, an amount shall be fixed at \$ _____ [*specify measure of liquidated damages, e.g., \$20 per ton or 25 percent of the market value*] of all products that are delivered, marketed or otherwise disposed of contrary to the provisions of this Agreement, which shall be paid to the Association on demand as liquidated damages.

Income Tax Consent

12. Producer consents and agrees that Producer shall take into account, at their stated dollar amounts, and in the manner specified in *Section 1385(a) of the Internal Revenue Code* in the taxable year in which received by the Producer:

(a) The amount of any distribution of patronage dividends as defined in *Section 1388(a) of the Internal Revenue Code* when made in qualified written notices of allocation as defined in *Section 1388(b) of the Internal Revenue Code* and received by Producer from the Association;

(b) The amount of any distributions as referred to in *Section 1382(c)(2)(A) of the Internal Revenue Code* of any income derived by the Association from business done with the United States, its agencies, or from sources other than patronage, when made in qualified written notices of allocation as defined in *Section 1388(b) of the Internal Revenue Code* and received by Producer from the Association;

(c) The amount of any per-unit retain allocations as defined in *Section 1388(f) of the Internal Revenue Code* when made in per-unit certificates as defined in *Section 1388(g) of the Internal Revenue Code* and received by Producer from the Association;

Persons to Whom Proceeds Are Payable

13. All deliveries of products under this Agreement are to be made in the name of Producer unless contrary notice is given to the Association in the manner provided for in this Agreement. All payments or advances under this Agreement are to be made to the person in whose name the deliveries are made or on order signed by that person and after receipt of written notice by the Association stating the order. However, if at the time of any delivery there stands on the record, or the Association has actual knowledge of, a crop mortgage covering the products delivered, the payments or advances shall, except as otherwise provided in this Agreement, be made only as directed by written request delivered to the Association and signed by both the mortgagor and mortgagee.

[Use if an agency agreement:]

Power to Pledge Products

14. Producer agrees that the Association shall have full power to borrow funds and pledge as security any and all products delivered to it pursuant to this Agreement, or any warehouse receipts or other documents relating to the products.

[Continue with the following for either purchase and sales or agency agreement:]

Force Majeure Clause

15. Should the performance of the obligations of either party under this Agreement be prevented or delayed by an act of God, war, civil insurrection, fire, flood, storm, strikes, lockouts, or by any law, regulation, or order of any federal, state, county, or municipal authority, or by any other cause beyond the control of the party to be excused, that party's performance under this Agreement, to the extent it is prevented or delayed, shall be excused.

Expenses of Enforcement

16. Should any litigation be commenced between the Producer and Association for the enforcement of any rights of either party against the other pursuant to the provisions of this Agreement, or by reason of any alleged breach of any of the provisions of this Agreement, the party prevailing in the litigation shall be entitled to receive from the unsuccessful party all costs incurred in connection with the litigation, including a reasonable allowance for attorneys' fees incurred by the prevailing party.

Notices

17. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this Agreement or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served and given when personally delivered to _____ *[designate recipient, e.g., the party or the designated agent of the party]* to whom they are directed, or, instead of such personal service, when deposited in the United States mail, first-class postage prepaid, addressed to the Producer at _____ *[address]*, or to the Association at _____ *[address]*. Either party may change its address for the purpose of this Paragraph by giving written notice of the change to the other party in the manner provided in this Paragraph.

Time of Essence

18. Time is of the essence of this Agreement and of each provision contained in it.

Assignment and Transfer

19. Producer shall not assign or transfer this Agreement to any person without the express prior written consent of the Association. In the event that all or any part of the land now or in the future owned or acquired by Producer and used for the production of products covered by this Agreement is sold, leased, or otherwise transferred, this Agreement shall

nevertheless remain in full force and effect and Producer shall remain obligated unless and until the written consent of the Association to a transfer or termination of this Agreement has been obtained.

Amendments to Agreement

20. This Agreement may be amended only by a writing signed by the party against whom or against whose successors and assigns enforcement of the change is sought.

Saving Clause

21. If any term or provision of this Agreement or any application hereof shall be held invalid or unenforceable, the remainder of this Agreement and any application of the terms and provisions thereof shall not be affected thereby but shall be valid and enforceable.

Governing Law

22. This Agreement shall be governed by and construed in accordance with the laws of _____
[specify jurisdiction, e.g., California].

Waiver

23. The waiver of any breach of any of the provisions of this Agreement by the Association shall not constitute a continuing waiver or a waiver of any subsequent breach by Producer either of the same or any other provision of this Agreement.

Arbitration

24. Any dispute that arises between the Association and Producer relating to the provisions of this Agreement shall be submitted to arbitration on application by either party. The arbitration panel shall consist of three persons, one each appointed by the Association and Producer, and the third shall be jointly appointed by the appointees of the Association and Producer. The arbitration shall be conducted in compliance with *Code of Civil Procedure Sections 1280 through 1294.2* relating to arbitration. The cost of the arbitration shall be divided evenly between the Association and Producer.

Executed on _____ [date] at _____, California.

PRODUCER

_____ [signature of producer]
[typed name]

ASSOCIATION

[name of Association]
_____ [signature], _____ [office]
[typed name and title]

[Add if contract is to be recorded:]

Acknowledgment

[Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

State of California)
 County of _____)

On _____ [date], before me, _____ [name and title of officer taking acknowledgment], personally appeared _____ [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is or are] subscribed to the within instrument and acknowledged to me that _____ [he or she or they] executed the same in _____ [his or her or their] authorized _____ [capacity or capacities], and that by _____ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Cooperatives General Overview Governments Agriculture & Food General
 Overview Governments Agriculture & Food Product Promotion



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 49 AGRICULTURAL CONTRACTS

PART IV. FORMS

C. Marketing Agreements

20-49 California Legal Forms--Transaction Guide § 49.341

§ 49.341 Marketing Agreement of Agricultural Cooperative Bargaining Association

[1] Comment

[a] Use of Form

This form is a marketing agreement for use between a member-producer and a cooperative bargaining association. Many provisions of this contract, including those governing liquidated damages and income tax consent, are similar to those provisions in a purchase and sale or agency contract between a member-producer and an agricultural cooperative association. For a discussion of those provisions, see § 49.340[1].

[b] Nature of Cooperative Bargaining Association

A cooperative bargaining association is a farmer association organized under the provisions of the Food and Agricultural Code pertaining to nonprofit agricultural cooperatives [*see Food & Agric. Code §§ 54001-54294*] to perform group bargaining between its producer-members and the first handler or processor, with respect to the sale of any agricultural commodity except milk, cotton, or cottonseed [*Food & Agric. Code § 54401*]. It is the public policy of the state to establish and support the right of any farmer to join voluntarily, belong to, and freely participate in cooperative bargaining associations. Interference with the rights of producers, including the obligation of processors to negotiate and bargain with cooperative bargaining associations, is an unfair trade practice [*Food & Agric. Code § 54402*].

[c] Unfair Trade Practices

[i] Acts of Processors and Associations

It is an unfair trade practice for any processor, handler, distributor, or their agents to interfere with, restrain, coerce, or boycott producers in the exercise of their rights to join and participate in cooperative bargaining associations [*Food & Agric. Code § 54431(a)*]. It is also unlawful for a processor, handler, distributor, or their agents to discriminate against any producer with respect to price or other terms of purchase of any raw agricultural commodity because of the

producer's participation in or contract with cooperative bargaining associations [*Food & Agric. Code § 54431(b)*]. Further, it is unlawful for a processor, handler, distributor, or their agents to pay or loan money, or give any other thing of value, to a producer as an inducement or reward for refusing to join, withdrawing from, or breaching an agreement with an association [*Food & Agric. Code § 54431(c)*].

It is unlawful and an unfair trade practice for any cooperative bargaining association, as well as any processor, handler, distributor, or their agents, maliciously or knowingly to give false reports about the finances, management, or activities of any cooperative bargaining association [*Food & Agric. Code § 54431(d)*]. It is unlawful and an unfair trade practice for processors, handlers, distributors, their agents, and certain types of cooperative bargaining associations to refuse to negotiate or bargain in a reasonable manner regarding contract terms including price, terms of sale, compensation for commodities produced under contract, and others [*see Food & Agric. Code §§ 54431(e), (f), 54432-54435*].

Refusal by producers or cooperative bargaining associations to negotiate or bargain in a reasonable manner includes refusal to comply with court-ordered conciliation procedures [*Food & Agric. Code § 54431(e)*; *see Food & Agric. Code § 54451 et seq.* (conciliation)].

[ii] Enforcement and Penalties

Producers or processors may file complaints with the Secretary of Agriculture against cooperative bargaining associations relating to any unfair trade practices [*Food & Agric. Code § 54404*]. The Secretary, on receipt of the complaint, will investigate, and may summon the person charged to appear at a hearing [*see Food & Agric. Code §§ 54404-54404.5*]. A willful violation of the provisions governing unfair trade practices is punishable by fines and subject to injunction [*see Food & Agric. Code §§ 54461-54463*].

[2] FORM

Marketing Agreement of Agricultural Cooperative Bargaining Association

MARKETING AGREEMENT

Identification of Parties

1. This Agreement is made on _____ [*date*], by and between _____ [*name(s)*] (Producer), _____ [*status, e.g., a California corporation or a partnership or a sole proprietor*], _____ [*address or principal place of business in California*], California, and _____ [*name of association*] (Association), a nonprofit cooperative bargaining association organized under the laws of the State of California, _____ [*address or principal place of business in California*], California.

Term of Agreement

2. The initial term of this Agreement shall commence on _____ [*date*] and terminate on _____ [*date*]. On termination of the initial term, the Agreement shall be automatically renewed for successive one-year terms unless either party serves written notice as provided in this Agreement indicating a contrary intention. In no event, however, shall the Agreement period extend beyond 15 years.

Appointment of Association as Exclusive Agent

3. Producer appoints and designates the Association exclusive sales agent for, and agrees to sell and deliver all _____ [*specify type of products*] (products), produced by or for Producer or acquired by or for Producer as landlord, tenant, lessor, or lessee in the State of California during the existence of this Agreement, only to the persons, firms, or corporations, and only on the terms and conditions fixed, established, and approved by the Association.

Obligations of Association

4. Each year during the term of this Agreement, the Association shall, for and on behalf of Producer and all other growers who have executed similar Agreements with the Association (the Producers), solicit and negotiate with the largest number of processors practicable, the terms, conditions, and prices for the sale of the products produced during the year as the Association in its absolute discretion deems to be to the best advantage of all Producers. On completion of negotiations, and in no event later than the _____ day of _____ [*specify month*] of each year, the Association shall deliver to Producer, in the manner provided for in this Agreement, a form of "approved contract" for the sale of Producer's products to any processor with whom the Association has conducted negotiations, which approved contract shall be in the form and contain the terms, conditions, and prices negotiated with the processors by the Association.

Producer to Sell Products Only on Contracts Approved by Association

5. During the term of this Agreement Producer shall not sell any products to any buyer except pursuant to purchase and sale contracts approved by the Association. After issuance of its form of approved contract each year, the Association shall approve, on written request of Producer, any and all purchase and sale contracts entered by Producer for the sale of products for the year that are in the form of, and contain the same terms, conditions, and prices as are contained in, the approved contract form. Notice of approval by the Association shall be given in the manner provided for in this Agreement.

Payment for Products Sold

6. During the term of this Agreement, any buyer of Producer's products shall, unless otherwise directed by the Association, pay directly to Producer the full purchase price of all products sold by Producer to the buyer, less the amount, not to exceed _____ percent, of the gross purchase price as shall be determined, on or before _____ [*specify month and day*] of the year in which the sale occurs, by the Board of Directors of the Association. Producer authorizes and directs the buyer to retain the deductible amount from the gross purchase price of the products and pay that sum directly to the Association. The amounts deducted and paid to the Association shall be used by the Association to pay the operating costs and expenses of the Association, including, among other things, depreciation on property, losses, salaries, wages, insurance, taxes, [*add if applicable: interest not exceeding 8 percent per annum on its issued and outstanding preferred stock, reserves for retiring preferred stock, interest not exceeding 8 percent per annum on its issued and outstanding common stock,*] and interest on debt obligations incurred by the Association. If, at the end of any fiscal year of the Association, the Board of Directors finds that the aggregate amount deducted during the fiscal year from the gross sales proceeds of products sold during the year by all Producers exceeds the amount required in that year to pay operating costs and expenses, the excess amount of the deductions shall, in the absolute discretion of the Board of Directors, either be ratably credited to the account of each Producer in the Revolving Fund of the Association according to the amount of the products sold by that Producer during the year, or distributed among all Producers according to the amount of products sold by each of them during the year. The determination by the Board of Directors of the amount required to pay the operating costs and expenses in any year, the amount of deductions in excess of the required amount, and the ratable portion of the excess to be credited or paid to Producer

shall be conclusive and binding on Producer.

Information to Be Furnished by Producer

7. Upon receiving a written request from the Association in the manner provided for in this Agreement, Producer agrees to notify the Association promptly in writing of the location of all crops of the products covered by this Agreement or controlled by Producer, the number of acres planted with those products, the varieties of products planted, and the amount of products Producer expects to produce in any specified year.

Articles of Incorporation and Bylaws Part of Agreement

8. The articles of incorporation and bylaws of the Association constitute a part of this Agreement, and any amendment to the articles, made in the manner provided by law, or to the bylaws, made as provided therein, shall automatically modify and amend this Agreement.

Liquidated Damages

9. In the event that Producer sells, markets, or disposes of any product covered by this Agreement contrary to the provisions of this Agreement, or otherwise fails to deliver the products to the Association or to perform any other duty in accordance with the provisions of this Agreement, that act or omission will injure the Association in an amount that will be extremely difficult to ascertain and establish. Therefore, an amount shall be fixed at \$ _____ [*specify measure of liquidated damages, e.g., \$20 per ton or 25 percent of the market value*] of all products that are delivered, marketed, or otherwise disposed of contrary to the provisions of this Agreement, which shall be paid to the Association on demand as liquidated damages.

Income Tax Consent

10. Producer consents and agrees that Producer shall take into account, at their stated dollar amounts, and in the manner specified in *Section 1385(a) of the Internal Revenue Code*, in the taxable year in which received by it:

(a) The amount of any distribution of patronage dividends as defined in *Section 1388(a) of the Internal Revenue Code* when made in qualified written notices of allocation as defined in *Section 1388(b) of the Internal Revenue Code* and received by Producer from the Association;

(b) The amount of any distributions as referred to in *Section 1382(c)(2)(A) of the Internal Revenue Code* of any income derived by the Association from business done with the United States, its agencies, or from sources other than patronage, when made in qualified written notices of allocation as defined in *Section 1388(b) of the Internal Revenue Code* and received by Producer from the Association;

(c) The amount of any per-unit retain allocations as defined in *Section 1388(f) of the Internal Revenue Code* when made in per-unit certificates as defined in *Section 1388(g) of the Internal Revenue Code* and received by Producer from the Association;

Force Majeure Clause

11. Should the performance of the obligations of either party under this Agreement be prevented or delayed by an act of God, war, civil insurrection, fire, flood, storm, strikes, lockouts, or by any law, regulation, or order of any federal, state, county, or municipal authority, or by any other cause beyond the control of the party to be excused, that party's performance under this Agreement, to the extent it is prevented or delayed, shall be excused.

Expenses of Enforcement

12. Should any litigation be commenced between the Producer and the Association for the enforcement of any rights of either party against the other pursuant to the provisions of this Agreement, or by reason of any alleged breach of any of the provisions of this Agreement, the party prevailing in the litigation shall be entitled to receive from the unsuccessful party all costs incurred in connection with the litigation, including a reasonable allowance for attorneys' fees incurred by the prevailing party.

Notices

13. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this Agreement or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served and given when personally delivered to _____ [*designate recipient, e.g., the party or the designated agent of the party*] to whom they are directed, or instead of such personal service, when deposited in the United States mail, first-class postage prepaid, addressed to the Producer at _____ [*address*], or to the Association at _____ [*address*]. Either party may change its address for the purpose of this Paragraph by giving written notice of the change to the other party in the manner provided in this Paragraph.

Time of Essence

14. Time is of the essence of this Agreement and of each provision contained in it.

Assignment and Transfer

15. Producer shall not assign or transfer this Agreement to any person without the express prior written consent of the Association. In the event that all or any part of the land now or hereafter owned or acquired by Producer and used for the production of products covered by this Agreement is sold, leased, or otherwise transferred, this Agreement shall nevertheless remain in full force and effect and Producer shall remain obligated unless and until the written consent of the Association to a transfer or termination of this Agreement has been obtained.

Amendments to Agreement

16. This Agreement may be amended only by a writing signed by the party against whom or against whose successors and assigns enforcement of the change is sought.

Saving Clause

17. If any term or provision of this Agreement or any application hereof shall be held invalid or unenforceable, the

remainder of this Agreement and any application of the terms and provisions thereof shall not be affected thereby but shall be valid and enforceable.

Governing Law

18. This Agreement shall be governed by and construed in accordance with the laws of _____
[specify jurisdiction, e.g., California].

Waiver

19. The waiver of any breach of any of the provisions of this Agreement by the Association shall not constitute a continuing waiver or a waiver of any subsequent breach by Producer either of the same or any other provision of this Agreement.

Arbitration

20. Any dispute that arises between the Association and Producer relating to the provisions of this Agreement shall be submitted to arbitration on application by either party. The arbitration panel shall consist of three persons, one each appointed by the Association and Producer, and the third jointly appointed by the appointees of the Association and Producer. The arbitration shall be conducted in compliance with *Code of Civil Procedure Sections 1280 through 1294.2* relating to arbitration. The cost of the arbitration shall be divided evenly between the Association and Producer.

Executed on _____[date] at _____, California.

PRODUCER

_____ [signature of producer]
[typed name]

ASSOCIATION

[name of Association]
_____ [signature], _____ [office]
[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Cooperatives General Overview Governments Agriculture & Food General
Overview Governments Agriculture & Food Product Promotion



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20-49 California Legal Forms--Transaction Guide §§ 49.342-49.359

[Reserved]

§§ 49.342[Reserved]



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D. Livestock-Related Agreements

20-49 California Legal Forms--Transaction Guide § 49.360

§ 49.360 Livestock Feeding Contract

[1] Comment

[a] Use of Form

This form is an agreement for use between a cattle owner and a commercial registered feedlot operator for the feeding and fattening of cattle for marketing. This particular form includes alternate provisions for the method of determining the amount the cattle owner will pay the operator of the feedlot. One payment method provides that the feedlot operator will receive a fixed sum on a per head, per day basis, known as a "custom feeding" contract. The alternate provision establishes a payment method based on the amount of weight gain in the cattle fed by the feedlot operator [*see* § 49.360[2], P 14].

[b] Alternate Payment Provisions

[i] Custom Feeding Basis

The most common type of payment provision employed in livestock feeding agreements is known as the custom feeding method. Using the custom feeding method, the feedlot operator receives a specified sum per day for each head of cattle in the feedlot. The operator also receives from the cattle owner reimbursement for the actual cost to the feedlot operator of all feed and supplements given to the cattle plus a specified handling charge for each ton of feed fed to the cattle.

The contractual amount per day for each head of an owner's cattle in the feedlot that the feedlot operator is to receive depends primarily on the number and size of the cattle, the type and amount of equipment required to care for them properly, and the labor required to care for the cattle. The handling charge per ton of feed usually depends on the type of feed the cattle are being fed. Because the owner is to reimburse the feedlot operator for the actual cost of all feed and supplements fed the cattle, the owner may and often does request that a specified ration be fed to the cattle. When the feedlot operator personally grows or produces the feed that is to be fed to the cattle, the contract usually specifies that he or she will be reimbursed for the market value of the feed.

[ii] Rate of Gain Agreements

The alternate provision for a method of payment contained in this form is based on the rate of weight gain in the livestock fed by the feedlot operator. Although not as common as the custom feeding method, rate of gain agreements are still used in the industry.

Under the typical rate of gain payment clause, the feedlot operator is paid a specified sum for each designated amount of weight gain in the cattle. The feedlot operator is not, as is the case under a custom feeding provision, reimbursed separately for the cost of feed, veterinary care, or other services provided to the owner's cattle. Thus, the specified sum to be paid for each measure of weight gain will differ among contracts depending on the cost of feed, labor, equipment, and services, and the market grade to which the cattle are being fed.

[c] Regulation of Commercial Feedlots

All feedlot operators having more than 500 head of cattle at one time during the calendar year must be registered with the Department of Food and Agriculture [*Food & Agric. Code* § 21081; see *Food & Agric. Code* §§ 21082-21084 (registration procedure)]. A "feedlot" is a beef cattle feedlot or feed yard having more than 500 head of cattle at one time during the calendar year in which the cattle are being fed for slaughter [*Food & Agric. Code* § 20013]. "Beef cattle" are bovine animals of any breed being grown primarily for meat production [*Food & Agric. Code* § 20014].

Operators of registered feedlots are required to maintain records for each lot of incoming and outgoing cattle. Records for incoming cattle must include (1) the name and address of the owner or shipper; (2) the date and number of cattle received; (3) the name of the trucking firm and the location from which the cattle were shipped; and (4) a description of the cattle that includes their brand and the lot numbers assigned them [3 *Cal. Code Reg.* § 856]. Records for cattle shipped from a registered feedlot must include (1) name and address of the owner; (2) date of shipping and slaughter plant or other destination; (3) description of cattle, including brand and lot numbers; and (4) the number of cattle shipped and the name of the trucking firm hauling the cattle [3 *Cal. Code Reg.* § 857].

Cattle entering a registered feedlot must be kept separate and not commingled with other cattle until inspected by a state inspector [*Food & Agric. Code* § 21051(d); 3 *Cal. Code Reg.* § 859]. Inspection is not necessary before slaughter at a licensed slaughterhouse if the cattle are being shipped directly from a registered California feedlot, other than by the director as necessary to monitor compliance with inspection requirements [*Food & Agric. Code* §§ 21057(a), 21206(a)].

[d] Livestock Service Lien

Under California law, a livestock servicer is granted a general lien on the livestock in its possession to secure the performance of all obligations of the owner of the livestock to the livestock servicer for both the provision of livestock services to the livestock in possession of the livestock servicer, and the provision of livestock services to other livestock for which livestock services were provided in connection with or as part of the same livestock service transaction, if the services were provided within the 12 months before the date on which the lien arose. The lien has priority over all other liens on and security interests in the livestock, and arises as the charges become due [*Civ. Code* § 3080.01]. "Livestock services" means any and all grazing, feeding, boarding, and general care, including animal health services, obtained or provided by the livestock servicer, and transportation or other services rendered by a person to livestock for the owner or his or her agent [*Civ. Code* § 3080(c)].

In addition to other rights and remedies provided by law, a lienholder may (1) retain possession of the livestock and charge the owner the reasonable value of providing livestock services until the owner's obligations secured by the lien have been satisfied; (2) after notice and hearing [see *Civ. Code* §§ 3080.03-3080.19], sell all or any portion of the livestock; or (3) commence legal action on its claim against the owner for services to the livestock and reduce the claim to judgment [*Civ. Code* § 3080.02(c)]. For a discussion of the procedural elements of enforcing the livestock servicers

lien, see California Forms of Pleading and Practice, Ch. 24, *Animals: Liens*.

[e] Dairy Cattle Supply Lien

Any person providing feed or materials to aid the raising or maintaining of dairy cattle has a lien on the proceeds of the milk or its products, for the reasonable or agreed charges for the feed or materials and the cost of enforcing the lien. The amount of charges secured by the lien may not exceed an amount equal to the reasonable or agreed charges for material or feed provided within a 45-day period, and only two providers may have an enforceable lien at anytime according to the priority established by statute [*Food & Agric. Code* § 57402; see *Food & Agric. Code* §§ 57406 (priority), 57401(e) ("reasonable or agreed charges" defined)]. The lien also extends to the proceeds from the sale of the milk or milk products [*Food & Agric. Code* § 57403(a)].

The lien must be perfected by filing, on a standard form of an original financing statement, a notice of claim with the Secretary of State that includes the following information [*Food & Agric. Code* § 57405(a), (b), (d)]: (1) the name and address of the lien claimant; (2) the name and address of the lien debtor; (3) the location of the dairy to which the feed and materials were provided; and (4) that the lien claimant has a dairy cattle supply lien pursuant to *Food & Agric. Code* § 57402.

On the original financing statement, the lien claimant may be identified as either the lien claimant or as the secured party [*Food & Agric. Code* § 57405(d)(1)]. The notice of lien must be signed by either the lien claimant or its authorized agent, and need not be signed by the lien debtor [*Food & Agric. Code* § 57405(c), (d)(2)]. The lien claimant must provide the lien debtor with written notice of the claim within 10 days from the date of filing with the office of the Secretary of State [*Food & Agric. Code* § 57405(f)]. For a discussion of requirements for filing financing statements, see Ch. 42, *Secured Transactions*.

For a discussion of the procedural elements of enforcing the dairy cattle supply lien, see California Forms of Pleading and Practice, Ch. 24 *Animals: Liens*.

[f] Use for Income Tax Purposes

Commercial feedlot operations may provide certain taxpayers with a tax benefit by use of prepaid feed plans. For further discussion of the "prepaid feed deduction," see § 49.361[1][b][i] et seq.

[2] FORM

Livestock Feeding Contract

LIVESTOCK FEEDING CONTRACT

Identification of Parties

1. This Agreement is made on _____ [date], by and between _____ [name(s)] (Owner), _____ [status, e.g., a California corporation or a partnership or a sole proprietor], of _____ [address or principal place of business in California], California, and _____ [name(s)] (Feeder), _____ [status, e.g., a California corporation, or a partnership, or a sole proprietor], of _____ [address or principal place of business in California], California.

Recitals

2.(a) Owner states and represents that it is engaged in the raising of cattle for sale as beef and that Owner holds title to all cattle delivered by it to the Feeder;

(b) Feeder states and represents that it is a commercial registered feedlot, in compliance with the registration requirements of the State of California, for the feeding and fattening of cattle for sale as beef.

Term of Agreement

3. This Agreement shall commence on _____ [date] and shall remain in force and effect until terminated by either party by giving _____ days notice as provided for in this Agreement.

Delivery of Cattle to Feedlot

4. Owner shall deliver all cattle to be fed in the feedlot during normal workday hours, and Feeder shall accept all cattle delivered to feedlot in compliance with the terms of this Agreement. Owner shall provide Feeder on or before the _____ day of each month that this Agreement is in existence with a written schedule of the approximate dates and times of Owner's anticipated delivery of cattle to the feedlot. Prior to delivery of cattle, Owner shall notify Feeder at least _____ [days or hours] before of the time of the delivery and the number of cattle to be delivered.

Number of Cattle

5. The total number of Owner's cattle held by Feeder for feeding shall not exceed _____ [specify number of head] at any one time.

Condition of Cattle

6. All cattle delivered to feedlot by Owner pursuant to this Agreement shall be in good health and at least _____ months of age.

Requirement of Brand

7. All cattle placed in the feedlot by Owner pursuant to this Agreement shall, at the time of their delivery to the feedlot by Owner, have been branded in the authorized locations on each animal with a brand recorded in the name of the Owner with the Bureau of Livestock Identification of the State of California. The brand, as recorded in the name of the Owner with the Bureau of Livestock Identification, consists of _____ [describe brand].

Commingle of Cattle

8. Upon the satisfactory completion of any hide and brand inspections as required by the State of California, Feeder shall be free to commingle Owner's cattle placed in the feedlot with other healthy, inspected cattle.

Feeding and Care of Cattle

9. Feeder shall feed, maintain, and keep all cattle delivered by Owner with the amounts of feed and supplements necessary for rendering the cattle marketable as _____ [*specify market grade of cattle*] and in accordance with the best course of husbandry practiced in the locale where the feedlot is located. Feeder shall furnish cattle with the necessary labor, bedding straw, and other materials and supplies as may be required for their proper care and maintenance in accordance with the best course of husbandry practiced in the locale where the feedlot is located.

Veterinary Care

10. Feeder shall regularly inspect cattle placed in the feedlot by Owner for symptoms of sickness or disease and shall retain the services of a veterinarian for the cattle as may be required and in accordance with the best course of husbandry practiced in the locale where the feedlot is located.

Recordkeeping Required of Feeder

11. In addition to any records required to be kept by law, Feeder shall keep and maintain at the feedlot complete and accurate records for each head of Owner's cattle, containing, among other things, the following:

- (a) Assigned identification number;
- (b) Date received at the feedlot;
- (c) Date redelivered to or on behalf of the Owner;
- (d) Location from which delivered and the name of the trucking firm making the delivery, if any;
- (e) Location to which redelivered and the name of the trucking firm making the redelivery, if any;
- (f) Weight at the time of delivery;
- (g) Weight at the time of redelivery;
- (h) Type, amount, and cost of the feed and supplements provided during its stay in the feedlot;
- (i) Type and cost of veterinary or other care, and the name of the person providing those services.

Right of Inspection of Premises and Records

12. Owner, or its agent, at Owner's sole cost and expense, shall have the right, during reasonable hours, to inspect Owner's cattle and the facility within which the cattle are contained, and to examine and copy any records required to be kept by Feeder pursuant to this Agreement or law.

Monthly Statements

13. During the existence of this Agreement, Feeder shall deliver to Owner on or before the ____ day of each month a written statement conforming to the notice requirements in this Agreement containing the following:

- (a) Number of cattle delivered to the feedlot by Owner during the preceding month, and dates of delivery;
- (b) Number of cattle redelivered to, or on behalf of, Owner during the preceding month, and dates of redelivery;
- (c) Type, amount, and cost of the feed and supplements provided while at the feedlot;
- (d) Type and cost of veterinary or other care, and the name of the person providing those services.

Payments by Owner

[Use if adopting the "custom feeding" method:]

14. Owner shall pay to Feeder, within _____ days after the receipt of each monthly statement, the following amounts:

- (a) The actual cost to feeder of all feed provided to the Owner's cattle during the preceding month plus a handling fee of \$_____ per _____ *[specify measure, e.g., pound or ton]*. For any amounts of feed produced by Feeder and fed to Owner's cattle, Owner shall pay Feeder the actual cost of the feed based on _____ *[describe method of price calculation, e.g., the prevailing market price in the locale of the feedlot during the preceding month or the average price quoted by the Federal-State Market News Report Service during the preceding month]*;
- (b) The actual cost of other services and supplies, including veterinary services provided to Owner's cattle during the preceding month;
- (c) The sum of \$_____ per day or fraction thereof for each head of Owner's cattle placed and kept in the feedlot during the preceding month.

[Or, if using the rate of gain method:]

14. Owner, in payment for the goods and services provided by Feeder, shall pay \$_____ per _____ pounds of weight gain added by the feeding done by Feeder for each head of cattle placed on the feedlot by Owner. Weight gain shall be based on the weight of each head of cattle at the time of delivery to the feedlot and the weight of each animal on redelivery as certified by a public weighmaster.

Feeding Period

15. All cattle placed in the feedlot by Owner shall remain for a period not less than _____ days and not more than _____ days. Should Owner allow any head of cattle placed in the feedlot to remain for longer than the maximum term, Feeder shall not be bound by the provisions of this Agreement fixing the amount owing Feeder for the days in excess of the maximum term, and shall be free to determine reasonable compensation.

Redelivery of Cattle

16. Before obtaining redelivery of any cattle placed in the feedlot by Owner, owner shall provide Feeder with _____ *[hours or days]* notice of its intent to remove the cattle at a particular time on a specified day,

within normal business hours. On receipt of the notice, Feeder shall comply with Owner's direction and assemble the cattle specified for redelivery by the Owner at the time and day indicated by the notice.

Risk of Loss or Injury

17. All cattle placed in the feedlot by Owner are and shall remain the property of the Owner and Owner shall bear the risk of loss or injury to the cattle unless the loss or injury is caused by a breach of this Agreement by feeder, or by the negligence or other fault by Feeder and its agents and employees.

Loss or Injury Caused by Cattle

18. _____ [*Specify either: Owner or Feeder*] shall be responsible and liable for all losses, injuries, or damages caused by cattle placed on the feedlot by Owner.

Force Majeure Clause

19. Should the performance of the obligations of either party under this Agreement be prevented or delayed by an act of God, war, civil insurrection, fire, flood, storm, strikes, lockouts, or by any law, regulation, or order of any federal, state, county, or municipal authority, or by any other cause beyond the control of the party to be excused, that party's performance under this Agreement, to the extent it is prevented or delayed, shall be excused.

Expenses of Enforcement

20. Should any litigation be commenced between the parties to this Agreement for the enforcement of any rights of either party against the other pursuant to the provisions of this Agreement, or by reason of any alleged breach of any of the provisions of this agreement, the party prevailing in the litigation shall be entitled to receive from the unsuccessful party all costs incurred in connection with the litigation, including a reasonable allowance for attorneys' fees incurred by the prevailing party.

Arbitration

21. Any dispute that arises between Owner and Feeder relating to the provisions of this Agreement shall be submitted to arbitration on application by either party. The arbitration panel shall consist of three persons, one each appointed by Owner and Feeder, and the third jointly appointed by the appointees of Owner and Feeder. The arbitration shall be conducted in compliance with *Code of Civil Procedure Sections 1280 through 1294.2* relating to arbitration. The cost of the arbitration shall be divided evenly between Owner and Feeder.

Notices

22. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this Agreement or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served and given when personally delivered to _____ [*designate recipient, e.g., the party or the designated agent of the party*] to whom they are directed, or instead of such personal service, when deposited in the United States mail, first-class postage prepaid, addressed to the Owner at _____[

address], or to the Feeder at _____[address]. Either party may change its address for the purpose of this Paragraph by giving written notice of the change to the other party in the manner provided in this Paragraph.

Effect on Heirs and Successors

23. This Agreement and each of its provisions shall be binding on and shall inure to the benefit of the respective heirs, devisees, legatees, executors, administrators, trustees, successors, and assigns of the parties to this Agreement. Nothing contained in this Paragraph shall be construed as a consent by Owner to any assignment of this Agreement or any interest therein by Feeder except as provided in Paragraph 27 of this Agreement.

Indemnification of Owner

24. During the existence of this Agreement, Feeder shall indemnify and hold Owner harmless from all damages, injuries, or claims arising in or about the Feeder's premises or arising from Feeder's operations on the premises.

Insolvency of Owner

25. The insolvency of Owner, as evidenced by the appointment of a receiver to take possession of all or substantially all of the assets of Owner, the making of a general assignment by Owner for the benefit of creditors, or an action taken or suffered by Owner under any bankruptcy or insolvency act, shall terminate this Agreement and entitle Feeder, in addition to any other remedy at law or equity, to claim a valid lien against Owner's cattle on the feedlot for the unpaid balance of amounts owed to Feeder by Owner for services provided under this Agreement.

Time of Essence

26. Time is of the essence of this Agreement and of each provision contained in it.

Assignment and Transfer

27. Feeder shall not assign or transfer this Agreement to any person without the express prior written consent of the Owner.

Amendments to Agreement

28. This Agreement may only be amended by a writing signed by the party against whom or against whose successors and assigns enforcement of the change is sought.

Saving Clause

29. If any term or provision of this Agreement or any application thereof shall be held invalid or unenforceable, the remainder of this Agreement and any application of the terms and provisions shall not be affected thereby, but shall be valid and enforceable.

Waiver

30. The waiver of any breach of any of the provisions of this Agreement by Owner or Feeder shall not constitute a continuing waiver or a waiver of any subsequent breach by either party of the same or any other provision of this Agreement.

Executed on _____[*date*], at _____, California.

OWNER

_____ [*signature of owner*]

[*typed name*]

FEEDER

_____ [*signature of feeder*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawFormationGeneral OverviewContracts LawSecured TransactionsPerfection &
PriorityPriorityLiensGovernmentsAgriculture & FoodGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 49 AGRICULTURAL CONTRACTS

PART IV. FORMS

D. Livestock-Related Agreements

20-49 California Legal Forms--Transaction Guide § 49.361

§ 49.361 Agreement for Prepaid Purchase of Livestock Feed

[1] Comment

[a] Use of Form

This form is an agreement for the prepaid purchase of livestock feed and supplies. It is designed to give a farmer purchasing feed and supplies an income tax benefit. An eligible farmer may wish to prepay certain farm expenses and claim the available deduction if the farmer has received unexpected income that places it in a higher tax bracket for the year in which the deduction is taken than is likely to be the case in the following year [see *Estate of Cohen v. Commissioner* (1970) 29 T.C.M. 1221, T.C. Memo. 1970-272] .

When a farmer takes the deduction, money that would otherwise have been paid in taxes can be used to purchase feed and other supplies in advance. This may alleviate the farmer's need for borrowing of funds to pay for the feed at a later time, thereby saving the farmer any interest that would have to be paid on the borrowed funds [see Pinney, *Agricultural Tax Problems, Including the "Prepaid Feed" Controversy*, 25 So. Cal. Tax. Inst. 477, 513 (1973)]. Other nontax reasons may influence the farmer's decision to prepay feed expenses and claim the deduction [see, e.g., *Cravens v. C.I.R.* (10th Cir. 1959) 272 F.2d 895, 897 (drought conditions)].

For a discussion of dairy cattle supply liens, see § 49.360[1].

[b] Income Tax Benefits

[i] In General

Generally, farmers have the option, for both federal and state tax purposes, of reporting their income under either the cash or accrual methods of accounting [Treas. Reg. §§ 1.446-1(c)(1)(iv), 1.471-6; Rev. & Tax. Code §§ 17024.5(d), 24651; see § 49.361[1][b][ii]]. A taxpayer who reports income under the cash method of accounting generally may deduct all ordinary and necessary expenses of carrying on a trade or business [see I.R.C. § 162] in the year during which those expenses are paid, regardless of when the items purchased are actually used or consumed [I.R.C. § 162; Treas.

Reg. § 1.461-1(a)(1)). Thus, a farmer using the cash method may deduct the cost of purchasing cattle feed in the year the cost is paid, regardless of when the livestock actually consume the feed.

[ii] Limitations on Tax Benefits

Several rules operate to reduce the availability of the tax benefits for prepaid feed deductions. First, corporations other than "S" corporations, certain "family corporations," and corporations with gross annual receipts of \$1,000,000 or less must compute taxable income from farming on an accrual method of accounting, and capitalize expenses pursuant to *I.R.C. § 263A* [*I.R.C. § 447*; *Rev. & Tax. Code § 24652*]. Second, farming syndicates may only deduct expenses for feed, seed, fertilizer, and other similar farm supplies in the taxable year during which they are actually used or consumed or, if later, in the year during which the expenses would otherwise be deductible [*I.R.C. § 464(a), (c)*; see *Rev. & Tax. Code § 17551*].

The farming syndicate limitation also applies to nonsyndicate taxpayer-purchasers of excess prepaid farm supplies who do not use an accrual method of accounting and who are not qualified farm-related taxpayers [*I.R.C. § 464(f)*]. "Excess prepaid farm supplies" are amounts paid for feed, seed, fertilizer, or other farm supplies that would be deductible in a subsequent year, to the extent that the amount exceeds 50 percent of the deductible farming expenses for the taxable year [*I.R.C. § 464(f)(4)*]. A "qualified farm-related taxpayer" means any taxpayer (1) whose principal residence is on a farm, or whose principal occupation is farming (or who is a member of such a taxpayer's family), and (2) whose aggregate prepaid farm supplies for the three taxable years preceding the taxable year are less than 50 percent of the aggregate deductible farming expenses for those years, or whose excess prepaid farm supplies for the taxable year result from any change in business operations directly attributable to extraordinary circumstances [*I.R.C. § 464(f)(3)*].

[iii] Contract Requirements Assuring Validity of Deduction

The Internal Revenue Service has promulgated a three-prong test for establishing the validity of a prepaid feed deduction for cash method taxpayers engaged in the business of raising or feeding livestock [see *Rev. Rul. 79-229, 1979-2 C.B. 210*]. The prepaid expense must be for the purchase of feed rather than a deposit, the prepayment must be made for a business purpose and not tax avoidance, and the deduction must not result in a material distortion of the taxpayer's income [*Rev. Rul. 79-229, 1979-2 C.B. 210*].

Whether an expense under a prepaid feed contract is a deposit or payment depends largely on the language of the sales contract used. When it can be shown that the expenditure is not refundable and is made pursuant to an enforceable sales contract, it will not be considered a deposit [*Rev. Rul. 79-229, 1979-2 C.B. 210*]. This form includes a nonrefundability clause [see § 49.361[2], P 7]. Provisions in the contract allowing variation in feed mixes to accommodate the current dietary needs of the cattle and allowing the contract price to vary according to the current market price of the feed are not indicative of a deposit [*Rev. Rul. 79-229, 1979-2 C.B. 210*].

A taxpayer has been held to have shown a business purpose rather than an intent to avoid taxation when the contract specifies a guaranteed maximum price for feed [see *Mann v. Commissioner* (8th Cir. [T.C.] 1973) 483 F.2d 673, 680] . In another case showing a business benefit to the taxpayer and not mere tax avoidance, the taxpayer was assured priority in the delivery of feed in the event of a shortage [see *Cravens v. Commissioner* (10th Cir. [T.C.] 1959) 272 F.2d 895, 899] . This agreement contains provisions establishing both of these business purposes [see § 49.361[2], PP 5, 9].

Transactions involving closely held investor-oriented groups formed to take advantage of syndicated tax shelter schemes will receive greater scrutiny by the Internal Revenue Service regarding the motives of the investors and their business purposes [see *Rev. Rul. 79-229, 1979-2 C.B. 210*].

[2] FORM

Agreement for Prepaid Purchase of Livestock Feed

CONTRACT FOR SALE OF LIVESTOCK FEED

Identification of Parties

1. This Agreement is made on _____ [date], by and between _____ [name(s)] (Seller), _____ [status, e.g., a California corporation or a partnership or a sole proprietor], of _____ [address or principal place of business in California], California, and _____ [name(s)] (Buyer), _____ [status, e.g., a California corporation, or a partnership, or a sole proprietor], of _____ [address or principal place of business in California], California.

Recitals

2. Seller agrees to sell, and Buyer agrees to purchase, in accordance with the terms and conditions set forth in this Agreement, the feed and supplies specified in the attached schedule, entitled "Schedule of Goods Purchased."

Term of Agreement

3. The term of this Agreement shall be for a period of _____ year(s) and shall commence on _____ [date]. Either party may terminate by giving _____ days notice, as provided in this Agreement, prior to the expiration of each one-year period this Agreement remains in existence.

Delivery of Feed

4. Seller shall, at its own cost and expense, during the existence of this Agreement deliver the feed and supplies specified in this Agreement to Buyer at the following location: _____ [address], _____, California, in the amounts and at the times that Buyer may request. Buyer shall notify Seller of its request for delivery at least _____ [hours or days] before the time of the requested delivery.

Purchase Price

5. The purchase price of the feed shall be the current market price for the feed as quoted by the Federal-State Market News Report Service on the date of delivery to Buyer. However, at no time during the existence of this Agreement shall the total purchase price of the feed exceed \$ _____ per _____ [pound or ton] (maximum purchase price).

Payment of Purchase Price

6. Buyer shall pay Seller \$ _____ for the purchase of the feed under this Agreement upon execution of this Agreement.

No Refund

7. No portion of the purchase price paid by Buyer to Seller upon execution of this Agreement shall be refunded to Buyer. Should the total purchase of feed as determined under Paragraph 4 of this Agreement be, after deduction of any discounts allowed Buyer pursuant to Paragraph 10, less than the purchase price paid by Buyer, the balance of the purchase price shall be credited toward further and future purchases of feed and other supplies by Buyer from Seller.

Substitution

8. Should the condition of Buyer's livestock so require, Buyer may request and receive the substitution of any item specified on the attached schedule for other items of equivalent value and in stock on Seller's premises.

Preferential Treatment

9. In the event of a shortage in supply, Buyer shall, at all times during the existence of this Agreement, receive the highest priority over other customers of Seller for delivery of feed ordered pursuant to this Agreement except for those customers having priority by law or by similar agreements existing prior to the execution of this Agreement.

Discounts

10. If Buyer, at any time during the existence of this Agreement, consents to take delivery of the feed or any portion of the feed purchased under this Agreement at Seller's premises located in _____, California, Buyer shall be allowed a discount of \$_____ per _____ [ton or pound] as compensation for Buyer's provision of transportation of the feed.

Limitation on Warranties

11. The goods sold to Buyer under this Agreement are sold subject only to the implied warranty of title described in *Section 2312(1) of the California Commercial Code* and the implied warranty of merchantability described in *Section 2314 of the California Commercial Code* as existing on the date of execution of this Agreement. Seller makes no express warranties concerning the goods sold under this Agreement and any affirmations or representations made by Seller or Seller's agents concerning the goods were made for illustrative purposes only and do not constitute warranties of the goods. SELLER MAKES NO WARRANTY THAT THE GOODS SOLD UNDER THIS AGREEMENT ARE FIT FOR ANY PARTICULAR PURPOSE OR PURPOSES.

Force Majeure Clause

12. Should the performance of the obligations of either party under this Agreement be prevented or delayed by an act of God, war, civil insurrection, fire, flood, storm, strikes, lockouts, or by any law, regulation, or order of any federal, state, county, or municipal authority, or by any other cause beyond the control of the party to be excused, that party's performance under this contract, to the extent it is prevented or delayed, shall be excused.

Expenses of Enforcement

13. Should any litigation be commenced between the parties to this Agreement for the enforcement of any rights of either party against the other pursuant to the provisions of this Agreement, or by reason of any alleged breach of any of

the provisions of this agreement, the party prevailing in the litigation shall be entitled to receive from the unsuccessful party all costs incurred in connection with the litigation, including a reasonable allowance for attorneys' fees incurred by the prevailing party.

Notices

14. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this Agreement or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served and given when personally delivered to _____ [*designate recipient, e.g., the party or the designated agent of the party*] to whom they are directed, or instead of such personal service, when deposited in the United States mail, first-class postage prepaid, addressed to the Seller at _____ [*address*], or to the Buyer at _____ [*address*]. Either party may change its address for the purpose of this Paragraph by giving written notice of the change to the other party in the manner provided in this Paragraph.

Time of Essence

15. Time is of the essence of this Agreement and of each provision contained in it.

Assignment and Transfer

16. Seller shall not assign or transfer this Agreement to any person without the express prior written consent of the Buyer.

Amendments to Agreement

17. This Agreement may be amended only by a writing signed by the party against whom or against whose successors and assigns enforcement of the change is sought.

Saving Clause

18. If any term or provision of this Agreement or any application hereof shall be held invalid or unenforceable, the remainder of this Agreement and any application of its terms and provisions shall not be affected thereby but shall be valid and enforceable.

Governing Law

19. This Agreement shall be governed by and construed in accordance with the laws of _____ [*specify jurisdiction, e.g., California*].

Waiver

20. The waiver of any breach of any of the provisions of this Agreement by either party shall not constitute a continuing

waiver or a waiver of any subsequent breach by either party of the same or any other provision of this Agreement.

Arbitration

21. Any dispute that arises between Seller and Buyer relating to the provisions of this Agreement shall be submitted to arbitration upon application by either party. The arbitration panel shall consist of three persons, one each appointed by Seller and Buyer, and the third shall be jointly appointed by the appointees of Seller and Buyer. The arbitration shall be conducted in compliance with *Code of Civil Procedure Sections 1280 through 1294.2* relating to arbitration. The cost of the arbitration shall be divided evenly between Seller and Buyer.

Executed on _____ [date] at _____, California.

SELLER

_____ [signature of seller]
[typed name]

BUYER

_____ [signature of buyer]
[typed name]

Schedule of Goods Purchased

The following specified feed and supplies have been sold by the undersigned Buyer pursuant to the Contract of Sale executed on _____ [date], by the undersigned Buyer and Seller:

[insert, for each type of feed and supply, the quantity, description, price per unit, total dollar amount per type, and the maximum purchase price].

Dated: _____

SELLER

_____ [signature of seller]
[typed name]

BUYER

_____ [signature of buyer]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Business ExpensesGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 49 AGRICULTURAL CONTRACTS

PART IV. FORMS

D. Livestock-Related Agreements

20-49 California Legal Forms--Transaction Guide §§ 49.362-49.379

[Reserved]

§§ 49.362[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 49 AGRICULTURAL CONTRACTS

PART IV. FORMS

E. Notices and Claims Related to Statutory Trusts

20-49 California Legal Forms--Transaction Guide § 49.380

§ 49.380 Notice of Seller's Intent to Preserve Rights in Statutory Trust Under Federal Law

[1] Comment

[a] Use of Form

This is a form for a notice to buyers of perishable agricultural products sold in interstate or foreign commerce, packers, and live poultry dealers of the seller's intent to preserve its rights in the statutory trust imposed on those products. For further discussion of the Perishable Agricultural Commodities Act [*see 7 U.S.C. §§ 499a-499s*] and Packers and Stockyards Act of 1921 [*see 7 U.S.C. §§ 181-229*], see § 49.11[3], [4].

For a discussion of the applicability of this form to transactions involving packers and live poultry dealers, see § 49.380[1][c].

[b] Nature of Statutory Trust for Perishable Agricultural Commodities

[i] In General

Congress established a statutory trust procedure for the benefit of unpaid sellers or suppliers of perishable agricultural commodities [7 U.S.C. § 499e(c)(1); *see* § 49.11[3]]. Perishable agricultural commodities, all inventories of food or other products derived from them, and any receivables or proceeds from their sale received by a commission merchant, dealer, or broker are deemed to be held in trust by that person for the benefit of any unpaid supplier of seller of those commodities, or their agents, until full payment has been made. Payment is not considered to have been made if the seller, supplier, or agent receives a payment instrument that is dishonored. Statutory trust provisions do not apply to transactions between a cooperative association and its members [7 U.S.C. § 499e(c)(2)].

[ii] Preservation of Rights in Trust Assets

To preserve its right to the trust assets, an unpaid seller, supplier, or their agents, of perishable agricultural commodities, must give notice of its intent to preserve the benefits of the trust to the commission merchant, dealer, or broker [7 U.S.C.

§ 499e(c)(3)]. The notice must be given within 30 days either (1) after the date payment must be made, as set forth in regulations issued by the secretary, (2) after any other date contractually agreed on by the parties before entering into the transaction, or (3) after the date the supplier, seller, or agent received notice that the payment instrument promptly presented for payment was dishonored [7 U.S.C. § 499e(c)(3)]. When the parties agree to a payment date different from that established by the secretary, a copy of that agreement must be filed in the records of each party to the transaction, and the terms of payment must be disclosed in invoices, accountings, and other documents related to the transaction [7 U.S.C. § 499e(c)(3)].

[iii] Contents of Notice

The notice of a seller's or supplier's intent to preserve trust benefits must be in writing, and must include a statement that it is a notice of that intent [7 C.F.R. § 46.46(g)(3)]. The notice must also include the following information for each shipment: (1) the names and addresses of the seller, supplier, or agent, and the commission merchant, broker, or dealer, as applicable; (2) the date of the transaction, commodity, contract terms, invoice, price, and the date payment was due; (3) if applicable, the date of receipt of notice that a payment instrument was dishonored; and (4) the amount past due and unpaid [7 C.F.R. § 46.46(g)(3)].

[c] Notice to Packers and Live Poultry Dealers

This form of notice may also be used to notify packers and live poultry dealers of the seller's or supplier's intent to preserve the benefits of the statutory trust imposed on livestock and poultry, and their proceeds, receivables, and inventories [see 7 U.S.C. §§ 196(a), 197(a)]. The requirements for the notice are identical to those for the notice involved in transactions for perishable agricultural commodities except as follows: (1) packers whose average annual purchases do not exceed \$500,000 and live poultry dealers whose average annual sales or average annual value of purchases of poultry do not exceed \$100,000 are exempt from the trust imposition provisions [7 U.S.C. §§ 196(b), 197(b)]; and (2) the seller or supplier who receives notice that payment has been dishonored must notify the packer or live poultry dealer within 15 business days after receipt of the notice of dishonor [7 U.S.C. §§ 196(b), 197(d)]. For additional discussion of statutory regulation of livestock transactions in interstate or foreign commerce, see § 49.11[4].

[2] FORM

Notice of Seller's Intent to Preserve Rights in Statutory Trust Under Federal Law

Notice of Intent to Preserve Trust Benefits

To: _____ [name of commission merchant, dealer, broker, packer, or live poultry dealer]
 _____ [street address]
 _____ [city, state, zip code]

Notice is hereby given pursuant to Section _____ [499e or 196 or 197] of Title 7 of the United States Code that _____ [name of seller, supplier, or agent], whose address is _____ [street], _____ [city], California, expressly states its intent to preserve trust benefits relating to the commodities described in this notice.

The _____ [commission merchant or dealer or broker or packer or live poultry dealer] to whom this notice is directed is _____ [name], whose address is _____ [street], _____ [city], California.

Date of Transaction

The date of the transaction between the parties to which this notice specifically applies is _____[date].

Type of Commodity

The commodity involved in the transaction to which this notice applies is _____[describe agricultural commodity].

Contract Terms

The original contract between the parties contained the following material terms:

- (a) Amount of commodity involved: _____[specify measure, e.g., tons or pounds];
- (b) Price to be paid per unit of commodity: \$_____;
- (c) Payment terms: _____;
- (d) Payment due date: _____.

Past Due Amounts

As of the date on which payment was due, _____[name of seller, supplier, or agent] had not received the sum of \$_____, which remains due and owing.

[Use, if applicable:]

Dishonored Payment Instrument

On _____[date], _____[name of seller, supplier, or agent] received notice that the payment instrument dated _____[date], drawn on the account of the _____[name of commission merchant, dealer, broker, packer, or live poultry dealer], had been dishonored by _____[name of financial institution].

Executed on _____[date], at _____, California.

_____[SELLER or SUPPLIER or AGENT]
 _____[signature]
 [typed name]

_____[COMMISSION MERCHANT
 or DEALER or BROKER or PACKER or LIVE POULTRY DEALER]
 _____[signature]
 [typed name]

_____[COMMISSION MERCHANT
or DEALER or BROKER or PACKER or LIVE POULTRY DEALER]
_____[signature]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral OverviewGovernmentsAgriculture & FoodPackers & Stockyards
ActGovernmentsAgriculture & FoodPerishable Agricultural Commodities Act



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION

20-50 California Legal Forms--Transaction Guide 50.syn

§ 50.syn Synopsis to Chapter 50: ADVERTISING AND PROMOTION

§ 50.01 California Sources

[1] Constitution

[2] Statutes

[a] False and Misleading Advertising

[b] Advertisements by Businesses and Professional Persons

[c] Regulation of Specific Types of Advertisements

[d] Regulation of Promotions and Solicitation Practices

[e] Outdoor Advertising Act

§ 50.02 Federal Sources

[1] Constitution

[2] Statutes

[3] Regulations

§§ 50.03-50.04 [Reserved]

§ 50.05 Law Reviews and Periodicals

§ 50.06 Annotations

§ 50.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§ 50.08 Internet References

§ 50.09 [Reserved]

§ 50.10 Constitutional Considerations

[1] Commercial vs. Noncommercial Speech

[2] Advertising by Attorneys

§ 50.11 California Regulation of Advertising

[1] False or Deceptive Advertising

[a] General Prohibition of False or Deceptive Advertising

[b] Civil Remedies for False or Deceptive Advertising

[2] Outdoor Advertising

[a] General Standards for Outdoor Advertising

[b] Specific Requirements for Outdoor Advertising

[c] Advertising Displays in Business Areas

[d] Advertising Displays Adjacent to Landscaped Freeways

[e] Advertising Displays Along Scenic Highways and Byways

[f] Message Center Displays

[g] Local Zoning Regulation of Outdoor Advertising

[h] Compelled Removal of Outdoor Advertising

[3] Restrictions When Post Office Box Address Is Used

[4] Advertising Grey Market Goods

[5] Direct Mail, Catalog, or Internet Advertising

[6] Unsolicited E-Mail Advertising

[a] California Requirements for E-Mail

[b] Federal CAN-SPAM Act

[i] Purpose

[ii] Scope of Act

[iii] Fraud and Related Activity Prohibited

[iv] Use of Illegally Obtained E-mail Addresses Prohibited

[v] Pornography Prohibited

[vi] Sending False or Misleading E-Mail Transmission Information Prohibited

[vii] Inclusion of Identifier, Opt-Out, and Physical Return Address in Commercial E-Mail

[c] Violation of E-Mail Service Provider's Policy

[7] Mobile Telephony (Cell Phones), Pager, and Two-Way Messaging Services

[8] Telephone Advertising

[a] "Do Not Call" List

[b] Exceptions to Restrictions on Telephone Advertising

[9] Unsolicited Advertising Faxes

[10] Spyware Advertisements

[11] Advertising of Information Access Services

[12] Open-End Consumer Credit Advertising

[13] Automatic Purchase Renewals and Continuous Service Offers

§ 50.12 Federal Trade Commission Act

[1] In General

[2] Advertising as Interstate Commerce

[3] False Advertising of Food, Drugs, Devices, and Cosmetics

[4] Regulation of Unfair or Deceptive Acts

§ 50.13 Other Federal Regulation of Advertising

[1] False Advertisements Prohibited Under Lanham Act

[2] Truth in Lending Act Restrictions

[3] Consumer Lease Advertising

[4] Federal Communications Commission Regulation

[5] Federal Election Commission Regulation

§ 50.14 Advertising Matter as Express Warranty

§§ 50.15-50.99 [Reserved]

§ 50.100 Facts

Scope

§ 50.101 Documents to Be Obtained

Scope

§§ 50.102-50.109 [Reserved]

Scope

§ 50.110 Applicable Governmental Controls

Scope

§ 50.111 Business Considerations

Scope

§§ 50.112-50.119 [Reserved]

§ 50.120 California Prohibitions Against False or Misleading Advertising

Scope

§ 50.121 Federal Prohibitions Against False or Deceptive Advertising

Scope

§ 50.122 Credit Advertising Under Federal Truth in Lending Act

Scope

§ 50.123 Consumer Lease Advertising

Scope

§§ 50.124-50.129 [Reserved]

§ 50.130 Advertiser's Agreement With Advertising Agency

Scope

§ 50.131 Advertising Agreements With Media

Scope

§§ 50.132-50.199 [Reserved]

§ 50.200 Advertising Agency Services Agreement

[1] Comment

[a] Use of Form

[b] Particular Provisions

[c] Agency Compensation

[2] FORM

Advertising Agency Services Agreement

§ 50.201 Advertising Agency's Letter Agreement to Represent Advertiser

[1] Comment--Use of Form

[2] FORM

Advertising Agency's Letter Agreement to Represent Advertiser

§ 50.202 Schedule of Advertising Agency Charges

[1] Use of Form

[2] FORM

Schedule of Advertising Agency Charges

§§ 50.203-50.209 [Reserved]

§ 50.210 Advertising Agreement--Banner Advertisements and Links on Web Site

[1] Comment--Use of Form

[2] FORM

Advertising Agreement--Banner Advertisements and Links on Web Site

§ 50.211 Co-Branding Agreement--Goods or Services to Be Advertised on Market-Segment Web Site

[1] Comment--Use of Form

[2] FORM

Co-Branding Agreement--Goods or Services to Be Advertised on Market-Segment Web Site

§ 50.212 Marketing and Advertising Agreement--Exclusive Internet Marketing Rights in Exchange for Advertising Commitment

[1] Comment--Use of Form

[2] FORM

Marketing and Advertising Agreement--Exclusive Internet Marketing Rights in Exchange for Advertising Commitment

§§ 50.213-50.219 [Reserved]

§ 50.220 Agreement for Extended Term Display Advertising--Newspaper or Chain of Newspapers

[1] Comment

[a] Use of Form

[b] Rates

[2] FORM

Agreement for Extended Term Display Advertising--Newspaper or Chain of Newspapers

§ 50.221 Agreement for Extended Term Magazine Advertising

[1] Comment--Use of Form

[2] FORM

Agreement for Extended Term Magazine Advertising

§§ 50.222-50.229 [Reserved]

§ 50.230 Agreement for Local Broadcast Advertising--Between Advertiser and Radio or Television Station

[1] Comment--Use of Form

[2] FORM

Agreement for Local Broadcast Advertising--Between Advertiser and Radio or Television Station

§ 50.231 Agreement for Network Broadcast Advertising--Between Advertising Agency and Radio or Television Network

[1] Comment--Use of Form

[2] FORM

Agreement for Network Broadcast Advertising--Between Advertising Agency and Radio or Television Network

§§ 50.232-50.239 [Reserved]

§ 50.240 Application for Outdoor Advertising Operator's License

[1] Comment

[a] Use of Form

[b] Limitation on Requirement for License

[c] Exempt Advertising Displays

[d] Outdoor Advertising Business

[e] Advertising Display Defined

[f] Contents of Application

[g] Initial and Renewal License Fees

[2] FORM

Application for Outdoor Advertising Operator's License

§ 50.241 Application for Outdoor Advertising Display Permit

[1] Comment

[a] Use of Form

[b] Requirement for Display Permit

[c] Contents of Application for Display Permit

[d] Application and Permit Fees

[2] FORM

Application for Outdoor Advertising Display Permit

§ 50.242 Lease of Real Property for Billboard

[1] Comment--Use of Form

[2] FORM

Lease of Real Property for Billboard

§§ 50.243-50.249 [Reserved]

§ 50.250 Agreement for Outdoor Painted-Panel Display

[1] Comment

[a] Use of Form

[b] Painted-Panel Billboards

[c] Basis for Cost of Outdoor Advertising

[d] Licenses and Permits

[2] FORM

Agreement for Outdoor Painted-Panel Display

§ 50.251 Agreement for Outdoor Poster-Panel Display

[1] Comment--Use of Form

[2] FORM

Agreement for Outdoor Poster-Panel Display

§§ 50.252-50.259 [Reserved]

§ 50.260 Transit Display Agreement

[1] Comment--Use of Form

[2] FORM

Transit Display Agreement

§§ 50.261-50.269 [Reserved]

§ 50.270 Exhibition Agreement

[1] Comment--Use of Form

[2] FORM

Exhibition Agreement

§§ 50.271-50.279 [Reserved]

§ 50.280 Co-Marketing Agreement--Retail Web Site to Be Promoted on Portal Web Site

[1] Comment--Use of Form

[2] FORM

Co-Marketing Agreement--Retail Web Site to Be Promoted on Portal Web Site



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION

20-50 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter is intended to assist an attorney in advising advertisers or advertising agencies on the legal aspects of obtaining and providing advertising services, in the context of California and federal regulation of advertising. It discusses some of the state and federal restrictions on the contents of advertising materials, along with constitutional considerations relating to those restrictions. It also includes coverage of the licensing and permit requirements applicable to outdoor advertising under California law.

The purely business aspects of advertising are within the sphere of an advertising agency's competence and not within the scope of this chapter. The legal aspects of an advertiser's relationship with an advertising agency are governed by contract, and this chapter addresses that relationship and includes illustrative agreements between advertisers and advertising agencies. This chapter also includes specimen agreements with various media for the dissemination of advertising. For discussion of general contract law, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

This chapter does not cover requirements that may be included in sales or consignment contracts for the promotion of goods sold or consigned, nor does it include sales promotion agreements between manufacturers and distributors. For coverage of these subjects, see Ch. 91, *Contracts With Sales Representatives* . Advertising by professional persons is not covered in this chapter; for discussion, see Rosden, the Law of Advertising(Matthew Bender).



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CHAPTER 50 ADVERTISING AND PROMOTION
PART I. RESEARCH GUIDE
A. Primary Sources

20-50 California Legal Forms--Transaction Guide § 50.01

§ 50.01 California Sources

[1] Constitution

Freedom of speech and press. *Cal. Const., art. I, § 2.*

[2] Statutes

[a] False and Misleading Advertising

Healing arts. *Bus. & Prof. Code § 651.*

Real property securities. *Bus. & Prof. Code § 10237.7.*

False or misleading advertising is unlawful. *Bus. & Prof. Code § 17500.*

Limitations on quantity. *Bus. & Prof. Code § 17500.5.*

Representations of worth or value. *Bus. & Prof. Code § 17501.*

Liability of publishers and broadcasters. *Bus. & Prof. Code § 17502.*

Prices of consumer goods or services sold in multiple units. *Bus. & Prof. Code § 17504.*

Statements as to ownership or control of goods. *Bus. & Prof. Code § 17505.*

Claim or representation pertaining to more than one article of merchandise or type of service. *Bus. & Prof. Code § 17507.*

Comparative advertising. *Bus. & Prof. Code § 17508.*

Prohibition against advertising product or service, when condition of sale is purchase or lease of different product or service, without disclosure of price of all products or services. *Bus. & Prof. Code § 17509.*

Secondhand, used, defective, second grade, or blemished goods. *Bus. & Prof. Code § 17531.*

Unassembled toys. *Bus. & Prof. Code § 17531.1.*

Federal surplus goods. *Bus. & Prof. Code §§ 17531.5, 17533.5.*

Coal. *Bus. & Prof. Code § 17532.*

Circulation figures. *Bus. & Prof. Code § 17533.*

Tear gas. *Bus. & Prof. Code § 17533.9.*

Conditional offer of prizes. *Bus. & Prof. Code § 17537.*

Mail order or catalog advertising. *Bus. & Prof. Code §§ 17538-17538.5.*

Disclosures relating to contest solicitations. *Bus. & Prof. Code § 17539.1.*

Motel rate signs. *Bus. & Prof. Code § 17560 et seq.*

Water treatment devices. *Bus. & Prof. Code § 17577 et seq.*

Automatic purchase renewals and continuous service offers. *Bus. & Prof. Code § 17600 et seq.* (operative 12/1/10). Definitions. *Bus. & Prof. Code § 17601.* Unlawful activities. *Bus. & Prof. Code § 17602.* Exemptions. *Bus. & Prof. Code § 17605.*

Remedies for misuse of deceased person's name, likeness, voice, or signature in advertising. *Civ. Code § 990.*

Representations constituting unlawful methods of competition or unfair or deceptive acts. *Civ. Code § 1770.*

Prohibition against and remedies for misuse of another person's name, likeness, voice, or signature. *Civ. Code § 3344.*

[b] Advertisements by Businesses and Professional Persons

Medical and pharmaceutical services. *Bus. & Prof. Code §§ 651-651.3.*

Optometrists. *Bus. & Prof. Code §§ 652.5, 656, 3000, 3090, 3097, 3100, 3101, 3102, 3120..*

Clinical laboratories. *Bus. & Prof. Code § 1280.*

Dentists. *Bus. & Prof. Code §§ 1670, 1680, 2271, 2272, 17500.*

Dispensing opticians. *Bus. & Prof. Code § 2556.*

Physical therapists. *Bus. & Prof. Code* § 2660.

Nurses. *Bus. & Prof. Code* § 2761.

Psychologists. *Bus. & Prof. Code* § 2930.5.

Providers of hearing aid services. *Bus. & Prof. Code* § 3350.

Architect may not advertise as such if not certified. *Bus. & Prof. Code* § 5536.

Building designer may not advertise as such if not licensed. *Bus. & Prof. Code* § 5536(c).

Attorneys. *Bus. & Prof. Code* §§ 6126, 6127.

Barbers. *Bus. & Prof. Code* § 7404.

Contractors. *Bus. & Prof. Code* §§ 7027, 7027.1.

Work by students of cosmetology school. *Bus. & Prof. Code* § 7937.

Private detectives. *Bus. & Prof. Code* § 7534.

Funeral establishments, directors, or embalmers. *Bus. & Prof. Code* §§ 7693, 7694.

Structural pest control operators. *Bus. & Prof. Code* §§ 8552, 8648.

Cemetery brokers. *Bus. & Prof. Code* §§ 9683-9686.

Real estate brokers. *Bus. & Prof. Code* §§ 10085, 10140, 10140.5, 10140.6, 17530.

Real estate licensees. *Bus. & Prof. Code* §§ 10140.6, 10232, 10232.1-10232.5.

Business opportunity brokers. *Bus. & Prof. Code* § 10235.

Mineral, oil, and gas brokers. *Bus. & Prof. Code* §§ 10512, 10562, 10562.5.

Advertisements by professional persons cannot be prohibited. *Bus. & Prof. Code* § 17500.1.

Employment agency advertising. *Civ. Code* § 1812.508.

Employment counseling service advertising. *Civ. Code* § 1812.513.

Job listing service advertising. *Civ. Code* § 1812.520.

Nurses' registry advertising. *Civ. Code* § 1812.533.

Check brokers. *Fin. Code* § 12311.

Escrow agents. *Fin. Code* §§ 17402, 17403.

Industrial loan companies. *Fin. Code § 18055 et seq.*

Employment agencies. *Lab. Code §§ 976, 977.*

Talent agencies. *Lab. Code § 1700.32.*

[c] Regulation of Specific Types of Advertisements

Advertisement of medicine or means to produce miscarriage or abortion. *Bus. & Prof. Code § 601.*

Advertisement of health care service plans. *Bus. & Prof. Code § 651.3; Health & Safety Code §§ 1352.1, 1361.*

Advertisement of drugs or devices. *Bus. & Prof. Code §§ 651.3, 4005(a); Health & Safety Code § 110403 et seq.*

Advertisements for eyeglasses. *Bus. & Prof. Code §§ 2556, 2558, 3120, 3128-3130.*

On-premises advertising displays. *Bus. & Prof. Code § 5490 et seq.*

Cemetery advertisements. *Bus. & Prof. Code § 9683 et seq.*

Real estate transactions. *Bus. & Prof. Code § 10139 et seq.*

Subdivided land. *Bus. & Prof. Code § 11022.*

Advertisement of goods acquired at bankruptcy, closeout, or other extraordinary sales. *Bus. & Prof. Code § 17027.*

Loss leader advertising. *Bus. & Prof. Code § 17050(e).*

Telephone and other communications equipment. *Bus. & Prof. Code § 17361.*

Exceptions to statutory regulation of telephone sales advertisements. *Bus. & Prof. Code § 17363.*

Requirements for advertising of automatic dialing-announcing devices. *Bus. & Prof. Code § 17363.5.*

Registration of telephone solicitors with Justice Department. *Bus. & Prof. Code § 17511 et seq.*

Prizes. *Bus. & Prof. Code §§ 17533.8, 17537.*

Advertising of promotional offers of and distribution of free samples of smokeless tobacco restricted. *Bus. & Prof. Code § 17537.3.*

Unsolicited e-mail advertising. *Bus. & Prof. Code § 17538.4.*

Unsolicited test message advertisements transmitted to mobile telephony service handset (cell phone), pager, or two-way messaging device. *Bus. & Prof. Code § 17538.41.*

Address requirements for any business using post office box in advertising. *Bus. & Prof. Code § 17538.5.*

Regulation of credit advertising. *Bus. & Prof. Code § 17538.7.*

Regulation of information access services. *Bus. & Prof. Code §§ 17539.5, 17539.6.*

False advertisement of water treatment device. *Bus. & Prof. Code § 17577 et seq.*

Regulation of unsolicited and unwanted telephone solicitations. *Bus. & Prof. Code § 17590 et seq.*

"Do not call" list. *Bus. & Prof. Code § 17591.*

Telephone solicitors defined. *Bus. & Prof. Code § 17592(a), (b).*

Prohibited acts. *Bus. & Prof. Code § 17592(c), (d).*

Exceptions. *Bus. & Prof. Code §§ 17592(e), (f), 17594.*

Penalties. *Bus. & Prof. Code § 17593(a)-(c).*

Affirmative defenses. *Bus. & Prof. Code § 17593(d).*

Furniture and bedding advertisements. *Bus. & Prof. Code §§ 19150, 19151, 19220.*

Advertisements for horse race predictions. *Bus. & Prof. Code § 19664.*

Secondhand watches. *Bus. & Prof. Code § 21508.*

Steamship passenger advertising. *Bus. & Prof. Code § 22300 et seq.*

Distilled spirit manufacturers and their agents, distilled spirit rectifiers, beer manufacturers, and vintners and their agents, and certain on-sale licensees in specified outdoor stadiums and motorsport entertainment complexes, may buy advertising time and space from or on behalf of certain arenas, auditoriums, and theaters. *Bus. & Prof. Code §§ 25503.6, 25503.8.*

Alcoholic beverages. *Bus. & Prof. Code §§ 25612, 25614, 25664.*

Autographed sports memorabilia. *Civ. Code § 1739.7.*

Credit card and charge card applications and solicitations. *Civ. Code §§ 1748.11, 1748.22, 1810.21.*

Unassembled furniture. *Civ. Code § 1770(a)(11), (12).*

Advertisement of cost plus markup. *Civ. Code § 1770(a)(20).*

Sale or lease of grey market goods. *Civ. Code §§ 1770(a)(21), 1797.8 et seq.*

Disseminating unsolicited prerecorded telephone messages. *Civ. Code § 1770(a)(22).*

Regulation of electronic shopping services. *Civ. Code § 1789 et seq.*

Restrictions on advertising by credit services organizations. *Civ. Code § 1789.13(g), (i).*

Vehicle lease advertisement. *Civ. Code § 2985.71.*

Unauthorized use of name or likeness. *Civ. Code § 3344.*

Advertisement of securities. *Corp. Code § 25000 et seq.; Fin. Code § 795.*

Advertisement of children for adoption is prohibited. *Fam. Code § 8609.*

Bank financial statement advertising. *Fin. Code §§ 791, 792, 795; Ins. Code § 12640.19.*

Misleading advertisements and labels concerning sale of pesticides. *Food & Agric. Code §§ 12991, 12992.*

Dairy products advertisements and labels must contain specified information. *Food & Agric. Code §§ 27637, 34091, 36001 et seq., 36061, 36062, 36804, 36809, 37131.*

Restrictions on marketing of organic foods. *Food & Agric. Code § 46000 et seq.; Health & Safety Code § 110810 et seq.*

Seed advertisements. *Food & Agric. Code § 52482 et seq.*

Continuing care contracts. *Health & Safety Code § 1793.5.*

Mobilehomes or commercial coaches. *Health & Safety Code § 18061.*

Cosmetics. *Health & Safety Code §§ 110290, 110340, 110390 et seq.*

Food and food products. *Health & Safety Code §§ 110390, 110660, 111210.*

Regulation of advertising of insurance products or annuities by depository institutions. *Ins. Code § 760 et seq.*

Unfair practices by insurance companies are prohibited. *Ins. Code § 790.02 et seq.*

Employment advertising requiring investment as condition of employment is prohibited. *Lab. Code § 407.*

Advertising for employees during labor dispute. *Lab. Code §§ 973, 974.*

Compensation to be paid to salespersons, brokers, or agents. *Lab. Code §§ 976, 977.*

Regulation of solicitation of workers' compensation claims. *Lab. Code § 5430 et seq.*

Use of state or federal flag in advertising is unlawful. *Mil. & Vet. Code §§ 614, 615.*

Obscene materials. *Penal Code § 311.5.*

Prohibition against advertisement of obscene matter depicting minors. *Penal Code § 311.10.*

Lotteries. *Penal Code §§ 322-324.*

Master keys for motor vehicles. *Penal Code § 466.5.*

Eavesdropping devices. *Penal Code* § 635.

Convict-made goods. *Penal Code* § 2886.

Sale of weapons. *Penal Code* § 12020.5.

Retailer advertisement that sales or use taxes will be absorbed is prohibited. *Rev. & Tax. Code* § 6205.

Automobile and other motor vehicle sales. *Veh. Code* §§ 9953, 11614, 11614.1, 11713-11713.12.

Health care plans. *Welf. & Inst. Code* § 14088.15.

[d] Regulation of Promotions and Solicitation Practices

Home solicitations. *Bus. & Prof. Code* § 17500.3.

Charitable solicitations. *Bus. & Prof. Code* § 17510 et seq.

Offering of prizes. *Bus. & Prof. Code* §§ 17533.8, 17537-17537.4.

Advertisements by homestead filing services. *Bus. & Prof. Code* § 17537.6.

Mail order and catalog businesses. *Bus. & Prof. Code* § 17538 et seq.

Unsolicited text message advertising. *Bus. & Prof. Code* § 17538.41.

Unsolicited fax advertising. *Bus. & Prof. Code* § 17538.43.

Unsolicited e-mail advertising. *Bus. & Prof. Code* § 17538.45.

Contests. *Bus. & Prof. Code* § 17539 et seq.

Representation that particular person has won prize. *Bus. & Prof. Code* § 17539.1.

Coupon offers. *Bus. & Prof. Code* § 17700 et seq.

Trading stamps. *Bus. & Prof. Code* § 17750 et seq.

Telephone advertising--"Do Not Call" List. *Bus. & Prof. Code* § 17591 et seq.

Consumer Protection Against Computer Spyware Act. *Bus. & Prof. Code* § 22947 et seq.

[e] Outdoor Advertising Act

Regulation of advertising displays within view of public highways is exclusively by state. *Bus. & Prof. Code* § 5270.

Displays covered by act. *Bus. & Prof. Code* § 5271.

Displays excepted from coverage of act. *Bus. & Prof. Code § 5272.*

Displays advertising businesses within redevelopment agency projects are exempt from certain restrictions. *Bus. & Prof. Code § 5273.*

License requirements. *Bus. & Prof. Code § 5300 et seq.*

Permit requirements. *Bus. & Prof. Code § 5350 et seq.*

Standards for displays. *Bus. & Prof. Code § 5400 et seq.*

Displays next to landscaped freeways. *Bus. & Prof. Code § 5440 et seq.*



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20-50 California Legal Forms--Transaction Guide § 50.02

§ 50.02 Federal Sources

[1] Constitution

Freedom of speech and press. *U.S. Const., amends. I, XIV.*

[2] Statutes

Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act of 2003). *15 U.S.C. § 7701 et seq.*, Pub L. 108-187, 117 Stat. 2699.

Use of name of member of either house of Congress in advertisement by any individual or entity that practices before federal agency is prohibited. *5 U.S.C. § 501.*

Grain advertisements are subject to regulation. *7 U.S.C. § 78.*

Banks under federal jurisdiction are forbidden to advertise with respect to lotteries. *12 U.S.C. §§ 25a, 339, 1730c, 1829a.*

Federal Reserve System Banks must comply with advertising requirements. *12 U.S.C. § 371b.*

Advertisements involving discriminatory practices such as rebates are prohibited. *15 U.S.C. § 13a.*

Federal Trade Commission regulation of false and misleading advertisements and unfair trade practices.

Unfair methods of competition are unlawful. *15 U.S.C. § 45.*

Dissemination of false advertisements. *15 U.S.C. § 52.*

Regulation of unfair or deceptive acts or practices. *15 U.S.C. § 57a.*

Misbranding or mislabeling wool products is prohibited. *15 U.S.C. § 68 et seq.*

False advertising concerning fur products is prohibited. *15 U.S.C. § 69 et seq.*

Misbranding textile fiber products is prohibited. *15 U.S.C. § 70a.*

Securities and Exchange Commission regulation of sale of securities. *15 U.S.C. §§ 77e, 77f, 77h, 77q, 77t.*

Wrongful use of a trademark is prohibited. *15 U.S.C. §§ 1114, 1118.*

Cigarettes: specified statement is required. *15 U.S.C. § 1331 et seq.*

Consumer credit advertisement requirements. *15 U.S.C. § 1661 et seq.*

Consumer lease advertisement requirements. *15 U.S.C. § 1667c.*

Federal Power Commission. *16 U.S.C. § 791a.*

Use of likeness of any security or obligation of the United States is prohibited. *18 U.S.C. § 475.*

Use of official badges, identification cards, or other insignias used by federal agencies is prohibited. *18 U.S.C. § 701.*

Use of names, insignias, uniforms, and emblems indicating that private business is connected with federal agency is prohibited. *18 U.S.C. §§ 701-703.*

Fraud and related activity in connection with electronic mail is prohibited. *18 U.S.C. § 1037.*

Use of mails to advertise lottery is prohibited. *18 U.S.C. § 1302.*

Use of mails for false or fraudulent scheme is prohibited. *18 U.S.C. § 1341.*

Use of wire, radio, or television to defraud is prohibited. *18 U.S.C. § 1343.*

Use of mails to advertise obscene matter is prohibited. *18 U.S.C. §§ 1461-1463.*

Advertisement of eavesdropping devices is prohibited. *18 U.S.C. § 2512.*

Importation of obscene advertisements or matter that urges treason, insurrection, or refers to lottery is prohibited. *19 U.S.C. § 1305.*

Food and Drug Administration authority to regulate labeling and branding of food, drugs, devices, and cosmetics. *21 U.S.C. § 331.*

Prescription drug advertisements must contain specified information. *21 U.S.C. § 352(n).*

Outdoor advertisements on federal highways are regulated. *23 U.S.C. § 131* (Highway Beautification Act of 1965).

Advertising costs are ordinary and necessary expenses. *I.R.C. § 162(a)*.

Advertisements indicating that federal excise tax is absorbed in purchase price are prohibited. *I.R.C. § 7261*.

Alcoholic beverage advertising. *27 U.S.C. § 205*.

Employment advertisements that express preference based on age are prohibited. *29 U.S.C. § 623(e)*.

Misleading advertising by patent attorneys is prohibited. *35 U.S.C. § 32*.

Use of flag in advertising is prohibited. *36 U.S.C. § 176*.

Unlawful advertising may not be delivered through mails. *39 U.S.C. § 3001(a), (d), (e)*.

Otherwise legal solicitation containing improper implication of federal government connection cannot be delivered through mails. *39 U.S.C. § 3001(h), (i)*.

Fraudulent advertising may not be delivered through mails. *39 U.S.C. § 3005*.

Obscene or lewd advertisements may not be delivered through mails. *39 U.S.C. § 3006*.

Employment advertisements that discriminate with respect to sex, religion, race, color, or national origin are prohibited. *42 U.S.C. § 2000e-3*.

Housing sale or rental advertisements that discriminate with respect to race, color, religion, or national origin are prohibited. *42 U.S.C. §§ 3603, 3604*.

Advertising for sale of passage on certain vessels must contain specified information. *46 U.S.C. § 3504*.

Federal Communications Commission regulation of radio and television. *47 U.S.C. §§ 151, 303, 307, 326*.

[3] Regulations

Tire advertising. 16 C.F.R. pt. 228.

Deceptive pricing. 16 C.F.R. pt. 233.

Bait advertising. 16 C.F.R. pt. 238.

Deceptive advertising of guarantees. 16 C.F.R. pt. 239.

Advertising allowances, merchandising payments, and services. 16 C.F.R. pt. 240.

Advertising dog and cat food. 16 C.F.R. pt. 241.

Advertising and promotion of household furniture. 16 C.F.R. pt. 250.

Use of word "free" and similar representations. 16 C.F.R. pt. 251.

Advertisement of feather and down products. 16 C.F.R. pt. 253.

Vocational and home study school advertising. 16 C.F.R. pt. 254.

Use of endorsements and testimonials in advertising. 16 C.F.R. pt. 255.

Fuel economy advertising for new cars. 16 C.F.R. pt. 259 et seq.

Environmental advertising and marketing guidelines. 16 C.F.R. pt. 260.

Wool products. 16 C.F.R. pt. 300.

Fur products. 16 C.F.R. pt. 301.

Textile fiber identification. 16 C.F.R. pt. 303.

Hobby protection. 16 C.F.R. pt. 304.

Energy cost and consumption and water use information. 16 C.F.R. pt. 305.

Octane ratings. 16 C.F.R. pt. 306.

Telemarketing sales. 16 C.F.R. pt. 310.

Retail food store advertising. 16 C.F.R. pt. 424.

Door-to-door sales cooling-off period. 16 C.F.R. pt. 429.

Amplifier power output claims. 16 C.F.R. pt. 432.

Mail or telephone order merchandising. 16 C.F.R. pt. 435.

Franchise and business opportunity disclosures. 16 C.F.R. pt. 436.

Funeral industry practices. 16 C.F.R. pt. 453.

Used motor vehicle trade regulation. 16 C.F.R. pt. 455.

Advertising of ophthalmic goods and services. 16 C.F.R. pt. 456.

Home insulation advertising. 16 C.F.R. pt. 460.

Fair packaging and labeling regulations. 16 C.F.R. pt. 500 et seq.



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20-50 California Legal Forms--Transaction Guide § 50.05

§ 50.05 Law Reviews and Periodicals

Kole, *Advertising Entertainment: Can Government Regulate the Advertising of Fully-Protected Speech Consistent With the First Amendment?* 9 *UCLA Ent. L. Rev.* 315 (2002).

Kruse, *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 *Cal. L. Rev.* 129 (2001).

Note, *Record Distributors' Minimum Advertised Price Provisions: Tripping Antitrust During Pursuit of Revenue, Control, and Survival in the Openly Competitive Digital Era*, 21 *Loy. Ent. L. Rev.* 437 (2001).

Note, *Beating the Odds: Greater New Orleans Broadcasting Association v. United States Strikes Congressional Ban on Commercial Speech Advertisements of Private Casino Gambling*, 20 *Loy. Ent. L. Rev.* 605 (2001).

Howard, *A Fistful of Lawsuits: The Press, the First Amendment, and Section 43(a) of the Lanham Act*, 88 *Cal. L. Rev.* 127 (2000).

Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 108 *Yale L.J.* 1619 (1999).

Litman, *Breakfast With Batman: The Public Interest in the Advertising Age*, 108 *Yale L.J.* 1717 (1999).

Ravine, *Footprints in Cyberspace: Using Transactional Data to Target Advertising*, 1998 *UCLA J. L. & Tech.* 4.

Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 *S. Cal. L. Rev.* 549 (1991).

McGowan, *A Critical Analysis of Commercial Speech*, 78 *Cal. L. Rev.* 359 (1990).

Note, *Shapero v. Kentucky Bar Association: United States Supreme Court Gives First Amendment Protection to*

Ambulance Chasing Through the Mail, 26 Cal. W. L. Rev. 201 (1990).

Comment, *Use of "Like/Love" Slogans in Advertising: Is the Trademark Owner Protected?* 26 San Diego L. Rev. 101 (1989).

Note, *Doctors Can "Just Say No": The Constitutionality of Consumer-Directed Advertising of Prescription Drugs*, 12 Hastings Comm. & Ent. L.J. 535 (1989).

Comment, *Advertiser Liability: Soldier of Fortune Cases Take Deadly Aim at Publishers*, 11 Hastings Comm. & Ent. L.J. 383 (1988).



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§ 50.06 Annotations

Annot., Sales and Use Taxes on Sale or Lease of Mailing or Customer List, 80 A.L.R.4th 1126 (1990) .

Annot., Validity, Construction, and Effect of Statutes, Ordinances, Or Regulations Prohibiting or Regulating Advertising of Intoxicating Liquors, 20 A.L.R.4th 600 (1983) .

Annot., Validity and Construction of Statutes or Ordinances Prohibiting or Restricting Distribution of Commercial Advertising to Private Residences-Modern Cases, 12 A.L.R.4th 851 (1982) .

Annot., Modern Status of Law Regarding Solicitation of Business by or for Attorney, 5 A.L.R.4th 866 (1981) .

Annot., Validity and Construction of State Statute Prohibiting Anonymous Political Advertising, 4 A.L.R.4th 741 (1981) .

Annot., Advertising Agency as Subject to FTC Order Under 15 USCS § 45 for *False or Deceptive Representations in Its Advertisements for Client's Product*, 47 A.L.R. Fed. 393 (1980) .

Annot., *Power of Federal Trade Commission to Issue Order Requiring Corrective Advertising*, 46 A.L.R. Fed. 905 (1980) .

Annot., Promotional Efforts Directed Toward Prescribing Physician as Affecting Prescription Drug Manufacturer's Liability for Product-Caused Injury, 94 A.L.R.3d 1080 (1979) .

Annot., Invasion of Privacy by Use of a Picture of Plaintiff's Property for Advertising Purposes, 87 A.L.R.3d 1279 (1978) .

Annot., Invasion of Privacy by Sale or Rental of List of Customers, Subscribers, or the Like, to One Who Will Use It

for Advertising Purposes, 82 A.L.R.3d 772 (1978) .

Annot., Validity and Construction of Statute or Ordinance Restricting Outdoor Rate Advertising by Motels, Motor Courts, and the Like, 80 A.L.R.3d 740 (1977) .

Annot., Classification and Maintenance of Advertising Structure as Nonconforming Use, 80 A.L.R.3d 630 (1977) .

Annot., Advertising "Free Trial" of Merchandise as Deceptive Act or Practice or Unfair Method of Competition Violative of § 5(A)(1) of Federal Trade Commission Act (15 USCS § 45(a)(1)), 26 A.L.R. Fed. 795 (1976) .

Annot., Validity, Construction, and Application of § 804(c) of Civil Rights Act of 1968 (Fair Housing Act) (42 USCS § 3604(c)) *Prohibiting Discriminatory Notice, Statement, or Advertisement With Respect to Sale or Rental of Dwelling*, 22 A.L.R. Fed. 359 (1975) .

Annot., Validity and Construction of Liquidated Damage Provision in Sign Contract, 60 A.L.R.3d 550 (1974) .

Annot., Validity and Construction of Statute or Ordinance Prohibiting Promotional Games in Connection With Sale of Gasoline, 57 A.L.R.3d 1288 (1974) .

Annot., Right to Republish Advertising Material Originally Appearing In Plaintiff's Publication, 55 A.L.R.3d 180 (1974) .

Annot., Validity, Construction, and Effect of State Legislation Regulating or Controlling "Bait and Switch" or "Disparagement" Advertising or Sales Practices, 50 A.L.R.3d 1008 (1973) .

Annot., Validity of Statute or Ordinance Forbidding Pharmacist To Advertise Prices of Drugs or Medicines, 44 A.L.R.3d 1301 (1972) .

Annot., Statements in Promotional or Explanatory Literature Issued by Lessor to Lessee as Ground for Relief From Lease Contract, 43 A.L.R.3d 1386 (1972) .

Annot., Advertisement Addressed to Public Relating to Sale or Purchase of Goods at Specified Price as an Offer the Acceptance of Which Will Consummate a Contract, 43 A.L.R.3d 1102 (1972) .

Annot., Billboards and Other Outdoor Advertising Signs as Civil Nuisance, 38 A.L.R.3d 647 (1971) .

Annot., Group Insurance: Waiver or Estoppel on Basis of Statements in Promotional or Explanatory Literature Issued to *Insureds*, 36 A.L.R.3d 541 (1971).

Annot., Promotion Schemes of Retail Stores as Criminal Offense Under Anti-Gambling Laws, 29 A.L.R.3d 888 (1970) .

Annot., Invasion of Privacy by Use of Plaintiff's Name or Likeness in Advertising, 23 A.L.R.3d 865 (1968) .

Annot., Aesthetic Objectives or Considerations as Affecting Validity of Zoning Ordinance, 21 A.L.R.3d 1222 (1968) .

Annot., Right of Publisher of Newspaper or Magazine, in Absence of Contractual Obligation, to Refuse Publication Advertisement, 18 A.L.R.3d 1286 (1968) .

Annot., Rights and Remedies With Respect to Another's Use of a Deceptively Similar Advertising Slogan, 2 A.L.R.3d

748 (1965) .

Annot., Measure of Damages to Advertiser, for Radio or Television Station's Breach or Wrongful Termination of Contract, 90 A.L.R. 2d 1199 (1963) .

Annot., Statements in Advertisements as Affecting Manufacturer's or Seller's Liability for Injury Caused by Product Sold, 75 A.L.R.2d 112 (1961) .



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§ 50.07 Text References

[1] Matthew Bender Sources

California Legal Forms(Matthew Bender).

Ch. 75, *Formation of Contracts and Standard Contractual Provisions.*

California Forms of Pleading and Practice (Matthew Bender).

Ch. 14, *Advertising.*

Ch. 127, *Consumer Contracts and Loans.*

Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts.*

Ch. 369, *Mobilehomes and Mobilehome Parks.*

Ch. 484, *Radio and Television.*

Ch. 500, *Sales: Sales Under the Commercial Code.*

Ch. 501, *Sales: Retail Installment Sales.*

Ch. 502, *Sales: Warranties.*

Ch. 504, *Sales: Consumers Legal Remedies Act.*

Ch. 565, *Unfair Competition.*

California Real Estate Law and Practice (Matthew Bender).
Ch. 250, *Development of Land Use Control in California*.
Ch. 264, *Uses Presenting Significant Regulatory Problems*.

Rosden, the Law of Advertising (Matthew Bender).

[2] Additional Text References

DeVore & Sack, *Advertising and Commercial Speech: A First Amendment Guide* (Practicing Law Institute 1999).



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§ 50.08 Internet References

Advertising [Fact Sheet] (Cal. Dept. of Consumer Affairs, 1998). <http://www.dca.ca.gov/legal/advfact.htm>

Survey of Unlawful Advertising Law (Cal. Dept. of Consumer Affairs, 1995, rev. 1997).
<http://www.dca.ca.gov/legal/u-6.html>

Advertising: Business Information (Fed. Trade Comm.). <http://www.ftc.gov/bcp/menu-ads.htm#bized>



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§ 50.10 Constitutional Considerations

[1] Commercial vs. Noncommercial Speech

Under the *First Amendment*, commercial speech can be forbidden or regulated in situations in which noncommercial speech could not be [see *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 379-381, 97 S. Ct. 2691, 53 L. Ed. 2d 810]. However, commercial advertising is not wholly outside the protection of the *First Amendment* [see *Va. Pharmacy Bd. v. Va. Consumers Council* (1976) 425 U.S. 748, 770-773, 96 S. Ct. 1817, 48 L. Ed. 2d 346]. The U.S. Supreme Court has adopted the following tests for determining the validity of governmental restrictions on commercial speech:

- First, commercial speech is protected only if it concerns lawful activity and is not misleading [see *Central Hudson Gas v. Public Service Comm'n* (1980) 447 U.S. 557, 563-566, 100 S. Ct. 2343, 65 L. Ed. 2d 341]. As "unprotected speech," false and misleading advertising may be banned [see *Better Business Bureau, Etc. v. Medical Directors* (5th Cir. 1982) 681 F.2d 397, 404]. However, truthful advertising related to lawful activities is entitled to *First Amendment* protection [see *Better Business Bureau, Etc. v. Medical Directors* (5th Cir. 1982) 681 F.2d 397, 405].
- Second, a restriction on otherwise-protected commercial speech is valid only if the restriction (1) seeks to implement a substantial governmental interest, (2) directly advances that interest, and (3) reaches no farther than necessary to accomplish the given objective [see *Central Hudson Gas v. Public Service Comm'n* (1980) 447 U.S. 557, 563-566, 100 S. Ct. 2343, 65 L. Ed. 2d 341].

The dispositive test often will be whether the governmental restriction reaches beyond what is necessary. The government has the burden of proving that its restriction, such as an ordinance banning signs, is narrowly tailored to achieve the desired objective. A relevant consideration for a court is whether there are numerous and obvious alternatives that would be less burdensome on affected persons, such as local merchants, than the existing restriction. If that restriction is not a neutral restriction based on time, place, and manner of advertising but is content-based--for instance, banning all signs except certain ones described according to their content--it indicates that the government has not carefully calculated the costs and benefits associated with the burden on speech imposed by its restriction [*Ballen*

v. *City of Redmond* (9th Cir. 2006) 466 F.3d 736, 742-745 (ordinance banning all portable signs except certain ones was unconstitutional; merchant, who was thus prohibited from advertising by portable sandwich-board sign in front of store and who sued for relief under 42 U.S.C. § 1983, was entitled to recover substantial attorney's fees in addition to nominal damages and injunction)].

A city ordinance prohibiting commercial billboards that are not on the advertiser's commercial site (while permitting them on the advertiser's site) does not violate the Supreme Court's guidelines. That prohibition directly advances governmental interests in traffic safety and esthetics while permitting on-site billboards; thus the ordinance reflects a proper decision on the part of the city that the interest in permitting on-site billboards is stronger than the city's interests in traffic safety and esthetics. However, the fact that the ordinance also prohibits noncommercial signs renders it invalid on its face [*Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490, 512, 513, 101 S. Ct. 2882, 69 L. Ed. 2d 800 ; *Metromedia, Inc. v. City of San Diego* (1980) 26 Cal. 3d 848, 164 Cal. Rptr. 510, 610 P.2d 407] . If severance of the valid prohibition from the invalid prohibition is impossible, the ordinance is invalid [*Metromedia, Inc. v. City of San Diego* (1982) 32 Cal. 3d 180, 190, 191, 185 Cal. Rptr. 260, 649 P.2d 902] .

The rule that a city's esthetic interests are sufficiently substantial to justify a content-neutral ordinance against the use of billboards [see *Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490, 507-508, 101 S. Ct. 2882, 69 L. Ed. 2d 800] extends to political advertising [see *City Council v. Taxpayers for Vincent* (1984) 466 U.S. 789, 817, 104 S. Ct. 2118, 80 L. Ed. 2d 772] and may also be applied to other noncommercial speech [e.g., *Showing Animals Respect & Kindness v. City of West Hollywood* (2008) 166 Cal. App. 4th 815, 819-825, 83 Cal. Rptr. 3d 134 (ordinance banning all mobile billboard advertising was not unconstitutional as applied to nonprofit organization's vehicle that, while on city streets, presented messages, in both videos and sound recordings, against cruelty to animals)].

[2] Advertising by Attorneys

An attorney may advertise if the advertising is not misleading [*Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 641, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315] . Letters from an attorney to members of the public that refer to services offered by the attorney and that are sent with an economic motive embody commercial speech. For commercial speech to be protected, it must concern lawful activity and not be misleading. Thus, the rule of professional conduct that prohibits misleading or deceptive communications [see *Cal. Rules Prof. Conduct, Rule 1-400*] are constitutional, and misleading advertising by an attorney violates that rule [*Leoni v. State Bar* (1985) 39 Cal. 3d 609, 624-625, 217 Cal. Rptr. 423, 704 P.2d 183] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law
 Bill of Rights
 Fundamental Freedoms
 Freedom of Speech
 General Overview
 Constitutional Law
 Bill of Rights
 Fundamental Freedoms
 Freedom of Speech
 Commercial Speech
 General Overview
 Constitutional Law
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 Freedom of Speech
 Commercial Speech
 Advertising
 Legal Ethics
 Legal Services
 Marketing
 Advertising



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§ 50.11 California Regulation of Advertising

[1] False or Deceptive Advertising

[a] General Prohibition of False or Deceptive Advertising

Generally, untrue or misleading statements are illegal in advertising for the sale of goods, services, or real estate [*Bus. & Prof. Code § 17500*]. However, this does not apply to broadcasting or publishing, including over the internet, an advertisement in good faith, without knowledge of its false, deceptive, or misleading character [*Bus. & Prof. Code § 17502*]. A number of particular types of false or misleading representations that are illegal are specified by statute [*see Bus. & Prof. Code §§ 17530 et seq., 17540 et seq.*]; for a guide, see § 50.120. Note that in some cases, *Bus. & Prof. Code § 17500* could be preempted by federal law [*see, e.g., Silvas v. E*Trade Mortg. Corp. (9th Cir. 2008) 514 F.3d 1001, 1006*]. For discussion, see *California Forms of Pleading and Practice, Ch. 14, Advertising, § 14.12[1]*.

Anyone who makes untrue or misleading advertising statements concerning goods, services, or real estate is guilty of a misdemeanor [*Bus. & Prof. Code § 17500*] and is subject to a civil penalty [*Bus. & Prof. Code § 17536(a)*] and an injunction [*see Bus. & Prof. Code § 17535; see, e.g., Day v. AT&T Corp. (1998) 63 Cal. App. 4th 325, 335-337, 74 Cal. Rptr. 2d 55* (action that sought only to enjoin misleading or deceptive practices in advertising of phone card rates and sought no monetary recovery did not implicate federal "filed rate doctrine" under 47 U.S.C. § 203 and could proceed under *Bus. & Prof. Code §§ 17200, 17500*)]. A violator of an injunction is subject to a civil penalty [*Bus. & Prof. Code § 17535.5(a)*].

[b] Civil Remedies for False or Deceptive Advertising

Consumers are entitled to sue for damages for the types of misrepresentations proscribed by the California Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*; for discussion and forms, see *California Forms of Pleading and Practice, Ch. 504, Sales: Consumers Legal Remedies Act* (Matthew Bender)]. Certain specifically listed types of misrepresentations made by any person in any transaction intended to result in the sale or lease of goods or services to any consumer are illegal [*see Civ. Code § 1770*; for a guide, see § 50.120]. Individual actions and class actions by consumers are authorized, in addition to common law or statutory remedies available to consumers and the Attorney General [*Civ. Code § 1780 et seq.; see Civ. Code § 1752*]. As a prerequisite to an action for damages, a consumer must

notify the advertiser of the alleged misrepresentation and demand rectification [*see Civ. Code § 1782(a)*]. No suit may be brought if the advertiser takes appropriate corrective action [*see Civ. Code § 1782(b), (c)*].

The Consumers Legal Remedies Act applies to advertisers, but not to the owners or employees of any advertising medium that publishes the prohibited representations, in the absence of proof that they knew that the representations were unlawful [*Civ. Code § 1755*]. Moreover, anyone who unintentionally perpetrated a deceptive practice under *Civ. Code § 1770* and makes the appropriate correction is excused from liability for damages [*see Civ. Code § 1784*].

For additional discussion of the Consumers Legal Remedies Act, see Ch. 92, *Service Contracts* .

[2] Outdoor Advertising

[a] General Standards for Outdoor Advertising

The Outdoor Advertising Act [*Bus. & Prof. Code § 5200 et seq.; see 4 Cal. Code Reg. § 2240 et seq.* (regulations)] regulates the placement of advertising displays within view of highways located in unincorporated areas and within 660 feet of main highways located within incorporated areas of the state [*Bus. & Prof. Code § 5271*]. It does not regulate advertising displays placed along city and county streets and roads. Rather, it permits local entities to enact zoning regulations to control those displays [*see [g], below; for discussion of constitutional considerations relating to governmental regulation of advertising, see § 50.10[1]*].

A license is required to engage in the outdoor advertising business [*see Bus. & Prof. Code § 5300 et seq.; § 50.240 (form)*]. Permits may be required for individual advertising displays [*see Bus. & Prof. Code § 5350 et seq.; § 50.241 (form)*]. The displays themselves also are regulated, and certain types of outdoor advertising displays can be removed by order of the Director of the Department of Transportation (Caltrans) [*see Bus. & Prof. Code § 5400 et seq.*].

In general, no advertising displays may be placed within 660 feet from the right of way of, and the copy of which is visible from, any interstate or primary highway other than those that comply with Caltrans regulations [*Bus. & Prof. Code § 5405*] and give information in the specific interest of the traveling public [*Bus. & Prof. Code § 5405(e); see 23 U.S.C. § 131*]. While the "specific interest of the traveling public" is not defined by statute or in regulations [*see 4 Cal. Code Reg. § 2240 et seq.*], the Legislature has found that outdoor advertising is a legitimate commercial use of property and an integral part of the business and marketing function that should be allowed to exist, subject to reasonable controls in the public interest [*see Bus. & Prof. Code § 5226*].

A display that meet the requirements discussed in the preceding paragraph and advertises the business conducted on the property where the display is located [*Bus. & Prof. Code § 5405(c)*], and "for sale" and "for rent" signs [*Bus. & Prof. Code § 5405(b); see [d], below*], are not subject to the foregoing regulation. No advertising display may be placed beyond the 660-foot limit outside of business or urban areas if it is visible from the highway unless it is within one of the categories permitted by *Bus. & Prof. Code § 5405* [*Bus. & Prof. Code § 5408.1(a)*].

Temporary political signs are permitted [*Bus. & Prof. Code § 5405.3*], as are directional displays for farm produce outlets [*Bus. & Prof. Code § 5405.5*]. Certain types of displays may be placed on bus passenger shelters or benches [*see Bus. & Prof. Code § 5408.5*].

[b] Specific Requirements for Outdoor Advertising

The name of the person who owns or maintains an advertising structure must be plainly displayed on the structure [*Bus. & Prof. Code § 5400*]. Advertising structures must be built to withstand a wind pressure of 20 pounds per square foot of exposed surface [*Bus. & Prof. Code § 5401*]. Obscene, indecent, or immoral displays are prohibited [*Bus. & Prof. Code § 5402; see People v. Turner (1976) 55 Cal. App. 3d Supp. 74, 76, 128 Cal. Rptr. 638* (statute is not unconstitutionally

vague)].

No advertising display may be placed within the right of way of any highway. Displays that are visible from a highway may not simulate an official warning or information sign, use a red or flashing light likely to be mistaken for a warning or danger signal, be placed on trees or other natural features, or impair the vision of travelers on adjacent highways. Illumination will be considered vision-impairing when its brilliance exceeds the values set forth in *Veh. Code* § 21466.5 [Bus. & Prof. Code § 5403; see 4 Cal. Code Reg. § 2305 (standards for regulating outdoor advertising on protected bonus segments of interstate highway)].

Displays may not be placed outside of any business district, any unincorporated town, or certain subdivided areas within 300 feet from an intersection, except on structures that already obstruct the view of approaching vehicles for that distance, or in such a way that they prevent any traveler on any highway from having a clear view of approaching vehicles for 500 feet [Bus. & Prof. Code § 5404].

[c] Advertising Displays in Business Areas

Advertising displays not in violation of the statutory standards may be placed within 660 feet of an interstate or primary highway if placed in a business area and if they meet certain specific requirements. Business-area displays may not exceed 1,200 square feet in area and may not exceed 25 feet in height or 60 feet in length, including border and trim [Bus. & Prof. Code § 5408(a)].

Those displays may not be so illuminated that they interfere with the effectiveness of, or obscure, official traffic devices. They may not include flashing or moving lights (except for public service information such as time or temperature) or lights directed at travelers that would cause glare, impair vision, or interfere with the operation of motor vehicles [see Bus. & Prof. Code § 5408(b)]. They may not obstruct or interfere with official traffic devices or the vision of drivers in approaching, merging, or intersecting traffic [see Bus. & Prof. Code § 5408(c)], and they must be separated from each other [see Bus. & Prof. Code § 5408(d)].

[d] Advertising Displays Adjacent to Landscaped Freeways

Advertising displays adjacent to landscaped freeways are severely limited [see Bus. & Prof. Code § 5440]. The only type of displays generally allowed are those that advertise goods manufactured or produced, or services rendered, on the property where the displays are placed, those that designate the owner or occupant of the premises on which the display is placed or that identify the premises, or "for sale" or "for lease" signs placed on the subject property [Bus. & Prof. Code § 5442; see Bus. & Prof. Code §§ 5442.7, 5442.8, 5442.9 (limited exceptions); see also *Dept. of Transportation v. Maldonado* (2001) 86 Cal. App. 4th 1225, 1230-1233, 104 Cal. Rptr. 2d 66 (affirming trial court's judgment enjoining property owner from violations; challenged advertising did not fall within statutory exception)].

[e] Advertising Displays Along Scenic Highways and Byways

Generally, no advertising display may be placed or maintained along any highway or segment of any interstate highway or primary highway that is an officially designated scenic highway or scenic byway [Bus. & Prof. Code § 5440.1; see 23 U.S.C. § 131(s)]. The only types of advertising displays permitted are those used exclusively for any of the following purposes [Bus. & Prof. Code § 5442.5]:

- Directional and official signs and notices, including, but not be limited to, signs and notices pertaining to natural wonders or scenic and historical attractions that are otherwise required or authorized by law and conform to the applicable regulations.
- Signs, displays, and devices advertising the sale or lease of real property on which they are located.

- Signs, displays, and devices, including, but not limited to, those that may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located.
- Landmark signs, including signs on farm structures or natural surfaces, or of historic or artistic significance.
- Signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the interstate or primary highway system.

[f] Message Center Displays

In addition to the classifications of outdoor advertising permitted within the 660-foot range, "message center displays" complying with all requirements of the Outdoor Advertising Act may be operated [*Bus. & Prof. Code § 5405(d)*; see *Bus. & Prof. Code § 5405(a)-(c)*; [a]-[e], *above*]. The illumination or appearance of illumination resulting in a message change of a message center display is not the use of flashing, intermittent, or moving light for the purpose of *Bus. & Prof. Code § 5408(b)* [*Bus. & Prof. Code § 5405(d)(1)*; see *Bus. & Prof. Code § 5408(b)* (advertising displays in business areas); [c], *above*]. However, no message center display may include any illumination or message change that is in motion or appears to be in motion or that changes in intensity or exposes its message for less than four seconds [*Bus. & Prof. Code § 5405(d)(1)*]. No message center may be placed within 1,000 feet of another message center display on the same side of the highway, or placed in violation of 23 U.S.C. § 131 (control of outdoor advertising) [*Bus. & Prof. Code § 5405(d)(1)*].

Message center displays located beyond the 660-foot limit and permitted by a city, county, or city and county on or before December 31, 1988, are deemed to be in compliance with permit requirements and structural regulations [*Bus. & Prof. Code § 5405(d)(2)*; see *Bus. & Prof. Code §§ 5350 et seq., 5400 et seq.* (permits; regulations)]. Any message center display legally placed before 1990, but not in conformance with the requirements of *Bus. & Prof. Code § 5405*, may be maintained under its existing criteria if it advertises only the business conducted, services rendered, or goods produced or sold on the property where the display is placed [*Bus. & Prof. Code § 5405(d)(3)*].

[g] Local Zoning Regulation of Outdoor Advertising

Although the Outdoor Advertising Act occupies the whole field of regulation of advertising displays along interstate or primary highways, it does not prohibit enforcement of its provisions by local entities or the passage of county zoning ordinances affecting the placement of advertising displays [*Bus. & Prof. Code § 5227*]. Moreover, cities and counties may enact zoning ordinances imposing restrictions on advertising displays adjacent to any street, road, or highway [*Bus. & Prof. Code § 5230*], and may require licenses and permits for the placement of displays in view of any highway within their boundaries [*Bus. & Prof. Code § 5231*]. For instance, a local building permit could be required, not only for erecting a new billboard but also for reconstructing a billboard if it has been destroyed or substantially damaged [*Viacom Outdoor, Inc. v. City of Arcata (2006) 140 Cal. App. 4th 230, 243-244, 246, 44 Cal. Rptr. 3d 300* (Act cannot be deemed either expressly or implicitly to displace traditional regulatory power of cities and counties, and therefore it does not preempt city's efforts to enforce permit requirements of its building code and sign code)].

A city, county, or city and county may adopt restrictions or prohibitions affecting off-premises message center displays. The restrictions or prohibitions may be equal to or greater than those imposed by *Bus. & Prof. Code § 5405(d)* [see [f], *above*]. However, the ordinance or regulation may not restrict or prohibit on-premises advertising displays [*Bus. & Prof. Code § 5405(d)(4)*; see *Bus. & Prof. Code § 5490 et seq.*]. For example, no city or county may require removal of an on-premises advertising display on the basis of its height or size by requiring conformance with an ordinance or regulation if special topographic circumstances would result in a material impairment of visibility of the display or the

owner's or user's ability to adequately and effectively continue to communicate with the public through the use of the display [see *Bus. & Prof. Code* § 5499; see also *Denny's v. City of Agoura Hills* (1997) 56 Cal. App. 4th 1312, 66 Cal. Rptr. 2d 382 (preexisting business signs were protected under that statute from city signage ordinance)].

Local governmental entities may make relocation agreements regarding existing advertising [*Bus. & Prof. Code* § 5443; see *Bus. & Prof. Code* § 5412].

[h] Compelled Removal of Outdoor Advertising

If any governmental entity requires the removal of a lawfully erected advertising display as a condition or prerequisite for the issuance or continuation of its approval for any activity other than a display, that act constitutes a "compelled removal" [*Bus. & Prof. Code* § 5412.6]. A compelled removal must be compensated [*Bus. & Prof. Code* § 5412]. However, a removal is not "compelled" when the construction for which the entity's approval is requested cannot be done without removing the display [*Bus. & Prof. Code* § 5412.6]. In addition, local agencies may remove certain specified types of advertising displays with compensation [see *Bus. & Prof. Code* § 5412.1].

When the Department of Transportation acquires property, it may relocate existing displays, subject to the approval of the public agency acquiring the property and the approval of the jurisdiction in which the display will be located. However, any relocation may not cause either a reduction in federal highway funds or an impermissible increase in the number of displays within the jurisdiction of a governmental entity [*Bus. & Prof. Code* § 5443.5].

[3] Restrictions When Post Office Box Address Is Used

Anyone operating a business in California who uses a post office box address, private mailbox receiving service, or street address representing a site used to receive or deliver mail or as a telephone answering service must, in the process of selling or offering for sale any consumer goods or services, disclose the legal name under which business is done and the complete street address from which business is actually conducted, in all advertising and promotional materials, including order blanks and forms. Violation of this requirement is a misdemeanor [*Bus. & Prof. Code* § 17538.5(a)], and injunctive and other civil remedies are available [see *Bus. & Prof. Code* §§ 17535, 17536]. A person operating a business from his or her residence is not required to disclose the residence address if the person has filed Form 1583 (Application for Delivery of Mail Through Agent) with the U.S. Postal Service and signed a statutory acknowledgment form provided by the commercial mail receiving agency [*Bus. & Prof. Code* § 17538(b)(2)].

Exemptions apply for persons who sell a preponderance of goods and services at retail from trade premises open to the public and persons who provide services under a license issued by a state entity or (except for mail order or catalog businesses) a city or county that has the person's current business or home address on record and is authorized to reveal that address to inquiring persons [*Bus. & Prof. Code* § 17538.5(b)(1)].

[4] Advertising Grey Market Goods

Any retailer who offers grey market goods [see *Civ. Code* § 1797.8 et. seq.] must make a required disclosure in any advertisement of those goods [*Civ. Code* § 1797.82; see *Civ. Code* §§ 1797.81, 1797.83 (required disclosures)]. For a procedural guide, see § 50.120. Grey market goods are trademarked consumer goods imported into the United States through channels other than the manufacturer's authorized American distributor without the normal express written warranty by the manufacturer [*Civ. Code* § 1797.8(a)].

A retailer who violates this requirement is liable to any buyer who returns the product [*Civ. Code* § 1797.85]. In addition, a violation is unfair competition [see *Bus. & Prof. Code* § 17200], a ground for rescission [*Civ. Code* § 1689], and an unfair method of competition [*Civ. Code* § 1797.86; see *Civ. Code* § 1770(a)(21)].

[5] Direct Mail, Catalog, or Internet Advertising

Orders from a telephone, mail order, catalog, or internet business must be acted on within 30 days unless a different period is conspicuously stated in its advertisements or a shorter time is clearly communicated by the person conducting the transaction [see *Bus. & Prof. Code* § 17538]. Advertisements may indicate that a delay can be expected for a specified period [see *Bus. & Prof. Code* § 17538.3(a)]. Mail order, catalog, or internet advertisers who use a post office box return address must observe other restrictions [see [3], *above*].

[6] Unsolicited E-Mail Advertising

[a] California Requirements for E-Mail

Former *Bus. & Prof. Code* § 17538.4, governing unsolicited commercial e-mail advertising, was repealed effective January 1, 2004. However, a cause of action in existence before that date will be governed by the law that was in effect when that cause of action arose [see *Stats.* 2003, ch. 487, § 4]. The former statute was replaced with a law creating an "opt-in" scheme for regulating unsolicited commercial e-mail [see *Bus. & Prof. Code* § 17529 *et seq.*]. Under that scheme, it is unlawful to advertise to or from a California e-mail address in an unsolicited commercial e-mail [*Bus. & Prof. Code* § 17529.2(a), (b)]; that is, an e-mail as to which the recipient neither (1) has provided direct consent to receive advertisements from the advertiser, nor (2) has a preexisting or current business relationship with the advertiser [*Bus. & Prof. Code* § 17529.1(o); see *Bus. & Prof. Code* § 17529.1(l) (defining preexisting or current business relationship)].

However, it appears probable that the California opt-in law has been pre-empted by federal law [see *15 U.S.C. § 7701 et seq.*, Pub L. 108-187, 117 Stat. 2699 discussed in [b], *below*]. For that reason, the California requirements are not discussed in greater detail here. For additional discussion of the California legislation, see *California Forms of Pleading and Practice*, Ch. 14, *Advertising* (Matthew Bender).

[b] Federal CAN-SPAM Act

[i] Purpose

The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, popularly referred to as the CAN-SPAM Act of 2003 (Act) [*15 U.S.C. § 7701 et seq.*, Pub L. 108-187, 117 Stat. 2699], took effect on January 1, 2004. The Act generally requires unsolicited commercial e-mail messages to be labeled (though not by a standard method) and to include opt-out instructions and the sender's physical address. The Act prohibits the use of deceptive subject lines and false headers in those messages. The Act supersedes any California statute or state or local regulation or rule that expressly regulates the use of electronic mail to send commercial messages, except to the extent that the statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached to it [*15 U.S.C. § 7707(b)(1)*]. It appears probable, therefore, that the statute preempts all or at least most of the California legislation discussed in [a], *above*.

[ii] Scope of Act

The Act regulates commercial electronic e-mail messages. For purposes of the Act, "commercial electronic e-mail message" means "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)." The term does not include a transactional or relationship message [Pub L. 108-187, § 3(2)(A), (B)]. Thus, contacting customers about their accounts or any ongoing services appears to be outside the scope of the Act. It is also unclear whether solicitation from nonprofit organizations are exempt.

In addition, including a reference to a commercial entity or a link to the website of a commercial entity in an electronic mail message (e-mail) does not, by itself, cause the e-mail to be treated as a "commercial electronic mail message" for

purposes of this Act, if the contents or circumstances of the e-mail indicate a primary purpose other than commercial advertisement or promotion of a commercial product or service [15 U.S.C. § 7702(2)(D)].

Unlike California's "opt-in" anti-spam legislation [see *Bus. & Prof. Code § 17529 et seq.*, discussed in [a], *above*], the federal Act takes an "opt-out" approach to spam. Under the California law, marketers would have to prove the "direct consent" of the recipients either in response to a clear and conspicuous request for the consent or at the recipient's own initiative [see *Bus. & Prof. Code § 17529.1(d)*]. In contrast, the federal Act requires a business to stop sending e-mails to those who request to be removed from a list [see 15 U.S.C. § 7704(a)(3), (4); [vii], *below*]. However, the Act directs the Federal Trade Commission to investigate a "Do-Not-E-mail" list approach [see 15 U.S.C. § 7708], which could be similar to the federal "Do-Not-Call" list [see [8][a]].

[iii] Fraud and Related Activity Prohibited

The Act prohibits fraud and related activity. Specifically, the Act makes it a crime to do any of the following [18 U.S.C. § 1037(a)]:

- Access a protected computer without authorization and intentionally initiate the transmission of multiple commercial e-mail messages from or through that computer.
- Use a protected computer to relay or retransmit multiple commercial e-mail messages, with the intent to deceive or mislead recipients, or any Internet access service, about the origin of these messages.
- Materially falsify header information in multiple commercial e-mail messages and intentionally initiate the transmission of those messages.
- Register, using information that materially falsifies the identity of the actual registrant, for five or more e-mail accounts or online user accounts or two or more domain names, and intentionally initiate the transmission of multiple commercial e-mail messages from any combination of those accounts or domain names.
- Falsely represent oneself to be the registrant or the legitimate successor in interest to the registrant of 5 or more Internet Protocol addresses, and intentionally initiate the transmission of multiple commercial e-mail messages from those addresses.
- Conspire to do any of these prohibited acts.

Penalties include a fine, imprisonment, and criminal forfeiture [see 18 U.S.C. § 1037(b); see also 15 U.S.C. § 7706 (civil enforcement provisions)].

[iv] Use of Illegally Obtained E-mail Addresses Prohibited

The Act also prohibits sending e-mail obtained through illegal means, such as by:

- Harvesting e-mail addresses that appear on websites [see 15 U.S.C. § 7704(b)(1)].
- Automatically generating multiple e-mail accounts [see 15 U.S.C. § 7704(b)(2)].
- Relaying or transmitting e-mail obtained through unauthorized access [see 15 U.S.C. § 7704(b)(3)].

[v] Pornography Prohibited

Warning labels must be placed on commercial e-mail containing sexually oriented material [see 15 U.S.C. § 7704(d)]. "Sexually oriented material" means any material that depicts sexually explicit conduct (as defined in 18 U.S.C. § 2256), unless the depiction constitutes a small and insignificant part of the whole, and the remainder of the material is not primarily devoted to sexual matters [15 U.S.C. § 7704(d)(4)]. The Federal Trade Commission will prescribe marks or notices that must be included in the subject heading of the e-mail [see 15 U.S.C. § 7704(d)(1)(A), (3)]. These rules do not apply if the recipient has given prior affirmative consent to receipt of the message [15 U.S.C. 7704(d)(2)].

Penalties for knowingly violating these rules include fine and imprisonment, or both [15 U.S.C. § 7704(d)(5)].

[vi] Sending False or Misleading E-Mail Transmission Information Prohibited

The Act also prohibits sending false or misleading transmission information, including the following:

- Initiating a transmission to a protected computer of a commercial e-mail message, or a transactional or relationship message, that contains materially false or materially misleading header information [15 U.S.C. § 7704(a)(1)].
- Initiating a transmission to a protected computer of a commercial e-mail message if the person transmitting the message has knowledge (actual or fairly inferred) that the message subject heading would be likely to mislead a recipient about a material fact regarding the contents or subject matter of the message [15 U.S.C. § 7704(a)(2)].

It is also unlawful for a person to promote, or allow the promotion of, that person's trade or business by e-mail with false or misleading information if that person knows, or should have known in the ordinary course of that person's trade or business, that the goods were being promoted in such a message and took no reasonable effort to prevent the transmission [15 U.S.C. § 7705(a); see 15 U.S.C. § 7705(b) (when liability is imputed to third-party promoter)].

[vii] Inclusion of Identifier, Opt-Out, and Physical Return Address in Commercial E-Mail

A commercial e-mail must contain a functioning return e-mail address or other Internet-based mechanism, clearly and conspicuously displayed, that the recipient may use to submit a reply e-mail requesting no further solicitation [see 15 U.S.C. § 7704(a)(3)(A)]. The e-mail also must include clear and conspicuous identification that the message is an advertisement or solicitation; clear and conspicuous notice of the opportunity to decline to receive further commercial electronic mail messages from the sender; and a valid physical postal address of the sender [15 U.S.C. § 7704(a)(5)(A)].

If a recipient makes a request not to receive some or any commercial e-mail messages, the sender, or any person acting on behalf of the sender, may not send a commercial e-mail that falls within the scope of the recipient's request more than 10 days after the request, [see 15 U.S.C. § 7704(a)(4)(A)(i)-(iii)]. In addition, the sender, or any other person who knows that the recipient has made such a request, may not sell, lease, exchange, or otherwise transfer or release the e-mail address of the recipient (including through any transaction or other transfer involving mailing lists bearing the e-mail address of the recipient), except to comply with the Act [15 U.S.C. § 7704(a)(4)(A)(iv)].

[c] Violation of E-Mail Service Provider's Policy

No registered user [see Bus. & Prof. Code § 17538.45(a)(5)] of any electronic mail service provider [see Bus. & Prof. Code § 17538.45(a)(3)] may use or cause to be used that electronic mail service provider's equipment located in California in violation of that electronic mail service provider's policy prohibiting or restricting the use of its service or equipment for the initiation of unsolicited electronic mail advertisements [Bus. & Prof. Code § 17538.45(b)]. No individual, corporation, or other entity may use or cause to be used, by initiating an unsolicited electronic mail

advertisement, any electronic mail service provider's equipment located in California in violation of that electronic mail service provider's policy prohibiting or restricting the use of its equipment to deliver unsolicited electronic mail advertisements to its registered users [*Bus. & Prof. Code § 17538.45(c)*]. An electronic mail service provider may not sue a specific defendant under both *Bus. & Prof. Code § 17529.8* and *Bus. & Prof. Code § 17538.45* for the same unsolicited commercial electronic mail advertisement [*Bus. & Prof. Code § 17538.45(f)(4)*]. For discussion of a cause of action for damages under *Bus. & Prof. Code § 17529.8*, see California Forms of Pleading and Practice, Ch. 14, *Advertising* (Matthew Bender).

An unsolicited electronic mail advertisement is any electronic mail message, the principal purpose of which is to promote, directly or indirectly, the sale or other distribution of goods or services to the recipient, that is (1) addressed to a recipient with whom the initiator does not have an existing business or personal relationship and (2) not sent at the request of or with the express consent of the recipient [see *Bus. & Prof. Code § 17538.45(a)(1), (2)*]. "Initiation" of an unsolicited electronic mail advertisement refers to the action by the initial sender of the electronic mail advertisement. It does not refer to the actions of any intervening electronic mail service provider that may handle or retransmit the electronic message [*Bus. & Prof. Code § 17538.45(a)(4)*].

An electronic mail service provider is not required to create a policy prohibiting or restricting the use of its equipment for the initiation or delivery of unsolicited electronic mail advertisements [*Bus. & Prof. Code § 17538.45(d)*].

Nothing in *Bus. & Prof. Code § 17538.45* limits or restricts the rights of an electronic mail service provider under 47 U.S.C. § 230(c)(1) (protection for "good samaritan" blocking and screening of offensive material: treatment of publisher or speaker), or any decision of an electronic mail service provider to permit or to restrict access to or use of its system, or any exercise of its editorial function [*Bus. & Prof. Code § 17538.45(e)*].

Note that *Bus. & Prof. Code § 17538.45* may be preempted by the federal CAN-SPAM Act of 2003 [15 U.S.C. § 7701 *et seq.*]. The preemption provisions of the CAN-SPAM Act applies to any California statute that expressly regulates the use of electronic mail to send commercial messages, except to the extent that the statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached to it [15 U.S.C. § 7707(b)(1); see [b][i], *above*].

[7] Mobile Telephony (Cell Phones), Pager, and Two-Way Messaging Services

Generally, no person, entity conducting business, candidate, or political committee in California may transmit or cause to be transmitted a text message advertisement to a mobile telephony services handset, pager, or two-way messaging device that is equipped with short-message capability or any similar capability allowing the transmission of text messages. [*Bus. & Prof. Code § 17538.41(a)(1)*]. "Mobile telephony service" (a term in use at the Public Utilities Commission and the Federal Communications Commission) means commercially available interconnected mobile phone services that provide access to the public switched telephone network (PSTN) via mobile communication devices employing radiowave technology to transmit calls, including cellular radiotelephone, broadband Personal Communications Services (PCS), and digital Specialized Mobile Radio (SMR) [*Bus. & Prof. Code § 17538.41(g)*]. This proscription applies when a text message advertisement is transmitted to a number assigned for mobile telephony, pager, or two-way messaging service to a California resident [*Bus. & Prof. Code § 17538.41(a)(2)*].

A text message advertisement is a message, the principal purpose of which is to promote the sale of goods or services, or to promote a political purpose or objective, to the recipient, and consisting of advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, or advertising material for political purposes [*Bus. & Prof. Code § 17538.41(a)(1)*].

Bus. & Prof. Code § 17538.41 does not apply to the following:

- Text messages transmitted at the direction of a person or entity offering mobile telephony, pager, or two-way messaging service, if the subscriber is offered an option not to receive those text messages [*Bus. & Prof. Code § 17538.41(b)*].

- Text messages transmitted by a business, candidate, or political committee that has an existing relationship with the subscriber, if the subscriber is offered an option not to receive text messages from that business, candidate, or political committee [*Bus. & Prof. Code § 17538.41(c)*].

- Text messages transmitted by an affiliate (that is, any company that controls, is controlled by, or is under common control with, another company) of a business that has an existing relationship with the subscriber, but only if the subscriber has provided consent to the business with which he or she has that relationship to receive text messages from affiliates of that business [*Bus. & Prof. Code § 17538.41(d)*].

- Electronic mail messages that are forwarded without the knowledge of the sender, to a mobile telephony services handset, pager, or two-way messaging device [*Bus. & Prof. Code § 17538.41(e)*].

There is no obligation on a person or entity offering mobile telephony, pager, or two-way messaging service, to control the transmission of a text message unless the message is transmitted at the direction of that person or entity [*Bus. & Prof. Code § 17538.41(f)*].

[8] Telephone Advertising

[a] "Do Not Call" List

The California Attorney General is required to maintain a "do not call" list containing the telephone numbers and ZIP codes of residential or wireless telephone subscribers who do not want to receive unsolicited and unwanted telephone calls from telephone solicitors [*Bus. & Prof. Code § 17591*]. For these purposes, a "telephone solicitor" is any person or entity who, on his or her own behalf or through salespersons or agents, announcing devices, or otherwise, makes or causes a telephone call that does any of the following to be made to a California telephone number [*Bus. & Prof. Code § 17592(a)*]:

- Seeks to offer a prize, or to rent, sell, exchange, promote, give, or lease goods or services or documents that can be used to obtain goods or services.
- Offers or solicits, or seeks to offer or solicit, any extension of credit for personal, family, or household purposes.
- Seeks marketing information that will or may be used for the direct solicitation of a sale of goods or services to the subscriber.
- Seeks to sell or promote any investment, insurance, or financial services.
- Seeks to make any telephone solicitation or attempted telephone solicitation described in *Bus. & Prof. Code § 17511.1*, which lists various specific telephone solicitation representations relating to offers of no-cost items, prizes, gifts, reduced-price goods, sales of specific types of goods (such as gold, silver, or other metals, coins, gemstones, oil, gas, or mineral interests), obtaining or arranging loans or credit, and other specified activities.

A person or entity does not necessarily qualify as a telephone solicitor if the products or services of the person or entity are sold or marketed by an independent contractor whose business practices are not controlled by the person or entity [

Bus. & Prof. Code § 17592(b)].

With specified exceptions [see [b], *below*], telephone solicitors may not call any telephone number, beginning on or after the 31st day after the then current do not call list becomes available, to, among other things, seek to offer a prize, to rent, sell, exchange, promote, gift, or lease any goods or services; to offer or solicit credit, or to seek to offer or solicit credit, for personal family or household uses; to seek marketing information that will, or may, be used for a direct solicitation of a subscriber; or to seek to sell or promote any investment, insurance, or financial services [see *Bus. & Prof. Code § 17592(c)*; see also *Bus. & Prof. Code § 17591* (unlawful uses of list)]. In addition, persons who sell, lease, exchange, or rent telephone solicitation lists--except for directory assistance lists and telephone directories that list substantially all publicly available telephone numbers in a specific geographic area--may not include in their lists telephone numbers that appear on the then current do not call list [*Bus. & Prof. Code § 17592(d)*].

Violators of any of these provisions may be subject to an injunction, civil penalties, and any other relief the court deems proper [see *Bus. & Prof. Code § 17593(a), (b)*; see also *Bus. & Prof. Code § 17593(d)* (affirmative defenses includes that violation was accidental and in violation of solicitor's procedures)]. These rights and remedies are cumulative of any other rights, remedies, and penalties under other law [*Bus. & Prof. Code § 17593(c)*].

In general, it is an abusive telemarketing act or practice and a violation of the Federal Trade Commission's telemarketing rule [see 16 C.F.R. pt. 310] for a telemarketer (or for a seller to cause a telemarketer) to initiate a telephone call to a person whose number is on a national do not call list maintained by the FTC, unless the telemarketer (or seller) has that person's express written permission or has an established business relationship with that person [16 C.F.R. § 310.4(b)(1)(iii)(B); but see 16 C.F.R. § 310.4(b)(3) (safe harbor standards for immunity of telemarketers and sellers)].

The California Attorney General has elected to coordinate the California do not call list with the FTC's national do not call list. Compliance information for telemarketers and sellers, along with information about consumer registration, can be found on a web site maintained by the California Attorney General at <http://nocall.doj.state.ca.us/> and on the FTC's web site at <http://www.ftc.gov/>.

Effective January 1, 2004, any contact with a consumer located in California that is made in connection with a telephone solicitation (made in or from outside California) for the purchase of goods or services primarily for personal, family, or household use is unlawful if the telemarketer is in violation of Section 310.4(a)(6)(i) of the FTC's telemarketing rule [*Civ. Code § 1670.6*], which requires that a seller or telemarketer making an offer involving both preacquired account information and a "free-to-pay conversion" (or "opt-out free trial") must (1) obtain from the customer, at a minimum, the last four digits of the account number to be charged, (2) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account for which the consumer provided the four digits, and (3) make and maintain an audio recording of the entire telemarketing transaction [16 C.F.R. § 310.4(a)(6)(i)].

Additionally, any contact with a consumer located in California that is made in connection with a telephone solicitation for the purchase of goods or services primarily for personal, family, or household use is unlawful if the telemarketer has not complied with Section 310.5(a)(5) of the FTC's telemarketing rule [*Civ. Code § 1670.6*], which provides that a telemarketer must keep specified authorizations or records for 24 months [16 C.F.R. § 310.5(a)(5)].

[b] Exceptions to Restrictions on Telephone Advertising

The rules regulating unsolicited and unwanted telephone solicitations discussed in [a], *above*, do not apply to telephone calls made in any of the following circumstances:

- In response to the express agreement, in writing, of the subscriber to place calls to that California

telephone number [see *Bus. & Prof. Code § 17592(e)(1)*].

- In response to the express request of the subscriber [*Bus. & Prof. Code § 17592(e)(2)*].
- In connection with the collection of a debt or the offer by a creditor to the subscriber of an extension of credit to pay a delinquent obligation owed by the subscriber to that creditor [*Bus. & Prof. Code § 17592(e)(3)*].
- To a subscriber, if the telephone solicitor has an established business relationship with the subscriber [see *Bus. & Prof. Code § 17592(e)(4)*].
- By an individual business person or a small business (excluding a telemarketing business) that employs no more than five full-time or part-time employees or independent contractors, if the individual business person or a principal of the small business makes the telephone calls himself or herself for the sale of goods or services offered by the person or business, and the telephone calls are made to subscribers within a 50-mile radius of the location of the individual person or business [see *Bus. & Prof. Code § 17592(e)(5)*].
- Solely to verify that a subscriber, and not an unauthorized third party, has terminated an established business relationship [*Bus. & Prof. Code § 17592(e)(6)*].
- By a tax-exempt charitable organization [*Bus. & Prof. Code § 17592(e)(7)*].
- To solicit a donation without the purchase of goods or services [*Bus. & Prof. Code § 17592(e)(8)*].

For these purposes, "express agreement" or "express request" does not include any consent or permission included in any contract of adhesion [*Bus. & Prof. Code § 17592(e)(1), (2)*; see *Bus. & Prof. Code § 17592(e)(2)(A)-(D)* (when telephone calls are presumed not to be made at subscriber's express request)]. "Express request" may include a telephone call from a person or entity who has been provided the subscriber's telephone number and name as a referral from a solicitor with which the subscriber has an established business relationship, if that solicitor has obtained the subscriber's express request for the referral [*Bus. & Prof. Code § 17592(e)(2)*].

"Established business relationship" in this context means a relationship between a seller and a subscriber based on the subscriber's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the 18 months immediately preceding the date of a telemarketing call [*Bus. & Prof. Code § 17592(e)(4)*]. Further, if a subscriber purchases or obtains a product or service through a licensed agent or broker, an established business relationship is created with the licensed agent or broker individually, apart from and in addition to, any established business relationship that may have been created by a licensed agent or broker acting on behalf of another. In these circumstances, the licensed agent or broker is a "telephone solicitor" [*Bus. & Prof. Code § 17592(e)(4)*; see also *Bus. & Prof. Code § 17592(a)* ("telephone solicitor" defined)].

In addition, a telephone solicitor is not prohibited from contacting by mail a subscriber whose telephone number appears on the "do not call" list to obtain the subscriber's express written permission allowing the telephone solicitor to make the calls described in *Bus. Code § 17592(c)* [*Bus. & Prof. Code § 17592(f)(1)*; see *Bus. & Prof. Code §§ 17592(f)(2)* (required disclosures), *17592(f)(3)* (exceptions to disclosure requirement); see also [a], above (discussing *Bus. & Prof. Code § 17592(c)*)]. In any dispute regarding whether a subscriber has provided this express written permission, the telephone solicitor has the burden of proving that the subscriber has provided this permission by producing the original or a facsimile document, signed by the subscriber, showing that permission [*Bus. & Prof. Code § 17592(f)(4)*].

[9] Unsolicited Advertising Faxes

Generally, no person or entity may use any telephone facsimile machine, computer, or other device to send, or cause another person or entity to send, an unsolicited advertisement to a fax machine, if either the person or entity or the recipient is located within California [*Bus. & Prof. Code § 17538.43(b)*; see *Bus. & Prof. Code § 17538.43(a)* (definitions)].

The recipient of an unsolicited advertising fax may bring an action for injunctive relief, actual damages or statutory damages of \$500 per violation, whichever is greater, or both injunctive relief and damages [*Bus. & Prof. Code § 17538.43(b)(2)*]. If the violation is willful, a court may award treble damages [*Bus. & Prof. Code § 17538.43(b)(2)(C)*].

A person or entity also may not initiate a fax using a machine that does not provide specified identification, or use a device to send a message via a fax, unless the message is clearly marked with specified identifying information, if either the person or entity is located in California or the recipient is located in California [*Bus. & Prof. Code § 17538.43(c)(1), (2)*]. This identifying information includes the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of the business, other entity, or individual. This information must appear in a margin at the top or bottom of each transmitted page or on the first page of each transmission [*Bus. & Prof. Code § 17538.43(c)(1), (2)*].

These provisions do not apply to fax sent by or on behalf of a professional or trade association that is a tax-exempt nonprofit organization, in furtherance of the association's tax-exempt purpose to a member of the association, if all of the following conditions are met *Bus. & Prof. Code § 17538.43(d)*:

- The member voluntarily provided the association the fax number to which the fax was sent.
- The fax is not primarily for the purpose of advertising the commercial availability or quality of any property, goods, or services of one or more third parties.
- The member who is sent the fax has not requested that the association stop sending faxes for the purpose of advertising the commercial availability or quality of any property, goods, or services of one or more third parties.

[10] Spyware Advertisements

Under the Consumer Protection Against Computer Spyware Act (Act) [*Bus. & Prof. Code § 22947 et seq.*], a person or entity who is not an authorized user of a computer owned by a person in California may not, with actual knowledge, conscious avoidance of actual knowledge, or willfully, take control of the consumer's computer by opening multiple, sequential, stand-alone advertisements in the consumer's Internet browser without the authorization of an authorized user and with knowledge that a reasonable computer user cannot close the advertisements without turning off the computer or closing the consumer's Internet browser [*Bus. & Prof. Code § 22947.3(a)(4)*; see *Bus. & Prof. Code § 22947.1(a)* (definitions)]. For further discussion of the Act, see *Ch. 57, Computer-Related Transactions*, § 57.39.

[11] Advertising of Information Access Services

A variety of activities related to soliciting and advertising information access services and telephone numbers with the 900 prefix are prohibited, including soliciting by automatic dialing devices, requiring callers to dial more than one 900-prefix number, and advertising that information access services are free [*Bus. & Prof. Code § 17539.5(b)*; see *Bus. & Prof. Code § 17539.5(a)* (definitions)]. Anyone soliciting or selling information access services must make certain required disclosures in all solicitations [see *Bus. & Prof. Code § 17539.5(c)*].

Solicitations and sales of information access services that offer the opportunity to participate in sweepstakes [see *Bus. & Prof. Code § 17539.5(a)(12)* (definition)] must meet additional requirements [see *Bus. & Prof. Code § 17539.5(d)-(e)*]. Persons soliciting callers may not state or imply that the person solicited will receive a prize in a sweepstakes except in specified situations [see *Bus. & Prof. Code § 17539.5(h)*]. To operate a sweepstakes through the use of a 900-prefix number, the information provider must first register with the Department of Justice [*Bus. & Prof. Code § 17539.55(a)*; see *Bus. & Prof. Code § 17539.55(b)* (contents of registration)].

If incentives are offered in a solicitation for an information access service, all restrictions, qualifications, and deadlines relating to the incentives must be disclosed [*Bus. & Prof. Code § 17539.5(f)*]. Persons soliciting callers may not state or imply that the caller is part of a significantly limited group unless that is true [*Bus. & Prof. Code § 17539.5(g)*]. Phone-in games of skill are subject to additional regulations [see *Bus. & Prof. Code § 17539.5(j)*].

[12] Open-End Consumer Credit Advertising

A seller may not advertise any method of payment for goods, property, or services purchased through the use of consumer credit under an open-end credit plan accepted for purchases by more than one seller unless certain clear and conspicuous disclosures are made [*Bus. & Prof. Code § 17538.7(a)*]. These include the details of the price and the down payment [*Bus. & Prof. Code § 17538.7(a)(1)*], payment details [*Bus. & Prof. Code § 17538.7(a)(2)*], finance charge data [*Bus. & Prof. Code § 17538.7(a)(3)*], and other specified information [see *Bus. & Prof. Code § 17538.7(a)(4)-(6)*]. Catalogs or multi-page advertisements may make these disclosures in a clear and conspicuous table [see *Bus. & Prof. Code § 17538.7(b)*]. For a guide to the required disclosures, see § 50.120.

In any such advertising, the cash price must be clearly and conspicuously stated next to the payment terms [*Bus. & Prof. Code § 17538.7(c)*]. Bait terms may not be advertised [see *Bus. & Prof. Code § 17538.7(d)*]. The terms in the statute have the same meanings as in the federal Truth in Lending Act regulations (Regulation Z) [*Bus. & Prof. Code § 17538.7(e)*].

[13] Automatic Purchase Renewals and Continuous Service Offers

Effective December 1, 2010, *Bus. & Prof. Code § 17600 et seq.* governs automatic purchase renewals and continuous service offers [*Bus. & Prof. Code § 17606*]. For these purposes, "automatic renewal" means a plan or arrangement in which a paid subscription or purchasing agreement is automatically renewed at the end of a definite term for a subsequent term [*Bus. & Prof. Code § 17601(a)*]. A "continuous service" is a plan or arrangement in which a subscription or purchasing agreement continues until the consumer cancels the service [*Bus. & Prof. Code § 17601(e)*].

The law was enacted to end the practice of ongoing charging of consumer credit or debit cards or third-party payment accounts without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service [*Bus. & Prof. Code § 17600*].

On and after December 1, 2010, it is unlawful for any business making an automatic renewal or continuous service offer to a consumer in California to do any of the following [see *Bus. & Prof. Code § 17602(d)* (requirements generally apply only prior to completion of initial order for automatic renewal or continuous service)]:

- Fail to present the automatic renewal or continuous service offer terms in a clear and conspicuous manner [*Bus. & Prof. Code § 17602(a)(1)*].
- Charge the consumer for an automatic renewal or continuous service without first obtaining the consumer's affirmative consent to the agreement containing the automatic renewal offer terms or continuous service terms [*Bus. & Prof. Code § 17602(a)(2)*].

- Fail to provide an acknowledgment that includes the automatic renewal or continuous service offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer [*Bus. & Prof. Code § 17602(a)(3)*].

If the offer includes a free trial, the business must disclose in the acknowledgment how to cancel and allow the consumer to cancel before the consumer pays for the goods or services [*Bus. & Prof. Code § 17602(a)(3)*; *see Bus. & Prof. Code § 17602(b)* (cost-effective, timely, easy-to-use mechanism to contact seller must be described in acknowledgment)].

If there is a material change in the terms of the automatic renewal or continuous service offer that has been accepted by a consumer in California, the business must provide the consumer with a clear and conspicuous notice of the material change and provide information on how to cancel in a form that the consumer may retain [*Bus. & Prof. Code § 17602(c)*].

If a business sends any goods, wares, merchandise, or products to a consumer under a continuous service agreement or automatic renewal of a purchase, without first obtaining the consumer's affirmative consent, the goods, wares, merchandise, or products will be deemed an unconditional gift to the consumer, who may dispose of them in any manner [*Bus. & Prof. Code § 17603*].

Except as specified, a violation of these provisions is not a crime, but is subject to enforcement by any available civil remedies [*Bus. & Prof. Code § 17604(a)*; *see Bus. & Prof. Code § 17604(b)* (exception for business that complies with statutory provisions in good faith)].

Certain services and businesses are exempt from these requirements [*see Bus. & Prof. Code § 17605*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law
Consumer Protection
False Advertising
General Overview
Communications Law
Privacy
Telephone Consumer Protection Act
Computer & Internet Law
Online Advertising
General Overview
Governments
Local Governments
Ordinances & Regulations
Trademark Law
Protection of Rights
Registration
Gray Market Goods & Recordation With Customs



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION
PART II. LEGAL BACKGROUND

20-50 California Legal Forms--Transaction Guide § 50.12

§ 50.12 Federal Trade Commission Act

[1] In General

The Federal Trade Commission (FTC) regulates advertisements in interstate commerce that constitute unfair or deceptive acts or practices under various provisions of the Federal Trade Commission Act [see 15 U.S.C. §§ 45, 52, 57a, 64; see also *California Dental Ass'n v FTC* (1999) 526 U.S. 756, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (although jurisdiction of FTC extended to California Dental Association, abbreviated or "quick look" analysis by federal appeals court was not sufficient to justify finding that certain advertising restrictions adopted by association violated 15 U.S.C. § 45)]. The commercial speech exception to the *First Amendment* [see § 50.10[1]] applies when the commercial expression is unlawful or misleading. FTC orders affecting direct home solicitation of customers are even less subject to constitutional restraints. In-person solicitation, because of its potential for abuse, can be more strictly regulated than public advertising [*Grolier, Inc. v. F.T.C.* (9th Cir. 1983) 699 F.2d 983, 988] .

[2] Advertising as Interstate Commerce

The dissemination of advertising on a nationwide scale is interstate commerce. Interstate commerce is involved when the medium disseminates news from other states or, in the case of print media, the paper on which the medium is printed has been shipped across state borders [see *Lorain Journal Co. v. United States* (1951) 342 U.S. 143, 150, 151, 72 S. Ct. 181, 96 L. Ed. 162] . Further, the copy and other materials used in advertising are usually shipped across state borders [see *Indiana Farmer's Guide Pub. Co. v. Prairie F.P. Co.* (1934) 293 U.S. 268, 276, 55 S. Ct. 182, 79 L. Ed. 356] . If payment for advertising is made across state borders, interstate commerce is involved. Interstate commerce is also involved if the goods or services that are advertised in any particular medium are sold across state lines [see *Lorain Journal Co. v. United States* (1951) 342 U.S. 143, 150, 151, 72 S. Ct. 181, 96 L. Ed. 162] .

[3] False Advertising of Food, Drugs, Devices, and Cosmetics

Federal law specifically prohibits the false advertisement of food, drugs, devices, and cosmetics [see 15 U.S.C. § 52]. A "false advertisement" of food, drugs, devices, or cosmetics is an advertisement, other than labeling, that is misleading in a material respect. A determination that the advertising is misleading is made on the basis of not only the representations given but also the extent to which the advertising fails to reveal facts or material in the light of such

representations which may result from the use of the advertised commodity [*see 15 U.S.C. § 55(a)(1)*].

The dissemination of any false advertisement that is likely to induce the purchase in interstate commerce of food, drugs, devices, or cosmetics is prohibited [*15 U.S.C. § 52(a)*]. That type of advertising is an unfair or deceptive act or practice [*see 15 U.S.C. §§ 45, 52(b)*].

The advertiser is liable for fine or imprisonment if the use of the commodity advertised may be injurious to health under the advertised circumstances, or if the violation is with intent to defraud or mislead. The advertising agency or medium is not liable unless it refuses to furnish the advertiser's name and mailing address to the FTC [*15 U.S.C. § 54*].

The FTC may sue in federal district court to temporarily restrain or enjoin false advertising pending a final administrative order, when the FTC believes that dissemination of the material is imminent and the restraint would be in the public interest. A regularly issued publication may go to court to prevent such an order to the extent it appears to the court that the restraint would delay the delivery of the issue beyond its regular time, and that the delay would be the result of the method of the manufacture and distribution of the publication in accordance with sound business practice, rather than any method or device adopted for evasion of the law [*15 U.S.C. § 53(a), (d)*].

[4] Regulation of Unfair or Deceptive Acts

The Federal Trade Commission Act does not specifically prohibit false advertising of services or goods other than food, drugs, devices, or cosmetics. However it gives the FTC extensive authority to define specific acts or practices that are unfair or deceptive and therefore proscribed [*see 15 U.S.C. §§ 45(a)(1), 57a(a)*; *see also California Dental Ass'n v FTC (1999) 526 U.S. 756, 119 S. Ct. 1604, 1607, 143 L. Ed. 2d 935*]. The FTC has issued a number of regulations directly concerning advertising practices. For example, it is an act of unfair competition to engage in deceptive pricing by means of fictitious former price statements [*see 16 C.F.R. § 233.1*] or fictitious or misleading retail price comparisons [*see 16 C.F.R. §§ 233.2, 233.5*]. Advertising a reduction from the manufacturer's list price when in fact the product is seldom sold at the list price is prohibited [*see 16 C.F.R. § 233.3*], and bargain offers based on the purchase of other merchandise are regulated [*see 16 C.F.R. § 233.4*]. Bait advertising also is prohibited [*see 16 C.F.R. pt. 238*]. For a guide to the regulations, see § 50.121.

Deceptive advertising of guarantees is prohibited [*16 C.F.R. pt. 239*; *see § 50.121*] under the Consumer Product Warranties Act [*15 U.S.C. § 2301 et seq.*], which protects consumers with respect to written or implied warranties on tangible personal property and in relation to certain services.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Federal Trade Commission Act General Overview Antitrust & Trade Law Federal Trade Commission Act Coverage Antitrust & Trade Law Federal Trade Commission Act U.S. Federal Trade Commission



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§ 50.13 Other Federal Regulation of Advertising

[1] False Advertisements Prohibited Under Lanham Act

Under the Lanham Act [15 U.S.C. § 1051 *et seq.*], the use of words or symbols tending falsely to describe advertised goods or services entered into interstate commerce subjects the user to civil liability to the party damaged thereby [see 15 U.S.C. § 1125(a)]. A determination that the challenged descriptions or representations create a likelihood of confusion in the consuming public is central to a finding of false representations in advertising. Representations are not shielded from liability simply because they are literally true. The proscription against false representation [15 U.S.C. § 1125(a)] reaches innuendo, indirect intimations, and ambiguous suggestions evidenced by the consuming public's misapprehension of the hard facts underlining an advertisement [see *Better Business Bureau, Etc. v. Medical Directors* (5th Cir. 1982) 681 F.2d 397, 400]. False representations of a competitor's products and services in a comparative advertising campaign are also actionable under the Act [*U-Haul Int'l, Inc. v. Jartran, Inc.* (9th Cir. 1982) 681 F.2d 1159, 1162].

[2] Truth in Lending Act Restrictions

The Truth in Lending Act [15 U.S.C. § 1601 *et seq.*] provides that credit advertisements may not state that a specific credit amount or installment amount can be arranged unless the creditor usually and customarily arranges or will arrange the credit amount or installment amount [15 U.S.C. § 1662(1)]. Credit advertisements may not state that a specified down payment will be accepted or that none is required in connection with any credit extension, unless the creditor usually and customarily accepts or will accept down payments in that amount [15 U.S.C. § 1662]. For a guide to the requirements for credit advertising, see § 50.122. For additional discussion of the Truth in Lending Act, see Ch. 45, *Consumer Installment Loans and Credit Sales*, and Ch. 46, *Credit Card and Other Open-End Credit Transactions*.

[3] Consumer Lease Advertising

Consumer lease advertising is subject to limitations under the Truth in Lending Act [see 15 U.S.C. § 1667c; see also § 50.123]. A "consumer lease" is a contract in the form of a lease or bailment for the use of personal property by a natural person for a period exceeding four months and for a total contractual obligation not exceeding \$25,000, primarily for

personal, family, or household purposes. The lessee may or may not have an option to purchase or otherwise become the owner of the property at the expiration of the lease. The term "consumer lease" does not include a credit sale, nor does it cover a lease for agricultural, business, or commercial purposes or one made to an organization [15 U.S.C. § 1667(1); 12 C.F.R. § 213.2(e)(1)]. The regulation of consumer lease advertising does not apply to transactions in which personal property is leased as an incident to the lease of real property and the lease provides that the lessee has no liability for the value of the property at the end of the lease term, except for abnormal wear and tear, and the lessee has no option to purchase the leased property [12 C.F.R. § 213.2(e)(3)].

[4] Federal Communications Commission Regulation

The Federal Communications Commission (FCC) regulates broadcast media [see 47 U.S.C. § 151], including a variety of matters relating to broadcast advertisements. For example, the FCC requires that every broadcast commercial identify its sponsor [see 47 C.F.R. § 73.1212], and regulates false, misleading, or deceptive advertising [FCC Public Notice 61-1316], loud commercials [FCC Public Notice 75-880], and program-length commercials [FCC Public Notice 74-77].

The majority of the FCC rules relating to advertising are contained in formal FCC Public Notices and informal communications covering a number of subjects. The notices are made available to the broadcast media. The FCC requires the broadcasters to comply with them and to reject proposed advertising if it fails to comply. For this reason, an advertiser or agency that plans to use radio or television advertising should contact the broadcaster to determine whether a proposed radio or television commercial meets FCC criteria before producing it.

[5] Federal Election Commission Regulation

Federal law forbids corporations, national banks, and labor organizations to pay for "electioneering communications," that is, candidate-focused advertisements transmitted by cable or satellite communication or broadcasted within 30 days of a federal primary election or 60 days of a federal general election, in the jurisdiction in which the candidate is running for office [see 2 U.S.C. §§ 434(f)(3), 441b(a), (b)(2)]. The Federal Election Commission has power to enforce the prohibition [see 2 U.S.C. § 437g].

The prohibition is not unconstitutional on its face but could be subject to a challenge on the ground of being applied in an unconstitutional manner [*Wis. Right to Life, Inc. v. FEC* (2006) 546 U.S. 410, 126 S. Ct. 1016, 1018, 163 L. Ed. 2d 990 (lawsuit challenging application to "grassroots lobbying advertisements" could be pursued in federal courts)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection False Advertising Lanham Act Banking Law Consumer Protection Consumer Leasing General Overview Banking Law Consumer Protection Truth in Lending General Overview Communications Law U.S. Federal Communications Commission General Overview



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20-50 California Legal Forms--Transaction Guide § 50.14

§ 50.14 Advertising Matter as Express Warranty

An express warranty is created by an affirmation of fact or promise made by a seller to a buyer that relates to the goods involved and becomes a part of the bargain between a buyer and a seller. The warranty is that the goods will conform to the affirmation or promise [*Com. Code § 2313(1)(a)*; see, e.g., *McDonnell-Douglas Corp. v. Thiokol Corp.* (9th Cir. 1997) 124 F.3d 1173, 1176-1179 (evidence failed to show that manufacturer of motors used to propel satellites from space shuttle breached express warranty that motors were free from defects in labor, material, or manufacture, or that statements in attached drawings were intended to be additional warranties forming part of parties' bargain)]. Any description of goods that is made part of the bargain creates an express warranty that the goods conform to the description [*Com. Code § 2313(1)(b)*]. A sample that is made part of the basis of the bargain creates an express warranty that all of the goods will conform to the sample [*Com. Code § 2313(1)(c)*]. However, a mere statement of the value of goods or of the seller's opinion or commendation of the goods does not create a warranty [*Com. Code § 2313(2)*].

A statement in an advertisement may be considered an express warranty and part of an implied or written contract of sale. Accordingly, the purchaser of a product who detrimentally relies on representations in advertising material may recover damages on the theory of breach of express warranty. Even the manufacturer can be held liable for breach of the warranty contained in advertising material without any showing of privity between the buyer and the manufacturer [see *Thomas v. Olin Mathieson Chem. Corp.* (1967) 255 Cal. App. 2d 806, 811, 63 Cal. Rptr. 454 ; see also *Smith v. Gates Rubber Co.* (1965) 237 Cal. App. 2d 766, 768, 47 Cal. Rptr. 307] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)WarrantiesExpress Warranties



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[Reserved]

§§ 50.15[Reserved]



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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

20-50 California Legal Forms--Transaction Guide § 50.100

§ 50.100 Facts

1. Name, address, and telephone number of advertiser.
2. Name of person within advertiser's organization responsible for advertising program.
3. If advertiser now employs advertising agency:
 - a. Its name, address, and telephone number.
 - b. Name of account executive handling advertiser's advertising program.
 - c. Nature of relationship (extent of traditional agency relationship).
4. Type of business in which advertiser is engaged (indicating types of products or services to be advertised).
5. Advertising budget advertiser desires to commit.
6. Advertising medium to be used.
7. Places (cities, counties, states, and foreign countries) in which products or services will be advertised.

NOTE:

If interstate advertising is contemplated, the attorney will have to examine the laws of the other states to identify applicable requirements (or include a disclaimer such as "void where prohibited by law").

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawContent RegulationAdvertising



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

20-50 California Legal Forms--Transaction Guide § 50.101

§ 50.101 Documents to Be Obtained

1. Evidence of copyrights and trademarks held by advertiser.
2. Recent and current contracts, and supporting documents, with advertising agencies and consultants, if any.
3. Recent and current contracts, and supporting documents, with advertising media, if any.
4. Recent and proposed advertising copy, scripts, or other promotional materials.

Legal Topics:

For related research and practice materials, see the following legal topics:

Communications LawContent RegulationAdvertisingContracts LawTypes of ContractsTrademark LawSubject Matter



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

20-50 California Legal Forms--Transaction Guide §§ 50.102-50.109

[Reserved]

§§ 50.102[Reserved]



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CHAPTER 50 ADVERTISING AND PROMOTION
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

1-50 California Legal Forms--Transaction Guide

NOTE:

A contract for the placement of advertising does not involve the sale of goods under Division 2 of the Commercial Code, which therefore has no application to a case involving or arising from such a contract [*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal. App. 4th 1171, 1186-1187, 80 Cal. Rptr. 3d 6 (contract obligated one party to place popup ads at web sites of its marketing partners, and then to relay to other party certain information provided by potential customers who responded to those ads; party that placed those ads could not argue that Commercial Code was applicable based on party's theory that it was delivering goods when it relayed that information, since that party was only providing service)].



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

20-50 California Legal Forms--Transaction Guide § 50.110

§ 50.110 Applicable Governmental Controls

1. Review prohibitions against false or misleading advertising under California law [*see § 50.120*] and laws of other states [*see Rosden, the Law of Advertising, Ch. 16, State Statutes Governing Advertising (Matthew Bender)*].
2. Review specific regulation pertinent to client's product or service under California law [*see § 50.01[2], [3]*], federal law [*see § 50.02[2], [3]*], and laws of other states [*see Rosden, the Law of Advertising, Ch. 16, State Statutes Governing Advertising (Matthew Bender)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection False Advertising State Regulation



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DIVISION III: COMMERCIAL TRANSACTIONS
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B. Preliminary Determinations

20-50 California Legal Forms--Transaction Guide § 50.111

§ 50.111 Business Considerations

1. Consider pertinent statutory and common law requirements for copyrights and trademarks [see Ch. 103A, *Copyrights* ; Gilson on Trademarks, Ch. 1, *General Principles* (Matthew Bender)] and ascertain:

- a. What copyrights and trademarks have been registered.
- b. Whether client's proposed advertising might infringe trademarks or copyrights of others.

2. Advise client to determine whether any of its advertising agencies or consultants represent any of client's competitors, or other persons with conflicting interests, which representation would impair agency's ability to fully represent client's best interests [see Rosden, the Law of Advertising, Ch. 1, *The Relationship Between Advertisers and Advertising Agencies* (Matthew Bender)].

3. Consider whether proposed advertising would involve or constitute defamation or invasion of privacy.

NOTE:

This question may arise if the advertising content contains statements about competitors or competitors' products [see Rosden, the Law of Advertising, Ch. 31, *Comparative Advertising* (Matthew Bender)] or contains an individual's name or likeness, testimonial, or endorsement [see Rosden, the Law of Advertising, Ch. 29, *Testimonials and Endorsements*; Ch. 30, *Pictorial Representations* (Matthew Bender)]. For discussion of the issues in the litigation context, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* , and Ch. 429, *Privacy* (Matthew Bender).

4. Consider effect of advertising copy as warranty, and advise client:

NOTE:

An advertisement could be interpreted as an express warranty, particularly if the advertised product is sold without any disclaimer. However, a mere statement of the value of goods or of the seller's opinion or commendation of the goods does not create a warranty [*Com. Code § 2313(2)*]. For discussion of express warranties, see § 50.14. Prohibitions against deceptive advertising of guarantees are *covered in § 50.121*.

a. Do not make affirmation of fact or promise relating to goods involved unless goods conform to that affirmation or promise [*Com. Code § 2313(1)(a)*].

b. Do not include description of goods unless they conform to that description [*Com. Code § 2313(1)(b)*].

c. Do not use sample or model as part of advertisement scheme unless all goods will conform to the sample [*Com. Code § 2313(1)(c)*].

5. Consider extent to which advertising medium (such as radio or television) is subject to legal restrictions that could affect client's advertising.

6. Advise client to consider advertising medium's policies with respect to form and content of advertisements.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesExpress WarrantiesCopyright LawOwner RightsGeneral OverviewTrademark LawProtection of RightsGeneral Overview



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20-50 California Legal Forms--Transaction Guide §§ 50.112-50.119

[Reserved]

§§ 50.112[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION
PART III. TRANSACTION GUIDE
C. Procedural Guide to Legal Aspects of Advertising

20-50 California Legal Forms--Transaction Guide § 50.120

§ 50.120 California Prohibitions Against False or Misleading Advertising

1. Screen all proposed advertising to ensure that:

- a. It does not violate, or come within, any specific statutory requirement.
- b. It does not contain any untrue or misleading statements concerning sale or disposition of any [*see Bus. & Prof. Code § 17500*]:
 - (1) Real property.
 - (2) Personal property.
 - (3) Services.

NOTE:

Untrue or misleading statements of this nature may not be made in California or from California and communicated to the public in any other state in any newspaper or other publication, radio or television broadcast, advertising device, or any other manner, including over the internet [*Bus. & Prof. Code § 17500; see, e.g., Day v. AT&T Corp.* (1998) 63 Cal. App. 4th 325, 331, 74 Cal. Rptr. 2d 55 (action to enjoin misleading or deceptive practices in advertising of phone card rates)].

2. Ensure that advertiser will not advertise goods or services with the intent not to supply reasonably expectable demand without disclosing limitation of quantity [*Civ. Code § 1770(a)(10)*].

3. If quantity of specific articles to be sold to any customer is to be limited, ensure that advertiser will state restriction [*see Bus. & Prof. Code § 17500.5(a)*].

NOTE:

An advertiser that fails to state a limit in its advertising and then refuses to sell the advertised item at the advertised price in any quantity then available for sale on the premises will be liable to the consumer for damages [*see Bus. & Prof. Code § 17500.5(b)-(d)*].

4. If price is to be described in terms of worth or value, ensure that advertiser will [*Bus. & Prof. Code § 17501*]:

a. Specify prevailing market price:

(1) At time of publication.

(2) In location where published.

b. Describe price as:

(1) Retail worth or value if offer is at retail.

(2) Wholesale worth or value if offer is at wholesale.

5. Ensure that advertiser will not advertise any price as "former price" unless either [*Bus. & Prof. Code § 17501*]:

a. Former price was prevailing market price (retail if offer is retail or wholesale if offer is wholesale) within three months immediately before publication of advertisement; or

b. Date when former price prevailed is clearly, exactly, and conspicuously stated in advertisement.

6. If price reduction is advertised, ensure that advertiser will not make any false or misleading statement of fact concerning [*Civ. Code § 1770(a)(13)*]:

a. Existence of reduction.

b. Reasons for reduction.

c. Amount of reduction.

7. Ensure that advertiser will not advertise any of following contingent on any event that must occur after consummation of advertised transaction [*Civ. Code § 1770(a)(17)*]:

a. Rebate.

b. Discount.

c. Other economic benefit.

8. If consumer goods or services [*see Bus. & Prof. Code § 17504(c), (d)*] are sold in multiple units (more than one item for one stated price), ensure that advertiser will:

a. Advertise goods or services at price of minimum multiple unit in which they are offered [*Bus. & Prof. Code § 17504(a)*]; or

b. Advertise goods or services to retail buyers at single unit price but also disclose, at least as prominently, price of minimum multiple unit [*Bus. & Prof. Code § 17504(b)*].

9. Ensure that advertiser will not represent advertiser as source of advertised goods unless representation is true; specifically, will not misrepresent that advertiser is [*see Bus. & Prof. Code § 17505; Civ. Code § 1770(a)(2)*]:

- a. Producer or manufacturer of advertised goods.
- b. Processor of advertised goods.
- c. Wholesaler of advertised goods.
- d. Importer of advertised goods.
- e. Owner or person who controls factory or other source of supply.

10. Ensure that advertiser will not misrepresent advertised goods as those of another person [*see Civ. Code § 1770(a)(1)*].

11. Ensure that advertiser will not misrepresent any of following with respect to advertiser's goods or services [*Civ. Code § 1770(a)(2), (5)*; *see Consumer Advocates v. Echostar Satellite Corporation (2003) 113 Cal. App. 4th 1351, 1353-1354, 8 Cal. Rptr. 3d 22* (consumers alleged that provider of satellite TV service violated *Civ. Code § 1770(a)(5)*; triable issues of fact found on whether defendants violated statute with representations about number of channels and program schedule)]:

- a. Sponsorship.
- b. Approval.
- c. Certification.
- d. Characteristics.
- e. Ingredients.
- f. Uses.
- g. Benefits.
- h. Quantities.

12. Ensure that advertiser will not misrepresent following characteristics of advertiser's business [*Bus. & Prof. Code § 17505*]:

- a. Character or type.
- b. Extent or volume.

13. Ensure that advertiser will not misrepresent advertiser's:

- a. Affiliation, connection, or association with another person [*Civ. Code* § 1770(a)(3), (5)].
- b. Certification by another person [*Civ. Code* § 1770(a)(3)].
- c. Sponsorship by another person [*Civ. Code* § 1770(a)(5)].
- d. Approval by another person [*Civ. Code* § 1770(a)(5)].
- e. Status with respect to another person [*Civ. Code* § 1770(a)(5)].

14. When advertisement pertains to more than one article of merchandise or type of service within same class of merchandise or service, ensure that advertiser will clearly and conspicuously identify article or service to which any stated price relates [*Bus. & Prof. Code* § 17507].

NOTE:

Disclosure of the relationship between an item and a price by means of an asterisk or other symbol and a corresponding footnote does not meet the requirement of clear and conspicuous identification when the item is not represented pictorially [*Bus. & Prof. Code* § 17507].

15. Ensure that advertiser will not make false or misleading claims that [*Bus. & Prof. Code* § 17508(a)]:

- a. Purport to be based on factual, objective, or clinical evidence;
- b. Compare advertised product's effectiveness or safety to that of other brands or products; or
- c. Purport to be based on any fact.

NOTE:

If any of these types of advertising claims are made, the advertiser must be able to substantiate them at the request of the Department of Consumer Affairs, the Attorney General, any city attorney, or any district attorney any time within one year from the last day on which the claims were made [*see Bus. & Prof. Code* § 17508(b), (c)].

16. Ensure that advertiser will not permit real estate advertising that is untrue or misleading in any of following respects [*Bus. & Prof. Code* § 17530]:

- a. Extent.
- b. Location.
- c. Ownership.
- d. Title.
- e. Any other characteristic, quality, or attribute.

17. Ensure that advertiser will not represent goods as original or new if they [*Civ. Code* § 1770(a)(6)]:

- a. Have deteriorated unreasonably.

- b. Are altered.
- c. Have been reconditioned.
- d. Are reclaimed.
- e. Are used or secondhand.

18. If merchandise being advertised is secondhand, used, defective, consists of "seconds" or blemished goods, or has been rejected by manufacturer as not first class, ensure that advertisement will [*Bus. & Prof. Code § 17531*]:

NOTE:

Merchandise must be advertised as "second hand" or "used" if it is used, worn, or sampled for a short time by a consumer and then returned in like-new condition in accordance with the retailer's policy allowing returns of merchandise at the customer's discretion, unless the customer's use was for inspection purposes only [*81 Ops. Cal. Atty. Gen. 161, 165 (May 22, 1998)*] .

a. Clearly, directly, and unequivocally state that goods involved are secondhand, used, defective, "seconds" or blemished goods, or have been rejected by manufacturer, as appropriate.

b. Display that statement:

(1) Conspicuously.

(2) Directly and in connection with name and description of that merchandise.

19. Ensure that advertiser will not misrepresent that advertiser's goods or services are any of following [*Civ. Code § 1770(a)(7)*; see *Consumer Advocates v. Echostar Satellite Corporation (2003) 113 Cal. App. 4th 1351, 1353-1354, 8 Cal. Rptr. 3d 22* (consumers alleged that provider of satellite TV service violated *Civ. Code § 1770(a)(7)*; triable issues of fact found on whether defendants violated statute with representations about number of channels and program schedule)]:

a. Of particular standard, quality, or grade.

b. Of particular style or model.

20. If federal surplus goods are advertised:

a. Ensure that advertisement will [*Bus. & Prof. Code § 17531.5*]:

(1) Clearly, directly, and unequivocally state that goods involved are federal surplus property.

(2) Display that statement:

(a) Conspicuously.

(b) Directly and in connection with name and description of that merchandise.

b. Ensure that advertiser will not misrepresent that [*Bus. & Prof. Code § 17533.5*]:

- (1) Sales location has official relation to federal government.
- (2) All articles sold there are surplus.
- (3) Articles sold there are of higher quality and lower prices than those obtainable elsewhere.

21. Ensure that advertiser will not accompany pictorial display of any merchandise not made in United States by words indicating that merchandise was made in United States [see *Bus. & Prof. Code* § 17533.7].

NOTE:

The fact that a product may have been designed, processed, and assembled in the United States would not prevent a conclusion that some part of the product was "substantially made, manufactured or produced" [*Bus. & Prof. Code* § 17533.7] outside the United States [*Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal. App. 4th 663, 672, 38 Cal. Rptr. 3d 36 (tools were unlawfully claimed to be "Made in U.S.A." since significant working parts were investment cast, fineblanked, formed, hardened, cut, forged, polished, or machined in various foreign countries; importantly, plier jaws that were investment cast in Mexico had letters "USA" stamped onto them)].

Merchandise has been "substantially made, manufactured, or produced outside the United States" when foreign operations, processes, or activities employed to create the merchandise are found to be considerable in either amount, value, or worth. When the merchandise consists of two or more physical elements or pieces, *Bus. & Prof. Code* § 17533.7 applies to any distinct component of the merchandise that is necessary for its proper use or operation [*Benson v. Kwikset Corp.* (2007) 152 Cal. App. 4th 1254, 1272-1273, 62 Cal. Rptr. 3d 284 (screws and pins made in Taiwan were distinct components clearly necessary to proper use or operation of lockset because without them one could not install or operate that product; partial assembly of lockset latches in Mexico was part of manufacturing process)].

22. If prizes are offered as part of advertising scheme, ensure that advertiser will not:

a. Offer prize or gift by mail, telephone, or in person with intent to make sales presentation without disclosing that intent in clear and unequivocal manner [*Bus. & Prof. Code* § 15733.8(a)].

b. Notify any person that he or she has won a prize or will receive a gift conditioned on [*Bus. & Prof. Code* § 17537]:

- (1) Payment of money; or
- (2) Purchase or rental of goods or services.

c. Offer any prize or gift to induce recipient to visit a location, attend sales presentations, or contact sales agent without written disclosure of [*Bus. & Prof. Code* § 17537.1(a)]:

- (1) Name and street address of owner of property or provider of services involved.
- (2) General description of business of owner of property or provider of services involved.
- (3) General description of property or services involved.

(4) Statement of odds of winning, in Arabic numerals of winning.

(5) All restrictions, qualifications, and other conditions to be satisfied before winning.

NOTE:

These include any deadlines, the approximate duration of any visit and sales presentation, minimum age qualification, financial qualification, and any requirement that if the winner is married both spouses must be present [*see Bus. & Prof. Code § 17537.1(a)(4)*].

(6) Statement that owner or provider reserves right to provide rain check or substitute a like item, if applicable.

(7) Statement that winner may request and will receive evidence that prize matches item selected for distribution to him or her.

(8) All other rules, terms, and conditions.

d. Offer any prize to induce recipient to visit a location, attend sales presentations, or contact sales agent if offeror knows that there is insufficient quantity of prize to meet anticipated response [*Bus. & Prof. Code § 17537.1(b)*].

e. Offer any prize to induce recipient to visit a location, attend sales presentations, or contact sales agent and fail to award prize to winner [*Bus. & Prof. Code § 17537.1(c)*; *see Bus. & Prof. Code § 17537.1(d)* (disclosure to be made if prize is unavailable for specified reasons)]:

(1) Unless prize is not reasonably available; and

(2) Offer disclosed reservation of right to give rain check or substitute item if offered prize is unavailable.

f. Offer incentive and request that recipient pay any money to any person, or purchase, rent, or otherwise pay any person or entity for product or service, including deposit, to use incentive [*Bus. & Prof. Code § 17537.2(a)*].

NOTE:

It is permissible to require a small refundable deposit if the incentive is a certificate or coupon redeemable for transportation, accommodations, recreation, vacation, entertainment, or like services if the deposit is payable directly to the provider of the services [*Bus. & Prof. Code § 17537.2(a)*]. The prohibition on incentives [*see Bus. & Prof. Code § 17537.2(a)*] does not apply to an opportunity to stay at a hotel or other resort accommodation at a discount from the standard rate if four conditions are satisfied: (1) the fee to use the incentive and any requirement to attend a sales presentation are disclosed, (2) a disclosure concerning the payment of taxes is provided, (3) the accommodations are within a 20-mile radius of the property on which the accommodations offered for sale are located, or if outside that radius, certain requirements regarding ownership and operation are met, and (4) the incentive is offered in conjunction with additional incentives in a group of incentives, and certain additional requirements are met [*Bus. & Prof. Code § 17537.2(f)*].

g. State or imply in offer that recipient is one of select group to receive particular incentive, without clear and conspicuous disclosure of number of persons in group or odds of receiving incentive [*Bus. & Prof. Code § 17537.2(b)*].

h. State or imply in offer that recipient is likely to receive one or more offered incentives because other named people

have already received other named incentives, without clear and conspicuous disclosure of recipient's odds of receiving incentive [*Bus. & Prof. Code § 17537.2(c)*].

i. Falsely state or imply that recipient is likely to receive incentive with higher retail price than that of another incentive [*Bus. & Prof. Code § 17537.2(d)*].

NOTE:

A list of incentives implies that they are listed in descending or ascending order of value unless the solicitation clearly and conspicuously negates that implication in close proximity to the list [*Bus. & Prof. Code § 17537.2(d)*].

j. Describe incentive in untrue or misleading manner, including [*Bus. & Prof. Code § 17537.2(e)*]:

(1) Implying that incentive is of greater fair market value or of different kind than reader would be led to believe from reading offer.

(2) Listing recipient's name near specific incentive without clearly and conspicuously disclosing, immediately above, below, or adjacent to recipient's name, recipient's odds of receiving that incentive.

23. If advertiser sells or offers consumer goods or services for sale and its advertising uses post office or "mail drop" address (that is, that of answering service or street address for site used primarily for receipt of mail), ensure that advertisement will disclose [*Bus. & Prof. Code § 17538.5*]:

NOTE:

There are a number of important exceptions to this requirement. The exceptions are noted in § 50.11[3]. The exceptions include, under specified circumstances, operations of retail premises open to the public, persons conducting mail order business from their personal residences, and persons conducting business under a state, county, or municipal license that contains the person's residence address, if the licensing entity is authorized to reveal that address to inquiring persons [*see Bus. & Prof. Code 17538.5(b)*].

a. Legal name of business.

b. Street address from which it is actually conducted.

24. If advertisement consists of catalog or seeks mail, telephone, or internet orders, ensure that orders will be acted on within 30 days unless:

NOTE:

A vendor who offers a return and refund policy allowing return of goods or cancellation of services must process and send to the buyer any refund due within 30 days or otherwise arrange to credit the buyer's account [*Bus. & Prof. Code § 17538(e)*].

a. Different period is conspicuously stated in advertisement [*Bus. & Prof. Code § 17538(a)*];

b. Shorter time is clearly communicated by one conducting the transaction [*Bus. & Prof. Code § 17538(a)*]; or

c. Advertisement indicates in type size as large as used for price that delay can be expected for specified

period [*Bus. & Prof. Code § 17538.3(a)*].

25. If advertiser is motel or motor court, ensure that:

NOTE:

Local governmental entities may enact more stringent controls on motel or motor court advertising [*Bus. & Prof. Code § 17567.5*] and, accordingly, these should be checked for such clients.

a. Outdoor signs will not show room rates unless they show [*Bus. & Prof. Code § 17564*]:

- (1) Rates charged for all accommodations offered for rent.
- (2) Number of rooms offered at each rate.
- (3) Number of persons accommodated at rate posted.
- (4) All rates and other data in type and material in same size and prominence.

b. Outdoor signs will not contain any untrue or misleading rate representations [*see Bus. & Prof. Code § 17566*].

26. Ensure that advertiser will not advertise products as made by:

a. Blind workers, unless at least 75 percent of time involved in manufacture was performed by blind persons [*Bus. & Prof. Code § 17522*].

b. American Indians, unless made by authentic American Indian labor [*Bus. & Prof. Code § 17569*].

27. Ensure that advertiser will not use deceptive representations or designations of geographic origin in connection with advertisement of goods or services [*Civ. Code § 1770(a)(4)*].

28. Ensure that advertiser will not disparage goods, services, or business of another by false or misleading representation of fact [*Civ. Code § 1770(a)(8)*].

29. Ensure that advertiser will not advertise goods or services with intent not to sell them as advertised [*Civ. Code § 1770(a)(9)*; *see Consumer Advocates v. Echostar Satellite Corporation (2003) 113 Cal. App. 4th 1351, 1353-1354, 8 Cal. Rptr. 3d 22* (consumers alleged that provider of satellite TV service violated *Civ. Code § 1770(a)(9)*; triable issues of fact found on whether defendants violated statute with representations about number of channels and program schedule)].

30. Ensure that advertiser will not represent that any advertised transaction confers or involves rights, remedies, or obligations [*Civ. Code § 1770(a)(14)*; *see Wang v. Massey Chevrolet (2002) 97 Cal. App. 4th 856, 867-870, 118 Cal. Rptr. 2d 770* (parol evidence rule did not constitute bar or defense to claim based on violation of statute)]:

- a. It does not have or involve; or
- b. That are prohibited by law.

31. Ensure that advertiser will not misrepresent authority of salesperson, representative, or agent to negotiate final terms

of transaction with consumer [*Civ. Code § 1770(a)(18)*].

32. If unassembled furniture is advertised, ensure that advertiser will not:

- a. Advertise it without clearly indicating that it is unassembled [*Civ. Code § 1770(a)(11)*].
- b. Advertise its price without clearly indicating assembled price if same furniture is available assembled from advertiser [*Civ. Code § 1770(a)(12)*].

33. Ensure that advertiser will not state in advertising that any particular part, replacement, or repair service is needed when it is not [*Civ. Code § 1770(a)(15)*].

34. If advertisement, including any advertisement over internet, solicits purchase or lease of product or service that requires purchase or lease of different product or service as condition of that transaction, ensure that advertiser will disclose price of all such extras in advertisement [*Bus. & Prof. Code § 17509(a)*].

35. Ensure that advertiser will not advertise offer of product at specified price plus specified percentage of that price unless [*Civ. Code § 1770(a)(20)*]:

- a. Total price is set forth in advertisement in size larger than any other price in advertisement.
- b. Price plus specified percentage thereof represents markup from seller's costs or wholesale price of product.

36. If advertiser will be offering grey market goods [*see § 50.11[4]*] for retail sale (or for lease of over four months [*see Civ. Code § 1797.8(b)*]), ensure that advertiser will post conspicuous sign, in conspicuous type size, on product display and attach conspicuous ticket, tag, or label to product or its package disclosing all of following, as applicable [*Civ. Code §§ 1797.81(a), 1797.82*]:

- a. Item is not compatible with United States electrical currents.
- b. Item is not compatible with United States broadcast frequencies.
- c. Replacement parts are not available through manufacturer's United States distributors.
- d. Compatible accessories are not available through manufacturer's United States distributors.
- e. Item is not accompanied by English instructions.
- f. Item is not eligible for manufacturer's rebate.
- g. Any other known incompatibility or nonconformity with domestic standards.
- h. Item is not covered by manufacturer's express written warranty valid in United States.

NOTE:

The warranty disclosure is not required if the goods are accompanied by an express written warranty provided by the retail seller, if the following conditions are met: the warranty is at least as good as the normal manufacturer's warranty; the seller has properly informed prospective buyers that copies of applicable warranties are available on request;

and the seller has complied with the Song-Beverly Consumer Warranty Act [*Civ. Code* § 1790 *et seq.*; *see Civ. Code* § 1747 *et seq.*] and the provisions on availability of presale warranties in the Federal Trade Commission regulations under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act [*see 15 U.S.C. § 2302(b)(1)(A)*].

37. Ensure that advertiser will not disseminate unsolicited prerecorded telephone message to any person not having established relationship with caller without obtaining the consent of that person to listen to prerecorded message, and without first informing that person by an unrecorded, natural voice, of following [*Civ. Code* § 1770(a)(22)]:

- a. Name of caller or organization being represented.
- b. Address or telephone number of caller or organization being represented.

38. Ensure that advertiser will not undertake any home solicitation [*see Civ. Code* § 1761(h) (definition)] of consumer who is senior citizen when loan is made encumbering his or her primary residence to pay for home improvements and when transaction is part of pattern or practice in violation of either 15 U.S.C. § 1639(h), (i) or 12 C.F.R. § 226.32(e) [*Civ. Code* § 1770(a)(23)].

38A. Ensure that advertiser will not charge or receive an unreasonable fee [*see Civ. Code* § 1770(a)(24)(B)(ii) (definition)] to prepare, aid, or advise any prospective applicant, applicant, or recipient in the procurement, maintenance, or securing of public social services [*Civ. Code* § 1770(a)(24)(A); *see Civ. Code* § 1770(a)(24)(B)(i) ("public social service" defined); *see also Civ. Code* § 1770(a)(24)(C) (exception, in certain circumstances, for attorneys licensed in California)].

39. If advertiser is mortgage broker or lender, ensure that advertiser will not use (directly or indirectly) home improvement contractor to negotiate terms of any loan that is secured, in whole or in part, by borrower's residence and is used to finance home improvement contract [*Civ. Code* § 1770(b)(1)].

40. If any method of payment for goods, property, or services to be purchased will use open-end consumer credit plan accepted by more than one seller, ensure that advertisement will:

NOTE:

Terms used below have the meanings ascribed in the federal Regulation Z [*Bus. & Prof. Code* § 17538.7(e)].

- a. Not use bait terms in advertising open-end consumer credit [*see Bus. & Prof. Code* § 17538.7(d)].
- b. Make following disclosures clearly and conspicuously:

- (1) Price and down payment terms [*Bus. & Prof. Code* § 17538.7(a)(1)]:
 - (a) Cash price.

NOTE:

The cash price must be clearly and conspicuously stated next to the payment terms [*Bus. & Prof. Code* § 17538.7(c)].

- (b) Amount or percentage of down payment, if any.

- (2) Payment terms [*Bus. & Prof. Code* § 17538.7(a)(2)]:

(a) Monthly or other periodic payment.

(b) Number of payments or period of repayment.

(c) Whether payment is calculated on assumption that purchaser has no outstanding balance due under credit plan, if that is so.

(3) Finance charge data [*Bus. & Prof. Code § 17538.7(a)(3)*]:

(a) Amount of finance charge.

(b) Any periodic rate applicable, expressed as an annual percentage rate.

(c) Any variable periodic rate applicable.

c. If in catalogs or multi-page advertisements [*Bus. & Prof. Code § 17538.7(b)*]:

(1) Set forth clearly and conspicuously the information set forth in P 40(b), *above*, in a table or schedule.

(2) Refer to that table wherever payment terms are stated elsewhere.

41. If advertising homestead filing service, ensure that advertisement will:

NOTE:

A homestead filing service is a service that, for compensation, prepares, completes, or provides any assistance in connection with homestead declarations. Legal services performed by attorneys are excepted from this definition [*see Bus. & Prof. Code § 17537.6(e)(1)*].

a. Not make any statement classified by statute as untrue or misleading [*Bus. & Prof. Code § 17537.6(a)*].

b. Include statutory disclosure statement in all advertising [*Bus. & Prof. Code § 17537.6(b)*]:

(1) At top of each page of every advertisement or promotional material, in 12-point boldface type enclosed in box formed by heavy line;

(2) Recited at beginning of every oral solicitation and broadcast advertisement; and

(3) Delivered in printed form to any person responding to oral solicitation or broadcast advertisement before person is obligated to pay for service.

42. If advertiser is vehicle dealer, auto broker, or lessor-retailer, ensure that advertiser will:

NOTE:

It is unlawful for any holder of a vehicle dealer license to violate any of the following statutory prohibitions concerning the advertising of vehicle sales [*see Veh. Code §§ 11713, 11713.1; Bus. & Prof.*

Code § 17537.7. A number of the following prohibitions also apply to auto brokers [*see, e.g., Veh. Code §§ 11713(b), (p), 11713.1(x); Bus. & Prof. Code § 17537.7; see also Veh. Code §§ 166, 232.5, 285* (definition)]. Similar advertising restrictions apply to lessor-retailers [*see Veh. Code §§ 11614, 11614.1* (prohibited acts)].

a. Not make, or cause to be made, any advertising statement that is both [*Veh. Code § 11713(a)*]:

(1) Untrue or misleading; and

(2) Known (or that should be known) to be untrue or misleading.

b. Not make any advertising statement as part of plan or scheme with intent not to sell any vehicle or service at advertised price or as advertised [*Veh. Code § 11713(a)*].

c. Not advertise any vehicle not actually for sale at dealer's premises or available to dealer directly from manufacturer or distributor at time of advertisement [*Veh. Code § 11713(b)*].

NOTE:

A dealer registered as an auto broker [*see Veh. Code § 11735*] may advertise its services of arranging or negotiating the purchase of a new motor vehicle from a franchised new motor vehicle dealer and specify the line-makes and models of those new vehicles [*Veh. Code § 11713(b)*]. Auto brokering service advertisements are subject to additional advertising restrictions [*see Veh. Code § 11713(b)(1)-(3)*].

d. Withdraw, within 48 hours, any advertisement of vehicle either sold or withdrawn from sale [*Veh. Code § 11713(c)*].

e. Not advertise vehicle as new if vehicle is used [*Veh. Code § 11713(d); see Veh. Code §§ 430, 665*].

f. Not advertise that down payment is not required when in fact down payment is required and buyer is advised to finance down payment by additional loan [*Veh. Code § 11713(k)*].

NOTE:

The term "no down payment," "zero down delivers," or a similar term, must not be advertised unless the vehicle will be sold to any qualified purchaser without a trade-in or prior payment of any kind [*Veh. Code § 11713(k)*].

g. Not use picture in connection with any advertisement of price of specific vehicle or class of vehicles unless picture is of year, make and model being offered for sale [*Bus. & Prof. Code § 11713(s)*].

NOTE:

The picture must not depict a vehicle with optional equipment or a design not actually offered in the advertised price [*Bus. & Prof. Code § 11713(s)*].

h. Not advertise vehicle for sale that was used by selling licensee in its business as demonstrator, executive vehicle, service vehicle, rental, loaner, or lease vehicle, unless advertisement clearly and conspicuously discloses vehicle's previous use [*Bus. & Prof. Code § 11713(t)*].

i. Identify advertised vehicle by its model, model year, and either license number or that portion of vehicle identification number that distinguishes vehicle from all other vehicles of same make, model, and model year [*Veh. Code § 11713.1(a); see Veh. Code § 11713.1(y)* ("make" and "model" defined)].

NOTE:

Model year is not required to be advertised for current year models. Year models are no longer current when ensuing year models are available for purchase at retail in California [*Veh. Code § 11713.1(a)*]. Any advertisement that offers for sale a class of new vehicles in a dealer's inventory, consisting of five or more vehicles, that are all the same make, model, model year, and type, is not required to include the vehicle identification numbers or license numbers [*Veh. Code § 11713.1(a)*].

- j. Include total price of vehicle in advertisement [*Veh. Code § 11713.1(b)*].

NOTE:

Total price does not include taxes, registration fees, state tire fee [*see Pub. Res. Code § 42885* ("tire fee" defined)], emission testing fees not exceeding \$50, actual fees charged for certificates of compliance or noncompliance [*see Health & Safety Code § 44060* (certificates of compliance and noncompliance)], finance charges, and document preparation charge [*Veh. Code § 11713.1(b)*]. The dealer document preparation charge may not exceed \$55 [*Veh. Code § 11713.1(b)*].

- k. Include, in any advertisement of vehicle for sale, statement that following charges will be added to advertised total price at time of sale [*Veh. Code § 11713.1(c)(1)*]:

NOTE:

This disclosure requirement is met by adding to the advertisement a statement that contains no abbreviations and is worded in substantially the following form: "Plus government fees and taxes, and finance charges, any dealer document preparation charge, and any emission testing charge" [*Veh. Code § 11713.1(c)(2)*]. An "advertisement" is any advertisement in a newspaper, magazine, or direct mail publication that is two or more columns in width or one column in width and more than seven inches in length, or on any web page of a dealer's web site that displays the price of a vehicle offered for sale on the internet [*Veh. Code § 11743.1(c)(3)*; *see Bus. & Prof. Code § 17538(f)(6)* ("internet" defined)].

(1) Sales tax.

(2) Vehicle registration fee.

(3) State tire fee [*see Pub. Res. Code § 42885* ("tire fee" defined)].

(4) State fee to issue any certificate of compliance or noncompliance.

(5) Finance charges.

(6) Any dealer document preparation charge.

- l. Not represent dealer document preparation charge or certificate of compliance or noncompliance fee as governmental fee [*Veh. Code § 11713.1(d)*].

- m. Sell vehicle at advertised total price, unless advertisement states that advertised total price is good for limited time and time has elapsed [*Veh. Code § 11713.1(e)*].

NOTE:

Advertised vehicles must be sold at or below the advertised total price, with exclusions specified by statute, regardless of whether the buyer knows the advertised total price [*Veh. Code § 11713.1(e)*].

n. Not advertise for sale or sell as new any vehicle of line-make for which dealer does not hold franchise [*Veh. Code § 11713.1(f)*].

NOTE:

This prohibition does not apply to transactions involving mobilehomes, recreational vehicles, commercial coaches, off-highway motor vehicles, manufactured homes, new vehicles that will be substantially altered or modified by a convertor before resale, commercial vehicles with a gross vehicle weight rating of more than 10,000 pounds, vehicles purchased for export and exported outside the territorial limits of the United States without being registered with the DMV, or vehicles acquired in the ordinary course of business as a new vehicle by a dealer franchised to sell that vehicle, if specified conditions are met, including if the manufacturer or distributor of the vehicle files a bankruptcy petition [*see Veh. Code § 11713.1(f)(2)*; *see also Veh. Code §§ 260, 396, 38012* (commercial vehicle; mobilehome; off-highway motor vehicle); *Health & Safety Code §§ 18010, 18001.8* (recreational vehicle; commercial modular, or coach)].

o. Not sell park trailer without first disclosing in writing to purchaser that park trailer is required to be moved by transporter or licensed manufacturer or dealer under permit issued by Department of Transportation or local authority with respect to highways under their respective jurisdictions [*Veh. Code § 11713.1(g)*].

NOTE:

For purposes of *Veh. Code § 11713.1*, a park trailer is a trailer designed for human habitation for recreational or seasonal use only that (1) contains 400 square feet or less of gross floor area, excluding loft area space meeting specified statutory requirements, (2) is built on a single chassis, and (3) may only be transported on the public highways with a permit issued under *Veh. Code § 35780* [*Health & Safety Code § 18009.3*; *Veh. Code § 11713.1(g)*]; *see Health & Safety Code § 18009.3(b)* ("loft area" defined); *Health & Safety Code § 18033* (requirements for loft areas excluded from gross floor area)].

p. Not advertise free merchandise, gifts, or services contingent on purchase of vehicle [*Veh. Code § 11713.1(h)*].

NOTE:

"Free" includes merchandise, gifts, or services offered at a price below the dealer's cost [*Veh. Code § 11713.1(h)*].

q. Not advertise vehicles or related goods and services without being able to supply reasonably expectable demand, unless advertisement discloses limitation of quantity [*Veh. Code § 11713.1(i)*].

NOTE:

An advertisement that uses phrases such as "starting at," "from," or "beginning as low as" in reference to an advertised price must disclose the number of vehicles available at the advertised price. Newspaper advertisements for vehicles that are two model years old or newer must state the number of vehicles in stock at the advertised price in specified type sizes and styles. The statements must be immediately above, below, or beside the advertised price without intervening words, pictures, marks, or symbols [*see Veh. Code § 11713.1(i)*].

r. Not use "rebate" or similar words, including, but not limited to, "cash back" offers unless amount is specifically expressed and rebate is directly offered from manufacturer or distributor to retail purchaser [*Veh. Code § 11713.1(j)*].

s. Not charge person higher price for purchasing vehicle on advertised credit terms than amount person would pay for cash price [*Veh. Code § 11713.1(k)*; *see Civ. Code § 2981(e)* ("cash price" defined)].

t. Not advertise guaranteed trade-in allowance [*Veh. Code § 11713.1(l)*].

u. Not misrepresent authority of salesperson, representative, or agent to negotiate final terms of transaction [*Veh. Code § 11713.1(m)*].

v. Not state that selling price of vehicle is above, below, or at manufacturer's or distributor's invoice price to dealer or dealer's cost [*Veh. Code § 11713.1(n)(1)*].

NOTE:

This prohibition does not apply to a communication that occurs during face-to-face negotiations for the purchase of a specific vehicle, or to a communication between a dealer and a prospective commercial purchaser that is not disseminated to the general public. "Commercial purchaser" means a dealer, lessor, lessor-retailer, manufacturer, remanufacturer, distributor, financial institution, government entity, or person who purchases 10 or more vehicles a year [*Veh. Code § 11713.1(n)(2)*].

w. Comply with federal prohibitions on "bait and switch" advertising [*Veh. Code § 11713.1(o)*; see 16 C.F.R. § 238].

x. Not make untrue or misleading statement that vehicle is equipped with all factory-installed optional equipment offered by manufacturer [*Veh. Code § 11713.1(p)*].

y. Not affix on new vehicle any supplemental price sticker containing price representing dealer's asking price that exceeds manufacturer's suggested retail price unless all of following occur [*Veh. Code § 11713.1(q)*]:

(1) Supplemental sticker clearly and conspicuously discloses in largest print on sticker, other than dealer's name, that supplemental price is dealer's asking price, and not manufacturer's suggested retail price.

(2) Supplemental sticker clearly and conspicuously discloses manufacturer's suggested retail price.

(3) Supplemental sticker lists each item that is not included in manufacturer's suggested retail price, and discloses additional price of each item.

NOTE:

If the supplemental sticker price is greater than the sum of the manufacturer's suggested retail price and the price of items added by the dealer, the supplemental sticker price must set forth that difference and describe it as "added mark-up" [*Veh. Code § 11713.1(q)(3)*].

z. Not advertise underselling claim without first establishing recent substantiating record [*Veh. Code § 11713.1(r)*].

aa. Not advertise incentive offered by manufacturer or distributor if dealer is required to contribute to incentive, without disclosing that dealer's contribution may affect consumer cost [*Veh. Code § 11713.1(s)(1)*; see *Veh. Code § 11713.1(s)(2)* ("incentive" defined)].

bb. Not display or offer for sale any used vehicle unless Federal Trade Commission Buyer's Guide is affixed [*Veh. Code § 11713.1(t)*; see 16 C.F.R. § 455.1 et seq.].

cc. Disclose in writing to franchisor of new motor vehicle dealer all of following information for each new vehicle of that franchisor's line-make sold [*Veh. Code § 11713.1(u)*]:

(1) Name of purchaser.

(2) Date of sale.

(3) Vehicle identification number.

dd. Not submit false purchaser's name or false sale date to franchisor [*Veh. Code § 11713.1(u)*].

ee. Not enter into motor vehicle retail sale contract unless contract clearly and conspicuously discloses whether vehicle is being sold as new or used [*Veh. Code § 11713.1(v)*; see *Veh. Code §§ 430, 665* ("new vehicle" defined; "used vehicle" defined)].

ff. Not use simulated check [see *Bus. & Prof. Code § 22433* (definition)] in advertisement for sale or lease of vehicle [*Veh. Code § 11713.1(w)*].

gg. Disclose, in clear and conspicuous manner in at least 10-point boldface type on face of contract for retail sale of new motor vehicle, whether transaction is subject to fee received by auto broker from sale, and name of auto broker, if applicable [*Veh. Code § 11713.1(x)*; see Ch. 47, *Automotive Financing and Vehicle Leasing*].

43. If sending or causing to be sent unsolicited advertising by e-mail, include the following in all documents:

NOTE:

The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act of 2003) [*15 U.S.C. § 7701 et seq.*, effective January 1, 2004; see § 50.11[6][b] for discussion] generally requires unsolicited commercial e-mail messages to be labeled (though not by a standard method) and to include opt-out instructions and the sender's physical address. The law prohibits the use of deceptive subject lines and false headers in those messages.

a. Functioning return e-mail address, clearly and conspicuously displayed, that recipient may use to submit reply e-mail requesting no further solicitation [see *15 U.S.C. § 7704(a)(3)*].

b. Clear and conspicuous identification that message is advertisement or solicitation [*15 U.S.C. § 7704(a)(5)(A)(i)*].

c. Clear and conspicuous notice of opportunity to decline to receive further commercial electronic mail messages from the sender [*15 U.S.C. § 7704(a)(5)(A)(ii)*].

d. Sender's valid physical postal address [*15 U.S.C. § 7704(a)(5)(A)(iii)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection False Advertising State Regulation Antitrust & Trade Law Consumer Protection Magnuson-Moss Warranty Act General Overview Computer & Internet Law Online Advertising Spam Email Trademark Law Protection of Rights Registration Gray Market Goods & Recordation With Customs



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION
PART III. TRANSACTION GUIDE
C. Procedural Guide to Legal Aspects of Advertising

20-50 California Legal Forms--Transaction Guide § 50.121

§ 50.121 Federal Prohibitions Against False or Deceptive Advertising

NOTE:

This is a guide to the generally applicable federal prohibitions against false or deceptive advertising. The Federal Trade Commission issues trade-practice rules governing deceptive advertising of specific products and services [*see* 16 C.F.R. § 228.0 et seq.]. For discussion of the FTC's power over advertising in interstate commerce, see Rosden, the Law of Advertising, Ch. 4, *The Federal Power to Regulate Advertising* (Matthew Bender).

1. Advise advertiser not to disseminate any false advertisement [*see* § 50.12[3]] in interstate commerce that is likely to induce purchase of [15 U.S.C. § 52(a)]:

- a. Food [*see* 15 U.S.C. § 55(b) (definition)].
- b. Drugs [*see* 15 U.S.C. § 55(c) (definition)].
- c. Devices [*see* 15 U.S.C. § 55(d) (definition)].
- d. Cosmetics [*see* 15 U.S.C. § 55(e) (definition)].

2. Advise advertiser not to include deceptive pricing representations in advertisements [*see* 16 C.F.R. pt. 233].

- a. Ensure that reduction in price is not based on former fictitious price [16 C.F.R. § 233.1].

NOTE:

A former price is not necessarily fictitious merely because no sales were made at that price, if the product was openly and actively offered for that price [*see 16 C.F.R. § 233.1(b)*]. If the advertiser sets forth the former price and uses the term "regularly," "usually," or "formerly," the advertiser should be certain that the former price was not fictitious [*see 16 C.F.R. § 233.1(e)*].

b. Ensure that "sale" price is compared to former price when reduction is insignificant [*16 C.F.R. § 233.1(e)*].

c. If retail price comparison is advertised [*16 C.F.R. § 233.2*]:

(1) Ensure that merchandise is not being offered at price lower than that charged by others when higher price is either fictitious or misleading [*16 C.F.R. § 233.2(a)*].

(2) Advise advertiser not to represent price as below those in its area unless [*16 C.F.R. § 233.2(a)*]:

(a) Reasonably certain that higher prices mentioned in advertisement do not appreciably exceed price at which article is being sold in advertiser's trade area in substantial number of sales.

(b) Sales of article in trade area at higher price are numerous enough for consumers to consider reduction as genuine bargain.

(c) Higher price does not represent isolated and unrepresentative price in that area.

d. Ensure that advertiser will not:

(1) Make retail price comparisons unless based on fact [*see 16 C.F.R. § 233.2(a)*].

(2) Advertise reduction from price being charged either by advertiser or others in trade area for other merchandise of like grade and quality when that other merchandise is not essentially of similar quality or is not obtainable in trade area [*see 16 C.F.R. § 233.2(a)*].

(3) Advertise reduction from manufacturer's list price when product is seldom sold at list price [*see 16 C.F.R. § 233.3(a)*].

NOTE:

A list price is not fictitious if there are substantial sales of the product made at that price in the advertiser's trade area [*16 C.F.R. § 233.3(d)*]. Generally, the question is resolved on the basis of the good faith of the advertiser in not attempting to establish a deceptive comparison in any trade area [*16 C.F.R. § 233.3(i)*].

(4) Advertise misleading bargain offers based on purchase of other merchandise [*16 C.F.R. § 233.4(a)*].

NOTE:

If merchandise is offered with terms such as "free," "2-for-1," "half-price sale," "1-cent sale," and "50 percent off," the terms and conditions of the offer must be made clear at the outset [*16 C.F.R. § 233.4(c)*].

(5) Represent retail price as "wholesale" price [*see 16 C.F.R. § 233.5*].

(6) Represent price as "factory" price unless it is price paid by those purchasing directly from manufacturer [see 16 C.F.R. § 233.5].

(7) Advertise second, imperfect, or irregular merchandise at reduced price without disclosing that stated higher comparative price refers to perfect merchandise [see 16 C.F.R. § 233.5].

(8) Advertise an advance sale unless advertiser actually expects, in good faith, to increase price at later date [see 16 C.F.R. § 233.5].

(9) Advertise that "limited" offer is being made if, in fact, offer is not limited [see 16 C.F.R. § 233.5].

3. Advise advertiser not to use bait advertising [16 C.F.R. pt. 238]:

NOTE:

Bait advertising is an insincere offer to sell a product or service that the advertiser in truth does not intend to sell. Its purpose is to switch consumers from buying the advertised merchandise in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. The primary aim is to obtain leads to persons interested in buying merchandise of the type advertised [16 C.F.R. § 238.0]. After an advertisement has drawn a customer to the advertiser's place of business, the advertiser should neither attempt to discourage the purchase of the advertised merchandise [see 16 C.F.R. § 238.3] nor "unsell" the advertised product with the intent of making a switch [see 16 C.F.R. § 238.4].

a. Advise advertiser not to advertise offer to sell any product unless offer is bona fide effort to sell that product [16 C.F.R. § 238.1].

b. Advise advertiser not to create false impression of grade, quality, make, value, currency of model, size, color, usability, or origin of offered product, which on later disclosure of true facts will cause purchaser to switch from one product to another [16 C.F.R. § 238.2].

4. Advise advertiser not to use deceptive advertising of warranty or guarantee [see 16 C.F.R. § 239.1 et seq.; § 50.14 (express warranties in advertising)] and that advertiser must:

a. Clearly and conspicuously disclose nature and extent of guarantee, including [16 C.F.R. § 239.1(a)]:

(1) Product or part of product that is guaranteed.

(2) Characteristics or properties included or excluded from guarantee.

(3) Duration of guarantee.

(4) Procedural steps consumers must take before advertiser will fulfill its obligation under guarantee.

b. Include, as part of advertisement, manner in which advertiser will perform [16 C.F.R. § 239.1(b)].

NOTE:

This should consist primarily of a statement of exactly what the guarantor undertakes to do under the

guarantee, such as repair, replace, or refund. If the guarantor or the person receiving the guarantee has an option as to what may satisfy the guarantee, that fact should be specified [16 C.F.R. § 239.1(b)].

c. Include identity of advertiser [16 C.F.R. § 239.1(c)].

d. If guarantee is advertised on pro rata basis: clearly disclose basis on which proration will be made [16 C.F.R. § 239.2].

e. If guarantee offers trial period (for example "satisfaction or your money back," "10-day free trial") and guarantee is subject to conditions or limitations: set forth conditions or limitations in full [16 C.F.R. § 239.3].

f. If "life" or "lifetime" guarantee is advertised and it relates to any life other than that of purchaser: clearly and conspicuously disclose what life is referred to [16 C.F.R. § 239.4].

g. If guaranteed savings (for example "guaranteed to save you 50 percent" or "guaranteed lowest price in town") are advertised: include clear and conspicuous disclosure of [16 C.F.R. § 239.5(c)]:

(1) What advertiser will do if savings are not realized (such as refund purchase price).

(2) Any time or other limitations imposed.

h. Not make any guarantee that advertiser does not intend to perform or cannot perform [see 16 C.F.R. § 239.6].

i. If guarantee indicates representation of material fact: representation must be truthful [16 C.F.R. § 239.7].

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection False Advertising General Overview Antitrust & Trade Law Consumer Protection False Advertising U.S. Federal Trade Commission



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20-50 California Legal Forms--Transaction Guide § 50.122

§ 50.122 Credit Advertising Under Federal Truth in Lending Act

NOTE:

For discussion of electronic advertisements relating to credit plans, see Ch. 45, ***Consumer Installment Loans and Credit Sales***, and Ch. 46, ***Credit Cards and Other Open-End Credit Transactions***.

1. Advise advertiser that credit advertisements must state only specific credit terms [15 U.S.C. § 1662; 12 C.F.R. §§ 226.16(a), 226.24(a)]:

- a. That actually are available.
- b. That will be arranged or offered by creditor.

2. Advise advertiser that open-end credit advertisement containing specific credit terms [see 12 C.F.R. § 226.6] must disclose [15 U.S.C. § 1663; 12 C.F.R. § 226.16(b)]:

NOTE:

"Open-end credit" and "open-end consumer credit" describe consumer credit extended under an open account, that is, when the creditor contemplates repeated transactions and may impose a finance charge from time to time on the outstanding unpaid balance and when the amount of credit that may be extended under the account is generally made available to the extent that any outstanding balance is repaid [15 U.S.C. § 1602(i); 12 C.F.R. § 226.2(a)(20)]. An advertisement for open-end credit that states specific credit terms must state only those terms actually arranged or offered by the creditor [12 C.F.R. § 226.16(a)]. If any of the terms required to be disclosed to a consumer in an initial disclosure statement [see 12 C.F.R. § 226.6; see also Ch. 46, ***Credit Card and Other Open-End Credit Transactions***] are also set forth in an advertisement, it must clearly and conspicuously set forth the following terms [16 C.F.R. § 226.16(b)].

- a. Any minimum, fixed, transaction, activity, or similar charge that might be imposed.
- b. Any periodic rate, expressed as annual percentage rate.
- c. Fact that periodic rate is variable, if it is.
- d. Any membership or participation fee that could be imposed.

3. Advise advertiser that closed-end credit advertisement in which rate of finance charge is stated must [15 U.S.C. § 1664(c); 12 C.F.R. § 226.24(c)]:

NOTE:

"Closed-end credit" describes any type of consumer credit other than open-end credit [see 15 U.S.C. § 1664(a); 12 C.F.R. § 226.2(a)(10)].

- a. State rate as "annual percentage rate," using that term.
- b. State fact that rate may increase, if it might.
- c. Not state any other rate.

NOTE:

A simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate [12 C.F.R. § 226.24(c)].

4. Advise advertiser that closed-end credit advertisement generally must state:

- a. Amount or percentage of down payment.
- b. Terms of repayment.
- c. Annual percentage rate, using that term.
- d. Fact that rate may increase, if it might.

NOTE:

This requirement applies if, as is generally the case, the closed-end credit advertisement contains any of the following terms: amount or percentage of down payment, number of payments or period of repayment, amount of any payment, or amount of finance charge [15 U.S.C. § 1664(d); 12 C.F.R. § 226.24(d)(1), (2)].

5. Advise advertiser that catalogues and multiple-page advertisements must [15 U.S.C. § 1661; 12 C.F.R. §§ 226.16(c), 226.24(e)(1)]:

- a. State required advertising disclosures in single table or schedule.
- b. State page number on which table or schedule begins throughout catalogue each time credit term

appears.

NOTE:

A catalog or other multiple-page advertisement or an electronic advertisement (for example, an advertisement appearing on an Internet Web site) complies with these requirements if the table or schedule of terms includes all appropriate disclosures for a representative scale of amounts up to the level of the more commonly sold higher-priced property or services offered [12 C.F.R. § 226.24(e)(2)]. If an advertisement using electronic communication contains the table or schedule permitted under 12 C.F.R. § 226.24(d)(1), any statement of terms set forth in 12 C.F.R. § 226.6 (initial disclosure statement) appearing anywhere else in the advertisement must clearly direct the consumer to the location where the table or schedule begins. For example, a term triggering additional disclosures may be accompanied by a link that directly takes the consumer to the additional information [*see* 12 C.F.R. pt. 226, supp. I, comment 16(c)-1].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionTruth in LendingGeneral Overview



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20-50 California Legal Forms--Transaction Guide § 50.123

§ 50.123 Consumer Lease Advertising

NOTE:

For discussion of electronic advertisements relating to consumer leases, see Ch. 47, ***Automotive Financing and Vehicle Leasing***, and Ch. 53, ***Personal Property Leasing***.

1. Advise advertiser not to state amount of any payment, number of required payments, or that any or no down payment or other payment is required at inception of lease without also stating [15 U.S.C. § 1667c; 12 C.F.R. § 213.7(d); see 12 C.F.R. § 213.7(e), (f) (alternative disclosures for merchandise tags, television or radio advertisements, and toll-free number or print advertisements)]:

- a. That advertised transaction is lease.
- b. Total amount due before or at consummation or by delivery, if delivery occurs after consummation.
- c. Number, amounts, due dates or periods of scheduled payments, and total of these payments under lease.
- d. Whether or not a security deposit is required.
- e. That extra charge may be imposed at end of lease term, when lessee's liability is based on difference between residual value of leased property and its realized value at end of lease term.

2. Advise advertiser not to advertise that specific lease of any property at specific terms or amounts is available, unless lessor usually and customarily leases or will lease that property at those amounts or

terms [12 C.F.R. § 213.7(a)].

3. Advise advertiser that catalogues and multiple-page advertisements must [12 C.F.R. § 213.7]:

- a. State required advertising disclosures in single table or schedule.
- b. State page number on which table or schedule begins throughout catalogue each time credit term appears.

NOTE:

If catalog or other multiple-page advertisement or electronic advertisement sets forth or gives information in sufficient detail to permit determination of required consumer lease advertisement disclosures in table or schedule of lease terms, it will be considered a single advertisement if the material contained and the disclosures made therein are set forth clearly and conspicuously. Unless the statement discloses all of the required lease terms, it will also be considered a single advertisement even when any statement of the lease terms appearing elsewhere in the catalog clearly and conspicuously refers to the page or pages on which the table or schedule appears [12 C.F.R. § 213.7(c)]. Electronic advertisements comply with 12 C.F.R. § 213.7(c) if the table or schedule with the additional information is set forth clearly and conspicuously and the triggering lease terms appearing anywhere else in the advertisement clearly refer to the page or location where the table or schedule begins [*see* 12 C.F.R. pt. 213, supp. I, comment 7(c)-2].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionConsumer LeasingGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION
PART III. TRANSACTION GUIDE
C. Procedural Guide to Legal Aspects of Advertising

20-50 California Legal Forms--Transaction Guide §§ 50.124-50.129

[Reserved]

§§ 50.124[Reserved]



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D. Drafting Guide to Advertising Agreements

20-50 California Legal Forms--Transaction Guide § 50.130

§ 50.130 Advertiser's Agreement With Advertising Agency

1. Specify term of agreement:
 - a. Unlimited unless terminated pursuant to other provisions of agreement.
 - b. For stated period.
2. Provide for appointment of agency to represent advertiser.
3. Specify services agency agrees to perform:
 - a. Market research.
 - b. Selection of media.
 - c. Preparation of copy:
 - (1) Art and layout.
 - (2) Production of copy for media, direct mail, handbill, or catalogues.
 - d. Product package design.
 - e. Contracting for purchase of media space.
 - f. Checking insertions in media for compliance with purchase contract.

g. Conduct of market testing.

4. Set forth agency's duties:

a. Exercise its best efforts.

b. Avoid conflicting interests.

c. Loyalty to advertiser.

d. Avoid contracting with itself without prior disclosure.

e. Abide by advertiser's instructions unless those instructions are unlawful, tortious, or violative of industry self-regulative standards.

f. Cooperate with advertiser in providing its services.

g. Protect and preserve advertiser's trade secrets.

5. Specify amount of control advertiser will exercise over activities of agency:

NOTE:

If the advertiser retains too much control over the agency's activities, the agency could be treated as a normal agent rather than an independent contractor [*see Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 949, 88 Cal. Rptr. 175, 471 P.2d 975*].

a. Specify that advertiser reserves right to:

(1) Confer with agency personnel on its advertising.

(2) Be advised on all aspects of its advertising.

(3) Approve agency's work.

b. If desired, specify that agency is independent contractor and avoid indication of advertiser control (which would contraindicate independent contractor status) by:

(1) Providing that agency has sole control over advertiser's advertising campaign.

(2) Avoiding provisions giving advertiser control over manner and means of its advertising.

6. Include statement, if desired, that agency is not liable for missed deadlines under specified circumstances.

7. Provide for reimbursement of costs incurred by agency on advertiser's behalf.

8. Provide for payment to agency for its services:

a. Specified commission, based on media gross charges with further provision for:

(1) Payment of any deficiency between rate specified and any lower rate actually charged by media.

(2) Disposition of any excess over specified commissions allowed by media:

(a) Credit to advertiser's account.

(b) Retention by agency.

(3) Specified commission based on charges made by third persons with whom agency contracts for products or services used to implement advertising campaign.

b. Flat fees:

(1) Fixed monthly service fee.

(2) Additional fee in amount to be determined by parties for special services.

9. Consider including provisions governing:

a. Right of agency to retain frequency discounts granted by media.

b. Obligation of advertiser to pay higher rate ("short rate") charged by media if contracts for multiple insertions are terminated prematurely.

10. Specify whether agency is to be paid for services rendered in preparing advertising materials and, if no payment is to be made, consider exception if:

a. Agency's advertising proposal is approved by advertiser.

b. Agency's proposal is approved and advertiser cancels it for reasons beyond agency's control.

11. Set forth terms governing billing by agency for its charges:

a. Periodic billing timed to take advantage of discounts.

b. Advertiser's right to substantiation.

12. Describe agency's obligation to make all payments required by agreement to be made to third persons.

13. Include clause providing that agency will hold advertiser harmless from all claims.

14. Require agency to maintain minimum amount of advertiser's liability policy for benefit of advertiser in specified minimum amount.

15. Provide for termination by either party on expiration of specified period after written notice, covering:

a. Duty of agency on receipt of notice of termination.

- b. Effect of termination on rights and duties of parties during notice period.
- c. Termination of work in progress on advertisements commenced before receipt of notice of termination.

16. Provide for assignment to advertiser by agency of contracts between agency and third persons for advertiser's account, covering:

- a. Advertiser's assumption of all obligations under those contracts.
- b. Advertiser's agreement to hold agency harmless from all liability.
- c. Responsibility for performance of contracts:
 - (1) That are nonassignable when consent to assignment is refused.
 - (2) When agency cannot obtain release from its obligations.

17. Provide for billing on termination for amounts not previously billed.

18. Provide for disposition of work in progress on termination and after payment has been made by advertiser.

19. Include standard general contract clauses:

NOTE:

For discussion and sample provisions, *see* Ch. 75, ***Formation of Contracts and Standard Contractual Provisions*** .

- a. Arbitration provisions.
- b. Prohibition against assignment of rights or delegation of duties without prior written consent of each party.
- c. Provision specifying that contract contains entire agreement of parties.
- d. Provision specifying controlling law.
- e. Provision that failure to object will not be deemed waiver.
- f. Requirement for written notices to each party at specified addresses.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawFormationGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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D. Drafting Guide to Advertising Agreements

20-50 California Legal Forms--Transaction Guide § 50.131

§ 50.131 Advertising Agreements With Media

NOTE:

While this guide applies specifically to newspaper advertising, it can be applied also to magazine advertising [*see* § 50.221 (agreement with magazine for extended term advertising)] as well as agreements for advertising in other media [*see* §§ 50.230 (local broadcast), 50.231 (network broadcast), 50.250, 50.251 (outdoor advertising), 50.260 (transit display advertising), 50.270 (exhibition agreement)].

1. Set forth agreement of advertiser to use and publisher to provide advertising space, specifying:

- a. Name of publication or, if agreement is for space in multiple publications, names of all publications.
- b. Period covered.
- c. Amount of advertising space to be used and provided, in terms of inches or lines per day, week, or other period.

NOTE:

The publisher will normally insist on a provision granting it the right to omit an advertisement when the space allotted to advertising in a particular issue has been filled, and reserving the right to limit the amount of space an advertiser may use in any one issue.

- d. Whether color or black and white.

e. Position of advertising space:

- (1) Run-of-publication.
- (2) Specified page or section.
- (3) Specified location on page or in publication.

NOTE:

The publisher will normally insist on a provision under which it may treat orders (as distinguished from contract requirements) for special positioning of an advertisement as a request only, with no obligation to comply, and subject to special position charges.

2. If contract is for advertisements to be inserted in more than one publication, specify:

- a. Whether each advertisement is to be inserted in all publications or those to be selected by advertiser on ad hoc basis.
- b. Whether each advertisement is to be identical in size and in copy.
- c. Whether advertisements must appear in each publication within same time period.

3. Set forth advertising rates for each advertisement.

4. Provide for billing by publisher.

5. Include provision governing advertiser's obligation to pay for advertisements published during preceding time period:

- a. Within specified time after receipt of bill.
- b. On or before specified day of each month.
- c. Consider adding provision giving publisher option to require payment to be made on presentation of bill.

6. Consider provision for cash discount to advertiser for prompt payment.

7. Describe obligations of parties regarding any commission payable to advertising agency, if any.

8. Specify which party is responsible for taxes that may be imposed.

9. If publisher reserves right to increase rates:

- a. Consider providing that advertiser will have option to cancel.
- b. Consider including provision that publisher may increase rates only if same increase is applicable to all advertisements in same classification.
- c. Specify notice method and period.

10. Set forth conditions under which publisher may reject advertisements based on business considerations (as opposed to advertisement style or content):

- a. If payment of any bill is not made when due.
- b. If advertiser makes assignment for benefit of creditors.
- c. If petition in bankruptcy or for reorganization is filed by or against advertiser.
- d. If advertiser goes out of business or announces intention of doing so.

11. Specify obligation and rights of advertiser if insertion of advertising is stopped by publisher:

- a. Pay for lesser amount of advertising actually used.
- b. Right to use additional advertising space after making that payment at agreed on rate.

12. Include provision governing party's payment obligation if, on termination of agreement, advertiser has used less space than agreed (warranting payment by advertiser at higher rate) or more space (warranting refund by publisher to make actual rate lower).

13. List or specify rating classifications of advertisements:

- a. Local retail display rates.
- b. General or national display rates.

14. Include provision for additional charges for special services:

- a. Composition charge for special or intricate layouts.
- b. Charge for drawings, engravings, or mats furnished by publisher at advertiser's request.
- c. Position charges for advertising to be placed at top of column or following and next to specified reading matter.

15. Describe publisher's right to censor, reject, alter, or refuse any advertising copy:

- a. In accordance with existing rules used by publisher.
- b. Limited by requirement that no change may be made without the prior consent of advertiser.

16. Provide that advertising resembling news matter must be clearly labeled as advertising.

17. Set forth rules governing advertising display design:

- a. Whether any of following are to be allowed:
 - (1) Advertisements encompassing one or more columns.

(2) Advertisements that are irregular or nonrectangular in shape.

(3) Advertisements composed entirely of solid black background with white letters ("reverse plate").

b. Publisher's options if nonconforming advertising matter is submitted:

(1) Refusal to print.

(2) Redesign in accord with normal design of advertising in use, with or without submission of proof to advertiser.

18. Specify deadline for submission of all advertising copy and consider adding requirement:

a. That advertising submitted before deadline cannot be canceled after deadline closing time.

b. Reserving publisher's right to change deadline by advance notice to advertiser.

19. Specify conditions for proof-reading of advertising copy:

a. Conditions under which publisher will furnish advance proof of advertising copy to advertiser.

b. Deadline for return of proof by advertiser and authority for publisher to regard material not returned before specified time as correct.

c. Composition charge for changes made on proofs.

d. Statement that publisher is not liable for errors in any advertisement unless proof is returned in ample time for corrections to be made before publication.

20. Include provision governing use and interpretation of publisher's standard publication order form:

a. Advertiser's agreement to use standard form.

b. Treatment of changes by advertiser as nonbinding requests.

c. Current rates to apply over differing rates stated in standard form.

21. Specify publisher's responsibility for drawings, cuts, or mats left by advertiser:

a. Specify time limit.

b. State that publisher is not responsible for items left beyond that time.

c. Agree on how items left beyond that time should be disposed of.

22. Include provision governing responsibility of publisher if advertisement is omitted:

a. Publisher is not entitled to payment.

b. Omission is not considered breach of agreement and publisher is not liable for any resulting damages as long as it publishes substitute advertisement within specified time.

23. Include provision specifying result if advertisement appears in position other than as provided:

a. No charge.

b. Cancellation of agreement at advertiser's option.

24. Specify responsibility of publisher for errors and quality.

a. No responsibility for unclear impressions under specified conditions including exercise of due care by publisher.

b. No liability for any incorrect materials supplied by another source.

25. Limit publisher's authority to cancel agreement:

a. Specify triggering conditions:

(1) Advertiser's failure to make timely payment on any bill.

(2) Any breach by advertiser.

(3) Advertiser becomes insolvent.

(4) Advertiser makes assignment for benefit of creditors.

(5) Insolvency proceedings are commenced by or against advertiser.

b. Provide for written notice of cancellation not less than specified time before it becomes effective.

c. Specify that in event of cancellation advertiser remains obligated to pay, at specified rates, for advertising already published.

26. Provide that advertiser may cancel agreement subject to continuing obligation to pay for advertisements already published.

27. Include clause under which advertiser assumes full responsibility and liability for the content of all advertising copy.

28. Include clause excusing publisher from liability for failure to publish any advertisement for specified causes beyond publisher's control ("force majeure").

29. Provide that if publisher is excused from liability for failure to publish advertisement under force majeure clause, advertiser may:

a. Have advertisement inserted in future issue under terms of contract.

b. Be excused from payment of charge for omitted advertisement without having base rate affected by

the reduction in space used.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawFormationGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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20-50 California Legal Forms--Transaction Guide §§ 50.132-50.199

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION
PART IV. FORMS

A. Advertising Agency Services

20-50 California Legal Forms--Transaction Guide § 50.200

§ 50.200 Advertising Agency Services Agreement

[1] Comment

[a] Use of Form

The form in [2], *below*, may be used to draft an agreement between an advertiser and an advertising agency for advertising services. This form is in a formal contract format. For a more informal letter agreement regarding advertising services, see § 50.201. For discussion of the terms and conditions of contracts between advertisers and advertising agencies, see Rosden, the Law of Advertising, Ch. 1, *The Relationship Between Advertisers and Advertising Agencies* (Matthew Bender).

[b] Particular Provisions

The advertiser should have the right to accept, reject, or modify projects and estimates submitted by the agency. This type of flexibility is necessary because the parties must exercise individual judgment with respect to the content and cost of a particular promotion, and will help avoid disputes.

Covering the details of the agency's billing procedures will protect the advertiser by helping to ensure accuracy and avoid disputes over payments. The agreement should also protect the agency against loss in the event of a default by the advertiser.

While the agency will be an independent contractor [*see* Ch. 84, *Independent Contractors*], it will be a special agent of the advertiser, subject to the direction and control of the advertiser and subject to fiduciary duties owed to the advertiser. The agreement should prescribe the agency's authority and responsibility in dealings with other persons.

The agreement should contemplate that the parties' relationship will continue for a long-enough period (commonly one year) to enable the agency to properly prepare promotions and to take advantage of media discounts for long-term placements. Nevertheless, an option to terminate a service agreement is essential, especially when one party must rely on the other's artistic judgments.

Since the advertiser normally relies on the skill and experience of the agency with respect to the content of promotional matter, an indemnification provision should be included, to protect the advertiser from claims or damages arising out of the materials prepared by the agency.

Title to all products and materials created for promotional use should be vested in the advertiser. When those materials are no longer to be used, the agency should turn over possession to the advertiser.

[c] Agency Compensation

An advertising agency usually receives at least a part of its compensation through commissions paid by the media with which it places advertising. The commission usually is a percentage of all gross advertising billings by the agency.

The agreement for the agency's services should specify in detail the methods to be used in compensating the agency, including the expected commission payments. When the advertiser is ignorant of the standard practice, and the agreement does not spell out the agency's right to receive the commissions, the advertiser could sue to recover the commission amounts, on the theory that the agent made a secret profit by misappropriating money that came into the agency's possession as an incident of the principal-agent relationship [see *Store of Happiness v. Carmona & Allen* (1957) 152 Cal. App. 2d 266, 270-271, 272, 312 P.2d 1104] .

The advertising agency may want to impose a monthly service charge, in addition to the agency's usual compensation, if the type of promotion expected will require extensive use of agency or specially hired personnel. An agency also generally will require reimbursement for various expenses in connection with its services.

[2] FORM

Advertising Agency Services Agreement

ADVERTISING AGENCY AGREEMENT

_____ [name of advertiser] ("Advertiser") and _____ [name of agency] ("Agency"),
in consideration of the promises made in this agreement, agree as follows.

1. ADVERTISING REPRESENTATION AND SERVICES

1.01. Term of Agreement. This agreement shall become effective _____ [date] and shall continue in effect _____ [e.g., until terminated as provided in this agreement or for a period of _____ (number) months, unless sooner terminated as provided in this agreement].

1.02. Appointment and Authorization of Agency. Advertiser retains and appoints Agency to represent Advertiser in carrying out the advertising program contemplated by this agreement, subject to the terms and conditions of this agreement. The products and services to be advertised are: _____ [specify]. Agency is authorized to enter into contracts with other persons [to perform duties that do not involve the personal or professional skill or taste of _____ (name of agency employee or Agency personnel) and] to effectuate the purposes of this agreement, and Agency shall be _____ [primarily or solely] liable to any such persons for all payments due under those contracts. Agency shall indemnify and hold Advertiser harmless from any and all claims and liabilities arising from any such contracts or from other performance of this agreement and shall exert best efforts to prevent any loss to Advertiser resulting from the failure of proper performance of any other person, but Agency shall not be liable or responsible to Advertiser for any such failure.

1.03. Agency Services. Agency agrees to act as Advertiser's advertising representative and to perform, on authorization by Advertiser, any or all of the following services to the extent necessary to meet Advertiser's needs:

- (a) Study and analyze, and survey the market for, Advertiser's business and products and services.
- (b) Develop an advertising program designed to meet Advertiser's needs and budget limitations.
- (c) Counsel Advertiser on, or make plans for, an overall merchandising program;
- (d) Determine and analyze the effect of the advertising used.
- (e) Plan, create, write, and prepare layouts and copy to be used in advertisements of all types.
- (f) Analyze all advertising media to determine those that are most suitable for use by Advertiser.
- (g) Make contracts with the advertising media for space or time and with others to effectuate the advertising program and obtain the most favorable terms and rates available.
- (h) Monitor all contracts with the various media for proper performance in the best interests of Advertiser, including the appearance, accuracy, date, time, position, size, extent, site, workmanship, and mechanical reproduction, as appropriate to the advertisements used.
- (i) Negotiate, arrange, and contract for any special talent required and for all photography, models, special effects, layouts, and art work, and for all printing, including any required engravings, electrotypes, typography, and any other necessary technical material for use in the advertising program.
- (j) Make timely payment to all persons or firms supplying goods or services in connection with the advertising program.
- (k) Advise and bill Advertiser for all remittances made by Agency for Advertiser's account and maintain complete and accurate books and records in this regard.
- (l) Cooperate with Advertiser and Advertiser's other representatives in order to achieve the best possible tax advantages to Advertiser from an advertising program.

1.04. Agency Duties. Agency shall exercise its best efforts, using its skill, experience, and knowledge to the best of its professional ability in providing the services required under this agreement, and in particular shall do all of the following:

- (a) Inform Advertiser of any fact or occurrence that affects Advertiser's interests, and disclose to Advertiser any personal, business, or financial interest (including but not limited to any ownership interest in, representation of, or employment by any person of firm providing any product or service that competes with any product or service provided by Advertiser) that may actually or potentially impair or otherwise affect Agency's ability to represent Advertiser's interests to the maximum extent contemplated by this agreement, or that may actually or potentially result in the disclosure by Agency of any confidential information with respect to Advertiser, the representation of Advertiser by Agency, or any of Advertiser's products and services;
- (b) Abide by the instructions of Advertiser to the extent that those instructions are not unlawful, tortious, or in violation of self-regulatory standards of the advertising industry.
- (c) Cooperate with Advertiser in providing the services required under this agreement.

(d) Protect and preserve any confidential information and trade secrets as defined by Advertiser and disclosed by Advertiser to Agency in the course of the relationship contemplated by this agreement.

This listing shall not be construed as in any way limiting Agency's duties to only the particular duties described here.

1.05. Prior Approval of Advertiser. Agency shall not do any of the following, except with prior disclosure to, and specific written approval by, Advertiser:

- (a) Serve any of Advertiser's competitors with respect to any of the products and services to the advertised under this agreement.
- (b) Enter into contracts on Advertiser's behalf with artists or other independent contractors who employ Agency as their agent, with entities owned or controlled by Agency or entities in which Agency has an interest.
- (c) Perform work itself that it is obligated under this agreement to contract out to other parties.

1.06. Obligations Incurred for Advertiser. Agency shall not incur any obligations or provide any services for Advertiser's account without first obtaining written approval from _____ [name and title of authorized person]. In order to obtain Advertiser's approval, Agency shall submit to Advertiser written proposals containing full descriptions of the proposed advertisements and estimates of the cost of the obligations or services involved, including media costs, cost of preparation of the advertisements, costs of production, and any additional costs, such as travel, mailing, postage, and similar expenses. All estimates shall be submitted on Agency's standard estimate forms with sufficient copies to meet the needs of Advertiser.

1.07. Missed Deadlines. Agency shall not be responsible for missed deadlines, missed closing dates, or missed insertions when the cause is delay by Advertiser in approving the advertising to be used.

2. COST AND PAYMENTS

2.01. Advertising Costs and Expenditures. Advertiser shall reimburse Agency for the following:

- (a) All costs incurred and expenditures made on behalf of Advertiser for approved advertising, except as specifically provided in this agreement (in addition to compensation as provided in Section 2.02).
- (b) The direct costs of mailing, packaging, shipping, taxes and duties, telephones, and telegrams incurred by Agency in connection with the performance of this agreement.
- (c) All of Agency's costs for any necessary traveling done on behalf of Advertiser (other than to or from the main office of Agency).
- (d) If Advertiser approves any planned advertising and then cancels all or any part of it: all costs incurred to the date of cancellation and any unavoidable costs incurred afterward, including any noncancellable commitments for time or space.

In the event that media or other charges increase or decrease after Agency has submitted an estimate, Advertiser shall pay for any increase or be given a credit for any decrease, as the case may be. If the amount of space or time or other advertising services actually used is less than that previously contracted for, Advertiser shall pay for any increased rate charged by the media because of loss of volume discount or because of higher scheduled rates. If additional space or time or services are so used, resulting in a lower rate, Advertiser shall make payments at the lower rate.

2.02. Agency's Compensation. Agency shall receive the following compensation for its services under this Agreement:

(a) Agency shall be entitled to receive a media-paid commission of _____ percent of the gross charges made by the advertising media for time or space used by Advertiser, except with respect to outdoor advertising, for which Agency's commission shall be _____ percent of the gross charges. If the media used do not provide commissions at the above rates, Advertiser shall pay any deficiency to Agency.

(b) Agency shall receive a contractor-paid commission of _____ percent of the charges made by other persons with whom Agency has contracted for products or services that are to be used to implement the advertising proposals approved by Advertiser.

(c) Agency shall prepare proposals of all planned advertising without cost to Advertiser unless and until the proposal is approved by Advertiser or, after having approved the proposal, Advertiser cancels the planned advertising due to circumstances beyond the control of Agency; then, in either event, Advertiser shall pay for a proposal to the same extent as for other advertising services.

(d) Advertiser shall pay to Agency the sum of \$ _____ per month as a service fee, for which Agency shall provide Advertiser with all normal advertising agency services or general supervision of, and advice and counsel on, its advertising program, and Agency shall give Advertiser the full benefit of its experience in devising the best methods of advertising Advertiser's products or services. The monthly service fee shall be payable to Agency until the effective date of termination of this agreement.

(e) Advertiser shall pay Agency a fee in an amount to be determined by the parties for any special services not otherwise provided for by this agreement. Before rendering or otherwise contracting for any special services, Agency shall present Advertiser with a written estimate of the cost of the services and obtain the approval of Advertiser as provided in Section 2.05. For this purpose, public relations or publicity work performed by Agency on behalf of Advertiser shall be considered within the usual scope of this agreement.

2.03. Billing. Agency shall bill Advertiser in conformity with the standards recommended by the American Association of Advertising Agencies and on Agency's standard forms. Agency shall bill Advertiser from time to time as necessary to take advantage of cash discounts provided by the media and other third-party suppliers. Preliminary bills estimating the costs involved may be used, but final, detailed bills, supported by invoices of charges of other persons and showing all adjustments and credits, will be submitted to Advertiser as soon as available. Agency's bills shall indicate the amount of commissions involved and any adjustments necessary to bring them into conformity with this agreement. The amount of cash discount allowed to Agency by suppliers will be credited to Advertiser, provided that payment is made to Agency in accordance with the specific discount terms contained in Agency's bills to Advertiser, and provided further that Advertiser is not in default in payment of any amounts due to Agency. Advertiser shall be entitled to proof of payment by Agency of all sums expended on behalf of Advertiser. Advertiser shall have the right to examine the books and records of Agency in regard to Advertiser's account at all reasonable times.

2.04. Payment. Advertiser shall pay each bill rendered by Agency not later than the stated due date, which shall be not sooner than 10 days after receipt by Advertiser unless Agency is required to make payment to the media or other suppliers within five days of the billing date and that fact is indicated on the bill.

2.05. Payment to Other Persons. Agency shall make all payments to other persons who become entitled to payment in accordance with this agreement. However, Agency has the right to discontinue making such payments if Advertiser is in default in any payment to Agency required by this agreement. Agency further has the right to terminate any arrangement for credit with Advertiser at any time.

3. INDEMNIFICATION AND INSURANCE

3.01. Sole Liability. Agency shall indemnify and hold Advertiser harmless from and against any and all claims, liabilities, or damages arising from the preparation or presentations of any advertising covered by this agreement, including the costs of litigation and counsel fees.

3.02. Insurance. Agency, during the term of this agreement, shall continuously maintain in force a liability insurance policy in a minimum amount of \$_____. The premiums shall be paid by Agency. Agency shall not commence performance of this agreement until the insurance coverage, or another mutually satisfactory insurance arrangement, is in full force and effect.

4. TERMINATION OF AGREEMENT

4.01. Notice of Termination. Either party may terminate this agreement by giving the other person written notice of termination at least 60 days before the effective date of termination. On receipt of notice of termination, Agency shall not commence work on any new advertisements but shall complete and place all advertisements previously approved by Advertiser. All other rights and duties of the parties shall continue during the notice period, and Advertiser shall be responsible to Agency for the payment of any contract obligation incurred with other persons during that period. If Advertiser or Agency should desire to terminate all work in progress on advertisements commenced before receipt of notice of termination, then termination may be effected on the parties' mutual consent and determination of the compensation to be received by Agency for partially completed work.

4.02. Assignment of Contracts. In the event of termination, Agency shall assign to Advertiser all of Agency's rights in contracts, agreements, arrangements, or other transactions made with other persons for Advertiser's account, effective on the date of termination or on another date the parties so agree; and Advertiser shall assume all obligations and hold Agency harmless from all liability under those contracts, agreements, arrangements, or other transactions. If any such contract is nonassignable or consent to assignment is refused, or if Agency cannot obtain a release from its obligations, then Agency shall continue performance, and Advertiser shall meet its obligations to Agency as though this agreement had not been terminated.

4.03. Billing on Termination. On termination of this agreement, Agency shall bill Advertiser for all amounts not previously billed and due Agency at that time under the terms of this agreement. Agency shall not be entitled to commission on or payment for any advertisement if work on it commenced after Agency received notice of termination of this agreement. Agency shall, however, be entitled to payment for services and commissions for advertisements commenced and approved for placement in specific media by Advertiser before receipt of the notice or, with the express written consent of Advertiser, before the effective date of termination.

4.04. Disposition of Property and Materials. (a) All plans, preliminary outlines, sketches, copy, and all other property and materials which are produced by reason of this agreement shall be the property of Advertiser as soon as payment for them has been made. On termination of this agreement, all such property and materials shall be the property of Agency unless Advertiser pays for them in accordance with the terms of this agreement, even if Advertiser or another person has physical possession of them.

(b) When Agency determines that art work, electrotypes, engravings, photographs, manuscripts, or any other items are of no further use in carrying out the terms of this agreement, Agency shall notify Advertiser in writing of that fact and shall clearly describe the particular items. Advertiser shall then be obligated to notify Agency in writing of the disposition Advertiser desires with respect to the items. All shipping and transportation costs shall be borne by Advertiser, and Agency shall not be obligated to store such material at its own expense except for a period of 30 days after the notice has been given. This procedure shall apply whether the items in question are in the possession of Agency or other persons. In the event that Advertiser fails to respond to Agency's notice within 30 days, Agency shall

have the option of discarding or otherwise disposing of the items, or storing the items in public storage facilities in the name of Advertiser and at Advertiser's expense and risk. In that event, Agency shall notify Advertiser in writing of the storage and give Advertiser the necessary particulars.

5. GENERAL TERMS AND CONDITIONS

5.01. Arbitration. Any controversy or claim arising out of or relating to this agreement, or the breach of it, shall be settled by arbitration in accordance with the rules of _____ [e.g., the American Arbitration Association], and judgment on the award rendered by the arbitrators may be entered in any court of competent jurisdiction.

5.02. Assignment and Delegation. Neither party may assign any rights or delegate any duties under this agreement without the express prior written consent of the other.

5.03. Entire Agreement. This writing contains the entire agreement of the parties. No representations other than those expressly set forth in this agreement were made or relied on by either party. No agent, employee, or other representative of either party is empowered to alter any of the terms of this agreement, unless done in writing and signed by an executive officer of each party.

5.04. Controlling Law. The validity, interpretation, and performance of this agreement shall be controlled by and construed under the laws of the State of California without reference to its conflict of law principles.

5.05. Failure to Object Not a Waiver. The failure of either party to object to, or to take affirmative action with respect to, any conduct of the other party that is in violation of the terms of this agreement shall not be construed as a waiver of that conduct or of any future breach or subsequent wrongful conduct.

5.06. Notices. All notices pertaining to this agreement shall be in writing and shall be transmitted either by personal hand delivery or through the U.S. Postal Service. The addresses on the signature page of this agreement for the respective parties shall be the places where notices shall be sent, unless written notice of a change of address is given.

Executed on _____ [date] at _____, California.

ADVERTISER

_____ [signature of officer]

[typed name and title]

_____ [address for notices]

AGENCY

_____ [signature of officer]

[typed name and title]

_____ [address for notices]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation General Overview Contracts Law Types of Contracts General Overview Labor & Employment Law Employment Relationships Independent Contractors



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION
PART IV. FORMS
A. Advertising Agency Services

20-50 California Legal Forms--Transaction Guide § 50.201

§ 50.201 Advertising Agency's Letter Agreement to Represent Advertiser

[1] Comment--Use of Form

The form in [2], *below*, may be used to draft a letter agreement between an advertiser and an advertising agency for advertising services. It is a less formal version of the same type of agreement illustrated in § 50.201. For further comment on particular terms (such as terms governing the agency's compensation), see § 50.200[1]. For an attachment showing a schedule of the agency's expected charges, see § 50.202.

[2] FORM

Advertising Agency's Letter Agreement to Represent Advertiser

LETTER AGREEMENT FOR ADVERTISING SERVICES

This letter states the terms and conditions on which we will agree to represent you as your advertising agency.

Duties and Services. In acting as your advertising agency, we will make every effort to further your best interests and to successfully conduct your advertising campaign. In order to do this, we will become sufficiently familiar with your business to recommend and prepare the most effective advertising possible, and we will submit to you for your approval our ideas and plans concerning your advertising program before they are put into effect. We will exercise our best efforts to obtain advertising space and time from the various media at the lowest possible cost and we will prepare estimates of cost showing the proposed use for your advertising budget. We will inspect and check all advertising placed by us for you to determine if it has been properly executed and maintained. In addition, we will pay all bills incurred for your advertising program after having received your authorization to incur and pay for the various obligations involved.

Duration of Agreement. Our agreement shall become effective _____ [as of the date of this letter or *specify other date*] and shall continue in force until _____ [terminated by following the procedure described in this letter or *specify date*]. When your assent is shown by returning a signed copy of this letter to us, we will commence your advertising campaign as of the agreed date.

Charges and Billing. Our charges and billing procedure are set out in detail in the attached schedule, which shows the cost of the various services we will perform for you.

Payments. At the end of each month you will be obligated to pay us \$ _____. That amount shall constitute our minimum monthly guaranteed compensation. All media commissions for time and space, commissions on services and supplies obtained by us for you, and all charges made for our services will be credited against this minimum amount. If the total compensation we receive on your account during a month exceeds the amount of our minimum guaranteed compensation, no further payment is required by you and the amount received by us in excess of the minimum will be accumulated to reduce the minimum payable in future months. If the total amount of compensation we receive on your account, including all commissions and charges made to you for certain agency services specified in the schedule of charges attached, does not equal the guaranteed minimum, you shall pay the difference to us at the end of each month. However, the amount of the payments will be allowed as a credit against any amounts due us from you in subsequent months when our total compensation from your account exceeds the minimum guaranteed compensation. We will not make a cash refund of the balance of this account in any event, and if a balance remains on termination of this contract, it will be considered compensation fully earned by us. These provisions for our minimum guaranteed compensation do not affect the amounts charged for time, space, or services or the maximum amount of compensation to be received by us on your account, but they only cause our compensation over the term of the agreement to be not less than the guaranteed amount stated per month.

Ownership of Advertising Materials. All advertising material prepared by us or procured from other sources, including but not limited to films, art work, and copy, shall be considered your property, provided you have fully paid for it. If advertising material, including plans and ideas, was not paid for by you because it was rejected or not used, we shall be considered its owners and may use it as we see fit, except that it shall not be used in a manner that discloses confidential information about your business.

Competition. At the present time we do not represent any advertiser that produces goods or provides services that will compete with yours, and we understand that you are not represented by any other advertising agency. We will obtain your prior written consent before we undertake to represent such an advertiser, and you will obtain our prior written consent before you undertake to obtain the services of another advertising agency.

Termination. The agreement between us and you may be terminated by written notice submitted by you to us or by us to you. The notice shall be submitted not less than 90 days before the effective termination date. Your and our rights and duties shall continue during the notice period until the effective termination date. The following provisions shall apply if the agreement is terminated:

- (a) All property and evidence of title belonging to you which is in our possession will be returned to you or to any other person designated by you.
- (b) Any information developed by us concerning your advertising will be furnished to you.
- (c) We will assist in the necessary assignments and transfers to you of all contracts and agreements with the advertising media and with other parties made by us for you.
- (d) You will assume all liability on those contracts and assist us in obtaining release from liability, and you shall indemnify us against any loss resulting from our continued liability under those contracts after the termination of the

agreement.

(e) Any work uncompleted at termination of the agreement, either being done by us or contracted for by us, will be paid for by you, provided that you have given your approval to the advertising program involved. We will be entitled to all media commissions for media advertising, even if the advertising has not been presented at the time of termination, provided that you have approved the advertisement and its placement with the media for presentation on specified dates and substantially all of the advertising material involved has been prepared by us or delivered to the media for presentation before termination.

Execution and Agreement. When signed by you, this letter will constitute a binding agreement between us and you.

Sincerely,

_____ [signature of agency's officer]

[typed name and title]

Agreed to _____ [date]

_____ [signature of advertiser's officer]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral Overview



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A. Advertising Agency Services

20-50 California Legal Forms--Transaction Guide § 50.202

§ 50.202 Schedule of Advertising Agency Charges

[1] Use of Form

The form in [2], *below*, may be used to draft a statement of an advertising agency's expected charges, which may be attached to the agreement between the agency and an advertiser.

[2] FORM

Schedule of Advertising Agency Charges

SCHEDULE OF CHARGES

1. The Media Commission System. When _____ [name of advertising agency] (the "Agency") places advertisements with media, the Agency may be compensated by the media owner with commissions. (Such media are commonly called commissionable media.) The Advertiser is billed by the Agency for the gross cost of the advertising, and the Agency is billed by the media owner for the gross cost less _____ percent (except in the case of outdoor advertising, in which case, the commission is _____ percent), which amount is retained by the Agency as its commission. If any media owner does not allow a percent discount to the Agency, the Agency will bill the Advertiser in an amount sufficient to allow it to retain the applicable commission.

2. Entitlement to Commission. If the Agency prepares the advertising copy, but it is directly placed with the media and paid for by the Advertiser, the Agency is entitled to its full commission. The mechanical costs of radio and television production, including talent, are normally billed to the Advertiser at cost plus a _____ percent Agency commission unless the charges are made by a television network which allows the Agency a _____ percent discount, in which event the Advertiser is billed at the gross cost.

3. Foreign Advertising. When an Agency conducts an advertising campaign in certain foreign countries, the rate of commission is _____ percent in order to compensate for the additional cost of doing business abroad.

4. Agency Services Performed for Basic Commission. In regard to magazines, newspapers, outdoor posters and painted signs, and transit advertising, the Agency will plan and prepare all advertising copy. It will place the copy with the media and will check to see that it has been properly presented. It will pay all bills from the media.

5. Radio and Television. In regard to radio and television, the Agency will plan and prepare the programs to be presented and will supervise their production, including the hiring of artists and the various production elements such as sets, costumes, and lighting effects.

6. Surveys. The Agency will also conduct appropriate consumer and business surveys and will plan and prepare certain collateral promotional matter in regard to the product being otherwise advertised.

7. Other Services for Which Agency Makes Charges. In order to take into account the different preferences of Advertisers in the comprehensiveness of layouts and television storyboards they desire, the Agency charges \$_____ per hour and _____ percent of costs for them when they are prepared for a commissionable media. If the Agency will not collect a commission, the fee is \$_____ per hour plus a _____ percent commission. No media commission will be payable when the layouts or storyboards are prepared for a dealer, or for point-of-sale advertising material, sale manuals, and similar items, if the Advertiser does the printing.

8. Writing Radio and Television Copy. No charge is made for writing radio and television advertising copy if the Agency will collect a media commission when it is used, or for copy that is collateral to that radio and television advertising copy, or if the Agency will receive a commission from the printing of the material. For other radio and television commercials the Agency will charge \$_____ per hour. This same charge will be made for writing point-of-purchase material, leaflets, catalogs, and sales presentations.

9. Charges for Surveys. Most consumer and business surveys made for the purpose of getting information on the preparation of advertising will be paid for by the Agency. However, an investigation made primarily for the Advertiser's own use must be paid for by the Advertiser at an agreed rate. The cost to be billed to the Advertiser will take into account the pay rate of Agency employees conducting the survey, the actual out-of-pocket expenses of the Agency, and the percentage of the field worker's salary to compensate for the supervisor's time involved. No percentage commission will be added to these cost figures.

10. Recipe Development and Associated Costs. If recipe development is required, the Agency will charge \$_____ per hour for recipe development in a test kitchen and preparation of advertisement illustrations in addition to its costs plus _____ percent. For performing miscellaneous services the actual out-of-pocket expenses of the Agency, other than transportation, will be billed at cost plus _____ percent.

11. Visual Presentations. For visual presentations prepared within the Agency, a charge of \$_____ an hour is made. If visual presentations are obtained from outside sources, the Advertiser is billed at cost plus _____ percent.

12. Agency's Billing Procedure. (a) For newspaper space, the Agency sends out an estimated bill near the end of the month for advertising inserted during that month, usually with a _____ percent cash discount included. Near the end of the following month a detailed statement is submitted showing the actual cost and cash discount.

(b) The billing time for magazine space varies according to the schedules of the various publications. Usually, the Advertiser will be billed by the Agency 15 days before the date on which the Agency must pay the publication for advertising. The various adjustments and credits given by the publication will be reflected in the invoices sent to the

Advertiser by the Agency after it has received them from the publication.

(c) An estimated bill is sent near the end of the month for radio and television spot commercials, as in the case of magazine advertising space, and near the end of the following month a detailed statement of charges is submitted together with a credit in the amount of the estimated bill. The same procedure is followed for network time, but the final bill is sent after it is received from the network. This will include credits for rate changes and loss of advertising time because of technical difficulties.

(d) An estimated bill for entertainment talent is submitted about a week before the performance is to be made, and is subject to subsequent adjustment if necessary. Charges for commercial talent and other production charges made by the Agency or an outside source are billed at the end of each month. The Agency will act as a withholding agent for purposes of collecting various payroll taxes which will be submitted to the Advertiser each month. The Advertiser is responsible as an employer for collecting social security and unemployment insurance taxes and in providing worker's compensation coverage for entertainers employed, except where the Advertiser uses a "package" show.

(e) The Agency will bill for billboards and car cards after it has received a bill from the media involved. Such a bill is usually received about the start of the posting period.

(f) The Agency will bill for art and mechanical production costs in the latter part of the month for those costs incurred in the preceding month. The billing will be supported by a statement of the details of the services performed. Commissionable items and cash discounts, if available, will be indicated.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

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20-50 California Legal Forms--Transaction Guide §§ 50.203-50.209

[Reserved]

§§ 50.203[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
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B. Internet Advertising

20-50 California Legal Forms--Transaction Guide § 50.210

§ 50.210 Advertising Agreement--Banner Advertisements and Links on Web Site

[1] Comment--Use of Form

The form in [2], *below*, may be used for drafting an agreement for the owner of a web site to display banner advertisements for, and links to web pages where visitors can buy, products that are offered for sale on the advertiser's web site. For illustrative purposes, it is assumed that the advertiser sells recorded music products. This agreement is based on an actual agreement filed as an exhibit to an SEC S-1 filing.

The form references exhibits that are not illustrated here. The exhibits would be used for such purposes as:

- Showing examples of specified kinds of web pages referenced in the agreement.
- Listing companies that are to be treated as competitors of the advertiser, for purposes stated in the agreement.
- Specifying termination-or-survival standards for other advertising agreements that the site owner has with competitors of the advertiser.
- Detailing a payment schedule for fees due from the advertiser for "page views" displayed by the site owner.
- Showing examples of various links and logos to be used in the advertising covered by the agreement.

Using exhibits can simplify the documentation burden when the parties subsequently modify the agreement by changing certain details that are covered in an exhibit.

[2] FORM

Advertising Agreement--Banner Advertisements and Links on Web Site

ADVERTISING AND PROMOTION AGREEMENT

This agreement is made _____ [date] by and between _____ [name of web site operator] ("Site Owner"), a California [or specify other state] _____ [corporation or general partnership or limited liability company or specify other type of entity] engaged in operating web sites, and _____ [name of advertiser] ("Advertiser"), a California [or specify other state] _____ [corporation or general partnership or limited liability company or specify other type of entity] engaged in retail sales.

In consideration of the mutual promises contained in this agreement, Site Owner and Advertiser agree as follows:

1. DEFINITIONS

1.01. Definitions. The following terms in this agreement have the meanings set forth or referenced below.

- (a) "Above-the-Fold" is defined in Section 2.03.
- (b) "Buy-Option Link" is defined in Section 2.01.
- (c) "Advertiser Competitor" is defined in Section 6.01.
- (d) "Advertiser Site" is defined in Section 2.01.
- (e) "Click-through" is defined in Section 5.03.
- (f) "Effective Date" means the date this agreement is made.
- (g) "Included Pages" is defined in Section 2.01.
- (h) "Initial Term" means the period beginning on the Effective Date and continuing for 12 calendar months following the Launch Date.
- (i) "Launch Date" is defined in Section 2.04.
- (j) "Portal Directory" is defined in Section 7.01.
- (k) "Page View" is defined in Section 3.01.
- (l) "Recorded Music" means any musical sound performance pre-recorded on any of the following media, which (except as otherwise stated here) does not include any textual, video, or software elements: vinyl, compact disc, magnetic tape (cassette, reel-to-reel, or 8-track), DAT, music only DVD recordings, music only ROM (except such ROM may include animation or video clips intended by the music recording artist as part of the musical sound recording); digitally distributed musical sound recordings of any of those; and other media and ancillary music-related merchandise including, without limitation, books, videos, laser discs, clothing, musical instruments, sheet music, musical scores, computer software, and technology used to deliver or render sound recording.
- (m) "Subsequent Term" means the successive period of 12 calendar months after the Initial Term.
- (n) "Term" (except in Initial Term and Subsequent Term) means the Initial Term and the Subsequent Term.

(o) "Shopping Guide" is defined in Section 7.03.

(p) "Site Owner's Service" is *defined in Section 2.01*.

2. MARKETING LINKS

2.01. "Advertiser Site," "Buy-Option Link," "Included Pages," and "Site Owner's Service" Defined. The following definitions are applicable to this agreement:

(a) "Advertiser Site" means the on-line store owned by Advertiser and currently located at _____ [*specify URL*].

(b) "Buy-Option Link" means a link that:

(1) Contains the Advertiser's logo, with dimensions no larger than _____ [*specify, e.g., 89 pixels wide by 31 pixels high*] (which is as large as Site Owner's standard navigational buttons), and a tag line, with no more than 16 characters, plus the name of an artist, as set forth in Exhibit _____;

(2) Is placed near any appropriate references to Recorded Music items on the Included Pages; and

(3) Will permit users to navigate directly from the Included Pages to a music-related page on the Advertiser Site, where such users may purchase the referenced Recorded-Music items, as reasonably designated by Advertiser (which page may be different for each Buy-Option Link).

(c) "Included Pages" means, collectively:

(1) Certain results pages in the Site Owner's Service with the music-related key words identified in Exhibit _____;

(2) Certain Recorded Music related pages of the Site Owner's Service to reasonably be determined by Site Owner; and

(3) Certain Recorded Music related pages identified in Exhibit _____.

In the event that Site Owner adds additional relevant Recorded Music related pages to the Site Owner's Service or modifies the existing Recorded Music related pages listed in Exhibit _____, those added or modified pages shall be deemed to be incorporated into Exhibit _____ as of the date Advertiser receives written notice of the addition or modification. Advertiser may request in writing that Site Owner add to Exhibit _____ any pages, existing as of the Effective Date, on the Site Owner's Service relevant to Recorded Music artists or musical genres, and Site Owner will not unreasonably withhold or delay approval and implementation of such a request. On approval of such a request, Exhibit _____ will be deemed by the parties to be so amended. In the event that Site Owner materially restructures the nature of the Site Owner's Service, Site Owner warrants that the restructuring will not result in any material change in Site Owner's representations under Sections 3.01 through 3.03 regarding the delivered number of Page Views.

(d) "Site Owner's Service" means Site Owner's principal directory to the world wide web, currently located at _____ [*specify URL*], and any other similar web sites that may be created by Site Owner, provided that any such other sites are wholly owned, created, and branded by Site Owner.

2.02. Buy-Option Links on Included Pages. Site Owner will place a Buy-Option Link (1) Above-the-Fold on each Included Page, and (2) at the bottom of each Included Page which requires the user to scroll more than one standard computer screen (that is, with a resolution of 640 pixels by 480 pixels). Each such Buy-Option Link will permit users to

navigate directly from the Included Page to a page on the Advertiser Site to be reasonably designated by Advertiser (which page may be different for each Buy-Option Link), the substantial purpose of which page shall be to enable users to purchase referenced Recorded-Music items relevant to the context of the Included Page.

2.03. "Above-the-Fold" Defined. "Above-the-Fold" means situated within the portion of a page that is designed to be visible on a standard computer screen with a resolution of 640 pixels by 480 pixels without requiring the user to scroll horizontally or vertically through the page.

2.04. Launch Date. "Launch Date" means the date on which Site Owner makes the Buy-Option Links available to users on each Included Page. The Launch Date shall be the earlier of (1) _____[*specify date*] or (2) a date not more than two weeks after Site Owner receives from Advertiser any and all URLs, URL formats (as applicable), content, and other materials necessary for Site Owner to provide the Buy-Option Links.

2.05. Placement of Links. Site Owner represents that it will place the Buy-Option Links on each Included Page in a manner that is comparable to other person links that are of a similar nature and function to the Buy-Option Links on any such Included Page. By way of example, but not limitation, the parties attach as Exhibit _____ examples of (1) a directory page link, and (2) a search page link. Advertiser will discuss with Site Owner any material changes to the Buy-Option Links from the examples set forth in Exhibit _____ before implementing any such changes.

2.06. Site Owner's Responsibility. Subject to the provisions of this agreement, Site Owner will solely be responsible for the user interface and placement of the Buy-Option Links on the Included Pages. Before any modifications to Buy-Option Links that are Above-the-Fold, Site Owner will consult with Advertiser in good faith. Site Owner agrees that Advertiser may vary the Buy-Option Links, up to _____[*number*] per month, unless otherwise agreed to in writing by Site Owner. The parties agree to cooperate with respect to testing the performance of the Buy-Option Links during the Term of this agreement.

3. SITE OWNER'S REPRESENTATIONS

3.01. Page Views During Initial Term. "Page View" means a web site user's viewing of any Included Page, and any discrete page on the Portal Directory or the Shopping Guide, which includes Advertiser as a featured site or content module as described in Sections 7.01 through 7.03. Site Owner represents that it will deliver, to users of the Site Owner Service and the Portal Directory and the Shopping Guide, a minimum of _____[*number*] Page Views during the Initial Term of this agreement, in accordance with the schedule set forth in Exhibit _____. In the event that Site Owner fails to deliver that number of Page Views during any quarter set forth in Exhibit _____, Site Owner will make good the shortfall during the next quarter by delivering substitute Page Views. Such substitute Page Views will be in addition to any Page Views otherwise stated in Exhibit _____ for that subsequent quarter. In the event of a shortfall during the last quarter of the Initial Term, and if Advertiser exercises its termination rights under this agreement, Site Owner's obligations under this Section 3.01 shall extend beyond the end of the Initial Term until the Page View obligation is satisfied. Sections 3.01 through 3.03 set forth the entire liability of Site Owner and Advertiser's sole remedy for Site Owner's breach of its representations under Sections 3.01 through 3.03.

3.02. Page Views During Subsequent Term. During the Subsequent Term (if any), Site Owner represents that it will deliver, to users of the Site Owner Service and the Portal Directory and the Shopping Guide, a minimum number of Page Views equal to the number of actual Page Views during the last _____[*number*] months of the Initial Term multiplied by _____[*specify factor*], but in any event not fewer than _____[*number*] Page Views. Within 30 days after the end of the Initial Term, Site Owner shall set forth the schedule, as reasonably agreed by Advertiser, for the delivery of Page Views of the Subsequent Term. In the event that Site Owner fails to deliver the scheduled number of Page Views in and for any quarter during the Subsequent Term, Site Owner will make good the shortfall during the next quarter by delivering substitute Page Views. Such substitute Page Views will be in addition to any Page Views otherwise scheduled for such subsequent quarter. In the

event of a shortfall during the last quarter of the Subsequent Term, Site Owner's obligations under this Section 3.02 shall extend beyond the end of such Subsequent Term until the Page View obligation is satisfied.

3.03. Existing Contracts. Except as set forth in Exhibit _____, Site Owner represents that no contract referenced in Sections 6.01 through 6.03 will remain in effect after _____[*date*].

3.04. Reports. On a monthly basis, or more frequently if relevant information is available to Site Owner, Site Owner will deliver to Advertiser a written report that describes in reasonable detail Site Owner's determination of the number of Page Views delivered during the period covered by the report.

3.05. User Estimates. During the Term of this agreement, at Advertiser's reasonable request, Site Owner will provide, up to once per month, estimates and research results that Site Owner has readily available in the normal course of its business, solely for use by Advertiser in determining usage pertaining to the Included Pages and Portal Directory. All such estimates and research results shall be considered confidential information under Section 9.03.

4. ADVERTISEMENTS

4.01. Insertion Order. Advertiser has placed with Site Owner an insertion order, _____[*identify by site owner's customary method, such as order number*], in accordance with Site Owner's standard terms and conditions for insertion orders.

4.02. Banner Advertisements. Site Owner agrees to place an Advertiser banner advertisement on _____[*specify number or selection criteria*] of the Included Pages ("Selected Pages"), on an as-available basis, such that on each Selected Page, the banner advertisement will appear Above-the-Fold with a size, prominence, and placement equivalent to other banners placed on the relevant portion of the Site Owner Service for similar inventory. The content and functionality of the banner advertisements will be as reasonably determined by Advertiser, subject to the provisions of this Section 4.02 and to Site Owner's generally applicable technical specifications and advertising guidelines. Advertiser shall be entitled to vary the banners, up to _____[*number*] per month. The banner advertisements shall only promote Advertiser in general or Recorded Music sold by Advertiser at the Advertiser Site, and shall not feature any non-Recorded Music items or merchandise.

4.03. Other Promotional Opportunities. From time to time during the Term of this agreement, the parties agree to discuss in good faith the possibility of additional promotional opportunities that may include the Site Owner trademark or trade name.

5. COMPENSATION AND AUDIT RIGHTS

5.01. Compensation During Initial Term. In consideration of Site Owner's performance and undertakings, Advertiser will pay Site Owner a total marketing fee of \$_____ for the Initial Term. That fee shall be divided into (1) a non-refundable slotting fee of \$_____ (the "Slotting Fee") and (2) a referral fee of at least \$_____ (the "Referral Fee"), as determined in Section 5.03. Such payments will be made in accordance with the terms of Sections 5.01 through 5.04.

5.02. Slotting Fee. Advertiser shall pay to Site Owner _____[*specify fraction, percentage, or amount*] of the Slotting Fee, as a set-up, design, and consultation fee, on _____[*specific launch date defined in Section 2.04*]. The balance of the Slotting Fee shall be due and payable in accordance with the schedule set forth in Exhibit _____. During the Subsequent Term, Advertiser shall pay Site Owner a Slotting Fee based on the following formula: the number of actual Page Views during the last _____[*number*] months of the Initial Term multiplied by _____[*factor*].

5.03. Referral Fee. Advertiser shall pay to Site Owner a Referral Fee of \$_____ per quarter during the Term. In addition, Advertiser shall pay to Site Owner (1) \$_____ per Click-through for any Click-throughs over _____[*number*], during the Initial Term, and (2) \$_____ per Click-through for any Click-throughs over _____[*number*], during the Subsequent Term.

"Click-through" means a user presence at the Advertiser Site that originated from the Included Pages, the Portal Directory, or the Shopping Guide, including any banner ads that are part of this agreement pursuant to Section 4.01. The payments under this Section 5.03 shall be due and payable within 30 days after the last day of each calendar quarter during the Term of this agreement.

5.04. Audit Rights. Site Owner shall maintain complete and accurate records in accordance with generally accepted methods of accounting for all transactions that are the subject of this agreement for three years after the last payment is due under this agreement. An independent accounting firm retained by Advertiser shall have access to Site Owner's records, on reasonable notice, for the purposes of auditing the number of Click-throughs and Page Views reported by Site Owner in support of Section 5.02, during normal business hours, for as long as those records are maintained. Advertiser shall pay the expenses of the accounting firm, unless the number of Click-throughs determined by the accounting firm is less than 90 percent of the Click-throughs reported by Site Owner over the preceding 12 months or the life of this agreement (whichever is shorter), in which case Site Owner shall promptly pay Advertiser the accounting firm's reasonable fees for that audit, and shall promptly reimburse any amount overpaid by Advertiser to Site Owner based on such excess Click-through amounts.

6. EXCLUSIVITY

6.01. "Advertiser Competitor" Defined. "Advertiser Competitor" means, collectively, (1) every Recorded-Music merchant listed on Exhibit _____, for any period during which the Recorded-Music merchant derives more than _____[*specify fraction, percentage, or amount*] of its annualized gross revenues directly from the sale of Recorded Music, and (2) every other business entity, without limitation as to legal form, that derives more than _____[*specify fraction, percentage, or amount*] of its annualized gross revenues directly from the sale of Recorded Music.

6.02. Advertiser Competitors. During the Term, no Advertiser Competitor will be permitted to purchase (1) advertising on the Included Pages, (2) banner advertisements on pages of the Portal Directory described in Section 7.01, or (3) banner advertisements on pages of the Shopping Guide that include Advertiser's content module as described in Section 7.03. However, notwithstanding the foregoing, (1) Site Owner may honor its current contracts with Advertiser Competitors or other entities, the terms of which would otherwise constitute a breach of the obligations of Site Owner as set forth above, provided, however, that all such contracts shall terminate in accordance with Site Owner's representations in Section 3.03, and shall not be renewed to the extent that those contracts include placement on Included Pages; and (2) Site Owner may run banner advertisements of Advertiser Competitors on the Portal Directory to the extent such advertisements are bartered by _____[*name of company sponsoring portal directory*] in connection with its agreement with Site Owner relating to the Portal Directory. Except as otherwise set forth in this agreement, Site Owner shall not be restricted from conducting its normal course of business with Advertiser Competitors outside the Included Pages.

6.03. Recorded Music Advertisements. Except as set forth in Section 6.02, during the Term of this agreement, Site Owner shall not permit any other person to purchase advertising on the Included Pages or any banner advertisements on pages of the Portal Directory described in Section 7.01, or banner advertisements on pages of the Shopping Guide which include Advertiser's content module as described in Section 7.03, if such advertising, to Site Owner's knowledge, either (1) promotes the sale of Recorded Music or (2) takes the user on a direct link from an Included Page to the page of another site, the substantial purpose of which page is the promotion or sale of Recorded Music. However, Site Owner shall not be in breach of this provision if Site Owner uses commercially reasonable efforts to remove such a link within

five business days after receipt by Site Owner of written notice by Advertiser of that link. Notwithstanding the foregoing, Site Owner may honor its current contracts with other persons, the terms of which would otherwise constitute a breach of the obligations of Site Owner as set forth here, provided that such contracts shall terminate in accordance with Site Owner's representations made in Section 3.03 and shall not be renewed to the extent that such contracts include placement on Included Pages. Notwithstanding the foregoing, Site Owner also may run banner advertisements of other persons on the Portal Directory to the extent that such advertisements are bartered by _____ [name of company sponsoring portal directory] in connection with its agreement with Site Owner relating to the Portal Directory. Except as otherwise set forth in this agreement, Site Owner shall not be restricted from conducting its normal course of business with any other person.

7. PORTAL DIRECTORY AND SHOPPING GUIDE

7.01. "Portal Directory" Defined. "Portal Directory" means the intellectual property currently referred to as _____ [name] by Site Owner and located at _____ [specify URL], which is maintained by Site Owner pursuant to an agreement between Site Owner and _____ [name of company sponsoring portal directory], in effect as of the Effective Date of this agreement.

7.02. Portal Directory. During the term (including any renewal terms) of the agreement cited in Section 7.01, Site Owner will include Advertiser as a featured site and a content module on the Portal Directory's _____ [describe page(s)] page[s].

7.03. Shopping Guide. Site Owner currently has an agreement with _____ [name of company sponsoring shopping guide] to produce a Shopping Guide by Site Owner. The Shopping Guide currently is located at _____ [specify URL]. During the term (including any renewal terms) of that agreement, Site Owner will include Advertiser as a content module on the Shopping Guide site. By way of example, but not limitation, attached as Exhibit _____ is a sample page from the Shopping Guide illustrating a content module. Site Owner's obligations under this Section 7.03 are subject to Advertiser meeting the generally applicable merchant standards as applied to merchants in the Shopping Guide.

8. TERMINATION

8.01. Termination With Cause. This agreement may be terminated at any time by either party:

(a) Immediately on written notice if the other person becomes insolvent, files a petition in bankruptcy, or makes an assignment for the benefit of creditors; or

(b) Thirty days after written notice to the other person of that person's breach of any of its obligations under this agreement in any material respect, if that breach is not remedied within that 30-day period.

8.02. Renewal; Termination Without Cause. On completion of the Initial Term, this agreement will automatically renew for the Subsequent Term, unless Advertiser notifies Site Owner in writing, at least 90 days before the expiration of the Initial Term, that Advertiser will not renew this agreement. If Site Owner is unable to enter into a substantially similar advertising transaction with a other person before the end of the Initial Term, and after using commercially reasonable efforts to do so, then Advertiser will pay Site Owner a nonrefundable termination fee of \$_____ (the "Termination Fee"), which shall be paid to Site Owner within 30 days after the expiration of the Initial Term. The Termination Fee shall be creditable toward advertising, on an as-available basis, on the Site Owner's Service (except that such advertising will not be placed on any Site Owner inventory directly linking to sites that are pornographic, racist, or indecent), within the first 30 days after the Initial Term. In the event that insufficient advertising is available to Advertiser under this Section 8.02, then the credit shall extend to first-available advertising through the end of calendar year _____ [specify year]. In no event shall the Termination

Fee credit toward advertising set forth in this Section 8.02 extend beyond _____[date], and that credit will be considered fully discharged as of that date. Advertiser shall execute standard insertion orders with respect to any advertising placed on the Site Owner's Service.

8.03. Survival of Provisions. The following provisions shall survive expiration or termination of this agreement: Section 1.01; the "make good" provisions of Sections 3.01 and 3.02; Section 5.04 (as stated there); and Sections 9.01 through 11.11.

9. CONFIDENTIAL INFORMATION AND PUBLICITY

9.01. Terms and Conditions. The terms and conditions of this agreement shall be considered confidential and shall not be disclosed to any person except to a party's accountants or attorneys, or except as otherwise required by law. Neither party shall make any public announcement regarding the existence of this agreement without the other person's prior written approval and consent.

9.02. Publicity. Any and all publicity relating to this agreement and subsequent transactions between Site Owner and Advertiser and the method of its release shall be approved in advance of the release by both Site Owner and Advertiser. Approval shall not unreasonably be withheld or delayed.

9.03. Nondisclosure Agreement. Site Owner and Advertiser have previously entered into a mutual nondisclosure agreement, dated _____, and expressly acknowledge that the nondisclosure agreement remains in full force and effect in accordance with its terms during the Term of this agreement.

10. INDEMNITY AND LIMITED LIABILITY

10.01. Indemnity. (a) Advertiser, at its own expense, will indemnify, defend and hold harmless Site Owner and its employees, representatives, agents and affiliates, against any claim, suit, action, or other proceeding brought against Site Owner based on or arising from a claim that any Advertiser trademark, service mark, or other brand feature, any material, product or service produced, distributed, offered, or provided by Advertiser, or any material presented on the Advertiser Site, infringes in any manner any copyright, patent, trademark, trade secret, or any other intellectual property right of any other person, is or contains any material or information that is obscene, defamatory, libelous, slanderous, or in violation of any law or regulation, or that otherwise violates any rights of any person or entity, including, without limitation, rights of publicity, privacy, or personality, or has otherwise resulted in any consumer fraud, product liability, tort, breach of contract, injury, damage, or harm of any kind to any other person; provided, however, that in any such case (1) Site Owner provides Advertiser with prompt notice of any such claim, (2) Site Owner permits Advertiser to assume and control the defense of such action on Advertiser's written notice to Site Owner of its intention to indemnify, and (3) on Advertiser's written request, and at no expense to Site Owner, Site Owner will provide to Advertiser all available information and assistance necessary for Advertiser to defend such a claim.

(b) Advertiser will not enter into any settlement or compromise of any such claim if that settlement or compromise would result in any liability to Site Owner, without Site Owner's prior written consent, which shall not unreasonably be withheld. Advertiser will pay any and all costs, damages, and expenses, including, but not limited to, reasonable attorneys' fees and costs awarded against or otherwise incurred by Site Owner in connection with or arising from any such claim, suit, action, or proceeding.

10.02. Limited Liability. Except as provided in Section 10.01, under no circumstances shall Advertiser or Site Owner, or any Affiliate of either party, be liable to the other for indirect, incidental, consequential, special or exemplary damages arising from this agreement, even if that party has been advised of the possibility of such damages, such as, but not limited to, loss of revenue or anticipated profits or lost business. For purposes of this agreement, the term "Affiliate" means any company or any other entity world-wide, including, without limitation, corporations, partnerships, joint

ventures, limited liability companies, in which Site Owner or Advertiser, as applicable, has at least 50-percent ownership or equity or at least a 50-percent financial interest.

11. GENERAL PROVISIONS

11.01. Independent Contractors. It is the intention of Site Owner and Advertiser that Site Owner and Advertiser are, and shall be deemed to be, independent contractors with respect to the subject matter of this agreement, and nothing contained in this agreement shall be deemed or construed in any manner whatsoever as creating any partnership, joint venture, employment, agency, fiduciary or other similar relationship between Site Owner and Advertiser.

11.02. Entire Agreement. This agreement, together with all exhibits, represents the entire agreement between Site Owner and Advertiser with respect to its subject matter and shall supersede all prior agreements and communications of the parties, oral or written.

11.03. Amendment and Waiver. No amendment to, or waiver of, any provision of this agreement shall be effective unless in writing and signed by both parties. The waiver by any party of any breach or default shall not constitute a waiver of any different or subsequent breach or default.

11.04. Governing Law. This agreement shall be governed by and interpreted in accordance with the law of the State of California without regard to its conflict of laws principles.

11.05. Successors and Assigns. Neither party shall assign its rights or obligations under this agreement without the prior written consent of the other person. Consent shall not unreasonably be withheld or delayed. Notwithstanding the foregoing, either party may assign its entire interest under this agreement to an entity that acquires substantially all of the stock or assets of a party, provided that consent will be required in the event that the nonassigning party reasonably determines that the assignee will not have sufficient capital or assets to perform all obligations under this agreement, or that the assignee is a direct competitor of the nonassigning party. All terms and provisions of this agreement shall be binding on and inure to the benefit of the parties and their respective permitted transferees, successors, and assigns.

11.06. Force Majeure. Neither party shall be liable for failure to perform or delay in performing any obligation (other than the payment of money) under this agreement if that failure or delay is due to fire, flood, earthquake, strike, war (declared or undeclared), embargo, blockade, legal prohibition, governmental action, terrorist act, riot, insurrection, damage, destruction, or any other similar cause beyond the control of that party.

11.07. Notices. All notices, requests and other communications called for by this agreement shall be deemed to have been given immediately if made by FAX or electronic mail (confirmed by concurrent written notice sent via overnight courier for delivery by the next business day), if made to Site Owner at the physical and electronic mail addresses set forth on the signature page of this agreement, with a copy to Site Owner's identified General Counsel, and if made to Advertiser at the physical and electronic mail addresses set forth on the signature page of this agreement, with a copy to Advertiser's identified General Counsel, or to such other address as either party shall specify to the other. Notice by any other means shall be deemed made when actually received by the party to which notice is provided.

11.08. Severability. If any provision of this agreement is held to be invalid, illegal, or unenforceable for any reason, that invalidity, illegality or unenforceability shall not affect any other provisions of this agreement, and this agreement shall be construed as if the invalid, illegal, or unenforceable provision had never been contained in it.

11.09. Sole Responsibility. Advertiser will remain solely responsible for the operation of the Advertiser Site, and Site Owner will remain solely responsible for the operation of the Site Owner's Services. Each party acknowledges that the Advertiser Site and the Site Owner's Services may be subject to temporary shutdowns from causes beyond the operating party's reasonable control. Each party, subject to the terms of this agreement, retains sole right and control over the

programming, content, and conduct of transactions over its internet-based service.

11.10. Counterparts. This agreement may be executed in two counterparts, both of which taken together shall constitute a single instrument. Execution and delivery of this agreement may be evidenced by facsimile transmission.

11.11. Authority. Site Owner and Advertiser represent to each other and warrant that the negotiation and entry of this agreement will not violate, conflict with, interfere with, result in a breach of, or constitute a default under any other agreement to which either is a party.

Executed on _____ [date] at _____, California.

ADVERTISER

_____ [signature of officer]

[typed name and title]

_____ [address for notices]

SITE OWNER

_____ [signature of officer]

[typed name and title]

_____ [address for notices]

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet LawInternet BusinessContractsGeneral OverviewComputer & Internet LawOnline

AdvertisingGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION
PART IV. FORMS
B. Internet Advertising

20-50 California Legal Forms--Transaction Guide § 50.211

§ 50.211 Co-Branding Agreement--Goods or Services to Be Advertised on Market-Segment Web Site

[1] Comment--Use of Form

The form in [2], *below*, may be used to draft an agreement for operation of a co-branded web site, which is a web site that one party operates under sponsorship by the other person for the parties' mutual benefit in marketing their goods or services to a segment of the buying public that is expected to be interested in the goods or services that both parties offer. For illustrative purposes, it is assumed that the web site operator targets young adult buyers of services related to attending a college or graduate school and that the co-branding sponsor is an airline. This agreement is based on an actual agreement filed as an exhibit to an SEC S-1 filing.

The form references exhibits that are not illustrated here. The exhibits would be used for such purposes as:

- Setting up a schedule for payments required under the agreement.
- Listing trademarks, brand names, and the like that are referenced in the agreement.
- Giving specifications for content and technical aspects of web pages referenced in the agreement, and describing each party's responsibility for creating or providing content.
- Detailing any ancillary activities that the agreement contemplates (such as one party's obligation to engage in promotional activities benefitting the other person, outside the framework of the c-branding agreement).

Using exhibits can simplify the documentation burden when the parties subsequently modify the agreement by changing certain details that are covered in an exhibit.

[2] FORM

Co-Branding Agreement--Goods or Services to Be Advertised on Market-Segment Web Site

CO-BRANDING AGREEMENT

This agreement is made by and between _____ [*name of web site operator*] ("Site Owner"), a California [*or specify other state*] _____ [*corporation or general partnership or limited liability company or specify other type of entity*] that provides access through the world wide web to applications and other content relating to the selection and attendance at colleges and graduate and professional degree programs, and _____ [*name of sponsor*] ("Sponsor"), a California [*or specify other state*] _____ [*corporation or general partnership or limited liability company or specify other type of entity*] that operates a commercial passenger airline service.

1. DEFINITIONS

1.01. Definitions. Wherever used in this agreement with initial letters capitalized as shown below, the following terms have the following meanings.

(a) "Co-Branded Pages" means pages on the Site Owner Web Site, to be developed pursuant to Section 2.02 and hosted on the Site Owner Web Site, that display both the Site Owner Brand Features and the Sponsor Brand Features, along with such Sponsor Content, Site Owner Content, and other content as the parties may agree on.

(b) "Confidential Information" means information (whether of a technical nature, business nature, or other nature) possessed by either party that the other person knows or reasonably should know to be confidential or proprietary information of the party possessing it.

(c) "Intellectual Property Rights" means any patent, copyright, rights in Trademarks, trade secret rights, moral rights, and other intellectual property or proprietary rights arising under the laws of any jurisdiction.

(d) "Exclusive Category" means any product category or service category identified in Exhibit ____.

(e) "Site Owner Brand Features" means the Site Owner Marks and Site Owner's distinct brand elements that appear from time to time in Site Owner's properties, ventures, and services worldwide and are protected under United States copyright law or for which Site Owner has established trademark, service mark, or trade dress rights, and any modifications to the foregoing that may be created during the term of this agreement.

(f) "Site Owner Content" means any information, materials, or content developed by Site Owner for use on the Sponsor Web Site.

(g) "Site Owner Marks" means those Trademarks of Site Owner set forth in Exhibit ____ and such other Trademarks (if any) as Site Owner may from time to time notify Sponsor to be Site Owner Marks within the meaning of this agreement.

(h) "Site Owner Web Site" means the web site currently located at _____ [*specify URL*] and any successor or replacement of that web site.

(i) "Sponsor Content" means any information, materials, or content supplied by or on behalf of Sponsor, whether directly or indirectly, for use on the Co-Branded Pages.

(j) "Sponsor Brand Features" means the Sponsor Marks and Sponsor's distinct brand elements that appear from time to time in Sponsor's properties, ventures, and services worldwide and are protected under United States copyright law or for which Sponsor has established trademark, service mark, or trade dress rights, and any modifications to the foregoing

that may be created during the term of this agreement.

(k) "Sponsor Marks" means those Trademarks of Sponsor set forth in Exhibit _____ and such other Trademarks (if any) as Sponsor may from time to time notify Site Owner in writing to be Sponsor Marks within the meaning of this agreement.

(l) "Sponsor Web Site" means the web site currently located at _____ [specify URL] and any successor or replacement of that web site.

(m) "Term" means the term of this agreement as provided in Section 4.01.

(n) "Trademarks" means and includes any trademarks, service marks, trade dress, trade names, corporate names, proprietary logos or indicia, and other source or business identifiers.

(o) "Web Site" means, with respect to any person or entity, all points of presence or services maintained by the person or entity on the internet (including, without limitation, the world wide web) or on any successor public data network. With respect to any Web Site maintained on the world wide web, the Web Site includes any HTML-coded page (or similar unit of information presented in any relevant data protocol) that either (1) is identified by the same second level domain (such as.com) or by the same equivalent level identifier in any relevant address scheme or (2) contains branding, graphics, navigation, or other characteristics, that would cause a user reasonably to conclude that the page is part of an integrated information or service offering.

2. CONTENT, CO-BRANDING, AND LICENSES

2.01. Creation of Content. Following the execution of this agreement, Site Owner and Sponsor will work in good faith to develop the content specified in Exhibit _____. All content to be included on the Co-Branded Pages shall comply with Site Owner's generally applicable content and technical guidelines.

2.02. Co-Branded Pages. Following the execution of this agreement, Site Owner and Sponsor will work in good faith to develop the Co-Branded Pages which may include all or part of the Sponsor Content and/or the Site Owner Content. The Co-Branded Pages shall have the specifications set forth on Exhibit _____. The Co-Branded Pages shall comply with Site Owner's generally applicable content and technical guidelines. Sponsor shall supply Sponsor Content and Sponsor Brand Features as agreed on by the parties for inclusion in the Co-Branded Pages. Following the development of the Co-Branded Pages, Site Owner shall use commercially reasonable efforts to post and maintain the Co-Branded Pages on the Site Owner Web Site. Site Owner may from time to time, in consultation with Sponsor, update and modify the Co-Branded Pages but may not change Sponsor content or Sponsor Brand Features, or do anything else with them, without Sponsor's prior written consent.

2.03. License to Site Owner. (a) Subject to Section 2.05, Sponsor hereby grants Site Owner a non-exclusive, revocable nontransferable, royalty-free, worldwide license to do all of the following:

- (1) Use, reproduce, publish, perform and display the Sponsor Marks and Sponsor Brand Features on the Co-Branded Pages.
- (2) Link to the Sponsor Web Site from the Co-Branded Pages and/or the Site Owner Web Site that contains the Co-Branded Pages.
- (3) Use, reproduce, publish, perform, and display the Sponsor Content in and on the Co-Branded Pages.

(b) All goodwill arising out of Site Owner's use of any of the Sponsor Marks shall inure solely to the benefit of Sponsor.

2.04. License to Sponsor. (a) Subject to Section 2.05, Site Owner hereby grants Sponsor a non-exclusive, nontransferable, royalty-free, worldwide license to do all of the following:

(1) Use, reproduce, publish, perform and display the Site Owner Marks and Site Owner Brand Features on the Sponsor Web Site in connection with the logo link contemplated by Section 2.01, and in connection with its promotional and marketing activities contemplated by Section 2.06.

(2) Use, reproduce, publish, perform and display the Site Owner Content on the Sponsor Web Site or other Sponsor properties as mutually agreed by the parties.

(b) All goodwill arising out of Sponsor's use of any of the Site Owner's Marks shall inure solely to the benefit of Site Owner.

2.05. Approval of Trademark Usage. Site Owner shall not use or exploit in any manner any of the Sponsor Marks or Sponsor Brand Features, and Sponsor shall not use or exploit in any manner any of the Site Owner Marks or Site Owner Brand Features, except in such a manner and in such media as may be specified in the other person's trademark usage and branding guidelines or as the other person may consent to in writing. Either party may revise those guidelines or revoke or modify any consent on written notice to the other person.

2.06. Promotion of Site Owner Services. Commencing on the date of this agreement and thereafter throughout the Term, Sponsor will use its commercially reasonable efforts (subject to the terms of this agreement) to generally promote and market Site Owner and the Site Owner Web Site. In addition, Sponsor will perform those specific promotional and marketing services specified on Exhibit ____.

2.07. Exclusive Sponsorship. During the Term, Site Owner will not grant any other person any right to sponsor any products or services in the Exclusive Category on or through the Site Owner Web Site. For the avoidance of doubt, the parties acknowledge that the foregoing restriction applies only to persistent sponsorship placement as judged by Sponsor at its discretion, and not to run-of-site banner advertisements or other rotating promotional placements.

2.08. Site Owner User Data. Site Owner will distribute marketing messages on behalf of Sponsor to Site Owner's end users via electronic mail and other methods of communication as mutually agreed by the parties. Furthermore, Site Owner will make available to Sponsor necessary end user data as reasonably appropriate for marketing purposes, including, without limitation, pre-populating end user data into online frequent flier account applications. Sponsor acknowledges that all end user data that is generated by Site Owner is valuable proprietary information of Site Owner and Sponsor agrees that any use of such end user data will be limited solely to use for purposes of delivering superior travel values to Site Owner end users and for no other purpose. Furthermore, Sponsor acknowledges that any use of Site Owner end user data shall be limited to the extent allowed by and subject to Site Owner's agreement with the end users; provided, however, that Site Owner represents and warrants that such agreements with its end users will not increase Sponsor's duties or decrease its rights, nor reduce Site Owner's obligation to Sponsor under this agreement without Sponsor's prior written permission.

3. COMPENSATION AND REPORTING

3.01. Up-Front Payment. On execution of this agreement, Sponsor will pay Site Owner the amounts set forth in Exhibit ____ (the "Up-Front Fee") in consideration of Site Owner's development and integration of travel-related content for use on the Co-Branded Pages and the Sponsor Web Site.

3.02. Quarterly Fee Payments. Sponsor will pay Site Owner the quarterly fees set forth in Exhibit ____.

3.03. Launch of Co-Branded Pages. After execution of this agreement, the parties shall work together cooperatively to determine a mutually agreeable timeline for the launch of the Co-Branded Pages. If the parties determine that an adjustment to the timing of quarterly payments under this agreement is appropriate, the parties may amend the quarterly payment schedule set forth in Exhibit ____ with a written amendment signed by both parties.

4. TERM AND TERMINATION

4.01. Term. The Term shall commence on the date of this agreement and, unless earlier terminated or extended as provided below, shall end at midnight on _____[date].

4.02. Termination. Either party may terminate this agreement on not less than _____[e.g., 60] days prior written notice to the other person of any breach of this agreement by the other person. In addition, either party may terminate this agreement immediately on written notice in the event that the other person fails to do business in the normal course or becomes subject to any bankruptcy, assignment for creditors, corporate dissolution, or similar proceeding.

4.03. Effect of Termination. On termination or expiration of this agreement, all rights and obligations under this agreement shall be extinguished, except that the rights and obligations of the parties under Sections 5.01 through 8.08 of this agreement, along with all accrued payment obligations of Sponsor (that is, the Up-Front Fee referenced in Section 3.01 and set forth in Exhibit ____), shall survive any termination or expiration of the Term.

4.04. Right of First Refusal. In the event of termination or expiration of this agreement for other than a material breach of this agreement by Sponsor, on notice from Sponsor delivered to Site Owner at least 45 days before the expiration or termination, Site Owner shall negotiate in good faith an agreement providing Sponsor with sponsorship rights similar to those described in this agreement on terms and conditions to be mutually agreed on by the parties. In the event that an agreement between the parties is not executed within 30 days following delivery, of such notice to Site Owner, Site Owner shall be free thereafter to enter into an such an agreement with any other person.

5. REPRESENTATIONS; WARRANTIES; INDEMNITY

5.01. Site Owner Representations and Warranties. Site Owner represents and warrants to Sponsor that:

- (a) Site Owner has full power and authority to enter into this agreement.
- (b) The execution, delivery, and performance by Site Owner of this agreement will not violate any law, statute or other governmental regulation, and will not violate any other agreement or instrument to which Site Owner is a party.
- (c) The use of the Site Owner Content will not violate or infringe any Intellectual Property Right or other right of any other person.

5.02. Sponsor Representations and Warranties. Sponsor represents and warrants to Site Owner that Sponsor has full power and authority to enter into this agreement; neither the execution, delivery and performance by Sponsor of this agreement, nor the performance of ticketing services by Sponsor, in connection with the Co-Branded Pages, will violate any law, statute or other governmental regulation or any other agreement or instrument to which Sponsor is a party; and the use of the Sponsor Content will not violate or infringe any Intellectual Property Right or other right of any other person.

6. EXCLUSIONS; NO LIABILITY

6.01. Warranties Excluded. Neither party makes any other representations or warranties of any kind, express or implied, in connection with this agreement or the transactions contemplated by this agreement. Without limiting the foregoing:

(a) Site Owner makes no representations or warranties with respect to the Site Owner Web Site, Site Owner Brand Features, or any other items or services provided by Site Owner, including, without limitation, any implied warranty arising by usage of trade, course of dealing, or course of performance, any implied warranty of merchantability or fitness for a particular purpose, and any implied warranty of noninfringement.

(b) Sponsor acknowledges that the Site Owner Web Site (including any servers or other hardware, software, and any other items used or provided by Site Owner in connection with the Site Owner Web Site) and Site Owner Brand Features are provided "as is" and that Site Owner makes no warranty that the Site Owner Web Site will be free from bugs, faults, defects, or errors, or that access to the Site Owner Web Site will be uninterrupted.

(c) Sponsor makes no representations or warranties with respect to the Sponsor Web Site, Sponsor Brand Features, or any other items or services provided by Sponsor, including, without limitation, any implied warranty arising by usage of trade, course of dealing, or course of performance, any implied warranty of merchantability or fitness for a particular purpose, and any implied warranty of noninfringement.

(d) Site Owner acknowledges that the Sponsor Web Site (including any servers or other hardware, software, and any other items used or provided by Sponsor in connection with the Sponsor Web Site) and Sponsor Brand Features are provided "as is" and that Sponsor makes no warranty that the Sponsor Web Site will be free from bugs, faults, defects, or errors, or that access to the Sponsor Web Site will be uninterrupted.

6.02. Limitation of Liability. Neither party will have any liability for, and each party waives and disclaims, any and all claims and causes of action against the other person, whether in contract, tort (including, without limitation, negligence and strict liability), warranty, or otherwise, relating to any indirect, consequential, or exemplary damages, in each case, arising out of or in connection with this agreement (including any breach of this agreement) or any of the transactions contemplated by this agreement.

7. OWNERSHIP RIGHTS

7.01. Sponsor's Retained Ownership. As between the parties, Sponsor retains all right, title, and interest in and to the Sponsor Web Site, the Sponsor Content, and the Sponsor Marks and other Sponsor Brand Features, along with all Intellectual Property Rights associated with any of the foregoing.

7.02. Site Owner's Retained Ownership. As between the parties, Site Owner retains all right, title and interest in and to the Site Owner Content, Site Owner Web Site, including, without limitation, any and all Site Owner Web Site content (other than the Sponsor Content), Sponsor-generated data, URLs, domain names, technology, hardware, software, code, know-how, techniques, algorithms, processes, user interfaces, "look and feel," Trademarks, and any other items posted on or used in connection or associated with the Site Owner Web Site--and the Site Owner Marks and other Site Owner Brand Features, along with all Intellectual Property Rights associated with any of the foregoing.

7.03. Additional Trademarks. Site Owner shall not register or attempt to register any of the Sponsor Marks or any Trademarks that Sponsor reasonably deems to be confusingly similar to any of the Sponsor Marks. Sponsor shall not register or attempt to register any of the Site Owner Marks or any Trademarks that Site Owner reasonably deems to be confusingly similar to any of the Site Owner Marks.

7.04. Further Assurances. Each party shall take, at the other person's expense, whatever action (including, without

limitation, execution of affidavits or other documents) the other person may reasonably request to effect, perfect, or confirm the other person's ownership interests and other rights as *set forth in Sections 7.01 through 7.03*.

8. GENERAL PROVISIONS

8.01. Confidentiality. During the Term, and for a period of five years after the end of the Term, the receiving party will not disclose to others or use for any purpose of its own, other than in performance of this agreement, any Confidential Information of the other person. Each party shall, at a minimum, take measures consistent with those taken to protect its own similar types of Confidential Information (but, in any event, at least reasonable measures) to protect the other's Confidential Information against disclosures prohibited by this agreement. Each party acknowledges that its breach of the provisions of this Section 8.01 will result in immediate and irreparable harm to the other person and that damages alone would be inadequate to compensate the injured party. Therefore, in the event of a breach of this Section 8.01 by either party, the other person may, without waiving the right to pursue any other remedies, immediately obtain and enforce injunctive relief prohibiting the breach or threatened breach or compelling specific performance. Notwithstanding any other provision of this agreement, the restrictions set forth in this Section 8.01 shall not apply to any information that is in or enters the public domain through no fault of the receiving party, or is disclosed to the receiving party by a third person legally entitled to make the disclosure, or is independently developed by the receiving party without reference to any Confidential Information of the other person, or is required to be disclosed by applicable law, regulation, or order of any governmental authority; provided that in the event of any such occurrence, the receiving party shall provide the disclosing party with prior notice that is reasonable in the circumstances of the disclosure and shall use reasonable efforts to cooperate with the disclosing party to minimize the extent and scope of the disclosure.

8.02. Independent Contractors. Sponsor and Site Owner are independent contractors under this agreement, and nothing in this agreement shall be construed to create a partnership, joint venture, franchise, or agency relationship between Sponsor and Site Owner. Neither party has any authority to enter into agreements of any kind on behalf of the other person.

8.03. Assignment. Neither party may assign this agreement or assign any rights or delegate any duties under this agreement without the prior written consent of the other person, which shall not be unreasonably withheld; except that either party, without the other party's consent, may assign this agreement or assign any rights or delegate any duties under this agreement to any corporate affiliate of the party or to any purchaser of all or substantially all of the party's assets or to any successor by way of merger, consolidation, or any similar transaction. Subject to the foregoing, this agreement will be binding on, enforceable by, and inure to the benefit of, the parties and their respective successors and assigns.

8.04. Choice of Law; Forum Selection. This agreement shall be governed by, and construed in accordance with, the law of the State of California without reference to its choice of law rules. Each party irrevocably consents to personal jurisdiction and venue in the state and federal courts located in California with respect to any actions, claims, or proceedings arising out of or in connection with this agreement.

8.05. Nonwaiver. No waiver of any breach of any provision of this agreement shall constitute a waiver of any prior, concurrent, or subsequent breach of the same or any other provision, and no waiver shall be effective unless made in writing and signed by an authorized representative of the waiving party.

8.06. Force Majeure. Neither party shall be deemed to be in default of or to have breached any provision of this agreement as a result of any delay, failure in performance, or interruption of service, resulting directly or indirectly from any act of God, act of civil or military authorities, civil disturbance, war (declared or undeclared), strike or other labor dispute, fire, transportation contingency, interruption in telecommunication or internet service or network-provider service, other catastrophe, or any other occurrence that is beyond the party's reasonable control.

8.07. Notices. Any notice or other communication required or permitted to be given under this agreement shall be given in writing and delivered by first class mail, delivered in person, transmitted by confirmed facsimile or e-mail, or delivered by courier service, properly addressed and with all applicable delivery charges prepaid, to the person signing this agreement on behalf of the party to receive notice, at its address specified in the signature block below, and shall be deemed effective on receipt. Either party may from time to time change the person to receive notices or the party's address for receiving notices, by giving the other person notice of the change in accordance with this section.

8.08. Integration. This agreement contains the entire understanding and agreement of the parties with respect to the transactions and matters contemplated by this agreement, supersedes all previous agreements or negotiations between Site Owner and Sponsor concerning the subject matter of this agreement, and cannot be amended except by a writing signed by both parties. If any provision of this agreement shall be adjudged by any court of competent jurisdiction to be unenforceable or invalid, that provision shall be limited or eliminated to the minimum extent necessary so that this agreement shall otherwise remain in full force and effect.

Executed on _____ [date] at _____, California.

SPONSOR

_____ [signature of officer]

[typed name and title]

_____ [address for notices]

SITE OWNER

_____ [signature of officer]

[typed name and title]

_____ [address for notices]

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Internet Business Contracts General Overview Computer & Internet Law Internet
Business Licensing General Overview Computer & Internet Law Online Advertising General Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION
PART IV. FORMS
B. Internet Advertising

20-50 California Legal Forms--Transaction Guide § 50.212

§ 50.212 Marketing and Advertising Agreement--Exclusive Internet Marketing Rights in Exchange for Advertising Commitment

[1] Comment--Use of Form

The form in [2], *below*, may be used to draft an agreement for a retailer to obtain exclusive marketing rights for featured products on a web site in exchange for the retailer's commitment to buy advertising on the web site, and on a radio network affiliated with the web site owner, and in magazines published by the web site owner. For illustration purposes it is assumed that the retailer sells popular music recordings and related items primarily to teenagers and young adults; that the web site has content designed to be attractive to buyers in the retailer's market segment; that the web site is jointly owned by a radio network owner (which operates the web site) and a magazine publisher (which provides content for the web site); and that the radio network's programming and publisher's magazines also appeal to the same market segment. The transaction embodied in the form includes a license to the retailer for displaying content from the web site on the retailer's own web pages, which is a kind of co-branding arrangement [see § 50.211] that helps the retailer to attract the same users who normally would visit the web site operated by the radio-network owner and publisher. This agreement is based on an actual agreement filed as an exhibit to an SEC S-1 filing.

The form references exhibits that are not illustrated here. The exhibits would be used for such purposes as the following:

- Specifying the design of web pages, and features of web pages, that are referenced in the agreement.
- Listing numerous items that are subsumed under a defined term in the agreement (in this case, the term "Publisher Content").
- Showing examples of web pages, and features of web pages, that are referenced in the agreement.

Using exhibits can simplify the documentation burden when the parties subsequently modify the agreement by changing certain details that are covered in an exhibit.

[2] FORM**Marketing and Advertising Agreement--Exclusive Internet Marketing Rights in Exchange for Advertising Commitment****MARKETING AND ADVERTISING AGREEMENT**

This agreement is made _____ [date] ("Effective Date") by and among _____ [name of web site operator] ("Site Owner"), a California [or specify other state] _____ [corporation or general partnership or limited liability company or specify other type of entity], and _____ [name of publisher providing content for web site] ("Publisher"), a California [or specify other state] _____ [corporation or general partnership or limited liability company or specify other type of entity], and _____ [name of retailer] ("Retailer"), a California [or specify other state] _____ [corporation or general partnership or limited liability company or specify other type of entity].

RECITALS

- (a) Site Owner operates a radio network and certain web sites.
- (b) Publisher owns and operates various magazines, and owns certain content related to the magazines, and owns the name, trademark, and brand " _____ " [specify name] (collectively "Publisher Brand").
- (c) Site Owner and Publisher have entered into a legally binding agreement to form a joint venture whereby Site Owner will operate a web site under the Publisher Brand ("Venture Web Site"), and Publisher will provide content to Site Owner for exclusive use on the Venture Web Site.
- (d) Retailer sells a variety of entertainment products through a retail vending site on the world wide web at _____ [specify URL] ("Retailer Site").
- (e) Site Owner, Publisher, and Retailer enter into this agreement for the purpose of enabling Retailer to be the exclusive Music Seller on the Venture Web Site, with a license to use, copy, and display the content of, and advertise and have links on, the Venture Web Site. In exchange, Retailer will purchase online advertising on the Venture Web Site, and advertising time from the radio airtime available through Site Owner's radio network, and advertising space in Publisher's magazines and other print publications.
- (f) In consideration of their mutual promises and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, and intending to be legally bound, the parties agree as follows:

1. DEFINITIONS

1.01. Definitions. Capitalized terms not otherwise defined in this agreement have the following meanings.

- (a) "Above-the-Fold" means situated within the portion of a web site page that is designed to be visible on a standard computer screen with a resolution of 640 pixels by 480 pixels without requiring the user to scroll horizontally or vertically through the page.
- (b) "Carry-Through Bar" means a feature on a Co-Branded Page that appears as a bar and, when clicked, links a Venture Web Site user back to the Venture Web Site from the Co-Branded Page.

(c) "Co-Branded Page" means a page residing on Retailer's servers that a visitor from the Venture Web Site will link to, which displays certain proprietary features of both the Venture Web Site and the Retailer Site, and where the visitor can purchase Retailer's products. A Co-Branded Page can only be viewed by a visitor who links to it directly from the Venture Web Site or through a stored URL (that is, a bookmark or similar technological storage mechanism). Retailer will provide screen-shot mockups of the Co-Branded Pages as set forth in Exhibit ____.

(d) "Competitive Marketing" means any advertising, promotion, sponsorship, link, or displayed message that covers products or services of the type offered by Retailer but which Retailer is not in fact offering through that advertising, promotion, sponsorship, link, or displayed message.

(e) "Content" means, collectively, the Publisher Content and the Site Owner Content.

(f) "Entity" means any natural person, partnership, corporation, or division, subsidiary or business unit, retail site, internet site, world wide web site or other form of business organization.

(g) "Retailer Link" means any form of link that contains a Retailer-designed or Retailer-approved proprietary feature, is located on a page on the Venture Web Site, and takes a Venture Web Site user to a Co-Branded Page.

(h) "Marks" means and includes names, brand names, logos, trademarks, trade names, service marks, and other proprietary indicia.

(i) "Music Seller" means any Entity that sells pre-recorded music or enables a person to purchase pre-recorded music on-line through the internet, the world wide web, or any other open or proprietary on-line service.

(j) "Publisher Content" means the content specified in Exhibit ____.

(k) "Publisher/Site Owner Exclusive License Agreement" is *defined in Section 2.06*.

(l) "Site" means a site on the internet, on the world wide web, or on any open or proprietary on-line service.

(m) "Site Owner Content" means all existing and future digitized and non-digitized articles, reviews, digital or transcribed interviews, video and audio libraries, photographs, books and any other content that Site Owner has created, published, or produced, or that Site Owner has access to through a licensing arrangement with any other Entity, provided Site Owner has the right to license or sublicense the foregoing.

(n) "Term" is *defined in Section 11.01*.

2. CONTENT

2.01. License to Retailer. Subject to the terms of this agreement, Site Owner hereby grants to Retailer during the Term a worldwide license to access, use, copy, modify, and reformat for display purposes and to display the Content solely on Retailer's Site or its servers. By way of example, and not limitation, permitted use includes digitizing non-digitized content. Retailer will use not more than the first 50 words from each Content article, review, or the like, without the prior consent of Site Owner, will provide a textual link-back to the Venture Web Site as part of that usage, and will not distribute the Content to any other person, except as permitted under an agreement mutually acceptable to the parties. For Content requested by Retailer when Site Owner or Publisher do not have the requisite rights to provide Retailer with that Content for its use pursuant to this agreement, Site Owner and Publisher will use their respective best efforts to assist Retailer in obtaining the rights, provided that Retailer shall bear all costs or expenses in that connection.

2.02. Exclusivity. During the Term and except as set forth in Exhibit ____, Site Owner and Publisher represent and

warrant that Retailer will be the exclusive Music Seller anywhere in the world that is permitted to access, use, copy, modify, and reformat for display purposes and to display the Content on any Site.

2.03. Content Indices. Within 48 hours of the Effective Date, and continuing throughout the Term, Site Owner will make available to Retailer, and on Retailer's request, reasonably provide access to, any and all indices in any form of the Content (the "Content Indices"). During the Term, as updated new Content Indices become available, Site Owner will immediately provide access to such updated or new Content Indices to Retailer.

2.04. Content Delivery. Within three business days of each receipt of a request from Retailer, Site Owner will deliver to Retailer the Content requested. If the Content is available in digitized form, Site Owner will deliver it in that form to Retailer in a manner mutually agreeable to the parties. If the Content is not available in digitized form, then Site Owner will deliver it in the best form in which it is available, and, at Retailer's discretion, (1) promptly (but in no event more than three business days after receipt of a request) digitize the requested Content, which digitized Content shall be deemed to also be part of the Content, in a form mutually agreeable to the parties; or (2) Retailer may have another person digitize the Content for Retailer, at no expense to Site Owner, and Retailer will provide a copy of all such digitized material to Site Owner, at no cost. Retailer and Site Owner agree to reasonably cooperate in fulfilling Retailer's requests for Content.

2.05. Access to Site Owner's and Publisher Libraries. At Retailer's request at any time and from time to time, Site Owner will make available a librarian knowledgeable in the Content and the structure of the Site Owner and Publisher Content libraries in the possession of Publisher or Site Owner (as the case may be), and that librarian will assist Retailer in accessing, digitizing and delivering the Content. Retailer will pay a reasonable hourly rate for that librarian's time devoted to assisting Retailer. Retailer and Site Owner will mutually agree on that rate based on good faith and diligent negotiations.

2.06. Other Representations and Warranties of Site Owner. Site Owner represents and warrants that as of the Effective Date and continuing throughout the Term:

(a) The Content available to Retailer under this agreement is all of the Content owned or licensed by Site Owner from Publisher.

(b) Except for the exclusivity limitations set forth in Exhibit _____, Site Owner has an exclusive, worldwide license with Publisher for use of all of the Publisher Content in connection with the Venture Web Site, which is stated as such in the exclusive license agreement entered in by and between Site Owner and Publisher dated _____ (the "Publisher/Site Owner Exclusive License Agreement"), and Publisher has expressly consented to Site Owner sub-licensing the Publisher Content to Retailer so that Site Owner can fulfill its obligations under this agreement, and Retailer can access and use the Content as set forth in this agreement.

(c) The Publisher Content has not been altered, redacted or modified in any manner from the original substance provided to Site Owner from Publisher.

(d) Site Owner shall not operate any Sites anywhere in the world (other than the Venture Web Site) independently of or in conjunction with Publisher that contains the Content in whole or in part and any Competitive Marketing.

(e) Site Owner shall license and deliver to Retailer the Content, subject to and consistent with the terms and conditions of this agreement.

2.07. Other Representations and Warranties of Publisher. Publisher represents and warrants that as of the Effective Date and continuing throughout the Term:

(a) The Publisher Content licensed to Site Owner under the Publisher/Site Owner Exclusive License Agreement is all of the Publisher Content owned or licensed by Publisher.

(b) Except for the exclusivity limitations set forth in Exhibit _____, Site Owner has an exclusive, worldwide license with Publisher for use of all of the Publisher Content in connection with the Venture Web Site, which is stated as such in the Publisher/Site Owner Exclusive License Agreement, and Publisher has expressly consented to Site Owner sub-licensing the Publisher Content to Retailer so that Site Owner can fulfill its obligations under this agreement, and Retailer can access and use the Publisher Content as set forth in this agreement.

(c) Except for the exclusivity limitations set forth in Exhibit _____, Publisher has not licensed the Publisher Content, in whole or in part, to any other person for use online or on any Site.

(d) During the Term, Publisher will not operate, independently of or in conjunction with Site Owner, any Sites (other than the Venture Web Site) that contain the Content in whole or in part and any Competitive Marketing.

2.08. Representations and Warranties of Retailer. Retailer acknowledges that the Publisher Content is the valuable intellectual property of Publisher and the Site Owner Content is the valuable intellectual property of Site Owner, and Retailer agrees that it shall not use or modify any of the Content, except as otherwise permitted under this agreement or as otherwise permitted by Site Owner or Publisher in their reasonable business judgment or, if applicable, by Publisher in its discretion as set forth in Exhibit _____.

3. VENTURE WEB SITE

3.01. Exclusivity. During the Term, Site Owner represents and warrants that Retailer will be the exclusive Music Seller throughout the world that can sell recorded music through, and place advertising, promotions, buttons, banners or other forms of links for the sale of recorded music on, the Venture Web Site. If Site Owner, Publisher, or another person wishes to sell one or more recorded music products on the Venture Web Site that are not offered by Retailer, Site Owner shall give Retailer a right of first refusal to offer those products. If Retailer, within 20 days of being provided such offer by Site Owner, determines not to offer those products, then Site Owner may permit the other person to offer those products for sale on the Venture Web Site; provided that if and when Retailer offers those products, Site Owner shall terminate that other person's right to offer such products for sale on the Venture Web Site as soon as practicably feasible, and, thereafter, Retailer shall be the exclusive Music Seller with the right to offer those products on the Venture Web Site.

3.02. Delivery and Placement of Retailer Links. During the Term, Site Owner shall place the Retailer Links on the pages on the Venture Web Site, and all existing and future equivalents, extensions or replacements of such pages on the Venture Web Site, in accordance with the specifications set forth in Exhibit _____. Unless otherwise specified in Exhibit _____, during the Term, the Retailer Links shall be permanent and non-rotating. Site Owner agrees that Retailer may vary the elements of the Retailer Links _____[number] times per month, on five business days notice. Before implementing any modifications to the Retailer Links not requested by Retailer, Site Owner will obtain the written consent of Retailer, which consent shall not be unreasonably withheld.

3.03. Minimum Retailer Link Guarantees. During the Term, Site Owner will deliver to users of the Venture Web Site a minimum of _____[number] Retailer Links on pages on the Venture Web Site as follows: _____[number] Retailer Links during the first 12 months beginning on the date the Retailer Links are fully implemented and operational on the Venture Web Site; _____[number] Retailer Links during the next 12 months; and _____[number] Retailer Links during the next following 12 months.

3.04. Continued Development of Other Retailer Link Placement Opportunities. The parties agree to work together during the Term in good faith to identify and implement appropriate placement of the Retailer Links throughout the

Venture Web Site, including all necessary testing of the performance of those links.

4. BUSINESS DEVELOPMENT OPPORTUNITIES

4.01. Cooperative Efforts. Throughout the Term, the parties will mutually work together in good faith to identify, create, develop and implement (1) marketing and public relations opportunities for additional sales, advertising and promotion of Retailer on the Venture Web Site and other Site Owner and Publisher Sites and media properties, sale of merchandise and co-branding of traffic flows between the Co-Branded Pages, the Retailer Site and the Venture Web Site and (2) opportunities for Retailer to distribute the Content to Retailer's business partners. Retailer will not distribute the Content except as permitted under agreement mutually acceptable to the parties.

4.02. Site Owner's and Publisher's Efforts. Throughout the Term, Site Owner and Publisher, in good faith and when feasible, will offer Retailer, and Retailer, in good faith and when feasible, will offer Site Owner and Publisher, the opportunity and right of first refusal to participate in other business relationships, similar to the business relationships envisioned under this agreement, that Site Owner, Publisher, or Retailer (as the case may be) have entered into or are considering entering into, and, on receipt of such an offer by, and expression of interest from, a party, the parties agree to negotiate diligently and in good faith to develop a definitive agreement concerning each such opportunity.

5. PAYMENTS

5.01. Content License Fees. Retailer agrees to pay Site Owner (provided the Publisher/Site Owner Exclusive License Agreement remains continually in effect during the Term so that Site Owner can fulfill its obligations as stated in this agreement) the total sum of \$_____ for the exclusive right to use the Content during the Term. Payment will be made in the following manner:

[Specify payment arrangement, e.g.:]

(a) The sum of \$_____ on execution of this agreement.

(b) The sum of \$_____ [number, e.g, 90] days after the Effective Date, provided that the Retailer Links are continuously fully implemented and operational on the Venture Web Site during the preceding _____ [number, e.g, 90]-day period.

(c) The sum of \$_____ [number, e.g, 180] days after the Effective Date, provided that the Retailer Links are continuously fully implemented and operational on the Venture Web Site during the preceding _____ [number, e.g, 180]-day period.

(d) Thereafter, commencing _____ [e.g., in the second year of the Term or specify date] through the Term, equal quarterly payments of \$_____ within _____ [e.g., 10] days of the first day of each calendar quarter for the upcoming quarter, provided the Retailer Links are continuously fully implemented and operational on the Venture Web Site during the preceding calendar quarter.

[Continue with the following:]

5.02. Print, Broadcast and Web site Advertising, Promotion, and Linking Fees. Retailer agrees to purchase, during the Term and as detailed below, a total of \$_____ from Site Owner in Venture Web Site advertising, promotions, and links; \$_____ from Publisher; \$_____ from Site Owner; and \$_____ in promotions in media properties controlled (currently and in the future) by Publisher or Site Owner or its radio affiliates.

(a) Retailer will allocate the print, broadcast and other promotional advertising dollars as follows:

_____ [specify]. Site Owner will receive a commission of \$ _____, which amount shall be over and above the \$ _____ in advertising fees, and that commission shall be payable _____ [specify amounts terms of payments, e.g., in equal installments of \$ _____] on the Effective Date, the first day of the second year of the Term and the first day of the third year of the Term].

(b) Retailer will pay Site Owner \$ _____ for delivery of the minimum number of guaranteed Retailer Links on the Venture Web Site pursuant to this agreement. Payments for delivery of Retailer Links shall be made quarterly with the first payment due within 30 days following the date on which the parties mutually agree that the Retailer Links have been fully implemented, are fully operational and are available to users on the Venture Web Site. Payment for each subsequent quarter shall be made within 30 days following the end of the quarter.

5.03. New Customer Finder's Fee. Retailer agrees to pay Site Owner a one time finder's fee of

\$ _____ for each new customer acquired via a direct online link between Retailer's Site and any of the Venture Web Site, provided that New Customer makes a non-returned purchase on Retailer's Site when first linking from the Venture Web Site to a Co-Branded Page ("New Customer"). For purposes of this Section 5.03, the same customer who may repeatedly link to a Co-Branded Page from the Venture Web Site over any length of time shall be considered a new customer only the first time the customer links to a Co-Branded Page from the Venture Web Site. Retailer will pay a quarterly advance on such fees of \$ _____, amounting to a total of \$ _____ (the "Finder's Fee Advance") during the term of this agreement, and those quarterly advances shall be due and payable within 10 days following the first day of the quarter. Each New Customer shall result in a decrement of the outstanding credit balance of the Finder's Fee Advance by \$ _____, until that balance equals \$ _____, at which time, Retailer shall pay Site Owner \$ _____ in cash for each New Customer, with such payments due on a quarterly basis.

6. AUDIT RIGHTS; REPORTING

6.01. Audit Rights; Underpayments and Overpayments. Each party shall maintain complete and accurate records in accordance with Generally Accepted Accounting Principles (GAAP) for all transactions that are the subject of this agreement for not less than three years after the last payment is due under this agreement. An independent accounting firm retained by a party (the auditing party) shall have access to these records of the other party (the audited party), on reasonable notice, for the purposes of audit during normal business hours, for so long as these records are required to be maintained. If the accounting firm determines that any additional payment is due the auditing party by the audited party and the payment is not the subject of a good faith dispute between the parties, then the audited party shall promptly make payment of that amount, plus interest at a rate of _____ percent per annum, to the auditing party. If a party overpays, the party that has made the overpayment shall be entitled to a credit against the next payment due, in the amount of the overpayment, unless the overpayment is the subject of a good faith dispute between the parties or if no further payments are due under this agreement, in which case, the party that has received the overpayment will promptly refund the amount of the overpayment.

6.02. Reports. Within 30 days after the end of each calendar month during the Term, Retailer shall provide Site Owner with a report listing the number of New Customers and the Finder's Fees (as specified in Section 5.03) due to Site Owner. The report is to be used by Site Owner solely to track whether Retailer is fulfilling its obligations under this agreement. On the first business day of each week during the Term, Site Owner will provide Retailer with a weekly report of Retailer Links delivered to users of the Venture Web Site during the immediately preceding week in a form and via media mutually agreeable to the parties. During the Term, each of Site Owner and Publisher will provide Retailer with monthly reports of total promotions delivered by each party in a form and via a method mutually acceptable to Retailer and Site Owner or Publisher (as the case may be). The reports are to be used by Retailer solely to track whether Site Owner and Publisher are fulfilling their obligations under this agreement.

7. RETAILER SITE

7.01. Framing and Return Links. During and after the Term, Site Owner shall not frame in any manner the Retailer Site or any Co-Branded Pages or pages from the Retailer Site. When a Venture Web Site user clicks on a button, banner, or any other form of link to a Co-Branded Page, the user shall be transferred directly to the Co-Branded Page without framing. Retailer shall place a Carry-Through Bar on the Co-Branded Pages that will provide a user that has linked to a Co-Branded Page from the Venture Web Site with an opportunity to return to the Venture Web Site. Retailer and Site Owner shall mutually agree on the overall design of the Carry-Through Bar within the specifications provided by Retailer in Exhibit ____.

8. RETAILER SALES

8.01. Fulfillment. During and after the Term, Retailer shall have the sole right and responsibility for processing all orders through every aspect of a transaction, including receiving, filling, shipping and handling, collecting payment, tracking, and transaction security. All orders for Retailer's products shall be placed by customers directly with Retailer and shall be subject to acceptance by Retailer. All orders accepted shall be subject to the terms and conditions of Retailer's then current terms and conditions of sale, which may be changed at any time without notice to Site Owner or its customers. Retailer shall have no obligation to ship any orders unless payment in full is received in advance. Prices for the products shall be set solely by Retailer. Retailer reserves the right to change its prices at any time without notice to Site Owner or its customers.

9. STAFFING

9.01. Staffing. During the Term, each party agrees to provide staffing sufficient to meet the party's obligations under this agreement in a timely manner. Further, each party shall appoint a relationship manager who shall have responsibility for managing the day-to-day activities of the party under this agreement.

10. LICENSE; OWNERSHIP

10.01. License to Publisher Brand Name and Marks. Publisher grants to Retailer, during the Term, a limited, worldwide, nontransferable license to use the Publisher Brand name and other marks (as authorized by Publisher from time to time) as reasonably necessary for Retailer to exercise its rights, promote and sell its products, and fulfill its obligations under this agreement. Retailer shall be the exclusive Music Seller licensed to use the Publisher Brand name in connection with on-line sales, except for sales by other persons licensed to sell music compilations under the Publisher Brand name. Publisher shall have the right to approve all initial uses of the Publisher Brand name, and approval shall not be unreasonably withheld or delayed.

10.02. License Between Site Owner and Retailer for Use of Marks. Retailer grants to Site Owner, during the Term, a limited, nonexclusive, nontransferable license to use Retailer's Marks (as authorized by Retailer from time to time) solely as reasonably necessary for Site Owner to perform its obligations under this agreement. Site Owner grants to Retailer, during the Term, a limited, nonexclusive, nontransferable license to use Site Owner's Marks (as authorized by Site Owner from time to time) solely as reasonably necessary for Retailer to perform its obligations under this agreement. Retailer and Site Owner shall each have the right to approve all initial uses of its Marks by the other, and approval shall not be unreasonably withheld or delayed.

10.03. Ownership. Each party owns and shall retain all right, title, and interest in its Marks and other intellectual property. No party shall copy, distribute, reproduce, or use the other's Marks or other intellectual property, except as expressly permitted under this agreement. No party shall at any time contest, impair, or disparage in any manner, or assist any other person in contesting, impairing, or disparaging in any manner, either directly or indirectly, another party's (the owning party's) Marks or its ownership rights in its Marks. Any and all goodwill arising from the use by a

party of another party's Marks shall inure solely to the benefit of the owning party, and each party expressly acknowledges the other's superior rights in those Marks.

11. TERM AND TERMINATION

11.01. Term. The term of this agreement shall commence on the Effective Date and shall continue for three years (the "Term") unless previously terminated. The Term shall include any renewal terms.

11.02. Renewals; Right of First Negotiation. If Retailer desires to renew this agreement, Retailer shall notify Site Owner and Publisher of its intention to renew not less than _____ [e.g., 75] days before the expiration of the Term, and, beginning not less than _____ [e.g., 60] days before the expiration of the Term, Site Owner and Publisher shall diligently and in good faith negotiate with Retailer to determine reasonable terms and conditions for renewal of this agreement and extension of the Term before the end of the Term. If the parties are not able to conclude negotiations within 30 days, then Site Owner or Publisher shall be free to initiate negotiations with any other person. Publisher and Site Owner shall not otherwise negotiate with any other person while the Agreement is in effect. If the Publisher/Site Owner Exclusive License Agreement is terminated at any time during the Term or while Retailer is negotiating a renewal of the Term, then Retailer shall have the right of first negotiation to use the Publisher Content (similar to the license set forth in Section 2.01 et seq.) directly with Publisher, and Publisher will diligently and in good faith negotiate such a license for a reasonable period of time.

11.03. Termination for Cause. If a party becomes insolvent, files a petition in bankruptcy, makes an assignment for the benefit of creditors, or dissolves or ceases to do business, then that party's rights and obligations under this agreement (except for the obligations applicable to the party specified in Section 11.07) shall be terminated by that act. If a party becomes insolvent, files a petition in bankruptcy, makes an assignment for the benefit of creditors, or otherwise is no longer able to fully perform its obligations under this agreement, this agreement shall not be terminated with respect to the remaining parties, and the terminated party shall not be relieved from liability for the performance of its obligations before the termination, and the other parties shall not be deprived of any rights and remedies available to them under this agreement or at law or in equity.

11.04. Termination for Material Breach. If a party materially breaches any of the terms of this agreement, any other party may terminate the breaching party's rights and obligations under this agreement (except for the obligations applicable to the party specified in Section 11.07) _____ [e.g., 30] days after written notice to the breaching party, if the breach is not remedied within that period to the reasonable satisfaction of the nonbreaching parties. The termination shall not relieve the breaching party from liability for the performance of its obligations before the termination, and shall not deprive the other parties of any rights and remedies available to them under this agreement or at law or in equity.

11.05. Termination for Breach of Exclusivity. Retailer may terminate this agreement immediately on providing written notice of termination to Site Owner and Publisher in the event that Site Owner or Publisher breaches any of the exclusivity provisions or their respective representations and warranties set forth in this agreement.

11.06. Termination Resulting From Termination of Publisher/Site Owner Exclusive License Agreement. If the Publisher/Site Owner Exclusive License Agreement is terminated or modified (so that Site Owner cannot fulfill its obligations to Retailer under this agreement) at any time during the Term, then Retailer shall have the right to immediately terminate this agreement and to receive a pro rata refund of all outstanding unearned advance payments made to Site Owner, and the applicable provisions of Section 11.02 shall apply.

11.07. Effects of Termination. On the termination or expiration of this agreement, each party will immediately cease any and all existing, and not make any future, use of the other party's name, brand names, Marks, and other proprietary indicia, and Retailer shall cease all use of the Content, and each party shall certify that use has ceased (as applicable) in

writing to the other party.

11.08. Survival. Sections 1.01, 6.01, 10.03, 13.01 through 13.03 (limited to actions arising during the Term), and 14.01 through 15.14 shall survive termination of this agreement.

12. GENERAL REPRESENTATIONS

12.01. Power to Act. Each party represents and warrants that it has, and will retain during the Term, all necessary rights, title and authority to enter into and fulfill its obligations under this agreement, to grant the other parties the rights and licenses granted in this agreement and to perform all of its obligations under this agreement.

12.02. No Restrictions. Each party represents and warrants that as of the Effective Date and continuing throughout the Term (1) there are no restrictions, agreements or understandings whatsoever to which the representing party is a party that would prevent or make unlawful its execution of this agreement or its engagement under this agreement, and (2) its execution of this agreement and its engagement under this agreement will not constitute a breach of any contract, agreement, or understanding, oral or written, to which it is a party or by which it is bound.

12.03. Retailer. Retailer represents and warrants that to the best of its knowledge any content provided by Retailer and displayed on Retailer's Site during the Term does not constitute defamation or invasion of the right of privacy or publicity, or infringement of the copyrights, Marks, or other intellectual property rights, of any other person. This representation and warranty shall specifically not apply to content provided by visitors to Retailer's Site such as visitors who use chat rooms, bulletin boards, or other forums that allow visitors to display material that is not within the control of Retailer.

12.04. Site Owner. Site Owner represents and warrants that to the best of its knowledge any Content provided by Site Owner to Retailer during the Term under this agreement does not constitute defamation or invasion of the right of privacy or publicity, or infringement of the copyrights, Marks, or other intellectual property rights, of any other person.

13. INDEMNIFICATION

13.01. Retailer Indemnification. Retailer shall indemnify, defend, and hold harmless Site Owner and Publisher and their respective affiliates, directors, officers, employees, and agents, against any and all claims, actions, liabilities, losses, and expenses (including reasonable attorneys' fees) brought about by any other person and relating to or arising out of any claim that any content provided by Retailer and displayed on the Co-Branded Pages or the Venture Web Site during the Term constitutes a defamation or invasion of the right of privacy or publicity, or infringement of the Marks, copyrights, or other intellectual property rights, of any other person. This indemnity specifically shall not apply to content provided by visitors to Retailer's Site who use Retailer's chat rooms, bulletin boards, or other forums that allow visitors to display material that is not within the control of Retailer.

13.02. Site Owner Indemnification. Site Owner shall indemnify, defend, and hold harmless Retailer and its respective affiliates, directors, officers, employees, and agents, against any and all claims, actions, liabilities, losses, and expenses, including reasonable attorneys' fees, brought about by any other person and relating to or arising out of any claim that any content provided by Site Owner that is displayed on the Co-Branded Pages, Retailer's Site or the Venture Web Site during the Term constitutes a defamation or invasion of the right of privacy or publicity, or infringement of the copyrights, Marks, or other intellectual property rights, of any other person.

13.03. Duties of Indemnifying Party. The indemnified party shall promptly provide the indemnifying party with written notice of any claim that the indemnified party believes falls within the scope of Sections 13.01 through 13.03; however, except to the extent the indemnifying party is actually prejudiced by the indemnified party's failure, a failure to provide prompt notice shall not limit the indemnified party's rights under Sections 13.01 through 13.03. The

indemnifying party shall have the right to control the defense and any settlement of a claim; however, in defending or settling a claim, the indemnifying party shall not prejudice the rights of or disclose the Confidential Information (see *Section 14.01*) of the indemnified party, without the prior written consent of the indemnified party. The indemnified party, at its own expense, may assist in the defense of any claim if it so chooses, except that the indemnifying party shall control the defense or the negotiations relative to the settlement of any claim.

14. CONFIDENTIALITY; PUBLIC RELATIONS

14.01. Definition. For purposes of this agreement, "Confidential Information" means the terms of this agreement, except as otherwise specifically provided in this agreement; each party's trade secrets, financial information, processes, formulas, specifications, programs, instructions, source code, technical know-how, methods and procedures for operation, benchmark test results, information about employees, customers, marketing strategies, services, business or technical plans and proposals, in any form; and any other information relating to either party that is not generally known to the public at large.

14.02. Protection of Confidential Information. Each party agrees that the Confidential Information of the other parties will be held in confidence to the same extent and the same manner as each party protects its own Confidential Information, but each party agrees that in no event will less than reasonable care be used. Each party, however, shall be permitted to disclose relevant aspects of Confidential Information to its officers, employees, and consultants on a need-to-know basis for the purpose of the party's performance of its obligations under this agreement, provided those persons agree to protect the other parties' Confidential Information to the same extent as required under this agreement. Each party agrees to use all reasonable steps to ensure that the other parties' Confidential Information received under this agreement is not disclosed in violation of this Section 14.02.

14.03. Exclusions From Confidential Information. Confidential Information shall not include information that (1) is or becomes generally known or available to the public at large through no negligent act or omission of either party; (2) can be demonstrated to have been available lawfully to either party before the disclosure or to have been furnished to either party without restrictions to disclosure or use after the disclosure; or (3) can be demonstrated to be independently developed by the recipient of Confidential Information without use of the Confidential Information (and independent development may be proved on the basis of either party's records related to that development).

14.04. Regulatory Disclosures. Each party agrees that it shall not be deemed a breach of this agreement for any person to disclose the terms and conditions of this agreement in any required regulatory filing with the Securities & Exchange Commission, a national stock exchange, or the NASDAQ, which the person, in good faith, determines is required, provided the person seeks confidential treatment of the material financial terms and conditions of this agreement.

14.05. Publicity. No party will make any announcements or statements to the public or create any written materials concerning the relationship between the parties without the prior written consent of the other parties, and consent is not to be unreasonably withheld or delayed. The parties agree to issue a joint press release within five business days of the Effective Date in a form and containing language reasonably acceptable to the parties.

15. MISCELLANEOUS

15.01. Indulgences, Etc. Neither the failure nor any delay on the part of any party to exercise any right, remedy, power, or privilege under this agreement shall operate as a waiver, nor shall any single or partial exercise of any right, remedy, power, or privilege preclude any other or further exercise of the same or any other right, remedy, power, or privilege, nor shall any waiver of any right, remedy, power, or privilege with respect to any occurrence be construed as a waiver with respect to any other occurrence or as a waiver of any other right, remedy, power, or privilege.

15.02. Controlling Law. This agreement and all questions relating to its validity, interpretation, performance, and

enforcement, shall be governed by and construed in accordance with the law of the State of California, other than conflicting choice of law provisions.

15.03. Notices. All notices, requests, demands, and other communications required or permitted under this agreement and the transactions contemplated in this agreement shall be in writing and shall be deemed to have been duly given, made, and received when delivered against receipt if sent by U.S. certified mail, return receipt requested, postage prepaid, or by reputable overnight courier, addressed as set forth below:

To Retailer: _____ [address]

To Site Owner: _____ [address]

To Publisher: _____ [address]

Notice by mail shall be by air mail if posted outside the continental United States. Any party may change the address to which communications or copies are to be sent by giving notice of the change of address in the manner set forth above.

15.04. Provisions Separable. The provisions of this agreement are independent of and separable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part.

15.05. Entire Agreement. The terms and conditions of this agreement and any and all exhibits attached to this agreement represent the entire understanding between the parties with respect to the subject matter of this agreement and supersede all prior and contemporaneous agreements and understandings, inducements, or conditions, express or implied, oral or written. The express terms of this agreement control and supersede any course of performance or usage of trade inconsistent with any of the terms of this agreement. This agreement may not be modified or amended other than by an agreement in writing signed by the parties.

15.06. Headings. Headings in this agreement are for convenience only, form no part of this agreement, and shall not affect its interpretation.

15.07. Telefaxes Constitute Valid Documents. This agreement and subsequent modifications may be transmitted by telecopy facsimile machine, and a facsimile copy shall be deemed an original if all pages are initialed and the document is signed by the duly authorized representatives of the parties. Facsimiles shall constitute valid, binding documents and shall be regarded as such on receipt. The original of the document sent by telefax shall be promptly sent within 72 hours by overnight courier to the receiving party so that accurate files may be maintained. Failure to send any original document as provided shall not affect the validity or binding nature of the document.

15.08. Force Majeure. No party shall be held to be in breach of this agreement by reason of any failure or delay in its performance under this agreement if that failure is due to causes beyond its reasonable control, including but not limited to, acts of the other parties, acts of God, delays in transportation, inability beyond its reasonable control to obtain necessary labor or materials, or events such as fires, floods, earthquakes, storms, wars (declared or undeclared), acts of public enemy, civil commotions, and the like or by any law, rule, regulation, order, or other action by any public authority. To the extent that failure to perform is caused by such an event, the failing party shall be excused from performance under this agreement as long as the event continues to prevent performance, provided that party takes all reasonable steps to resume full performance.

15.09. Independent Contractors. Each party is an independent contractor and shall have no authority to obligate or bind the other parties in any respect. No employee of a party shall represent himself or herself to be an employee of another party.

15.10. Compliance With Laws. Each party shall comply with all federal, state, and local laws, licensing regulations, and rulings of governmental bodies having jurisdiction over its business. Nothing in this agreement shall be construed to require either party to perform any act in violation of any laws, regulations, or rulings.

15.11. Disclaimer of Warranty. Except as otherwise provided in this agreement, the Retailer Site and the Co-Branded Pages are provided on an "as is" basis without warranties of any kind, either express or implied, including, but not limited to, warranties of title and implied warranties of merchantability or fitness for a particular purpose, other than those warranties that are implied by or incapable of exclusion, restriction, or modification under, the laws applicable to this agreement.

15.12. Limitations of Liability. (a) In no event shall any party be liable for any indirect, special, exemplary, consequential, or incidental damages, of any nature under this agreement, whether the damages are alleged in tort, contract, or indemnity, even if the party is informed of the possibility of the damages, unless the damages are due to the party's gross negligence or willful misconduct.

(b) Site Owner shall not be liable to Retailer for claims arising solely as a result of a breach by Publisher of any of its representations, warranties, or obligations under this agreement.

(c) Publisher shall not be liable to Retailer for claims arising solely as a result of a breach by Site Owner of any of its representations, warranties, or obligations under this agreement.

15.13. Binding Agreement. This agreement shall be binding on the parties and their respective heirs, executors, successors, and assigns. No party, without the prior written consent of the other parties, may assign or transfer this agreement or any obligation incurred under this agreement, and any attempt to do so in contravention of this section shall be void and of no force and effect.

15.14. Timely Performance. In the performance of this agreement, time is of the essence.

Executed on _____ [date] at _____, California.

PUBLISHER

_____ [signature of officer]
[typed name and title]

SITE OWNER

_____ [signature of officer]
[typed name and title]

RETAILER

_____ [signature of officer]
[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Internet Business Contracts General Overview Computer & Internet Law Internet Business Licensing General Overview Computer & Internet Law Online Advertising General Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION
PART IV. FORMS
B. Internet Advertising

20-50 California Legal Forms--Transaction Guide §§ 50.213-50.219

[Reserved]

§§ 50.213[Reserved]



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION
PART IV. FORMS

C. Newspaper and Magazine Advertising

20-50 California Legal Forms--Transaction Guide § 50.220

§ 50.220 Agreement for Extended Term Display Advertising--Newspaper or Chain of Newspapers

[1] Comment

[a] Use of Form

The form in [2], *below*, may be used to draft an agreement between an advertiser and a newspaper publisher for extended term display advertising in a single newspaper or a chain of newspapers. For a similar agreement covering advertisements in a magazine, see § 50.221.

This agreement contains detailed provisions concerning the rates for the various types of advertisements. For discussion of rates, see [b], *below*. Usually the publisher will have a rate card; in that case, the rate should be identified with particularity in the agreement because rates are subject to change.

It is the usual practice for a publisher to limit its liability for mistakes in advertising copy. For this reason, it is the better practice to include provisions calling for the submission of copy and proofs in ample time to discover errors.

A publisher will maintain its own standards regarding the content of advertising matter, and will usually reserve the right to reject copy that it deems objectionable. The agreement, therefore, should contain provisions specifying these standards and the procedure on rejection.

This agreement requires the advertiser to indemnify the publisher for claims or liability arising from advertising copy because as a general rule either the advertiser or an advertising agency prepares the advertisement. This type of provision is usually required by the publisher because, under normal circumstances, the publisher does not have time to check advertising copy for libel, invasion of privacy, or other factors that may result in civil liability.

[b] Rates

The rates for advertising space will usually vary according to the type of advertisement and whether a specified amount of space is used each week under the agreement (a fixed-space agreement). As a general rule, fixed-space advertising

will cost less than open-space advertising (in which the total space is used for the term of the agreement with no minimum amount allocated to a fixed period). Amusement advertisements are usually more expensive than retail advertisements. Special requirements such as a specified page or a preferred position will usually be subject to an additional charge, if the publisher consents to such an accommodation. As a general practice, newspapers offer discounts based on the quantity of lines or space used over a period of time (usually one year), and therefore an extended term agreement is preferable if the advertiser desires to take advantage of the lower rates.

[2] FORM

Agreement for Extended Term Display Advertising--Newspaper or Chain of Newspapers

EXTENDED TERM DISPLAY ADVERTISING AGREEMENT

_____ [name of advertiser] ("Advertiser") and _____ [name of publisher] ("Publisher"), in consideration of the promises made in this agreement, agree as follows.

1. ADVERTISING SPACE

[EITHER, for advertising in chain of newspapers:]

1.01. Amount. Advertiser agrees to use and Publisher agrees to provide a minimum of _____ [e.g., 10,000 agate lines] of advertising space in _____ [names of newspapers] (collectively "the Publications" or individually a "Publication") during the term of this agreement, subject to the terms and conditions of this agreement.

1.02. Period of Advertising. The period for inserting advertising in the Publications shall commence within 30 days after the execution of this agreement, and shall continue for a period of 12 months from the date of the first insertion ("the Period").

1.03. Same Advertisement in All Publications. Each particular advertisement shall be inserted in each Publication, and those advertisements must be identical in size and in copy and must appear in those Publications within the same calendar week.

[Or, for advertising in single newspaper:]

1.01. Description. Advertiser agrees to use and Publisher agrees to provide advertising space in _____ [name of newspaper] ("the Publication") subject to the terms and conditions of this agreement.

1.02. Insertion Period. The period for the insertion of advertising shall be _____ [e.g., 12 months] commencing _____ [date] ("the Period").

1.03. Amount and Use of Space. The amount of advertising space that shall be used and provided during the Period is _____ [e.g., for retail or local display advertising: 500 inches or for general or national display advertising: 5,000 agate lines], which shall be used _____ [e.g., for open-space advertising: at the option of Advertiser during the Period or for fixed-space advertising: at the rate of 10 inches every week during the Period].

[Continue with the following:]

1.04. Positioning of Advertisements. The position of the advertising space shall be _____[e.g., above the fold or run-of-the-paper].

1.05. Colors. The advertisements shall be printed in _____[e.g., black and white or four color].

1.06. Products or Services Advertised. The products or services that are to be advertised are _____[specify].

2. RATES AND PAYMENTS

2.01. Rates. Advertiser shall pay the following rates for the advertisements: _____[e.g., \$_____ per inch for retail fixed-space display advertising, using 10 inches per week for the Period, for a total cost of \$_____,] plus a premium of \$_____ for placement _____[specify preferred placement, e.g., above the fold], for an overall cost of \$_____.

2.02. Billing and Payments. Publisher shall present a bill to Advertiser detailing the charges for advertisements inserted during the preceding month on or before the 15th of each month. Advertiser shall pay within 30 days after presentment.

2.03. Cash Discount and Commission. Advertiser shall be entitled to a cash discount of _____ percent for payments made within 10 days after receipt of a monthly bill, provided no outstanding balance remains due to the Publisher. The total cost stated in Section 2.01 includes an amount that can be used to pay a commission to an advertising agency, which at the option of Advertiser and on written request, the Publisher shall pay to a designated agency.

2.04. Taxes. Any and all taxes, whether federal, state, or local, that may be imposed on any advertising published pursuant to this agreement shall be the responsibility of Advertiser, and the amount shall be billed to Advertiser in addition to the amount otherwise payable.

2.05. Increase in Rates. Publisher reserves the right to increase the rates stated in this agreement from time to time and in its sole discretion, based on an increase in its rate schedule. In the event of such an increase, Advertiser shall have the option of canceling the remainder of this agreement as of the date the new rates become effective or continuing at the new rates. If Advertiser cancels this agreement because of increased rates, Publisher shall not charge Advertiser the scheduled higher rate for the decreased amount of advertising space used because of the cancellation, provided Advertiser makes immediate payment of all sums due under this agreement. Publisher shall increase the rates stated in this agreement only if the increase is applicable to all advertisements in the same classification. Publisher shall notify Advertiser in writing of any increase in rates at least 20 days before the effective date of the increase, and Advertiser shall notify Publisher in writing of Advertiser's election to cancel the balance of this agreement, at least 10 days before the effective date of any increase.

2.06. Effect of Nonpayment. Publisher may stop inserting Advertiser's advertisements in the Publication[s] if the payment of any bill is not made when due, or if Advertiser makes an assignment for the benefit of creditors, or if a petition in bankruptcy or for reorganization is filed by or against Advertiser, or if Advertiser goes out of business or announces an intention of doing so. If advertising is stopped, or if the specified amount of advertising space is not used during the Period for any other reason not caused by Publisher, payment in full is due immediately at Publisher's scheduled open display rate for the lesser amount of advertising actually used. If Advertiser pays that amount in full, Advertiser shall have the right to use additional advertising space during the Period, and any additional advertising shall be subject to a charge based on the open display rate for the total amount of advertising actually used pursuant to this

agreement.

2.07. Adjustment of Rates Based on Space Used. If Advertiser uses space in addition to the agreed amount specified in Section 2.01, Publisher shall remit the difference, if any, between the amount paid by Advertiser based on the rate for the agreed amount of space and the charges based on any reduced rate to which Advertiser becomes entitled by reason of the increase in space used. Payment shall be made by Publisher on termination of this agreement, subject to an offset for any amount owed to Publisher by Advertiser at that time. If, on termination of this agreement, Advertiser has not used all of the agreed amount of space, Advertiser shall pay to Publisher the difference, if any, between the charges for which Advertiser has been billed based on the agreed amount of space, and the charges based on the higher rate that becomes applicable by reason of the reduction in space used by Advertiser. This additional amount shall be due and payable immediately on termination of this agreement. However, if Advertiser cancels this agreement because of increased rates, payment will be governed by Section 2.05.

2.08. Rating Classifications of Advertisements. Local retail display rates apply to advertisements, other than those concerning airplanes, automobiles, and all other motor vehicles, placed by Advertiser for goods or services offered to the public through retail outlets controlled by Advertiser. If, however, Advertiser sells through retail outlets it does not control, as well as through those it does control, no mention may be made, in any advertisements qualifying for local retail display rates, of retail outlets not controlled by Advertiser. General or national display rates apply to all other advertising.

2.09. Additional Charges. In addition to the rates specified on Publisher's rate schedule for normal copy that can be set in the usual manner, other charges are applicable when special services are involved. An additional composition charge will be made for intricate layouts, copy calling for type to be set on the bias, circles and other difficult composition, or revision of original copy after it is set in type, and for any advertising ordered that is not to be published by Publisher or is set on a wait-order basis and is not to be published within 10 days. An additional charge will be made for all drawings, engravings, or mats furnished by Publisher at the request of Advertiser. Additional position charges will be made and will increase the basic rates as follows: (1) for full position at top of column or following and next to reading matter, _____ percent; (2) for a specified page, _____ percent; and (3) next to reading matter, _____ percent. Any copy that requires engraving shall be subject to an additional engraving charge, to be determined.

3. CONTENT AND DESIGN OF ADVERTISING

3.01. Content. Publisher reserves the right to censor, reject, alter, or refuse any advertising copy, in its sole discretion and to disapprove any advertising copy in accordance with any rules Publisher may now have, or may adopt in the future, concerning acceptance of advertising matter, but no change in advertising copy will be made without the prior consent of Advertiser.

3.02. Advertising Appearing to Be News Matter. Any advertising copy resembling news matter or advertisements in cartoon technique or comic strip form must carry the word "Advertisement" over each column in which the advertisement appears. Publisher in its sole discretion shall decide whether advertising copy is subject to this provision, but no advertising with such a caption shall be printed without the prior consent of Advertiser.

3.03. Design. Advertisements that encompass one or more columns must be as many inches deep as columns wide. The minimum acceptable depth is 14 lines. Advertisements may not be irregular or nonrectangular in shape (commonly known as "stair-step," "step-down," or "step-up" advertisements). Advertisements may not be composed entirely of solid black background with white letters (commonly referred to as "reverse plate"). If Advertiser submits advertising copy not in conformity with the foregoing restrictions, Publisher shall have the option of either refusing to print it or redesigning it in accord with the normal design of advertising in use, without submitting a proof to Advertiser unless one was specifically requested on the order. Publisher reserves the right to change, benday, or otherwise lighten type,

cuts, and borders without submitting a proof to Advertiser.

4. SUBMISSION OF ADVERTISING COPY

4.01. Time Limit. Advertiser shall be responsible for the submission of all advertising copy, including changes, to Publisher not later than _____ [e.g., noon Friday for Monday publication, 4:00 P.M. Friday for Tuesday publication, or noon of the fourth day before publication for remaining publishing days]. Advertising submitted and ordered in accordance with the foregoing cannot be canceled after the closing time. Publisher reserves the right to change the closing hour for receiving advertising copy by giving 10 days' notice in writing to Advertiser. All orders for advertisements, for changes of copy, and for discontinuance of any "until forbid" advertisements shall be in writing.

4.02. Correction of Proofs. (a) If Advertiser furnishes advertising copy to Publisher at least 48 hours before the time it is to be published, Publisher shall furnish to Advertiser a proof of the advertisement as set for insertion and shall make any corrections or changes that may be desired by Advertiser, provided Advertiser returns the proof with any corrections or changes noted on it at least _____ hours before the time it is to appear in the Publication[s]. In the event the proof is not returned before that time, Publisher will regard the advertisement as correct and may insert it in the Publication[s] without liability for any errors. Advertiser shall pay the scheduled composition charge for any changes in the proof from the advertising copy submitted.

(b) Publisher will not be liable for any errors in any advertisement unless the proof is returned in ample time for corrections to be made before going to press. If any error properly noted is not corrected by Publisher, Publisher shall be liable only for refunding or crediting such portion of the entire cost of the advertisement as the space occupied by the noted error bears to the whole space occupied by the advertisement.

4.03. Publication Orders. Advertiser agrees to use Publisher's standard publication order form. No change or addition to the terms and conditions stated in that form shall be binding on Publisher, and any attempt to alter those terms and conditions shall be treated as a request only. If orders contain incorrect rates or conditions, the advertising referred to in the form shall be published, and Advertiser shall pay for it at the applicable rate in accordance with the terms of this agreement.

4.04. Available Space Limitations. Publisher has the right to omit any advertisement when the space allotted to advertising in a particular issue has been filled. In addition, Publisher has the right to limit the amount of space that Advertiser may use in any one issue.

4.05. Requests for Position. Notwithstanding any other provision in this agreement, any specification or order for the use or nonuse of any particular page or relating to the type of news or advertising on the page where the advertisement is to be inserted shall be treated as a request only, and Publisher shall not be obligated to comply with such a request. If a request for position is granted, Advertiser shall pay any additional charges that are applicable by reason of the terms of this agreement.

4.06. Drawings, Cuts, and Mats. Publisher shall not be responsible for drawings, cuts, or mats left with Publisher for more than 30 days after they are no longer to be used by Publisher.

5. PRINTING ERRORS

[EITHER]

5.01. Omission of Advertisement. If any advertisement fails to appear as agreed in this agreement, without the fault of

Advertiser, and subject to the provisions of Section 8.01, Publisher shall not be entitled to payment for that advertisement.

[OR]

5.01. Omission of Advertisement. The failure of Publisher to insert any advertisement in any issue of the Publication[s] shall be deemed immaterial, and shall not be considered a breach of this agreement, nor shall Publisher be liable for damages for such a failure. If copy for an advertisement is submitted in accordance with this agreement and is omitted from one or more issues of the Publication[s], the identical advertisement or an advertisement of the same size will be published by Publisher within six days after the date of the omission in the Publication[s] from which it was omitted.

[Continue with the following:]

5.02. Misplacement of Advertisement. If any advertisement appears in a position other than as provided in this agreement, Publisher shall make no charge for that advertisement, and Advertiser shall have the option of canceling the remainder of this agreement by written notice to Publisher.

5.03. Errors and Quality. Publisher assumes no responsibility for a failure to obtain clear impressions when key numbers are mortised into cuts or casts of mats, provided due care is exercised in the handling of key numbers in electros by Publisher. Publisher shall not be liable for any incorrect cuts or matrix supplied by another publisher.

6. TERMINATION

6.01. Cancellation by Publisher. Publisher may cancel this contract at any time on the failure of Advertiser to pay any bill submitted under this agreement within the time specified in this agreement for the payment of bills; or on any other breach of this agreement by Advertiser; or on Advertiser's violation of any of the terms and conditions in this agreement; or on Advertiser becoming insolvent or filing an assignment for the benefit of creditors; or if any insolvency proceedings are commenced by or against Advertiser. Publisher shall give Advertiser written notice of cancellation not less than 10 days before the cancellation is to be effective.

6.02. Cancellation by Advertiser. Advertiser may cancel this agreement at any time by giving written notice of cancellation to Publisher.

6.03. Payment on Cancellation. In the event of cancellation of this agreement, whether by Publisher or by Advertiser, Advertiser shall immediately pay for all advertising published under this agreement, at the rate earned for the amount of space actually used according to Publisher's rate schedule then in effect, and for any other charges incurred in connection with this agreement.

7. INDEMNIFICATION

7.01. Advertiser Responsible for Advertising Copy. Advertiser assumes full and complete responsibility and liability for the content of all advertising copy submitted, printed, and published pursuant to this agreement, and shall indemnify and hold Publisher harmless from any resulting demands, claims, or liability. Advertiser shall reimburse Publisher for any amount paid by Publisher in settlement of claims or in satisfaction of judgments obtained by reason of publication of advertising copy, and for all expenses incurred in that regard, including, but not limited to, attorneys' fees and costs of litigation.

8. MISCELLANEOUS PROVISIONS

8.01. Excuse for Failure to Publish. Publisher shall not be responsible or liable for any damages to Advertiser by reason of a failure to insert any advertisement provided for in this agreement because of any labor dispute, strike, war (declared or undeclared), riot, terrorist act, insurrection, civil commotion, fire, flood, accident, storm, or any act of God, or any other cause beyond the control of Publisher. In such an event, Advertiser shall have the option of either having the advertisement inserted in a future issue of the Publication [in which the advertisement normally would have appeared] on the terms and conditions contained in this agreement or of having no charge made by Publisher for the advertisement not inserted and of having the rate charged per line or inch of advertising be unaffected by the reduction in space used.

8.02. Assignment and Delegation. Neither party may assign any rights or delegate any duties under this agreement without the express prior written consent of the other.

8.03. Entire Agreement. This writing contains the entire agreement of the parties. No representations were made or relied on by either party, other than those expressly set forth in this agreement. No agent, employee, or other representative of either party is empowered to alter any of the terms of this agreement, unless done in writing and signed by executive officers of the parties. In particular, and not in limitation of the foregoing, Advertiser acknowledges that no representations of Publisher were made or relied on with respect to circulation guaranties. Advertiser also acknowledges that no representations of Publisher were made regarding the lowest advertising rates in force.

8.04. Controlling Law. The validity, interpretation, and performance of this agreement shall be controlled by and construed under the laws of the State of California without reference to its conflict of law principles.

8.05. Failure to Object Not a Waiver. The failure of either party to object to, or to take affirmative action with respect to, any conduct of the other that is in violation of the terms of this agreement shall not be construed as a waiver of any rights or of any future breach or subsequent wrongful conduct.

Executed on _____ [date], at _____ [city], California.

PUBLISHER

_____ [signature of officer]

[typed name and title]

ADVERTISER

_____ [signature of officer]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION
PART IV. FORMS

C. Newspaper and Magazine Advertising

20-50 California Legal Forms--Transaction Guide § 50.221

§ 50.221 Agreement for Extended Term Magazine Advertising

[1] Comment--Use of Form

The form in [2], *below*, may be used to draft an agreement between an advertiser and the publisher of a monthly magazine for extended term advertising in the magazine. An extended term is usually one year.

While newspaper advertising agreements can include terms permitting the advertiser to specify the position of its advertising [*see* § 50.220], that practice is not common and usually involves an extra charge. In magazine advertising, the position of the advertisements is usually specified.

This agreement contains provisions that apply if the circulation falls below a stated guaranteed minimum. These provisions help to assure the advertiser that advertisements will reach the contemplated audience or, at least, that there will be a reduction in cost if circulation falls below the guaranteed minimum.

[2] FORM

Agreement for Extended Term Magazine Advertising

EXTENDED TERM ADVERTISING AGREEMENT

[*name of advertiser*] ("Advertiser") and _____ [*name of publisher*]
("Publisher"), in consideration of the promises made in this agreement, agree as follows.

1. ADVERTISING SPACE

1.01. Description. Advertiser agrees to use and Publisher agrees to provide advertising space in _____ [*name of publication*] ("the Publication"), subject to the terms and conditions of this agreement. The size of the advertising space shall be _____ [*e.g.*, full page]. The position of the advertising space

shall be _____ [e.g., second cover]. The advertising space shall be used and provided _____ [number] times on the following dates: _____ [specify]. The advertisements shall be printed in _____ [e.g., black and white or four-color].

2. COST AND PAYMENTS

2.01. Rates. The rates for the advertisements referred to in this agreement are as follows:

_____ [specify type of advertisement, size, position, rate per insertion, and total cost, for each type of advertisement]. Any copy that requires engraving shall be subject to an additional engraving charge, to be determined.

2.02. Billing and Payments. Publisher shall bill Advertiser for the advertising _____ [before or after] publication on a monthly basis _____ [specify when, e.g., on the first day of each month]. Advertiser shall make payments to Publisher for the advertising within 30 days after presentment of Publisher's bill.

2.03. Discount and Commission. The amount billed shall be reduced by a discount of _____ percent on payment within 10 days after presentment of Publisher's bill, and that payment date shall be stated on the bill. The total cost includes an amount that can be used to pay a commission to an advertising agency, which at the option of Advertiser and on written request, Publisher shall pay to a designated agency.

2.04. Taxes. Any and all taxes, whether federal, state, or local, that may be imposed on any advertising published pursuant to this agreement shall be paid by Advertiser and shall be billed to Advertiser on a regular basis.

3. CONTENT AND DESIGN OF ADVERTISING

3.01. Content. Publisher has the right to censor, reject, alter, or refuse any advertising copy, in its sole discretion, and to disapprove any advertising copy in accordance with any rules that Publisher has or might have concerning acceptance of advertising matter, but no change in advertising copy will be made without the prior consent of Advertiser.

3.02. Advertising Appearing to Be News Matter. Any advertising copy resembling news matter or advertisements in cartoon technique or comic strip form must carry the word "Advertisement" over each column in which the advertisement appears. Publisher in its sole discretion shall decide whether advertising copy is subject to this provision, but no advertising with such a caption shall be printed without the prior consent of Advertiser.

3.03. Design. Advertisements that encompass one or more columns must be as many inches deep as columns wide. The minimum acceptable depth is 14 lines. Advertisements may not be irregular or nonrectangular in shape (commonly known as "stair-step," "step-down," or "step-up" advertisements). Advertisements may not be composed entirely of solid black background with white letters (commonly referred to as "reverse plate"). If Advertiser submits advertising copy not in conformity with the foregoing restrictions, Publisher shall have the option of either refusing to print it or redesigning it in accord with the normal design of advertising in use, without submitting a proof to Advertiser unless one was specifically requested on the order. Publisher reserves the right to change, benday, or otherwise lighten type, cuts, and borders without submitting a proof to Advertiser.

4. SUBMISSION OF ADVERTISING COPY

4.01. Submission in Advance. Advertiser shall submit all advertising copy to Publisher at least seven days before each date it is to be inserted in the Publication. If Advertiser fails to submit advertising copy within that time limit, Publisher shall have the option of inserting any copy previously used by Advertiser or of declining to publish any advertisement for Advertiser in that issue. If the first alternative is followed, Advertiser shall pay to Publisher the full amount of the contract price for the advertising. If the second alternative is followed, the rate charged to Advertiser shall be increased to the rate charged for the frequency of advertising actually done, as shown on Publisher's rate schedule.

5. PRINTING ERRORS

[EITHER]

5.01. Omission of Advertisement. If any advertisement fails to appear as agreed in this agreement, without the fault of Advertiser, and subject to the provisions of Section 8.01, Publisher shall not be entitled to payment for that advertisement.

[OR]

5.01. Omission of Advertisement. The failure of Publisher to insert any advertisement in any issue of the Publication shall be deemed immaterial, and shall not be considered a breach of this agreement, nor shall Publisher be liable for damages for such a failure. If copy for an advertisement is submitted in accordance with this agreement and is omitted from one or more issues of the Publication, the identical advertisement or an advertisement of the same size will be published by Publisher within six days after the date of the omission in the Publication from which it was omitted.

[Continue with the following:]

5.02. Misplacement of Advertisement. If any advertisement appears in a position other than that provided for in this agreement, Publisher shall make no charge for that advertisement and Advertiser shall have the option of canceling the remainder of this agreement by written notice to Publisher.

5.03. Errors and Quality. Publisher assumes no responsibility for a failure to obtain clear impressions when key numbers are mortised into cuts or casts of mats, provided due care is exercised in the handling of key numbers in electros by Publisher. Publisher shall not be liable for any incorrect cuts or matrix supplied by another publisher.

6. GUARANTEE OF CIRCULATION

6.01. Number of Copies Per Issue. Publisher guarantees that the average circulation of the Publication shall be not less than _____[number] copies per issue for those issues in which the advertisement of Advertiser is to be inserted. The report of average circulation figures for the Publication as indicated in _____[name of publication or report], published by _____[name of service], shall be conclusive.

6.02. Refund and Termination. If the actual average circulation of the Publication is less than that guaranteed, Publisher shall credit a pro rata refund to Advertiser based on the shortage in circulation. Advertiser shall have the option of terminating the balance of this agreement by written notice if a shortage of circulation continues for _____[number] successive issues in which an advertisement of Advertiser is inserted.

7. INDEMNIFICATION

7.01. Advertiser Responsible for Advertising Copy. Advertiser assumes full and complete responsibility and liability for the content of all advertising copy submitted, printed, and published pursuant to this agreement, and shall indemnify and hold Publisher harmless from any resulting demands, claims, or liability. Advertiser shall reimburse Publisher for any amount paid by Publisher in settlement of claims or in satisfaction of judgments obtained by reason of publication of advertising copy, and for all expenses incurred in that regard, including, but not limited to, attorneys' fees and costs of litigation.

8. MISCELLANEOUS PROVISIONS

8.01. Excuse for Failure to Publish. Publisher shall not be responsible or liable for any damages to Advertiser by reason of a failure to insert any advertisement provided for in this agreement because of any labor dispute, strike, war (declared or undeclared), riot, terrorist act, insurrection, civil commotion, fire, flood, accident, storm, or any act of God, or any other cause beyond the control of Publisher. In such an event, Advertiser shall have the option of either having the advertisement inserted in a future issue of the Publication on the terms and conditions contained in this agreement or of having no charge made by Publisher for the advertisement not inserted and of having the rate charged be unaffected by the reduction in space used.

8.02. Assignment and Delegation. Neither party may assign any rights or delegate any duties under this agreement without the express prior written consent of the other.

8.03. Entire Agreement. This writing contains the entire agreement of the parties. No representations were made or relied on by either party, other than those expressly set forth in this agreement. No agent, employee, or other representative of either party is empowered to alter any of the terms of this agreement, unless done in writing and signed by executive officers of the parties. In particular, and not in limitation of the foregoing, Advertiser acknowledges that no representations of Publisher were made or relied on with respect to circulation guaranties. Advertiser also acknowledges that no representations of Publisher were made regarding the lowest advertising rates in force.

8.04. Controlling Law. The validity, interpretation, and performance of this agreement shall be controlled by and construed under the laws of the State of California without reference to its conflict-of-law principles.

8.05. Failure to Object Not a Waiver. The failure of either party to object to, or to take affirmative action with respect to, any conduct of the other that is in violation of the terms of this agreement shall not be construed as a waiver of any rights or of any future breach or subsequent wrongful conduct.

Executed on _____ [date], at _____ [city], California.

PUBLISHER

_____ [signature of officer]
[typed name and title]

ADVERTISER

_____ [signature of officer]
[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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C. Newspaper and Magazine Advertising

20-50 California Legal Forms--Transaction Guide §§ 50.222-50.229

[Reserved]

§§ 50.222[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
 CHAPTER 50 ADVERTISING AND PROMOTION
 PART IV. FORMS
 D. Radio and Television Advertising

20-50 California Legal Forms--Transaction Guide § 50.230

§ 50.230 Agreement for Local Broadcast Advertising--Between Advertiser and Radio or Television Station

[1] Comment--Use of Form

The form in [2], *below*, may be used to draft an agreement for radio or television broadcasting of advertisements and is designed for use when an advertiser deals directly with a station for local broadcasting. It includes provisions for use when program material is to be supplied by the station or when the advertiser is to do so. For a network broadcasting agreement between an agency and a radio or television broadcasting system, see § 50.231. This form can be adapted for use when an agency deals with the station, by changing party references (from "Advertiser" to "Agency") and including a provision to the effect that the stated rates include the agency commissions.

This form contains provisions dealing with the effect of an interruption in the contemplated advertising schedule that could result from preemptive coverage of major news events or from technical difficulties.

[2] FORM

Agreement for Local Broadcast Advertising--Between Advertiser and Radio or Television Station

AGREEMENT FOR BROADCAST ADVERTISING

_____ [name of advertiser] ("Advertiser") and _____ [name of station owner]
 ("Broadcasting Company"), in consideration of the promises made in this agreement, agree as follows:

1. BROADCASTING TIME

1.01. Agreement to Use and Provide Broadcasting Time. Advertiser agrees to use and Broadcasting Company agrees to provide broadcasting time on _____ [radio or television] station _____ [call letters] located in _____ [city and state] ("the Station"), subject to the terms and conditions of this agreement.

1.02. Term of Agreement. The term of this agreement shall be from _____[*date*] to and including _____[*date*] ("the Term").

1.03. Advertising Spots. Throughout the Term, Advertiser shall have the right to use _____[*e.g.*, three periods of one minute each] for presenting commercial announcements _____[*specify regular-schedule context, e.g.*, immediately before, during, and immediately after each broadcast of a series of programs entitled _____ to be presented on the Station on _____ (*specify days, e.g.*, every Monday) from _____ (*time of day*) to _____ (*time of day*)] ("the Advertising Spots").

1.04. Subject of Commercial Announcements. Advertiser shall not use the Advertising Spots to advertise any person or entity other than Advertiser, and shall not advertise any products or services other than _____[*specify products or services to be advertised*] without the express prior written consent of Broadcasting Company.

2. COST AND PAYMENTS

2.01. Rates and Charges. The rates for the Advertising Spots are based on Broadcasting Company's rate card, a copy of which is attached and incorporated into this agreement. The total charge per Advertising Spot is \$_____.

2.02. Agency Commission and Rate Representation. The charges specified in this agreement are based on Broadcasting Company's _____[gross rates and are not subject to an agency commission or net rates and have been reduced by the amount that would be payable to an advertising agency as its commission. Advertiser represents that no advertising agency is entitled to a commission by reason of the broadcasts agreed to in this agreement]. Broadcasting Company represents that the rates, discounts, and charges specified in this agreement are as favorable to Advertiser as any available for broadcasts under a like agreement as of the date of execution of this agreement. If any other advertiser or agency is given more favorable treatment in this regard during the Term, then Broadcasting Company shall apply those standards to this agreement as of the date they become effective with respect to that other advertiser or agency.

[EITHER]

2.03. Discounts. The rates and charges specified in this agreement have been reduced by the maximum discounts applicable to the particular terms of this agreement, and any deviation may result in higher or lower discounts and charges for the time actually used pursuant to the rate card of Broadcasting Company.

[OR]

2.03. Discounts. The rates and charges specified in this agreement represent the gross rates and charges of Broadcasting Company, and on billing Advertiser, Broadcasting Company will reduce those charges as follows:

(a) Advertiser shall be entitled to a cash discount of _____ percent of the total charges billed if payment is made to Broadcasting Company on or before the 15th of each month for the charges incurred in the preceding month, provided there are no other amounts due to Broadcasting Company from Advertiser.

(b) Advertiser shall be allowed an overall discount of _____ percent on the total gross billing for station time pursuant to this agreement, if that total gross billing is not less than \$_____ during any

yearly period commencing with the date of the first broadcast and terminating 12 months later. If Advertiser is not entitled to an overall discount during any specified year, it shall have the right to qualify for either or both of the following discounts.

(1) If the broadcasts provided for in this agreement are continued for not less than 13 consecutive weeks, Advertiser is entitled to a discount on gross billing for station time as follows:

_____ [*specify*].

(2) If the broadcasts provided for in this agreement are presented for continuous periods of not less than one year, commencing with the date of the first broadcast under this agreement, Advertiser shall be entitled to an annual discount of 52 times

_____ percent of the largest gross billings (less any advertising agency commission previously allowed on it) for station time used for broadcasts under this agreement for any week of that annual discount year. On termination of this agreement, if broadcasts under this agreement have continued for more than one annual discount year, Advertiser may elect to have this discount based on any consecutive 52-week period between the start of the last completed annual discount year and the termination date of this agreement, but that 52-week period may not include any period during which an overall discount has been allowed.

[OR]

2.03. Discounts. The rates and charges specified in this agreement represent the gross rates and charges of Broadcasting Company, and on billing Advertiser, Broadcasting Company will reduce those charges as follows:

(a) Advertiser shall be entitled to a cash discount of _____ percent of the total charges billed if payment is made to Broadcasting Company on or before the 15th of each month for the charges incurred in the preceding month, provided there are no other amounts due to Broadcasting Company from Advertiser.

(b) Advertiser shall be entitled to a volume discount of _____ percent based on the total amount of station time provided for under this agreement, as provided in the rate card of Broadcasting Company. This discount shall be reflected in the bills submitted to Advertiser. If the volume of broadcast time actually used exceeds that provided for in this agreement, any additional time shall be considered covered under this agreement for purposes of this discount, and if Advertiser becomes entitled to a higher discount as specified on Broadcaster's rate card, that discount shall apply to the entire period covered by this agreement. If a lesser amount of broadcasting time than that called for in this agreement is actually used, the lower discount specified in Broadcasting Company's rate card will apply to the entire period of broadcasting under this agreement.

[CONTINUE]

2.04. Copyright License Costs. Broadcasting Company reserves the right to commence charging Advertiser for the cost of obtaining any standard music license issued by the American Society of Composers, Authors and Publishers, or by Broadcast Music, Inc., or by SESAC, Inc., covering the nondramatic performance of the compositions, as published, of those organizations. Broadcasting Company shall give Advertiser written notice of its intention to make any such charge at least two weeks before the effective date, and on receiving that notice, Advertiser may cancel this agreement by giving written notice to Broadcasting Company, effective within one week after receipt of the notice. Advertiser

shall not lose the benefit of any discount or lower rate by reason of cancellation under this provision.

2.05. Taxes. Any and all taxes, whether federal, state, or local, that may be charged or assessed against Broadcasting Company on account of this agreement or the performance of any obligations under this agreement shall be paid by Advertiser and shall be included on the regular billings as an additional charge.

2.06. Billing and Payment. (a) Broadcasting Company shall bill Advertiser monthly for all broadcasts presented during the previous month. Advertiser shall remit all payments due under this agreement to Broadcasting Company at _____ [or specify address] within 30 days after receipt of each bill. Payments shall be deemed made for all purposes under this agreement as of the date Broadcasting Company actually receives the remittance.

(b) All payments shall be received by Broadcasting Company subject to collection. Any delay in the collection of or failure to honor a payment instrument shall void the attempted payment, and payment shall not be considered made for purposes of this agreement until the instrument actually clears or the amount involved is otherwise in the actual possession of Broadcasting Company.

(c) All bills submitted pursuant to this agreement shall be deemed correct unless Advertiser makes written objection within 10 days after receipt.

(d) If Advertiser fails to make any payment when required by this agreement, Broadcasting Company shall have the option of canceling the balance of this agreement by giving written notice of cancellation before the payment in arrears has been received by Broadcasting Company.

2.07. Increase in Rates. Broadcasting Company reserves the right to increase any rate or charge, or to reduce any discount specified in this agreement, by giving Advertiser not less than 20 days' prior notice of the change. On notification of a change of rates, Advertiser shall have the option of continuing this agreement in effect at the higher rates or canceling this agreement as of the date the change in rates becomes effective, without reduction of discounts or increase of rates because of the resulting reduction in time used. No increase of rates will be effective unless Broadcasting Company issues new rate cards reflecting the increase in rates applicable to all similar broadcasts.

3. PROGRAMS AND ANNOUNCEMENTS

[EITHER]

3.01. Production by Broadcasting Company. Broadcasting Company shall provide the materials, talent, and all other production facilities for the commercial announcements to be presented in the Advertising Spots. If additional services not covered in this agreement are provided, the charges for those services will be determined by the mutual agreement of the parties. If the cost of talent or other production services as specified in this agreement should be increased by union action or any other causes beyond the control of Broadcasting Company, the change in cost will be borne by Advertiser. Broadcasting Company assumes no liability for the default or nonappearance of talent contracted for in this agreement, and reserves the right to provide substitute talent, provided that no additional charge shall be made to Advertiser and any resulting savings will accrue to Advertiser. Broadcasting Company retains all rights in all material furnished by it for the broadcasts, and Advertiser shall make no other use of that material without the express prior written consent of Broadcasting Company.

[OR]

3.01. Production by Advertiser. Advertiser shall provide the materials, talent, and all other production facilities for

the commercial announcements to be presented in the Advertising Spots; however, Broadcasting Company shall always provide its usual technical and transmission facilities and the services of its regular staff announcers without any charge in addition to that for broadcast time.

3.02. Submission to Broadcasting Company. Advertiser shall present all materials to be used in broadcasts under this agreement to Broadcasting Company not less than 48 hours in advance of its scheduled broadcast date. Materials required to be submitted shall include scripts, continuity, tape recordings, records, commitments for talent, and all other material necessary to present the broadcast. These materials shall not be considered submitted to Broadcasting Company until Broadcasting Company actually receives them. If Broadcasting Company has not received these materials at least 48 hours before the scheduled broadcast, it shall notify Advertiser of that fact, and Broadcasting Company may use substitute materials that Broadcasting Company deems suitable and appropriate under the circumstances, and Advertiser shall pay, in addition to all other charges specified in this agreement, the entire cost of that production reasonably incurred by Broadcasting Company.

3.03. Approval of Content of Broadcasts. Broadcasting Company shall have the right to disapprove all materials submitted for broadcasts and to refuse to permit any individual to participate in any broadcast. Broadcasting Company may delete or omit any part of any broadcast. Broadcasting Company's right of disapproval shall be exercised in its sole discretion as to any matter it deems objectionable for any reason whatsoever. Broadcasting Company reserves the right to refuse to broadcast all or any part of any announcement, or to interrupt any broadcast in progress and cease to transmit all or any part, if Broadcasting Company reasonably and in good faith determines that the program or announcement material is of substandard technical quality, or not in conformity with the standards of quality broadcasting, or is in bad taste or otherwise objectionable.

3.04. Standards for Acceptable Content. In order to express certain minimum standards of Broadcasting Company for accepting broadcast material, the following rules are set forth. They do not purport to be a complete list of Broadcasting Company's standards, and are set forth for example only. In appropriate situations, Broadcasting Company may waive certain of the following requirements if good broadcasting in the public interest will result. Advertiser may submit any questionable matter to Broadcasting Company for a determination of the permissibility of its use before contracting any obligations or commitments. Advertiser agrees that, in order to obtain the highest possible degree of excellence in the broadcasting of programs and announcements, the following types of statements and practices shall not be used:

- (a) False or unwarranted claims for any product or service.
- (b) Infringements of another advertiser's rights through plagiarism or unfair imitation of either program idea or copy, or any other unfair competition.
- (c) Disparagement of competitors or competitive goods.
- (d) Lotteries or "drawing contests" or any other contest in which the public is unfairly treated or where fair and competent judging is not provided.
- (e) Presentation of slanderous, obscene, profane, vulgar, repulsive, or offensive matter, either in theme or in treatment.
- (f) Ambiguous statements that may be misleading to the audience.
- (g) Unpleasantly rapid delivery of commercial announcements.
- (h) Testimonials that cannot be authenticated.

4. FAILURE TO BROADCAST

4.01. Preemptions. Broadcasting Company reserves the right to preempt the time provided under this agreement, in order to present special events or programs of outstanding public importance. Broadcasting Company shall give Advertiser as much notice of preemption as is reasonably possible under the circumstances. If advance notice of the preemption is not possible, Broadcasting Company shall give notice promptly after preemption. Advertiser shall not be required to pay for any time preempted by Broadcasting Company. If a substitute time can be agreed on by Broadcasting Company and Advertiser, the preempted broadcast shall be presented at that time pursuant to the terms of this agreement. If mutual agreement in this regard is not possible, Advertiser shall continue to be entitled to all discounts and reductions of rates charged called for by this agreement notwithstanding the reduction in broadcasting time used. Broadcasting Company shall present courtesy announcements referring to Advertiser at the beginning and end of the broadcast of the preempting program.

4.02. Technical Difficulties or Other Causes Beyond Control of Broadcasting Company. (a) Any failure, interruption, or delay in presenting the broadcasts provided for in this agreement, in whole or in part, resulting from technical difficulties or mechanical failure of any of the broadcasting equipment or from strikes, labor disputes, boycotts, riots, terrorist acts, civil insurrection, war or national emergencies, governmental restrictions, acts of God, or any other cause beyond the control of Broadcasting Company, shall not constitute a breach of this agreement.

(b) If an entire broadcast is not presented, Broadcasting Company and Advertiser shall attempt to agree on a mutually satisfactory time to reschedule that broadcast pursuant to this agreement. If rescheduling cannot be agreed on or if part of a broadcast is omitted, Broadcasting Company shall grant a pro rata reduction in charges for the broadcasting time lost by Advertiser. However, if any commercial announcements are omitted, in whole or in part, Advertiser shall be entitled to a reduction in the time charges for the entire broadcast in the same ratio as the omitted announcement time bears to the total announcement time included in the broadcast, if this results in a greater reduction in charges.

(c) Advertiser shall continue to be entitled to all discounts and rates provided in this agreement, notwithstanding any reduction in broadcasting time used pursuant to this section.

5. INDEMNIFICATION

5.01. By Advertiser. Advertiser agrees to indemnify and hold harmless Broadcasting Company from and against any and all claims, damage, or liability, including attorneys' fees and the costs and expense of any legal action resulting from the broadcasting of material supplied or produced by Advertiser, including any musical composition or performance.

5.02. By Broadcasting Company. Broadcasting Company agrees to indemnify and hold harmless Advertiser from and against any and all claims, damage, or liability, including attorneys' fees and the costs and expense of any legal action resulting from the broadcasting of material supplied or produced by Broadcasting Company, including any musical composition or performance.

5.03. Advertiser Responsible for Advertising Copy. Advertiser assumes full and complete responsibility and liability for the content of all advertising copy submitted and broadcast pursuant to this agreement, and shall indemnify and hold Broadcasting Company harmless against any demands, claims, or liability on it. Advertiser shall reimburse Broadcasting Company for any amount paid by Broadcasting Company in settlement of claims or in satisfaction of judgments obtained by reason of broadcasting advertising copy, and for all expenses incurred in that regard, including, but not limited to, attorneys' fees and costs of litigation.

5.04. Continuing Effect. The provisions of Sections 5.01 through 5.03 shall remain effective and inure to the benefit of the respective parties notwithstanding the expiration, cancellation, or termination of this agreement.

6. TERMINATION OF AGREEMENT

6.01. Termination. Either Broadcasting Company or Advertiser may terminate this agreement at the completion of the thirteenth, twenty-sixth, or thirty-ninth week of broadcasting, by giving the other party written notice of termination not less than 21 days before the effective date of the termination.

6.02. Cancellation for Nonperformance. Either Broadcasting Company or Advertiser may cancel this agreement at any time by giving the other party written notice of cancellation, if the other party has not complied with the terms and conditions of this agreement. Broadcasting Company may so cancel this agreement if Advertiser has failed to make any payment when due pursuant to this agreement or has become bankrupt, or if insolvency proceedings are instituted by or against Advertiser, or if it reasonably appears that the credit of Advertiser is impaired.

6.03. Effect on Rates. The rates and discounts specified in this agreement shall continue in effect in the event Broadcasting Company terminates this agreement pursuant to Section 6.01 or Advertiser cancels this agreement pursuant to Section 6.02. If Advertiser terminates this agreement pursuant to Section 6.01 or Broadcasting Company cancels this agreement pursuant to Section 6.02, the rates and discounts applicable to the entire term of this agreement shall be modified to reflect those shown in Broadcasting Company's rate schedule for the amount of time and other services actually used under this agreement.

7. RENEWAL OF AGREEMENT

7.01. Advertiser Renewal Option. Advertiser shall have an option to renew this agreement on the terms and conditions contained in this agreement, except that the rates and charges provided in this agreement may be changed to match the rates and charges for other purchasers of broadcasting time according to Broadcasting Company's rate schedules in effect at the commencement date of the renewed contract.

7.02. Notice of Intention to Renew. Written notice of intention to renew this agreement shall be given to Broadcasting Company by Advertiser not less than 10 days before the termination date of this agreement.

7.03. Nonrenewal. No option to renew shall be available if there has been any default in the payments to Broadcasting Company required by this agreement or as to Advertiser's performance of any of the other terms and conditions of this agreement. [Broadcasting Company may refuse to renew this agreement by giving Advertiser notice to that effect within five days after it has received notice that Advertiser has exercised its option to renew this agreement.]

8. MISCELLANEOUS PROVISIONS

8.01. Governmental Regulation. This agreement is subject to the terms of the licenses held by Broadcasting Company and to all federal, state, and municipal laws, regulations, and decisions either presently in existence or to be enacted, made, or enforced in the future, including the regulations and actions of all governmental administrative agencies and commissions.

8.02. Assignment and Delegation. Neither party may assign any rights or delegate any duties under this agreement without the express prior written consent of the other.

8.03. Entire Agreement. This writing contains the entire agreement of the parties. No representations other than those expressly set forth in this agreement were made or relied on by either party. No agent, employee, or other representative of either party is empowered to alter any of the terms of this agreement, unless done in writing and signed by an officer of each party.

8.04. Controlling Law. The validity, interpretation, and performance of this agreement shall be controlled by and

construed under the laws of the State of California without reference to its conflict of law principles.

8.05. Failure to Object Not a Waiver. The failure of either party to object to, or to take affirmative action with respect to, any conduct of the other that is in violation of the terms of this agreement shall not be construed as a waiver of any rights or of any future breach or subsequent wrongful conduct.

8.06. Cessation of Performance. In the event of any material breach of this agreement, including a failure to make any payments required under this agreement, the nonbreaching party shall, in addition to any other rights and remedies available, have the option to immediately cease all performance under this agreement.

Executed on _____[*date*], at _____[*city*], California.

BROADCASTING COMPANY

_____[*signature of officer*]

[*typed name and title*]

ADVERTISER

_____[*signature of officer*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION
PART IV. FORMS
D. Radio and Television Advertising

20-50 California Legal Forms--Transaction Guide § 50.231

§ 50.231 Agreement for Network Broadcast Advertising--Between Advertising Agency and Radio or Television Network

[1] Comment--Use of Form

The form in [2], *below*, may be used to draft an agreement by an advertising agency with a radio or television network (which has operating arrangements with local stations). Unlike the agreement between an advertiser and a local station *set forth in § 50.230*, this form contains provisions with respect to agency commissions.

[2] FORM

Agreement for Network Broadcast Advertising--Between Advertising Agency and Radio or Television Network

AGREEMENT FOR NETWORK BROADCASTS

_____[*name of agency*] ("Agency"), acting for the benefit of _____[*name of advertiser*] ("Advertiser"), and _____[*name of network owner*] ("Network"), in consideration of the promises made in this agreement, agree as follows:

1. BROADCASTING TIME

1.01. Agreement to Use and Provide. Agency agrees to use and Network agrees to provide broadcasting time, as described in this agreement, on the _____[*radio or television or radio and television*] stations identified in Exhibit _____ ("the Stations"), subject to the terms and conditions of this agreement.

1.02. Term of Agreement. The term of this agreement shall be from _____[*date*] to and including _____[*date*] ("the Term").

1.03. Advertising Spots. Throughout the Term, Agency shall have the right to use _____ [e.g., three periods of one minute each] for presenting commercial announcements _____ [specify regular-schedule context, e.g., immediately before, during, and immediately after each broadcast of a series of programs entitled _____ to be presented on the Stations on _____ (specify days, e.g., every Monday) from _____ (time of day) to _____ (time of day)] ("the Advertising Spots").

1.04. Subject of Commercial Announcements. Agency shall not use the Advertising Spots to advertise any person or entity other than Advertiser and shall not advertise any products or services other than _____ [list products or services to be advertised] without the express prior written consent of Network.

2. COST AND PAYMENTS

2.01. Rates and Charges. The rates for the Advertising Spots are based on Network's rate card, a copy of which is attached and incorporated into this agreement. The total charge per Advertising Spot is \$_____.

2.02. Agency Commission and Rate Representation. The charges specified in this agreement are based on Network's gross rates and are subject to an agency commission of _____ percent on billing to Agency. Network represents that the rates, discounts, and charges specified in this agreement are as favorable to Agency as any available for broadcasts under a like agreement as of the date of execution of this agreement. If any other advertiser or agency is given more favorable treatment in this regard during the Term, then Network shall apply those standards to this agreement as of the date they become effective with respect to that other advertiser or agency.

[EITHER]

2.03. Discounts. The rates and charges specified in this agreement have been reduced by the maximum discounts applicable to the particular terms of this agreement, and any deviation may result in higher or lower discounts and charges for the time actually used pursuant to the rate card of Network.

[OR]

2.03. Discounts. The rates and charges specified in this agreement represent the gross rates and charges of Network, and on billing Agency, Network will reduce those charges as follows:

(a) Agency shall be entitled to a cash discount of _____ percent of the total charges billed if payment is made to Network on or before the 15th of each month for the charges incurred in the preceding month, provided there are no other amounts due to Network from Agency.

(b) Agency shall be allowed an overall discount of _____ percent on the total gross billing for station time pursuant to this agreement, if that total gross billing is not less than \$_____ during any yearly period commencing with the date of the first broadcast and terminating 12 months later. If Agency is not entitled to an overall discount during any specified year, it shall have the right to qualify for either or both of the following discounts.

(1) If the broadcasts provided for in this agreement are continued for not less than 13 consecutive weeks, Agency is entitled to a discount on gross billing for station time as follows:

_____ [specify].

(2) If the broadcasts provided for in this agreement are presented for continuous periods of not less than one year, commencing with the date of the first broadcast under this agreement, Agency shall be entitled to an annual discount of 52 times

_____ percent of the largest gross billings (less any advertising agency commission previously allowed on it) for station time used for broadcasts under this agreement for any week of that annual discount year. On termination of this agreement, if broadcasts under this agreement have continued for more than one annual discount year, Agency may elect to have this discount based on any consecutive 52-week period between the start of the last completed annual discount year and the termination date of this agreement, but that 52-week period may not include any period during which an overall discount has been allowed.

[OR]

2.03. Discounts. The rates and charges specified in this agreement represent the gross rates and charges of Network, and on billing Agency, Network will reduce those charges as follows:

(a) Agency shall be entitled to a cash discount of _____ percent of the total charges billed if payment is made to Network on or before the 15th of each month for the charges incurred in the preceding month, provided there are no other amounts due to Network from Agency.

(b) Agency shall be entitled to a volume discount of _____ percent based on the total amount of station time provided for under this agreement, as provided in the rate card of Network. This discount shall be reflected in the bills submitted to Agency. If the volume of broadcast time actually used exceeds that provided for in this agreement, any additional time shall be considered covered under this agreement for purposes of this discount, and if Agency becomes entitled to a higher discount as specified on Broadcaster's rate card, that discount shall apply to the entire period covered by this agreement. If a lesser amount of broadcasting time than that called for in this agreement is actually used, the lower discount specified in Network's rate card will apply to the entire period of broadcasting under this agreement.

[OR]

2.03. Discounts. The rates and charges specified in this agreement represent the gross rates and charges of Network, and on billing Agency, Network will reduce those charges as follows:

(a) Agency shall be entitled to a cash discount of _____ percent of the total charges billed if payment is made to Network on or before the 15th of each month for the charges incurred in the preceding month, provided there are no other amounts due to Network from Agency.

(b) If the aggregate of the gross rates per night hour of all continental United States Stations actually used on any broadcast equals or exceeds \$_____, there will be allowed on the net billing (after deduction of dollar volume and annual or overall discounts) for all Stations used on that broadcast a discount of _____ percent, less half of the percentage points, if any, by which the aggregate of the gross rates per night hour of all Stations actually used for the broadcast is less than \$_____, provided that at least _____ [number] Stations whose gross rates per night hour aggregate at least \$_____ remain on firm order throughout the Term. In computing the rate of the discount applicable to any broadcast that is one of a series of broadcasts, a Station that has been ordered for and has accepted that series of broadcasts, but is unavailable

for a particular broadcast because it has preempted the broadcast time for a special event of importance or because of failure of facilities, shall be deemed to have actually been used for that broadcast. The term "Station" for this purpose shall mean any Station identified on Exhibit _____, except that bonus Stations shall not be counted and two or more Stations sold as a unit shall be counted as a single Station.

(c) The discounts on any broadcasts that are transmitted between the hours of 9:00 A.M. and 1:00 P.M. shall be adjusted so that 10 percentage points shall be deducted from the total of all other discounts allowable.

[CONTINUE]

2.04. Copyright License Costs. Network reserves the right to commence charging Agency for the cost of obtaining any standard music license issued by the American Society of Composers, Authors and Publishers, or by Broadcast Music, Inc., or by SESAC, Inc., covering the nondramatic performance of the compositions, as published, of those organizations. Network shall give Agency written notice of its intention to make any such charge at least two weeks before the effective date, and on receiving that notice, Agency may cancel this agreement by giving written notice to Network, effective within one week after receipt of the notice. Agency shall not lose the benefit of any discount or lower rate by reason of cancellation under this provision.

2.05. Taxes. Any and all taxes, whether federal, state, or local, that may be charged or assessed against Network on account of this agreement or the performance of any obligations under this agreement shall be paid by Agency and shall be included on the regular billings as an additional charge.

2.06. Billing and Payment. (a) Network shall bill Agency monthly for all broadcasts presented during the previous month. Agency shall remit all payments due under this agreement to Network at _____[or specify address] within 30 days after receipt of each bill. Payments shall be deemed made for all purposes under this agreement as of the date Network actually receives the remittance.

(b) All payments shall be received by Network subject to collection. Any delay in the collection of or failure to honor a payment instrument shall void the attempted payment, and payment shall not be considered made for purposes of this agreement until the instrument actually clears or the amount involved is otherwise in the actual possession of Network.

(c) All bills submitted pursuant to this agreement shall be deemed correct unless Agency makes written objection within 10 days after receipt.

(d) If Agency fails to make any payment when required by this agreement, Network shall have the option of canceling the balance of this agreement by giving written notice of cancellation before the payment in arrears has been received by Network.

2.07. Increase in Rates. Network reserves the right to increase any rate or charge, or to reduce any discount specified in this agreement, by giving Agency not less than 20 days' prior notice of the change. On notification of a change of rates, Agency shall have the option of continuing this agreement in effect at the higher rates or canceling this agreement as of the date the change in rates becomes effective, without reduction of discounts or increase of rates because of the resulting reduction in time used. No increase of rates will be effective unless Network issues new rate cards reflecting the increase in rates applicable to all similar broadcasts.

3. PROGRAMS AND ANNOUNCEMENTS

[EITHER]

3.01. Production by Network. Network shall provide the materials, talent, and all other production facilities for the commercial announcements to be presented in the Advertising Spots. If additional services not covered in this agreement are provided, the charges for those services will be determined by the mutual agreement of the parties. If the cost of talent or other production services as specified in this agreement should be increased by union action or any other causes beyond the control of Network, the change in cost will be borne by Agency. Network assumes no liability for the default or nonappearance of talent contracted for in this agreement, and reserves the right to provide substitute talent, provided that no additional charge shall be made to Agency and any resulting savings will accrue to Agency. Network retains all rights in all material furnished by it for the broadcasts, and Agency shall make no other use of that material without the express prior written consent of Network.

[OR]

3.01. Production by Agency. Agency shall provide the materials, talent, and all other production facilities for the commercial announcements to be presented in the Advertising Spots; however, Network shall always provide its usual technical and transmission facilities and the services of its regular staff announcers without any charge in addition to that for broadcast time.

3.02. Submission to Network. Agency shall present all materials to be used in broadcasts under this agreement to Network not less than 48 hours in advance of its scheduled broadcast date. Materials required to be submitted shall include scripts, continuity, tape recordings, records, commitments for talent, and all other material necessary to present the broadcast. These materials shall not be considered submitted to Network until Network actually receives them. If Network has not received these materials at least 48 hours before the scheduled broadcast, it shall notify Agency of that fact, and Network may use substitute materials that Network deems suitable and appropriate under the circumstances, and Agency shall pay, in addition to all other charges specified in this agreement, the entire cost of that production reasonably incurred by Network.

3.03. Approval of Content of Broadcasts. Network shall have the right to disapprove all materials submitted for broadcasts and to refuse to permit any individual to participate in any broadcast. Network may delete or omit any part of any broadcast. Network's right of disapproval shall be exercised in its sole discretion as to any matter it deems objectionable for any reason whatsoever. Network reserves the right to refuse to broadcast all or any part of any announcement, or to interrupt any broadcast in progress and cease to transmit all or any part, if Network reasonably and in good faith determines that the program or announcement material is of substandard technical quality, or not in conformity with the standards of quality broadcasting, or is in bad taste or otherwise objectionable.

3.04. Standards for Acceptable Content. In order to express certain minimum standards of Network for accepting broadcast material, the following rules are set forth. They do not purport to be a complete list of Network's standards, and are set forth for example only. In appropriate situations, Network may waive certain of the following requirements if good broadcasting in the public interest will result. Agency may submit any questionable matter to Network for a determination of the permissibility of its use before contracting any obligations or commitments. Agency agrees that, in order to obtain the highest possible degree of excellence in the broadcasting of programs and announcements, the following types of statements and practices shall not be used:

- (a) False or unwarranted claims for any product or service.
- (b) Infringements of another advertiser's rights through plagiarism or unfair imitation of either program idea or copy, or any other unfair competition.
- (c) Disparagement of competitors or competitive goods.

- (d) Lotteries or "drawing contests" or any other contest in which the public is unfairly treated or where fair and competent judging is not provided.
- (e) Presentation of slanderous, obscene, profane, vulgar, repulsive, or offensive matter, either in theme or in treatment.
- (f) Ambiguous statements that may be misleading to the audience.
- (g) Unpleasantly rapid delivery of commercial announcements.
- (h) Testimonials that cannot be authenticated.

4. NETWORK BROADCASTS

4.01. Stations. The broadcasts described in this agreement shall be carried over Network's facilities and be presented by all of the Stations except as otherwise provided in this agreement.

4.02. Omission of Broadcasts. (a) The fact that any Station is unavailable or will not accept the programs or announcements, or for any other reason does not present one or more of the broadcasts, shall not constitute a breach of this agreement on the part of Network. However, Agency shall not be required to pay for the facilities of the Stations for any such broadcast.

(b) Network and Agency may agree on mutually satisfactory dates to present omitted broadcasts on a delayed basis, on the Stations not presenting them, in which event the provisions of this agreement, including all charges, shall fully apply to the delayed broadcasts. In any event, Agency shall not be penalized by way of increased rates or reduced discounts because of the failure of any Station to present any broadcast.

(c) If presentation of the broadcasts has been suspended by any Station for _____[*period of time*], Agency shall have the option of deleting that Station from the coverage of this agreement and of not using the facilities of that Station when it again becomes available, provided that no Station may be deleted from the coverage of this agreement if that deletion would cause the gross amount of time charges for the Stations actually used to be less than 80 percent of the total amount of those charges provided in this agreement.

4.03. Broadcast Origination. All broadcasts shall originate in the studios of Network in _____[*city or cities*]. On request of Agency, and if Network consents, broadcasts may be originated from places other than those listed above, but in that event Agency shall pay a special origination charge.

4.04. Use of Recordings. (a) If any Station cannot receive any broadcast on a direct basis because of lack of service of coaxial cable, microwave relay, or leased lines, that Station shall present the broadcast by means of recordings of the original broadcast. The cost of making those recordings and of shipping them to any such Station, and all incidental expenses, shall be paid by Network. All such recordings shall be and remain the property of Network.

(b) The presentation of any broadcast on a recorded basis is subject to and dependent on the rules of any union having jurisdiction, the conditions under which the owners of musical, literary, and other material rights make that material available for recorded broadcasts, and the availability of suitable facilities for transmitting the recordings to the Stations involved. All expenses made necessary by the demands for payment by the owners of musical, literary, or other rights for the use of recordings shall be paid by Network.

5. FAILURE TO BROADCAST

5.01. Preemptions. Network reserves the right to preempt the time provided under this agreement, in order to present special events or programs of outstanding public importance. Network shall give Agency as much notice of preemption as is reasonably possible under the circumstances. If advance notice of the preemption is not possible, Network shall give notice promptly after preemption. Agency shall not be required to pay for any time preempted by Network. If a substitute time can be agreed on by Network and Agency, the preempted broadcast shall be presented at that time pursuant to the terms of this agreement. If mutual agreement in this regard is not possible, Agency shall continue to be entitled to all discounts and reductions of rates charged called for by this agreement notwithstanding the reduction in broadcasting time used. Network shall present courtesy announcements referring to Agency at the beginning and end of the broadcast of the preempting program.

5.02. Technical Difficulties or Other Causes Beyond Control of Network. (a) Any failure, interruption, or delay in presenting the broadcasts provided for in this agreement, in whole or in part, resulting from technical difficulties or mechanical failure of any of the broadcasting equipment or from strikes, labor disputes, boycotts, riots, terrorist acts, civil insurrection, war or national emergencies, governmental restrictions, acts of God, or any other cause beyond the control of Network, shall not constitute a breach of this agreement.

(b) If an entire broadcast is not presented, Network and Agency shall attempt to agree on a mutually satisfactory time to reschedule that broadcast pursuant to this agreement. If rescheduling cannot be agreed on or if part of a broadcast is omitted, Network shall grant a pro rata reduction in charges for the broadcasting time lost by Agency. However, if any commercial announcements are omitted, in whole or in part, Agency shall be entitled to a reduction in the time charges for the entire broadcast in the same ratio as the omitted announcement time bears to the total announcement time included in the broadcast, if this results in a greater reduction in charges.

(c) Agency shall continue to be entitled to all discounts and rates provided in this agreement, notwithstanding any reduction in broadcasting time used pursuant to this section.

6. INDEMNIFICATION

6.01. By Agency. Agency agrees to indemnify and hold Network harmless from and against any and all claims, damage, or liability, including attorneys' fees and the costs and expense of any legal action resulting from the broadcasting of material supplied or produced by Agency, including any musical composition or performance.

6.02. By Network. Network agrees to indemnify and hold harmless Agency from and against any and all claims, damage, or liability, including attorneys' fees and the costs and expense of any legal action resulting from the broadcasting of material supplied or produced by Network, including any musical composition or performance.

6.03. Agency Responsible for Advertising Copy. Agency assumes full and complete responsibility and liability for the content of all advertising copy submitted and broadcast pursuant to this agreement, and shall indemnify and hold Network harmless against any demands, claims, or liability on it. Agency shall reimburse Network for any amount paid by Network in settlement of claims or in satisfaction of judgments obtained by reason of broadcasting advertising copy, and for all expenses incurred in that regard, including, but not limited to, attorneys' fees and costs of litigation.

6.04. Continuing Effect. The provisions of Sections 6.01 through 6.03 shall remain effective and inure to the benefit of the respective parties notwithstanding the expiration, cancellation, or termination of this agreement.

7. TERMINATION OF AGREEMENT

7.01. Termination. Either Network or Agency may terminate this agreement at the completion of the thirteenth, twenty-sixth, or thirty-ninth week of broadcasting, by giving the other party written notice of termination not less than 21 days before the effective date of the termination.

7.02. Cancellation for Nonperformance. Either Network or Agency may cancel this agreement at any time by giving the other party written notice of cancellation, if the other party has not complied with the terms and conditions of this agreement. Network may so cancel this agreement if Agency has failed to make any payment when due pursuant to this agreement or has become bankrupt, or if insolvency proceedings are instituted by or against Agency, or if it reasonably appears that the credit of Agency is impaired.

7.03. Effect on Rates. The rates and discounts specified in this agreement shall continue in effect in the event Network terminates this agreement pursuant to Section 7.01 or Agency cancels this agreement pursuant to Section 7.02. If Agency terminates this agreement pursuant to Section 7.01 or Network cancels this agreement pursuant to Section 7.02, the rates and discounts applicable to the entire term of this agreement shall be modified to reflect those shown in Network's rate schedule for the amount of time and other services actually used under this agreement.

8. RENEWAL OF AGREEMENT

8.01. Agency Renewal Option. Agency shall have an option to renew this agreement on the terms and conditions contained in this agreement, except that the rates and charges provided in this agreement may be changed to match the rates and charges for other purchasers of broadcasting time according to Network's rate schedules in effect at the commencement date of the renewed contract.

8.02. Notice of Intention to Renew. Written notice of intention to renew this agreement shall be given to Network by Agency not less than 10 days before the termination date of this agreement.

8.03. Nonrenewal. No option to renew shall be available if there has been any default in the payments to Network required by this agreement or as to Agency's performance of any of the other terms and conditions of this agreement. [Network may refuse to renew this agreement by giving Agency notice to that effect within five days after it has received notice that Agency has exercised its option to renew this agreement.]

9. MISCELLANEOUS PROVISIONS

9.01. Governmental Regulation. This agreement is subject to the terms of the licenses held by Network and the Stations and to all federal, state, and municipal laws, regulations, and decisions either presently in existence or to be enacted, made, or enforced in the future, including the regulations and actions of all governmental administrative agencies and commissions.

9.02. Assignment and Delegation. Neither party may assign any rights or delegate any duties under this agreement without the express prior written consent of the other.

9.03. Entire Agreement. This writing contains the entire agreement of the parties. No representations other than those expressly set forth in this agreement were made or relied on by either party. No agent, employee, or other representative of either party is empowered to alter any of the terms of this agreement, unless done in writing and signed by an officer of each party.

9.04. Controlling Law. The validity, interpretation, and performance of this agreement shall be controlled by and construed under the laws of the State of California without reference to its conflict of law principles.

9.05. Failure to Object Not a Waiver. The failure of either party to object to, or to take affirmative action with respect to, any conduct of the other that is in violation of the terms of this agreement shall not be construed as a waiver of any rights or of any future breach or subsequent wrongful conduct.

9.06. Cessation of Performance. In the event of any material breach of this agreement, including a failure to make any payments required under this agreement, the nonbreaching party shall, in addition to any other rights and remedies available, have the option to immediately cease all performance under this agreement.

Executed on _____ [date], at _____ [city], California.

NETWORK

_____ [signature of officer]

[typed name and title]

AGENCY

_____ [signature of officer]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Communications Law Broadcasting General Overview Contracts Law Types of Contracts General Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 50 ADVERTISING AND PROMOTION

PART IV. FORMS

D. Radio and Television Advertising

20-50 California Legal Forms--Transaction Guide §§ 50.232-50.239

[Reserved]

§§ 50.232[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 50 ADVERTISING AND PROMOTION
PART IV. FORMS
E. Outdoor Advertising
1. Outdoor Advertising Business

20-50 California Legal Forms--Transaction Guide § 50.240

§ 50.240 Application for Outdoor Advertising Operator's License

[1] Comment

[a] Use of Form

The form in [2], *below*, is an application for an outdoor advertising operator's license under the Outdoor Advertising Act [*Bus. & Prof. Code § 5200 et seq.*; see 4 *Cal. Code Reg. § 2240 et seq.* (regulations)]. It is California Department of Transportation (Caltrans) Form ODA-0004.

The form is available from the Department of Transportation, 1120 N Street, MS 37 (or P.O. Box 942874), Sacramento, California 94274-0001, and must be filed at the same address. The form also may be obtained from some Caltrans field offices or online at the Caltrans web site.

ELECTRONIC FORMS NOTE

ELECTRONIC FORMS NOTE: Electronic copies of this form that may be printed out and filled in for filing can be obtained at through the outdoor advertising pages of the Department of Transportation's web site, located at <http://www.dot.ca.gov/oda/>. You may also obtain a copy of this form via e-mail by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or e-mailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 50.240. Please be sure to include your e-mail address along with your request and we will provide the form via return e-mail. To view and print these forms, your computer system will need Adobe Acrobat Reader version 3.0 or higher.

[b] Limitation on Requirement for License

Generally, any person who wishes to conduct an outdoor advertising business must first obtain an outdoor operator's license [*Bus. & Prof. Code §§ 5301, 5303*] or apply for permits for individual displays [*Bus. & Prof. Code § 5303*]. For the requirements for individual displays, see § 50.241[1].

The requirements of the Outdoor Advertising Act [*see* § 50.11[2]] (and, thus, the requirements for a license and permits) apply only when the business involves the placement of advertising displays (1) within view of highways located in unincorporated areas of the state or (2) within 660 feet from the edge of the right-of-way of interstate or primary highways, including portions of those highways located within incorporated areas, if the copy is visible from the highway [*Bus. & Prof. Code* § 5271].

[c] Exempt Advertising Displays

With limited exceptions [*see Bus. & Prof. Code* §§ 5300 *et seq.*, 5400-5404 (exceptions)], advertising displays used exclusively for any of the following purposes are not subject to the requirements of the Outdoor Advertising Act [*Bus. & Prof. Code* § 5272]:

- To advertise the sale, lease, or exchange of the real property on which the display is placed.
- To advertise directions to, and the sale, lease, or exchange of, real property for which the display is placed (but this exemption does not apply to displays subject to the Highway Beautification Act of 1965 [*see* 23 U.S.C. § 131]).
- To designate the name of the owner or occupant of the premises.
- To identify the premises.
- To advertise the business conducted, services rendered, or goods produced or sold on the property on which the display is placed. This display must be on the same side of the highway and within 1,000 feet of the point on the property or within 1,000 feet of the entrance to the site where the business is conducted, services are rendered, or goods are produced or sold [*Bus. & Prof. Code* § 5272].
- To advertise products, goods, or services sold by persons on the premise of an arena, provided these advertising displays are in existence before January 1, 2009, at an arena located on public land with a capacity of 5,000 seats or more that provides a permanent venue for professional sports, and that advertises products, goods, or services that are or will be sold on the premise of the arena on a regular basis under an agreement of at least one year duration between the vendor or business and the property owner, facility owner, or facility operator. This advertising display may not advertise products, goods, or services directed at an adult population, including, but not limited to, alcohol, tobacco, gambling, or sexually explicit material.

Further, noncommercial, protected speech contained within any advertising display authorized by, or exempted from, the Outdoor Advertising Act may not be regulated under the Act [*Bus. & Prof. Code* § 5275].

Owners of real property have additional rights to place signs on property relating to the ownership, location, and disposition of the property [*see Civ. Code* § 713]. Restrictions in fee-interest grants or purchase money security instruments on the right of property owners to display reasonable signs relating to the property are void as unreasonable restraints on alienation [*see Civ. Code* § 712].

[d] Outdoor Advertising Business

A person engages in the outdoor advertising business whenever, personally or through employees, that person places an advertising display, or changes the advertising message of an advertising display that does not pertain exclusively to that person's business and is visible from a state highway or freeway [*Bus. & Prof. Code* § 5300(a)]. A manufacturer or

distributor of a consumer product does not engage in this type of business merely by furnishing a sign pertaining to the product to a retailer of that product for installation on the retailer's place of business, or by installing on the retailer's place of business a sign containing advertising pertaining to the product, the name, or the business of the retailer [*Bus. & Prof. Code § 5300(b)*].

[e] Advertising Display Defined

An advertising display is an advertising structure or sign [*Bus. & Prof. Code § 5202*]. An advertising structure is any kind of structure erected or maintained for outdoor advertising purposes and on which any kind of advertisement may be placed [*see Bus. & Prof. Code § 5203*]. A sign is any type of device placed for outdoor advertising purposes on the ground, a building, or anything other than an advertising structure [*Bus. & Prof. Code § 5221*]. The definitions of advertising structure and sign do not include any of the following [*Bus. & Prof. Code §§ 5203, 5221*]:

- Official notices issued by any court or public body or officer.
- Notices posted by any public officer in performance of a public duty or by any person in giving legal notice.
- Directional warning or information structures or signs required by or authorized by law or by federal, state, or county authority.
- A sign erected near a city or county boundary that contains the name of that city or county and the names of, or any other information regarding, civic, fraternal, or religious organizations located within that city or county.

In addition, "advertising structure" does not include a structure erected near a city or county boundary that contains the name of that city or county and the names of, or any other information regarding, civic, fraternal, or religious organizations located in that city or county [*Bus. & Prof. Code § 5203(d)*].

[f] Contents of Application

The application must show the applicant's full name and the post office address of the applicant's fixed place of business. It must also contain a certification that the applicant has obtained a copy of the Outdoor Advertising Act and all applicable regulations and is aware of their contents [*Bus. & Prof. Code § 5303*].

[g] Initial and Renewal License Fees

The applicant must pay the initial license fee and each annual renewal fee. A higher fee rate is set for applicants maintaining seven or more sign or structure permits [*Bus. & Prof. Code § 5484*]. Fees for original licenses issued after the first of July will be apportioned and collected on the basis of one twelfth of the fee for each month or part of a month remaining in the fiscal year that begins on the first of July [*Bus. & Prof. Code § 5302*]. Each license remains in force for one year and may be renewed annually. The renewal fee is due annually in advance on the first of July [*Bus. & Prof. Code § 5301*].

[2] FORM

Application for Outdoor Advertising Operator's License

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Legal Topics:

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California Legal Forms--Transaction Guide

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20-50 California Legal Forms--Transaction Guide § 50.241

§ 50.241 Application for Outdoor Advertising Display Permit

[1] Comment

[a] Use of Form

The form in [2], *below*, is an application for an outdoor advertising display permit under the Outdoor Advertising Act [*Bus. & Prof. Code § 5200 et seq.*; *see 4 Cal. Code Reg. § 2240 et seq.* (regulations)]. It is California Department of Transportation (Caltrans) Form ODA-0002. It is for use by a person that has previously obtained and currently maintains a license to engage in the outdoor advertising business [*see § 50.240*].

The form is available from the Department of Transportation, 1120 N Street, MS 37 (or P.O. Box 942874), Sacramento, California 94274-0001. The form also may be obtained from a Caltrans district office or online at the Caltrans web site.

ELECTRONIC FORMS NOTE

ELECTRONIC FORMS NOTE: Electronic copies of this form that may be printed out and filled in for filing can be obtained at through the outdoor advertising pages of the Department of Transportation's web site, located at <http://www.dot.ca.gov/oda/>. You may also obtain a copy of this form via e-mail by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or e-mailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 50.241. Please be sure to include your e-mail address along with your request and we will provide the form via return e-mail. To view and print these forms, your computer system will need Adobe Acrobat Reader version 3.0 or higher.

The form must be filed at the appropriate Caltrans district office (see the reverse side of the form), based on the location of the display.

A permit to place temporary political signs does not require use of this form; instead, a person who will be responsible for removing the signs must submit a Statement of Responsibility for Temporary Political Signs [*see Bus. & Prof. Code*

§ 5405.3]. The form for that statement can be obtained, and must be filed, at the Caltrans district office serving the location where the signs will be displayed. That form also may be obtained from the Caltrans web site or the Sacramento office address.

[b] Requirement for Display Permit

The Outdoor Advertising Act forbids the placement of any advertising display within the areas affected by the Act [see § 50.240[1][b]] without a permit for that display from the California Department of Transportation [Bus. & Prof. Code § 5350].

A new permit is required for any relocation of an existing permitted display or portion of an existing permitted display, regardless of the reason for relocating (even if, for example, the display is relocated for reasons of safety) [*People ex rel. Dept. of Transportation v. Ad Way, Inc.* (1992) 8 Cal. App. 4th 309, 315, 11 Cal. Rptr. 2d 407 ; see 4 Cal. Code Reg. § 2270 (customary maintenance, which may be done without permit, does not include any relocation of display or portion of display, and any relocation constitutes placement of new display); *People ex rel. Dep't of Transportation v. Ad Way Signs, Inc.* (1993) 14 Cal. App. 4th 187, 196-197, 17 Cal. Rptr. 2d 496 (regulatory exclusion of relocation from definition of customary maintenance, and requirement to obtain new permit for relocation, are not contrary to legislative intent of Outdoor Advertising Act)].

The permit holder has the right to place the advertising display for the remainder of the calendar year in which the permit is issued and for an additional four calendar years [Bus. & Prof. Code § 5358], as well as the right to change the advertising copy without obtaining a new permit and without paying any additional fee [Bus. & Prof. Code § 5359(a)]. However, issuance of a permit does not affect the obligation of the display owner to comply with applicable zoning ordinances [Bus. & Prof. Code § 5359(b)].

[c] Contents of Application for Display Permit

The application must show the name and address of the applicant. It must also contain a general description of the property where the proposed display is to be placed and a diagram indicating the location of the display on the property. The description and diagram must be drafted in a manner that will allow the property and the location of the proposed display to be readily ascertained and identified [Bus. & Prof. Code § 5353]. The applicant must offer written evidence that both the owner or person in control or possession of the property and the city or county with land use jurisdiction over the property have consented to placement of the display [Bus. & Prof. Code § 5354(a)]. At the request of the city or county with land use jurisdiction over the property, the Department of Transportation (Caltrans) must reserve a location for an applicant for a period of time not to exceed 90 days from the date Caltrans received the request, in advance of receiving written evidence of consent [Bus. & Prof. Code § 5354(b); see Bus. & Prof. Code § 5354(c) (Caltrans has discretion to grant additional period of 30 days on proof of extenuating circumstances)].

The application must describe the proposed display, including its material, size, and subject, as well as the manner proposed for its placement [Bus. & Prof. Code § 5355]. The applicant's outdoor advertising display license number must appear on the permit application [Bus. & Prof. Code § 5357].

[d] Application and Permit Fees

An application for an original permit to place an advertising structure [see § 50.240[1][e] (definition)] must be accompanied by an application fee [Bus. & Prof. Code § 5486] and a permit fee [see Bus. & Prof. Code § 5485(a)(1)]. An application for a permit to place a sign [see § 50.240[1][e] (definition)] must also be accompanied by a fee [see Bus. & Prof. Code § 5485(a)(1)]. When an application is filed in full compliance with the law, and the appropriate fee is paid, a permit is issued [see Bus. & Prof. Code § 5358]. A permit renewal term is for five years and must be reflected on the face of the permit [Bus. & Prof. Code § 5360(a)]. Regulations for permit renewal adopted by the Department of

Transportation (Caltrans) must include procedures for late renewal within a period not exceeding one year from the date of permit expiration. Any permit that is not renewed is deemed revoked [*Bus. & Prof. Code* § 5360(b); see *Bus. & Prof. Code* § 5485(a), (b) (annual fees); see also *Traverso v. Department of Transportation* (2001) 87 Cal. App. 4th 1142, 1143, 105 Cal. Rptr. 2d 179 (trial court properly sustained demurrer by Caltrans to individual's action seeking to revive, renew, or have reissued permits for billboards that were canceled many years earlier)].

[2] FORM

Application for Outdoor Advertising Display Permit

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Legal Topics:

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20-50 California Legal Forms--Transaction Guide § 50.242

§ 50.242 Lease of Real Property for Billboard

[1] Comment--Use of Form

The form in [2], *below*, may be used to draft an agreement between an outdoor advertising company and the owner of real property (land or building) for the placement of a billboard and for access to the billboard. It is essentially a commercial lease. For additional discussion, procedural and drafting guides, and alternate provisions, see Ch. 35, *Real Property Leases and Lease Provisions*.

This agreement does not specify the lease term. The industry standard for the term of a billboard space lease is a minimum of 10 years, in order to allow the billboard owner enough time to fully amortize the cost of building and maintaining the advertising display and to make a profit on advertising operations. For billboard advertising display agreements, see §§ 50.250, 50.251.

This agreement provides for adherence by the billboard owner to all governmental requirements. For discussion of those requirements, see §§ 50.11[2], 50.240[1] (application for outdoor advertising license) and 50.241[1] (application for outdoor display permit).

This agreement grants the billboard owner a right of access over the lessor's land or through a building to the billboard itself, but that is not a grant of an easement. For discussion of easements, see Ch. 28, *Easements, Covenants, and Adjoining Owners*, Pt. A.

[2] FORM

Lease of Real Property for Billboard

BILLBOARD SPACE LEASE AND AGREEMENT

1. Lease. _____[*name of landowner*] ("Landlord"), a California [*or specify other state*]

_____[corporation or general partnership or limited liability company or *specify other type of entity*], as lessor, leases, under the terms and conditions of this agreement, to _____[*name of billboard owner*] ("Billboard Owner"), a California [*or specify other state*] _____[corporation or general partnership or limited liability company or *specify other type of entity*], as lessee, premises in the County of _____, State of California, described as follows ("the Premises"): _____[*describe, e.g., the roof of the building located at* _____ (*address*) or *insert legal description of land*].

2. Term. The term of the lease and this agreement shall commence at 12:01 A.M. on _____[*date*] and end at 12:01 A.M. on _____[*date*] ("the Term"), unless terminated before that date as provided in this agreement.

3. Rent. Billboard Owner shall pay to Landlord as rent the sum of \$_____ per year, payable at the rate of \$_____ per month, in advance on the first day of each month, commencing _____[*date*], at the office of Landlord at _____[*address*], or at any other place or places that Landlord may from time to time designate by written notice delivered to Billboard Owner.

4. Use of Premises. During the Term, Billboard Owner shall construct and maintain not more than one billboard ("the Display") on the Premises and shall use the Premises for no other purpose.

5. Access to Premises. Landlord grants to Billboard Owner and Billboard Owner's employees the right of access to the Premises _____[*describe access, e.g., over contiguous premises owned by Landlord or through the public portions of the building and by means of its elevators and stairways*] for the purpose of erecting and maintaining the Display at all times during the Term.

6. Electric Power Supply. Billboard Owner shall arrange and pay for providing a supply of electrical power to the Display and shall be responsible for the cost of all electrical power used in the construction, operation, and maintenance of the Display.

7. Maintenance of Display. Billboard Owner, at its own cost and expense, shall keep and maintain the Display and all facilities appurtenant to the Display in good order and repair and in as safe, clean, and attractive a condition as when erected, and shall promptly repair any damage to the Display as a result of graffiti, vandalism, storms and weather, or other causes. If Billboard Owner fails to do so for any period of _____[*number*] or more days after receipt from Landlord of a notice to maintain the Display, then Landlord shall have the option to repair the Display and recoup the cost from Billboard Owner or to demolish and remove the Display at Billboard Owner's expense.

8. Government Requirements. Billboard Owner, at Billboard Owner's own cost and expense, shall comply with all statutes, ordinances, regulations, and requirements of all governmental entities, whether federal, state, county, or local, relating to Billboard Owner's use of the Premises, whether those statutes, ordinances, regulations, or requirements are now in force or are yet to be enacted. The judgment of any court of competent jurisdiction, or the admission by Billboard Owner in a proceeding brought against Billboard Owner by any government entity, that Billboard Owner has violated any such statute, ordinance, regulation, or requirement shall be conclusive as between Landlord and Billboard Owner and shall be ground for termination of this agreement by Landlord.

9. Taxes. Billboard Owner shall be responsible for and shall pay all taxes, federal, state, or local, imposed on account of the Display.

10. Maintenance of Premises. Billboard Owner accepts the Premises in present condition and acknowledges that the condition is satisfactory as of the date of this agreement. Landlord shall maintain the Premises in the same condition (or better condition, at Landlord's option, from time to time) and shall make no alterations without the express prior written consent of Billboard Owner.

11. Ownership of Display. The Display shall remain the personal property of Billboard Owner, shall not be considered for any purpose whatsoever to be a fixture on the Premises, and shall be removed by Billboard Owner, leaving no evidence that the Display ever was on the Premises, on termination of this agreement.

12. Indemnity and Insurance. Billboard Owner shall indemnify and hold Landlord and the Premises free and harmless from any and all claims, liability, loss, damage, or expense resulting from Billboard Owner's use of the Premises. Billboard Owner, at its own cost and expense, shall maintain during the Term, the following insurance policies, issued by an insurer or insurers approved by Landlord:

(a) A broad form comprehensive coverage policy of public liability insurance insuring Landlord against loss or liability caused by or connected with Billboard Owner's use of the Premises, in amounts not less than \$_____ for personal injury and \$_____ for property damage; and

(b) A policy of fire insurance insuring Landlord against damage or destruction by fire caused by or connected with Billboard Owner's use of the Premises.

13. Option to Renew. Billboard Owner shall have an option to renew this agreement. Billboard Owner shall exercise that option by giving Landlord written notice of intention to do so not less than six months before the end of the Term.

14. Termination by Landlord. Landlord shall have the right to terminate this agreement by giving Billboard Owner _____[number] days notice in writing and reentering and regaining possession of the Premises in the manner provided by law if Billboard Owner breaches any of the covenants, conditions, or promises contained in this agreement. If Billboard Owner breaches this agreement or abandons the Premises before the expiration of the Term, Landlord, in addition to terminating this agreement, may recover from Billboard Owner any unpaid rent due at the time of termination and any other amount necessary to compensate Landlord for all detriment proximately caused by Billboard Owner's breach. The waiver by Landlord of any breach by Billboard Owner shall not constitute a continuing waiver or a waiver of any subsequent breach of the same or another provision of this agreement.

15. Termination by Billboard Owner. Billboard Owner shall have the right to terminate this agreement by giving Landlord _____[number] days notice in writing in the event that any covenant or restriction or any statute, ordinance, regulation, or requirements of any governmental entity, whether federal, state, county, or local, relating to Billboard Owner's use of the Premises shall prohibit, limit, or restrict Billboard Owner's use of the Premises as contemplated by this agreement.

16. Notices. All notices required by this agreement or to be given pursuant to this agreement shall be in writing and either personally served on the other party or delivered to the other party by _____[specify means] at the address given for that party on the signature page of this agreement.

17. Time of Essence. Time is of the essence of this agreement.

18. Governing Law. This lease and agreement shall be construed according to, and the rights of the parties shall be governed by, the law of the State of California without reference to its conflict of law principles.

19. Attorneys' Fees. If any legal action is necessary to enforce the terms of this agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled.

20. Entire Agreement. This writing sets forth the entire agreement between the parties with regard to the subject matter. No other agreements, representations, or warranties have been made by either party to the other with respect to the subject matter.

21. Severability. Any provision of this agreement found or deemed by a court of competent jurisdiction to be invalid or unenforceable shall be considered severable from the remainder of this agreement and shall not cause the invalidity or unenforceability of the remainder of this agreement.

22. Amendment. This agreement may be amended only by a written agreement signed by both parties.

Executed on _____ [date] at _____, California.

LANDLORD

_____ [name of company]

By _____ [signature]

[typed name and title]

_____ [address for notices]

BILLBOARD OWNER

_____ [name of company]

By _____ [signature]

[typed name and title]

_____ [address for notices]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

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[Reserved]

§§ 50.243[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
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E. Outdoor Advertising
2. Billboard Advertising

20-50 California Legal Forms--Transaction Guide § 50.250

§ 50.250 Agreement for Outdoor Painted-Panel Display

[1] Comment

[a] Use of Form

The form in [2], *below*, may be used to draft an agreement between an advertising agency and an outdoor advertising company, known in the industry as a plant operator, for the procurement of painted-panel billboard advertising display space [see [b], *below*]. For discussion of outdoor advertising in general, see Rosden, the Law of Advertising, Ch. 48, *Billboard Advertising* (Matthew Bender).

[b] Painted-Panel Billboards

Painted-panel billboards are usually 14 feet high and 48 feet long with the advertising display hand-painted onto the billboard. Painted-panel billboards are usually illuminated and contracted for on a single-sign basis for a single location that may be changed from time to time under a rotary plan for a minimum period of one year. Such billboards are referred to as rotating bulletins. See § 50.251[1] regarding poster-panel billboards.

[c] Basis for Cost of Outdoor Advertising

The cost of outdoor advertising displays is based on the amount of exposure the sign receives at the agreed location. This is measured in terms of gross rating points (G.R.P.), a means of stating the percentage of the population near the display that will be exposed to it daily. The G.R.P. measurement is established by the Traffic Audit Bureau, an organization sponsored by advertisers, advertising agencies, and outdoor advertising billboard owners.

[d] Licenses and Permits

An outdoor advertising display business must obtain a license to engage in that type of business from the California Department of Transportation [*Bus. & Prof. Code* §§ 5301, 5303; see § 50.240 (form)] and must also obtain a permit for

each display it places [see *Bus. & Prof. Code* § 5350; see also § 50.241 (form)] and comply with local zoning ordinances applicable to outdoor advertising. This agreement includes provisions designed to ensure that the plant operator is duly licensed and that it complies with the applicable statutes and regulations.

[2] FORM

Agreement for Outdoor Painted-Panel Display

OUTDOOR ADVERTISING DISPLAY AGREEMENT

_____ [name of agency] ("Agency"), acting in the interest of _____ [name of advertiser] ("Advertiser"), and _____ [name of billboard company] ("Plant Operator"), in consideration of the promises made in this agreement, agree as follows.

1. ADVERTISING DISPLAY

1.01. Responsibility of Plant Operator. Plant Operator shall provide a painted-panel billboard bearing copy that conforms to a design furnished by Agency and that is illuminated and maintained in a manner satisfactory to Agency ("the Display") for a period of _____ [specify time period], commencing on _____ [date], at the locations stated in Section 1.02.

1.02. Location. The Display shall be exhibited at _____ [specify exact location or describe location in terms of percentage of population to be exposed to display] from _____ [date] to _____ [date] and then at _____ [specify each additional location or describe location in terms of percentage of population to be exposed to display] from _____ [date] to _____ [date].

1.03. Copy. All copy shall be furnished by Agency and shall be subject to the approval of Plant Operator, which may reject any of it if it reasonably appears to be unlawful or detrimental to Plant Operator's business.

1.04. Instructions. Plant Operator shall not commence operations until it receives and thoroughly understands all written instructions from Agency with respect to the construction and maintenance of, and copy for, the Display. This applies to the construction of new displays as well as any maintenance or repaint services that Plant Operator is obligated to perform under the terms of this agreement.

1.05. Illumination. The Display shall be illuminated _____ [specify time period, e.g., from sunset to midnight]. Plant Operator shall maintain brilliant and even illumination at all times and shall advise Agency in writing of any lack of illumination. Agency shall be entitled to a pro rata credit in an amount equal to _____ percent of the stated monthly rate for the Display in the event of any failure of illumination. The cost for the Display, as set forth in Section 2.01, includes the cost of illumination, and billings shall not commence until after all service, including illumination, is completed.

1.06. Maintenance of Display. The display shall be [constructed and] painted with dispatch and shall be completed in a first-class workmanlike manner. It shall be maintained in first-class order and shall be subject to inspection by Agency and Advertiser. The rates for the Display, as set forth in Section 2.01, include _____ [number] repaints. Agency shall, however, have the right to order additional repaints at a charge of \$_____ for each repaint.

2. COST AND PAYMENTS

2.01. Monthly Rate. The monthly rate for the Display is \$_____.

2.02. Completion Notices and Billing. Plant Operator shall forward a written notice of completion to Agency within five days after the completion of the Display or any repaint or after any loss or other change in the Display. Completion notices shall be accompanied by an invoice covering the period from the date of actual completion to the end of the applicable calendar month. All subsequent billings shall cover the period from the first of the month. All pro rata invoices and credits shall be computed on the basis of a 30-day month. All completion notices shall be accompanied by at least four photographs (not smaller than five inches by seven inches), two of which shall be close-up shots, and two of which shall be middle-distance shots, and all of which shall be taken from the line of travel.

2.03. Payments. The rate stated in this agreement includes an Agency commission of _____ percent. Plant Operator shall bill Agency monthly, in advance, for the Display, commencing on the completion of service on each space, and Agency shall remit payments to Plant Operator within 30 days after the billing date. Agency shall be directly responsible to Plant Operator for all payments called for under this agreement.

2.04. Taxes. Plant Operator shall pay any and all state, federal, or local taxes that may be imposed on account of the Display.

3. INDEMNIFICATION

3.01. Insurance. Plant Operator shall, at its own expense, obtain from a reputable insurance company a general liability and property damage insurance policy in the minimum amount of \$_____. That policy shall contain an appropriate provision to the effect that its benefits shall be in favor of Agency and Advertiser.

3.02. Plant Operator's Responsibility. Plant Operator shall be responsible for any damage or loss due to property damage or personal injury by reason of the construction, maintenance, painting, or removal of the Display. Plant Operator shall protect, defend, and hold Agency and Advertiser harmless from any liability by reason of any claims or demands arising out of property damage or personal injury that may result from the construction, maintenance, painting, or removal of the Display, including reasonable attorneys' fees and expenses of litigation.

3.03. Display Existing After Termination. Plant Operator shall indemnify and hold Agency and Advertiser harmless with respect to any claims or liability resulting from the Display if it remains on any location designated in this agreement after the termination of the Agreement.

3.04. Actual Owner of Space. Plant Operator shall indemnify and hold Agency and Advertiser harmless from any and all claims by and liabilities to any actual owner, plant owner, or operator of any location referred to in this agreement.

4. TERMINATION

4.01. By Agency. Agency shall have the right to terminate this agreement if one or more of the following events should occur:

(a) There is a change in the length of approach of traffic to the Display.

(b) There is a change in the direction of traffic flow.

(c) There is a reduction in the circulation of population past the Display.

(d) An advertising display that advertises a competitive product or service is erected facing the same direction and within 150 feet of the Display.

(e) Authority to erect the Display at any location specified in this agreement is not secured within 45 days after the execution of this agreement.

4.02. Notices. Agency shall give Plant Operator 30 days written notice of its election to terminate this agreement. Plant Operator shall give Agency written notice of the occurrence of any conditions *set forth in Section 4.01*.

4.03. Display Obscured. In the event that the Display becomes obscured or cannot be fully viewed from the line of travel, Agency shall be entitled to a pro rata credit based on the stated monthly cost of the Display for any period in which it is so affected. Credit shall be given either in cash or by credit memorandum. Plant Operator shall notify Agency immediately, in writing, of any condition that would affect the ability of the Display to be viewed from the line of travel.

4.04. Cancellation by Plant Operator. Plant Operator shall have the right to cancel this agreement with respect to the placement of the Display in a location for which Plant Operator does not currently have authority to erect and maintain an advertising display, if Plant Operator cannot expeditiously obtain such authority. Plant Operator shall give Agency written notice of cancellation, and cancellation shall be without penalty other than loss of payment for the Display for the location involved.

4.05. Cancellation by Agency. Agency shall have the right to cancel this agreement after the expiration of 90 days from the date of completion of the original display. Agency shall give Plant Operator written notice of its intention to cancel and that cancellation shall not be effective until 30 days after Plant Operator has received that notice. In the event of cancellation, Agency shall pay, in addition to all other charges, an amount equal to _____ percent of the monthly charge for the canceled display.

4.06. Governmental Restriction. In the event that any action by federal, state, or local government prohibits or restricts the subject matter or continuance of the Display, Agency or Plant Operator shall have the right to cancel this agreement without penalty, as of the effective date of the restriction or prohibition.

5. RIGHT TO ERECT DISPLAYS

5.01. Authority of Plant Operator. Plant Operator has the right and authority to erect the Display as specified or shall, within 45 days after the execution of this agreement, secure the necessary authority to erect and maintain the Display at any location at which Plant Operator does not now have that authority. On demand by Agency, Plant Operator shall exhibit or supply copies of the permits and other documents on which Plant Operator relies as authority to erect and maintain the Display at any particular location.

5.02. Independent Contractor. Plant Operator shall retain sole control and supervision over the construction, execution, maintenance, and removal of the Display at any particular location and sole control and supervision over the property on which the Display shall be located. Agency understands, and Plant Operator represents, that Plant Operator is an independent contractor for all purposes with respect to its relationship with Agency and Advertiser.

6. COMPLIANCE WITH LAW AND CONTRACT

6.01. License and Permits. Plant Operator shall, at its own expense, secure the necessary license and all necessary permits and consents, and shall comply with all applicable state, federal, and local statutes and regulations with respect to the placing and showing of the Display.

6.02. Merger Clause. This writing is intended to encompass the complete and entire agreement of the parties. Neither party has made, or relied on, any representations, stipulations, or agreements other than those expressly contained in this

agreement. No agent, officer, employee, or other representative of either party has the right or authority to alter any of the terms of this agreement.

6.03. Assignment and Delegation. Neither party shall assign any rights or delegate any duties under this agreement without obtaining the prior written consent of the other.

6.04. Controlling Law. The validity, interpretation, and performance of this agreement shall be controlled by and construed under the laws of the State of California without reference to its conflict of law principles.

Executed on _____[*date*], at _____[*city*], California.

AGENCY

_____ [*signature of officer*]

_____ [*typed name and title*]

_____ [*address for notices*]

PLANT OPERATOR

_____ [*signature of officer*]

_____ [*typed name and title*]

_____ [*address for notices*]

Legal Topics:

For related research and practice materials, see the following legal topics:

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 2. Billboard Advertising

20-50 California Legal Forms--Transaction Guide § 50.251

§ 50.251 Agreement for Outdoor Poster-Panel Display

[1] Comment--Use of Form

The form in [2], *below*, may be used to draft an agreement between an advertising agency and an outdoor advertising company, known in the industry as a plant operator, for a poster-panel billboard. For discussion of outdoor advertising in general, see Rosden, the Law of Advertising, Ch. 48, *Billboard Advertising* (Matthew Bender).

Poster-panel billboards are approximately 12 feet high and 24 feet wide with the advertising applied in the form of pre-printed posters or sheets of paper of varying dimensions that fit together and are pasted onto the billboard to form the complete display. The posters are regularly printed in three different sizes: 24-sheet posters are 8 feet by 19 feet 6 inches; 30-sheet posters are 9 feet 7 inches by 21 feet 7 inches; and bleed posters are 10 feet 5 inches by 22 feet 8 inches. The billboards are contracted for in sets (called showings) of a specified number of signs, on a monthly basis at a fixed charge regardless of size; and they may or may not be illuminated.

See § 50.250[1] regarding painted-panel billboards as well as the basis for the cost of billboard advertising and the requirement for a license and a permit.

[2] FORM

Agreement for Outdoor Poster-Panel Display

OUTDOOR ADVERTISING DISPLAY AGREEMENT

_____[*name of agency*] ("Agency"), acting in the interest of _____ [*name of advertiser*] ("Advertiser"), and _____ [*name of billboard company*] ("Plant Operator"), in consideration of the promises made in this agreement, agree as follows.

1. POSTER DISPLAYS

1.01. Responsibility of Plant Operator. Plant Operator shall display and maintain the poster-panel billboard showings ("the Billboards") described in this agreement for Agency and Advertiser in accordance with the terms of this agreement.

1.02. Description. The Billboards are to be located in _____ [name or description of city, town, county, or other area]. The showing shall consist of _____ [number] Billboards, of which _____ [number] shall not be illuminated and _____ [number] shall be illuminated. The Billboards shall use _____ [describe panel size, e.g., 24-sheet or 30-sheet or bleed] panels. The showing shall run for _____ [number] months and shall adhere to the following posting schedule: _____ [specify].

1.03. Posters. All posters used on the showing shall be supplied by Agency and shall be shipped prepaid to _____ [address] so that Plant Operator shall receive them at least 15 days before each scheduled posting date. Plant Operator shall immediately and expeditiously notify Agency if the posters are not received on the agreed date, if the design is incorrect, or if the amount of paper received is incorrect. Plant Operator shall have the right to reject any copy that it, reasonably and in good faith, believes to be unlawful or detrimental to Plant Operator's business.

1.04. Illuminated Billboards. All illuminated Billboards shall be illuminated _____ [specify period, e.g., from sunset to midnight]. All illuminated Billboards shall be properly equipped with a sufficient number of reflectors and lamps of adequate size to permit illumination of each panel to the extent necessary to effectuate even and brilliant illumination, in keeping with standards of the outdoor advertising industry. Plant Operator shall grant Agency a pro rata credit for any loss of illumination, not to exceed \$ _____ per panel per month.

1.05. Substitute Dates. If the showing cannot be posted on the dates ordered, Plant Operator shall submit available substitute dates. The substitute dates shall be subject to the approval of Agency, and Plant Operator shall not post any paper without the prior written approval of Agency with respect to all substitute dates.

2. COSTS AND PAYMENT

2.01. Commission and Rates. The cost of the showing is \$ _____ per month, which includes an Agency commission of _____ percent. Agency shall be directly responsible to Plant Operator for all payments called for under this agreement.

2.02. Discounts. The cost has been reduced by the highest discount applicable by reason of continuity, frequency, or quantity, or any other plan involving a discount, offered by Plant Operator to any advertiser or agency; and the discount has been computed by combining the space ordered with other advertising space ordered by Advertiser and Agency, its parent company, affiliates, or subsidiaries, including space ordered for other products and services, from Plant Operator for poster showings. In addition, any future orders by Advertiser or Agency, its parent company, affiliates, or subsidiaries, shall be combined for the purpose of computing any additional or higher discount that may be due for any applicable period. Any additional or higher discount earned by reason of these combinations shall apply to all such agreements.

2.03. Rate Protection. Plant Operator represents that the rates for the showing are the minimum available to any advertiser or agency for the same services and that its rates are published. In the event that any advertiser is given a lower rate, Plant Operator shall immediately notify Agency and shall make that lower rate applicable under this agreement. Plant Operator shall extend to Agency as favorable a showing and other considerations and privileges as are extended to any other advertiser or agency with a similar agreement.

2.04. Billing. Plant Operator shall forward to Agency monthly bills in advance from the date of commencement of service, together with location lists, in duplicate. The location lists shall be signed by Plant Operator's plant manager or posting superintendent and shall certify that the postings referred to in the bill were delivered as scheduled and in accordance with the terms of this agreement. Agency shall not be liable for any payment unless and until the bill and duplicate certified location list are received. Agency, within 30 days after the receipt of the bill and list, shall pay the amount due as shown on it. Plant Operator shall look solely to Agency for payment.

2.05. Credits. If a poster is removed because of loss of location, reduction in circulation, or for any other reason, a location of equal advertising value shall be substituted by Plant Operator, provided Agency grants prior written approval of the substitution. Agency's prior written approval shall not be unreasonably withheld. In the event an appropriate substitute location cannot be agreed on, a pro rata credit shall be given Agency with respect to any removed poster. Credits shall be given either in cash or by credit memo. In the event that an advertisement for a competitive product is posted within 150 feet of any of the Billboards, Agency shall not pay for the scheduled poster for the period after the advertisement for the competitive product is posted, or shall be given a pro rata credit for each poster if the competitive advertisement is discovered subsequent to any payment made under this agreement.

2.06. Taxes. All federal, state, or local taxes now effective or imposed in the future with respect to the showing referred to in this agreement and the posting and maintenance of the paper shall be paid by Plant Operator.

3. POSTING AND MAINTENANCE OF SHOWING

3.01. Posting. The showing shall be posted by Plant Operator in a first-class workmanlike manner in accordance with the specific instructions of Agency and Advertiser. All paper shall be posted within five working days from each scheduled posting date. All posters shall be maintained by Plant Operator on display for one month until the corresponding date in the following month, unless otherwise specified in writing by Agency or Advertiser. Plant Operator shall post the showing only if the entire showing can be posted in accordance with the terms of this agreement. Plant Operator shall not post a partial showing without the express prior written consent of Agency. All Billboards shall be well distributed in prominent locations, not closer than 150 feet from any advertisement for a competitive product or service.

3.02. Maintenance. Plant Operator shall maintain all posters and surrounding blanking areas in good condition. Posters shall be promptly renewed, if required, at no extra cost to Agency. Agency shall supply renewal posters to Plant Operator on request. Plant Operator shall keep all molding and lattices clean and in good condition at all times, and shall see to it that the premises directly in front of all panels are kept in a clean and presentable condition. Plant Operator shall freshly blank the posters each month. Plant Operator shall post all paper and maintain all panels in accordance with the standards of the industry as specified by the _____ [Outdoor Advertising Association of America or Institute of Outdoor Advertising].

4. INDEMNIFICATION

4.01. By Plant Operator. Plant Operator shall be solely responsible for the property on which the Billboards are placed. Plant Operator shall indemnify and hold the Agency and Advertiser harmless from any liability or claim resulting from the installation, maintenance, or removal of the Billboards. Plant Operator shall indemnify and hold Agency and Advertiser harmless from all claims, demands, and liability resulting from any advertising remaining on display after termination of this agreement. All indemnification shall include attorneys' fees and reasonable costs of litigation.

4.02. By Agency. Agency shall indemnify and hold Plant Operator harmless from all liabilities, claims, and loss arising out of the character, content, and subject matter of any advertising copy displayed pursuant to this agreement. All

indemnification shall include attorneys' fees and reasonable costs of litigation.

5. TERMINATION

5.01. Cancellation by Either Party. This agreement is subject to cancellation by either party on written notice to the other person at least 30 days in advance of any scheduled posting date. If Agency cancels this agreement, the cost of the display shall be computed on the basis of Plant Operator's rate schedules for the advertising actually used, and Agency shall be responsible for any short rate that may result. If Plant Operator cancels this agreement, Agency shall be entitled to a pro rata refund, including any discounts that would have been earned had all of the advertising been posted and exhibited for the full term of this agreement.

5.02. Termination Because of Legal Restrictions. Agency or Plant Operator shall have the right to terminate this agreement immediately in the event that the sale or advertising of the products or services to be advertised under this agreement is prohibited or restricted by any law, regulation, or order, either federal, state, or local. The terminating party shall give the other party written notice of termination, and termination shall be effective on the effective date of the law, regulation, or order. Termination shall be without penalty other than a reduction in cost, on a pro rata basis, for the service not supplied.

6. COMPLIANCE WITH LAW AND CONTRACT

6.01. Assignment and Delegation. Neither party shall assign any rights or delegate any duties under this agreement without the express prior written consent of the other.

6.02. Waiver. The failure of either party to insist on rigid adherence to any of the provisions of this agreement shall not be deemed a waiver of any conduct by the other party with respect to any past breach or right to insist on rigid adherence to the provisions of this agreement at any future time.

6.03. Control of Display. Plant Operator is an independent contractor with respect to Agency and Advertiser. Plant Operator shall retain sole control and supervision of the manner in which the display is executed, maintained, and removed.

6.04. License and Permits. Plant Operator, at its own expense, shall secure all necessary licenses, permits, and consents and shall comply with all applicable statutes and regulations with respect to the posting and showing of the displays.

6.05. Merger Clause. This writing contains the complete and entire agreement of the parties. No representations other than those expressly set forth in this agreement were made or relied on by either party. No agent, employee, or career representative of either party is empowered to alter any of the conditions of this agreement, unless done in writing and signed by an officer of each party.

6.06. Controlling Law. The validity, interpretation, and performance of this agreement shall be controlled by and construed under the laws of the State of California without reference to its conflict of law principles.

Executed on _____[date], at _____[city], California.

AGENCY

_____ [signature of officer]

[typed name and title]

_____ [address for notices]

PLANT OPERATOR

_____ *[signature of officer]*

[typed name and title]

_____ *[address for notices]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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PART IV. FORMS
E. Outdoor Advertising
2. Billboard Advertising

20-50 California Legal Forms--Transaction Guide §§ 50.252-50.259

[Reserved]

§§ 50.252[Reserved]



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F. Public Transit Display Advertising

20-50 California Legal Forms--Transaction Guide § 50.260

§ 50.260 Transit Display Agreement

[1] Comment--Use of Form

The form in [2], *below*, may be used to draft an agreement for the display of advertising materials on public transit vehicles. It is designed as an agreement between an advertising agency and a transit company or authority but can be modified for use by an individual advertiser. The posters used on transit vehicles are typically contracted for in sets (called showings).

[2] FORM

Transit Display Agreement

TRANSIT DISPLAY AGREEMENT

_____ [name of agency] ("Agency"), acting in the interest of _____ [name of advertiser] ("Advertiser"), and _____ [name of transit company] ("Company"), in consideration of the promises made in this agreement, agree as follows.

1. TRANSIT DISPLAY

1.01. Responsibility of Company. Company shall display and maintain the transit advertising display materials ("the Showing") described in this agreement for Agency and Advertiser.

1.02. Description. The Showing shall be in accordance with the following specifics: _____ [specify, as appropriate, market, size of showing, number of displays, type of display, size, height, and width, starting date, number of months, and type of transit].

1.03. Schedule. The Showing shall be displayed in accordance with the following posting schedule:

_____[specify].

2. COSTS AND PAYMENT

2.01. Rates. The cost of the showing shall be as follows: _____[specify display, cost per month, and total cost, for each display].

2.02. Commission and Discounts. Company represents that the rates set forth in this agreement are the lowest rates applicable to any agency or advertiser for like service, and that Company's rates are published. The rates set forth in this agreement are subject to an agency commission of _____ percent, and are also subject to the highest discount available by reason of continuity, frequency, quantity, or any other plan involving a discount that may be offered to any other agency or advertiser by Company for like advertising. For the purpose of computing any applicable discount under this agreement, Company shall combine the space ordered under this agreement with any other agreement with Company for the advertisement of any other product or service by Advertiser or Agency, its parent company, any other subsidiary of the parent company, and any affiliates of Advertiser or Agency. In addition, any future orders by Advertiser or Agency, its parent company, affiliates, or subsidiaries, shall be combined for the purpose of computing any additional or higher discount for any applicable period. Any additional discount earned by reason of such combinations shall apply to all agreements.

2.03. Billing. Company shall forward to Agency monthly bills in advance from the date of commencement of service. Those bills shall reflect the gross cost less Agency's commission. Agency shall pay the amount due as shown on each bill within 30 days after its submission. Service shall be deemed to commence on the date the installation of all display material is completed. Company shall include an affidavit of services rendered with each bill if requested. Company shall look solely to Agency for payment. All credits (or payments) shall be by cash or credit memo.

2.04. Taxes. All taxes, federal, state, or local, which are now or may be imposed on the Showing shall be borne by Company.

3. ADVERTISING MATERIAL

3.01. Responsibility of Agency. All advertising display materials referred to in this agreement shall be provided by Agency without expense to Company. Those materials shall be shipped to _____[specify location], or such other locations as Company shall designate in writing, in time to arrive at least 10 days before any scheduled installation date. Company shall immediately and expeditiously notify Agency if the materials do not arrive by that time. Company shall properly care for and store all advertising materials so that they shall be in good condition on the scheduled installation dates.

3.02. Display Service. Company shall install all advertising materials as scheduled and in accordance with any specific instructions of Agency. Company shall maintain all displays in good condition and shall promptly replace all soiled or defaced material with extra displays furnished by Agency for that purpose. Company shall not change any scheduled installation date without the prior written approval of Agency. The rates specified in this agreement shall include a change of display material once each month without additional charge. Company shall make any such changes on written request of Agency. Company shall not make any changes in locations without first obtaining the written approval of Agency.

3.03. Competitive Products. Company shall see to it that any advertising concerning a competitive product or service is not placed on the same or adjacent location showing to the same circulation. All displays involving a competitive product or service shall be placed a reasonable distance away from any advertising of products or services scheduled in this agreement.

4. COMPLIANCE WITH CONTRACT AND LAWS

4.01. Omission of Advertising. The loss of service by reason of omitted advertising shall not constitute a breach of this agreement, provided there is satisfactory reason for that loss. In any such event, Agency shall have the option of receiving a pro rata credit for that loss, or the equivalent in additional service, or extension of service. The fact that any such loss has occurred or that any such credit, additional service, or extension of service has been granted shall not affect any discount structure.

4.02. Control. Company shall have complete and sole control and supervision of the manner in which the displays are mounted, executed, maintained, and removed, as well as sole and complete control and supervision over the displays and the property on which they are located. Company is an independent contractor with respect to Agency and Advertiser.

4.03. Copy Approval. Company shall have the right to approve all copy submitted by Agency, and all copy shall also be subject to the approval of any other person that may control the vehicles or locations on which the displays are to be exhibited. Company or any such other person shall reject copy only on reasonable grounds.

4.04. Waiver. The failure of Agency to insist on rigid adherence to any of the provisions of this agreement shall not be deemed a waiver of any conduct of Company with respect to any past breach or of the right to insist on rigid adherence to the provisions of this agreement at any future time.

4.05. Assignment and Delegation. Neither party shall assign any rights or delegate any duties under this agreement without the express prior written consent of the other.

4.06. License and Permits. Company shall, at its own expense, secure all necessary permits and consents, and shall comply with all applicable statutes and regulations with respect to the placing and showing of the displays.

4.07. Merger Clause. This writing contains the complete and entire agreement of the parties. No representations other than those expressly set forth in this agreement were made or relied on by either party. No agent, employee, or other representative of either party is empowered to alter any of the terms of this agreement, except in a writing signed by an officer of each party.

4.08. Controlling Law. The validity, interpretation, and performance of this agreement shall be controlled by and construed under the laws of the State of California without reference to its conflict of law principles.

5. TERMINATION OF CONTRACT

5.01. Rejection of Advertising Material. If any of the advertising material referred to in this agreement is rejected or disapproved in accordance with Section 5.03, Agency shall immediately have the right to terminate this agreement, either in whole or as to that part involving the rejected material. Company shall not alter or change any of the displays without the prior written consent of Agency.

5.02. Cancellation by Notice. Agency and Advertiser reserve the right to cancel this agreement on written notice by either Agency or Advertiser to Company 30 days in advance of the scheduled cancellation date. In the event of cancellation, any applicable short rate bill shall become immediately due and payable and shall be computed on the basis of the difference between the rate actually earned, according to Company's schedule of rates effective at the time this agreement was made, and the rate applicable to the service for the full term agreed on.

5.03. Cancellation in Event of Changed Law or Condition. Agency and Advertiser reserve the right to cancel this agreement in the event that the sale or advertising of any of the products or services to be advertised is restricted or

prohibited by any form of federal, state, or local governmental action. Cancellation on this basis shall be without short rate penalty and a pro rata refund for the service not provided will be made. If, for causes beyond the control of Company, the right to display advertising in or on any of the vehicles or locations referred to in this agreement is lost, this agreement shall not be considered to have been breached, but Agency shall be entitled to a pro rata refund for the cost of the service not provided.

6. INDEMNIFICATION

6.01. Execution of Displays. Company shall indemnify and hold Agency and Advertiser harmless from all claims, demands, and liabilities arising out of the installation, maintenance, or removal of all displays. Indemnification shall include attorneys' fees and the reasonable costs of litigation, and any loss by reason of personal injury or property damage.

6.02. Content of Displays. Agency shall hold Company harmless and indemnify Company from all claims, demands, and liabilities arising from the copy and content of any of the displays.

6.03. Display Continued After Termination of Agreement. Company shall indemnify and hold Agency harmless from all claims, demands, and liability caused by any advertising remaining on display after the termination of this agreement.

Executed on _____ [date], at _____ [city], California.

AGENCY

_____ [signature of officer]

[typed name and title]

_____ [address for notices]

COMPANY

_____ [signature of officer]

[typed name and title]

_____ [address for notices]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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F. Public Transit Display Advertising

20-50 California Legal Forms--Transaction Guide §§ 50.261-50.269

[Reserved]

§§ 50.261[Reserved]



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G. Exhibitions

20-50 California Legal Forms--Transaction Guide § 50.270

§ 50.270 Exhibition Agreement

[1] Comment--Use of Form

The form in [2], *below*, may be used to draft an agreement between a trade association or other group that intends to hold an exhibition or trade show and an advertiser that desires to lease space or display advertising materials. Exhibits at trade shows are a popular and effective method of promotion. In essence, the advertiser leases space, or is granted a license, to erect a display. The agreement normally would be subject to the terms of the primary agreement (lease) between the trade association and the owner of the premises, and to any rules and regulations of that owner.

Most exhibitions are centered around similar and competing products. For this reason, this exhibition agreement contains detailed provisions designed to provide an equal opportunity for all individual exhibitors to effectively show their products or services.

[2] FORM

Exhibition Agreement

EXHIBITION AGREEMENT

_____[*name of advertiser*] ("Exhibitor") and _____[*name of trade association*] ("Association"), in consideration of the promises made in this agreement, agree as follows.

1. SPACE GRANTED AND TERMS OF PAYMENT

1.01. Space. Exhibitor is granted the right to use the space described as follows ("the Exhibit Space"):

_____[*describe, e.g., booth number* _____] located as shown on the floor plan attached to this agreement].

1.02. Term and Payment. Exhibitor shall be entitled to use the Exhibit Space for a total period of _____ days, commencing on _____ [date] and expiring on _____ [date]. Exhibitor shall pay to Association for the use of the Exhibit Space the total sum of \$_____, of which \$_____ is payable on the execution of this agreement, receipt of which is hereby acknowledged, and the balance of \$_____ is payable before the installation of any materials to be used in the Exhibit Space.

2. USE AND DESIGN OF EXHIBIT

2.01. Use of Exhibit. Exhibitor shall use the Exhibit Space to display, demonstrate, or sell the following products or services: _____ [specify]. The type of exhibit to be constructed is _____ [specify]. The Exhibit Space shall not be used for any type of exhibit or for advertising any product or service other than those specifically mentioned in this agreement, without the express prior written approval of Association.

2.02. Conditions on Design of Exhibit. (a) Exhibitor shall have the right, subject to any limitations contained in this agreement, to arrange and design the exhibit within the Exhibit Space in the manner that Exhibitor deems best suited for the display, demonstration, or sale of the products or services being advertised, demonstrated, shown, or sold.

(b) Before the installation of the exhibit, Exhibitor shall submit to Association, for approval, a detailed diagram and any other specifics and statements that are necessary to definitely illustrate the exact nature of the exhibit to be installed, including its appearance and character.

(c) Association reserves the right to disapprove the display of any item that Association, reasonably and in good faith, determines is not in keeping with the nature, character, or orderly conduct of the exhibition, or is detrimental to the appearance of any other exhibits or of the exhibition as a whole.

(d) Association reserves the right to require that the exhibit be arranged in a manner that will not interfere with other exhibits, particularly those in close proximity to that of Exhibitor.

(e) Association reserves the right to require alteration of the appearance of the exhibit in order to prevent the destruction, deterioration, or loss of effect of any other advertising or any other exhibit.

(f) Association reserves the right to disapprove any design or arrangement of the exhibit that Association, reasonably and in good faith, determines may endanger the lives or safety of persons attending the exhibition.

3. OPERATION OF EXHIBIT

3.01. Conduct. Exhibitor shall not use any scheme or device that is illegal, in bad taste, or detrimental to Exhibitor's trade or industry. Association reserves the right to require cessation of any such activity. Exhibitor shall not cause any apparatus or device to be placed in the Exhibit Space that will produce undue noise or in any way interfere with, or be objectionable to, any other exhibitor. Association may require the removal of any such apparatus or device.

3.02. Maintenance. Exhibitor shall be responsible for all maintenance of the exhibit. At all times, including the hours during which the exhibition is open to the public, Exhibitor shall maintain the exhibit in a clean and orderly manner and shall take any steps that may be necessary to prevent injury or damage to any person or exhibit on the premises.

3.03. Removal. Exhibitor, at Exhibitor's own expense and within 12 hours after the close of the exhibition, shall remove the exhibit and all of Exhibitor's property from the premises. The Exhibit Space shall be left broom clean and in the same condition as when first occupied by Exhibitor. No property or material shall be removed before the close of the exhibition without the express prior written consent of Association.

3.04. Indemnification and Insurance. Exhibitor shall indemnify and hold Association harmless and at its own expense obtain a liability insurance policy against claims, demands, and liabilities for personal injuries or property damage that may be caused by the installation, maintenance, or conduct of the exhibit. That policy shall be obtained from a reputable insurance carrier and shall be in a minimum amount of \$ _____ for each occurrence.

3.05. Restriction on Liability. Association shall not be responsible or liable for the loss of, or damage to, any of the property of Exhibitor, notwithstanding the provisions of Section 4.02 concerning night security guards and special police. Exhibitor shall, at its own expense, obtain the necessary insurance coverage with respect to loss by fire, theft, accident, or other cause, if that type of protection is desired.

4. OPERATION OF EXHIBITION

4.01. Admission. The exhibition shall be open to the public from _____[time] to _____[time] of each day of the exhibition. Except for those persons issued identification passes, all persons shall be required to pay an admission charge of \$ _____ for adults and \$ _____ for children. Exhibitor shall be given a total of _____[number] free passes to the exhibition for use in the discretion of Exhibitor.

4.02. Protection. Association shall provide night security guards at all hours from the time of closing of the exhibition until the time the exhibition is opened to the public on the following day. Association shall also provide special police to maintain order during the times the exhibition is open to the public, and Exhibitor shall require that all persons connected with the use of the Exhibit Space must obey the reasonable requests and directives of the special police. The special police and night security guards will be independent contractors, and Association shall not be held liable or responsible for any of their acts or conduct.

4.03. Identification Passes. Exhibitor shall supply Association with a list of employees and other personnel who will be entitled to access to the exhibit, and Association shall issue identification passes to those personnel. No more than _____[number] identification passes shall be issued. No other persons will be permitted to enter the premises during the hours when the exhibition is closed to the public. This restriction will be strictly enforced.

5. INTERPRETATION OF CONTRACT

5.01. Force Majeure. In the event the premises in which the exhibition is to be held are destroyed or damaged by fire, the elements, other calamity, or other cause beyond the control of Association, so that the exhibition cannot be held, Association shall not be liable to Exhibitor except to the extent of returning any payment previously made by Exhibitor to Association pursuant to this agreement. In the event the exhibition commences and cannot continue because of any circumstances beyond the control of Association, Association shall not be liable except to the extent of returning to Exhibitor the difference between the total cost of the Exhibit Space and the pro rata cost of the Exhibit Space for the period the exhibition was open to the public.

5.02. Assignment. Neither party shall assign any right or delegate any duty under this agreement, or permit any other person to use the Exhibit Space without the express prior written consent of the other party. If Exhibitor attempts to permit any other person to use the Exhibit Space, or attempts an assignment in violation of this agreement, that permit or assignment shall be without effect, and Association shall have the right to refuse admittance to that other person and to prevent that other person from using the Exhibit Space. In that event, Exhibitor shall not be entitled to the return of any payment, and Association shall not be liable to Exhibitor for any damages.

5.03. Entire Agreement. This writing contains the complete and entire agreement of the parties. No representations other than those expressly set forth in this agreement were made or relied on by either party. No agent, employee, or

other representative of either party is empowered to alter any of the terms of this agreement except in a writing signed by an officer of each party.

5.04. Controlling Law. The validity, interpretation, and performance of this agreement shall be controlled by and construed under the laws of the State of California without reference to its conflict of law principles.

6. COMPLIANCE WITH LAW AND CONTRACT

6.01. Primary Agreement. In addition to the terms expressly set forth in this agreement, the parties agree to be bound by the provisions of the primary agreement that Association has made with _____ [name of owner of premises] for the use of the premises and the rules and regulations of _____ [name of owner of premises] concerning the exhibition and the use of the Exhibit Space, which are attached to this agreement.

6.02. Government Regulation. This agreement is subject to all laws, statutes, ordinances, orders, regulations, and directives that may be imposed by the federal, state, or local governments.

Executed on _____ [date], at _____ [city], California.

ASSOCIATION

_____ [signature of officer]
[typed name and title]

_____ [address for notices]

EXHIBITOR

_____ [signature of officer]
[typed name and title]

_____ [address for notices]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral Overview



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20-50 California Legal Forms--Transaction Guide §§ 50.271-50.279

[Reserved]

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H. Cooperative Advertising

20-50 California Legal Forms--Transaction Guide § 50.280

§ 50.280 Co-Marketing Agreement--Retail Web Site to Be Promoted on Portal Web Site

[1] Comment--Use of Form

The form in [2], *below*, may be used for drafting an agreement by the operator of a retail web site to buy promotional links and advertising on another party's portal web site (that is, a web site that provides access to many other web sites through links that are grouped in categories). For illustration purposes it is assumed that the retailer sells computer hardware and software and that the portal web site is aimed at Spanish-speaking users. This agreement is based on an actual agreement filed as an exhibit to an SEC S-1 filing.

The form references exhibits that are not illustrated here. The exhibits would be used for such purposes as:

- Listing particular logos, trade names, trademarks, and service marks that are covered by a general reference in the agreement.
- Specifying locations within the portal web site for the retailer's buttons, banners, and links.
- Identifying the retailer's competitors whose products and services must not be marketed on the portal site for the period of exclusivity guaranteed by the agreement.

Using exhibits can simplify the documentation burden when the parties subsequently modify the agreement by changing certain details that are covered in an exhibit.

[2] FORM

Co-Marketing Agreement--Retail Web Site to Be Promoted on Portal Web Site

CO-MARKETING AGREEMENT

This agreement is made _____[*date*] ("Effective Date") by and between _____[*name*

of company that operates retail web site] ("Retailer"), a California [or specify other state] _____ [corporation or general partnership or limited liability company or specify other type of entity], and _____ [name of company that operates portal web site] ("Site Owner"), a California [or specify other state] _____ [corporation or general partnership or limited liability company or specify other type of entity].

RECITALS

(a) Retailer owns and operates a web site through which it sells _____ [e.g., personal computers and related hardware, software, and peripherals] (the Retail Web Site defined in Section 1.01). Site Owner owns and operates a portal web site (the Portal Web Site defined in Section 1.01). Retailer and Site Owner desire to market and promote the Retail Web Site through advertising on the Portal Web Site and a direct link back from the Portal Web Site.

(b) In consideration of their mutual promises and the covenants and conditions in this agreement, the parties agree as follows:

1. DEFINITIONS

1.01. Definitions. For purposes of this agreement, the following terms have the indicated meanings:

(a) "Activation Date" means the earlier of the date Site Owner activates the Link and the date 60 days following the Effective Date.

(b) "Banners" means run-of-network banner advertisements promoting the Retail Web Site, in which the Link is embedded.

(c) "Buttons" means buttons in which the Link is embedded.

(d) "Commissions" means, with respect to any calendar quarter during the Term, an amount equal to _____ percent of Net Portal Customer Revenues.

(e) "Default" means, with respect to either party, either:

(1) Any material breach by that party of any obligation for the payment of money set forth in this agreement, if the breach has not been cured within three business days following that party's receipt of notice of the breach; or

(2) Any material breach by that party of any obligation set forth in this agreement, other than as specified in clause (e)(1), if the breach has not been cured within 20 business days following that party's receipt of notice of the breach.

(h) "Guaranteed Impressions" means, with respect to the Banners and the Buttons, _____ [number] impressions per month, of which _____ [number] shall be Banner impressions.

(i) "Link" means a direct hypertext link from the Portal Web Site to the Retail Web Site, by which the Retail Web Site will be viewed by users of the Link through the Portal Web Site's frameset.

(j) "Net Portal Customer Revenues" means, with respect to any calendar month, all revenues collected by Retailer from Portal Customers during that month, less _____[specify amounts to be deducted in computing net revenue].

(k) "Newsletter" means the English version of the quarterly newsletter authored by Retailer.

(l) "Optional Termination Payment" means an amount equal to _____ percent of the unpaid balance of the Sponsorship Fee as of the Termination Date following the termination of this agreement pursuant to Section 5.02.

(m) "Portal Customers" means all users who purchase any products or services from the Retail Web Site by following a link from the Portal Web Site.

(n) "Portal Web Site" means the collection of documents accessible by the public via the internet at the URL _____[specify].

(o) "Quarterly Commission Report" means, with respect to any calendar quarter, a detailed description of the revenues received by Retailer from Portal Customers during that quarter and a computation of the Commissions relating to those revenues.

(p) "Retailer Marks" means the logos, trade names, trademarks, and service marks listed in Exhibit _____.

(q) "Retail Web Site" means a presence on the world wide web, containing content in the Spanish language, that is managed or administered by Retailer or is hosted by Retailer, including, without limitation, the InterNIC-assigned domain name _____[specify] and any other address that directs or may direct users to Spanish-language sections of the web site.

(r) "Sponsorship Fee" is defined in Section 3.01.

(s) "Site Owner Marks" means Site Owner's logos, trade names, trademarks, and service marks.

(t) "Term" means the term of this agreement, commencing _____[specify].

(u) "Termination Date" means the earlier of the first anniversary of the Activation Date and the date of any termination of this agreement pursuant to Section 5.01 or Section 5.02.

(v) "Usage Report" means a report prepared by Retailer that specifies the country of origin, chosen language, and other available demographic information relating to, and the goods purchased by, each Portal Customer.

2. CO-MARKETING OBLIGATIONS

2.01. The Link. Commencing on the Activation Date, Site Owner will establish and maintain the Link. Retailer will provide Site Owner with the URLs necessary to establish the Link.

2.02. Marketing. Retailer shall deliver to Site Owner appropriate artwork and logos constituting the Retailer Marks, from which Site Owner shall develop the Banners and the Buttons in forms that Site Owner reasonably determines will maximize the number of Portal Customers. Site Owner, commencing on the Activation Date, shall place the Buttons in the locations within the Portal Web Site specified in Exhibit _____. If Site Owner changes the layout of the Portal Web Site in such a way that the Buttons cannot be placed as provided in Exhibit _____, then the Buttons shall be given essentially the same placement within the redesigned Portal Web Site as described in Exhibit _____. Site Owner shall provide to Retailer not less than the Guaranteed Impressions. Within 20 days after the end of each calendar quarter after

the Effective Date, Site Owner shall deliver to Retailer a confirmation of the number of impressions received by the Banners and the Buttons during that quarterly period. Within 20 days after the end of each of the first three months following the Effective Date and after each subsequent calendar quarter, Retailer shall deliver to Site Owner a Usage Report covering the monthly or quarterly period.

2.03. Co-Marketing. Site Owner shall employ traditional co-branded marketing initiatives valued at not less than _____ percent of the Sponsorship Fees actually received from Retailer during the Term. This co-branded marketing will be intended to introduce Retailer to the Latin American marketplace as a brand featured on the Portal Web Site. Co-branded marketing initiatives may include television, newspaper, magazine, and radio advertising.

2.04. Targeted Marketing. Site Owner shall designate a representative to work with Retailer's personnel to translate into Spanish the Newsletter that Retailer delivers to its customer base via electronic mail and, using commercially reasonable efforts, to measure the effectiveness of marketing strategies employed pursuant to Sections 2.02 and 2.03. Site Owner, in its sole discretion, may arrange for the translation into Spanish of product reviews and other material provided by Retailer, but if Site Owner elects to arrange for those translations, Retailer agrees that those translations shall be available only to users of the Portal Web Site, and shall not be used or seen by users of the Retail Web Site who have not used the Link.

2.05. Trademarks. (a) Retailer hereby grants to Site Owner a non-exclusive non-transferable license to use the Retailer Marks during the Term solely in conjunction with the design, creation, and display of the Banners and Buttons as provided in this agreement. However, Site Owner shall submit to Retailer for its prior written approval the design of the Banners and Buttons, and approval shall not be unreasonably withheld or delayed.

(b) Site Owner acknowledges and agrees that the Retailer Marks will remain the exclusive property of Retailer, nothing in this agreement shall confer on Site Owner any right of ownership in the Retailer Marks, and Site Owner shall not now or in the future contest the validity of the Retailer Marks.

(c) Retailer acknowledges and agrees that the Site Owner Marks are and shall remain the sole property of Site Owner. Nothing in this agreement shall confer on Retailer any right of ownership in the Site Owner Marks, and Retailer shall not now or in the future contest the validity of the Site Owner Marks.

(d) Site Owner does not grant a license, or authorize Retailer in any way whatsoever, to use Site Owner Marks, and any use of Site Owner Marks by Retailer must be pursuant to Site Owner's specific prior written approval.

2.06. Exclusivity. During the Term, Site Owner shall not establish a direct link from the Portal Web Site to the web site of any broad-based reseller of _____ [product or product line, e.g., new personal computers, related hardware, software, and peripherals] listed in Exhibit _____ [add any limitations, e.g.,; however, in the event that Retailer does not have a competitive auction offering in Spanish in development and being beta-tested before _____ (date) and a complete and fully functioning version of a competitive auction offering available in Spanish before _____ (date), Site Owner may establish a direct link to the web site of any auction-format reseller of _____ (product or product line, e.g., new personal computers, related hardware, software, and peripherals)].

2.07. Public Relations. Each party agrees to cooperate, when possible, for all public relations events relating to the activation of the Link and the placement of the Banners and Buttons.

2.08. Confidentiality. All information (whether written, oral, or in any other form) disclosed by each party to the other person during the negotiation of this agreement, or to be disclosed during the Term, including, but not limited to, all information disclosed pursuant to Section 2.02 as well as business plans, product ideas, marketing concepts, and

financial information and projections, shall constitute "Confidential Information." However, Confidential Information does not include Quarterly Commission Reports, information that is or becomes publicly known through no wrongful act of either party (or any of its employees), has been approved for release by written authorization of the originating party, or has been disclosed pursuant to a requirement of a government agency or of law. During the Term and at all times after termination of this agreement, the party to whom Confidential Information has been imparted shall maintain that information as confidential and shall not disclose or permit the same to be disclosed to any person or entity. Each party shall use its best efforts to take all reasonable steps to minimize the risks of disclosure of Confidential Information. The unauthorized disclosure by a party of Confidential Information received from the other person will cause irreparable harm and significant injury to the other person, which may be difficult to ascertain; accordingly, each party shall be entitled to equitable relief, including, without limitation, an immediate injunction enjoining any breach of this Section 2.08, in addition to all other remedies available at law or in equity. This Section 2.08 shall survive the termination or expiration of this agreement.

3. FEES AND COMMISSIONS

3.01. Sponsorship Fee. Retailer shall pay to Site Owner a Sponsorship Fee as follows: \$_____ payable on the Effective Date, and the remainder payable in 11 equal monthly installments of \$_____ on the first business day of each succeeding calendar month. Notwithstanding anything to the contrary contained in this agreement, the Sponsorship Fee shall be payable to Site Owner regardless of the termination of this agreement. This Section 3.01 shall survive the termination of this agreement for any cause, other than as a result of a Default by Site Owner or pursuant to Section 5.02. On termination of this agreement as a result of a Default by Site Owner, any remaining monthly installments shall not be paid to Site Owner by Retailer; however, Site Owner shall retain or be paid the Sponsorship Fee previously received by, or owing to, Site Owner before the Termination Date.

3.02. Commissions. Retailer shall pay to Site Owner the Commissions owing for each calendar quarter, payable within 30 days of the last day of the quarter; however, the Commissions payable may be offset by an amount equal to the installment of the Sponsorship Fee actually paid to Site Owner in each quarter. Within 30 days after the end of each calendar quarter, Retailer shall deliver to Site Owner a Quarterly Commission Report with respect to the quarter, and in the event of any refunds by Retailer to Portal Customers, for returned products or otherwise, of amounts with respect to which Commissions have already been paid to Site Owner, the amount of those Commissions shall be deducted from the next quarterly payment of Commissions; or if no quarterly payment is owing by Retailer for the following quarter, Retailer may render a statement to Site Owner for those amounts, which shall be due and payable by Site Owner within 30 days after receipt of the statement. This Section 3.02 shall survive the termination of this agreement with respect to any Commissions accrued (including any revenues billed to Portal Customers but not yet collected by Retailer) and unpaid during the Term.

4. REPRESENTATIONS AND WARRANTIES

4.01. Representations and Warranties of Site Owner. Site Owner represents and warrants to Retailer that:

(a) Site Owner has full power and authority, and has taken all action necessary, to execute and deliver this agreement and to fulfill its obligations under this agreement.

(b) Site Owner's making and performance of this agreement does not and will not violate any law or regulation applicable to Site Owner, its certificate of incorporation, bylaws or other organizational documents, or any other agreement to which it is a party or by which it is bound.

(c) Site Owner has duly executed and delivered this agreement, and it constitutes legal, valid and binding obligations, enforceable against Site Owner in accordance with the terms of this agreement (except to the extent that enforceability may be limited by bankruptcy, insolvency, or other similar laws of general applicability affecting enforcement of

creditors' rights generally, or by a court's discretion in relation to equitable remedies).

(d) All approvals, authorizations or other actions by, or filings with, any governmental authority or other person or entity necessary for the validity or enforceability of Site Owner's obligations under this agreement have been obtained.

4.02. Representations and Warranties of Retailer. Retailer represents and warrants to Site Owner that:

(a) Retailer has full power and authority, and has taken all action necessary, to execute and deliver this agreement and to fulfill its obligations under this agreement.

(b) Retailer's making and performance of this agreement does not and will not violate any law or regulation applicable to Retailer, its certificate of incorporation, bylaws or other organizational documents, or any other agreement to which it is a party or by which it is bound.

(c) Retailer has duly executed and delivered this agreement, and it constitutes legal, valid and binding obligations, enforceable against Retailer in accordance with the terms of this agreement (except to the extent that enforceability may be limited by bankruptcy, insolvency, or other similar laws of general applicability affecting enforcement of creditors' rights generally, or by a court's discretion in relation to equitable remedies).

(d) All approvals, authorizations or other actions by, or filings with, any governmental authority or other person or entity necessary for the validity or enforceability of Retailer's obligations under this agreement have been obtained.

4.03. Disclaimer. Except as expressly set forth in this agreement, neither party makes, and each party specifically disclaims, any representations or warranties, express or implied, regarding the party's web site or web pages, including any implied warranty of merchantability or fitness for a particular purpose and implied warranties arising from course of dealing or course of performance. Specifically, each party acknowledges and understands that the other may encounter technical or other difficulties that may periodically hinder the operation of the Link.

5. TERMINATION

5.01. Default. Either party may immediately terminate this agreement in the event of a Default by the other person, on written notice to the other person, without prejudice to any other rights the terminating party may have under this agreement or at law.

5.02. Optional Termination. If Site Owner receives 100 or more unique complaints from users in any calendar month regarding their experiences with Retailer or the Retail Web Site, then Site Owner shall notify Retailer about those complaints within five business days after the end of that month. Site Owner may terminate this agreement at any time, on written notice to Retailer if Site Owner has received at least 100 unique complaints per month for two consecutive months, and Site Owner has provided Retailer with the notice required above, or if Retailer ceases to be a broad-based reseller of _____ [product or product line, e.g., new personal computers, related hardware, software, and peripherals]. For purposes of this Section 5.02, a complaint shall not include any complaint regarding the fact that the product-specific pages within the Retail Web Site are not in Spanish or with regard to matters as to which Retailer has, before receipt of the complaint, conspicuously posted a notification in Spanish on the Retail Web Site; and those matters include, without limitation, the fact that certain products sold by Retailer may not be shipped to certain countries and the fact that users in certain countries may experience difficulties in receiving delivery of international shipments. Notwithstanding anything to the contrary contained in this agreement, on any termination of this agreement pursuant to this Section 5.02, Retailer shall pay to Site Owner the Optional Termination Payment within three days following the Termination Date.

6. INDEMNIFICATION

6.01. Indemnification of Retailer. Site Owner shall indemnify, hold harmless, and defend Retailer from and against any and all claims, liabilities, losses, damages, expenses and costs (including, without limitation, legal fees and costs) arising out of or relating to Site Owner's breach of any of its representations and warranties set forth in this agreement, Site Owner's breach of any of its obligations under this agreement, the Site Owner Marks, or any negligence or intentional wrongdoing by Site Owner or Site Owner's employee or agent.

6.02. Indemnification of Site Owner. Retailer shall indemnify, hold harmless, and defend Site Owner from and against any and all claims, liabilities, losses, damages, expenses and costs (including, without limitation, legal fees and costs) arising out of or relating to Retailer's breach of any of its representations and warranties set forth in this agreement, Retailer's breach of any of its obligations under this agreement, any of the products or services offered for sale on the Retail Web Site, the Retail Web Site, the Retailer Marks, or any negligence or intentional wrongdoing by Retailer or Retailer's employee or agent.

7. GENERAL

7.01. Review Rights. Retailer shall retain complete, clear, and accurate records regarding the products and services purchased by Portal Customers. Site Owner shall have the right, on not less than 10 days prior written notice to Retailer, but not more often than twice during the Term, to cause an independent Certified Public Accountant to inspect and review, during Retailer's normal business hours, all relevant records of Retailer and any of its affiliates on which the Quarterly Commission Reports and Commissions are based. The cost of the review shall be paid by Site Owner; however, if the review reveals an under-reporting in excess of 5 percent in amounts due to Site Owner from Retailer, Retailer shall promptly pay to Site Owner the cost of the review, the amount of any underpayment, and interest on the amount of any underpayment equal to 11.5 percent per month from the date originally owing to Site Owner. The provisions of this Section 7.01 shall survive the Termination Date, but Site Owner may not commence a review after the date 90 days following the Termination Date.

7.02. Notices. All notices and other communications between the parties required or permitted under this agreement shall be in writing and shall be deemed to have been duly given on delivery by certified or registered mail, return receipt requested, or by telecopy transmission with confirmation of receipt, addressed as follows, or to any other address that has been duly specified by the receiving party in a notice or communication to the sending party pursuant to this Section 7.02:

To Site Owner at _____ [specify]

To Retailer at _____ [specify].

7.03. No Waiver; Cumulative Remedies. No failure or delay in the exercise, by either party, of any right, remedy, power, or privilege under this agreement shall operate as a waiver of it; nor shall any single or partial exercise of any right, remedy, power, or privilege under this agreement preclude any other or further exercise of it or the exercise of any other right, remedy, power, or privilege. The rights, remedies, powers, and privileges provided in this agreement are cumulative and not exclusive of any rights, remedies, powers, and privileges provided by law.

7.04. Counterparts. This agreement may be executed simultaneously in counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. Transmission by telecopy of an executed counterpart of this agreement shall be deemed to constitute due and sufficient delivery of the counterpart.

7.05. Severability. Any provision of this agreement that is prohibited or unenforceable in any jurisdiction shall be ineffective in that jurisdiction to the extent of the prohibition or unenforceability, without invalidating the remaining provisions of this agreement, and the prohibition or unenforceability in that jurisdiction shall not invalidate that

provision in any other jurisdiction or render it unenforceable there.

7.06. Governing Law. This agreement shall be governed by and construed in accordance with the law of the State of California without reference to its conflict of law principles.

7.07. Jurisdiction. Any judicial proceeding brought with respect to this agreement must be brought in a court of competent jurisdiction in the State of California. By execution and delivery of this agreement, each party:

(a) Accepts, generally and unconditionally, the exclusive jurisdiction of such a court and any related appellate court, and irrevocably agrees to be bound by any judgment rendered by those courts in connection with this agreement;

(b) Irrevocably waives any objection it may now or in the future have as to the venue of any suit, action, or proceeding brought in such a court or that such a court is an inconvenient forum; and

(c) Agrees that service of process in the action or proceeding may be effected by mailing a copy by registered or certified mail (or any substantially similar form of mail), postage prepaid, to the receiving party's address *set forth in Section 7.02* or in any other manner permitted by law.

7.08. Headings. The section headings in this agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this agreement.

7.09. Entire Agreement. This agreement, including the exhibits, embodies the entire agreement and understanding of the parties with respect to the subject matter of this agreement and supersedes all previous agreements and understandings between the parties with respect to the subject matter.

7.10. Amendments; Waivers; Binding Effect. Any amendments to, or waivers of, this agreement shall be in writing and signed by both parties or, in the case of a waiver, by the party waiving compliance. This agreement shall be binding on and inure to the benefit of the parties and their respective successors and permitted assigns.

7.11. Assignment. Neither party may assign this agreement without the prior written consent of the other person, and any attempt by a party to assign this agreement without consent shall be null and void; however, either party shall be entitled to assign this agreement without the other person's prior written consent in connection with a merger of the assigning party with or into, or sale of all or substantially all of the assets of the assigning party to, an entity that is not a direct competitor of the other person.

7.12. No Agency. No agency, partnership, joint venture, or employment relationship shall be created by or inferred from the existence or performance of this agreement, and neither party shall have any authority to bind the other in any respect whatsoever.

7.13. Survival. In addition to the provisions in this agreement that provide for their surviving after the Termination Date, paragraphs (b) and (c) of Section 2.05, and Sections 6.01, 6.02, 7.02, 7.03, 7.05 through 7.09, and 7.15, and this Section 7.13 shall also survive after the Termination Date.

7.14. Force Majeure. Either party shall be excused from any delay or failure in performance under this agreement, except the payment of money due and payable under this agreement, caused by reason of any occurrence or contingency beyond its reasonable control, including, without limitation, acts of God, fires, floods, wars (declared or undeclared), civil disturbances, acts of sabotage, accidents, or labor disputes. The obligations and rights of the party excused shall be extended on a day-to-day basis for the period of time equal to that of the underlying cause of the delay.

7.15. Interpretation. All terms set forth in this agreement and not otherwise defined in this agreement shall be

construed to have meanings consistent with the internet, world wide web, and telecommunications industry.

7.16. Limitation of Liability. In no event shall either party be liable to the other or any other person or entity in connection with this agreement for any special, consequential, incidental, or reliance damages (or any loss of revenue, profits, or data), however caused, whether for breach of contract or negligence or under any other legal theory, whether foreseeable or not and whether or not the other person has been advised of the possibility of the damages, and notwithstanding the failure of essential purpose of any limited remedy. Both parties agree that these limitations of liability are agreed allocations of risk and are reflected in the fees agreed on by the parties.

Executed on _____[*date*], at _____, California.

SITE OWNER

_____[*signature of officer*]

[*typed name and title*]

RETAILER

_____[*signature of officer*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet LawInternet BusinessContractsGeneral OverviewComputer & Internet LawOnline
AdvertisingGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 51 FRANCHISE AGREEMENTS

21-51 California Legal Forms--Transaction Guide 51.syn

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General Area Designated-Exact Location to Be Specified When Determined

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Exclusive Area or Territory Provision

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Lease of Premises by Franchisee From Third Party After Execution of Franchise Agreement

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 51 FRANCHISE AGREEMENTS

21-51 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers the drafting of franchise agreements. Franchising is a method of expanding and financing a business and delivering goods and services. It has enabled a large number of companies to achieve national and even international trademark and trade name recognition within a short time and with little outlay of their own capital. The chapter discusses state and federal statutes governing franchising and franchise agreements, and it outlines the determinations that must be made before drafting or entering into franchising agreements. It also includes guides for drafting franchise agreements, certain related and subsequent procedures, and representative complete forms of franchise agreements.

For detailed coverage of franchise registration under the California Franchise Investment Law, see Ch. 51A, *Franchise Registration*. Copyright is discussed in Ch. 103A, *Copyrights*. Trademarks are covered in detail in Gilson on Trademarks (Matthew Bender). Other relevant chapters include Ch. 1A, *Role of Counsel in Starting a New Business*; Ch. 1B, *Selecting Form of Business Entity*; Ch. 1C, *Regulation of Employers*; Ch. 1E, *Taxation of Businesses*; Ch. 1F, *Insurance Considerations in Business Formation*; Ch. 75, *Formation of Contracts and Standard Contractual provisions*; and Ch. 76, *Assignment of Rights and Obligations*.



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51 FRANCHISE AGREEMENTS

PART I. RESEARCH GUIDE

A. Primary Sources

21-51 California Legal Forms--Transaction Guide § 51.01

§ 51.01 California Sources

[1] Statutes

Cartwright Act. *Bus. & Prof. Code § 16720 et seq.*

Franchise Relations Act. *Bus. & Prof. Code § 20000 et seq.*

Termination and nonrenewal of franchises other than those of gasoline dealers and automobile dealers. *Bus. & Prof. Code § 20000 et seq.*

Act applies to franchises of indefinite duration that may be terminated by either party without cause. *Bus. & Prof. Code § 20041.*

Termination and nonrenewal of gasoline dealer and petroleum distributor franchises. *Bus. & Prof. Code §§ 20999-20999.4, 21140.6.*

Sale, transfer, or expiration of lease on gasoline dealer or petroleum distributor franchise premises. *Bus. & Prof. Code § 20999.25.*

Franchised gasoline dealer's right to purchase fuel and automobile accessories from source other than franchisor. *Bus. & Prof. Code § 21140 et seq.*

Franchised gasoline dealer's right to set hours of business; exceptions. *Bus. & Prof. Code §§ 21150, 21150.1.*

Fair Dealership Law prohibiting discrimination in connection with granting, sale, bequest, transfer, termination, and renewal of dealerships. *Civ. Code § 80 et seq.*

Seller assisted marketing plans. *Civ. Code § 1812.200 et seq.*

Franchise Investment Law. *Corp. Code § 31000 et seq.*

Definitions. *Corp. Code § 31100 et seq.*

Regulation of sales of franchises. *Corp. Code § 31200 et seq.*

Fraudulent and prohibited practices. *Corp. Code § 31300 et seq.*

Administration. *Corp. Code § 31500 et seq.*

General provisions. *Corp. Code § 31510 et seq.*

Motor vehicle franchises.

Vehicle "franchise," "franchisee," "franchisor" defined. *Veh. Code §§ 331-331.3.*

Termination of automobile dealer franchise. *Veh. Code §§ 3060, 3061.*

Notice of intent to terminate motor vehicle dealer's franchise agreement for failure to conduct customary sales and service operations during customary hours of business for seven consecutive business days, except when beyond direct control of franchisee or by order of Department of Motor Vehicles. *Veh. Code § 3060(a)(1)(B)(v).*

Automobile franchisee's right to curb intrabrand competition in relevant market area. *Veh. Code §§ 3062, 3063.*

Automobile franchisor's obligation to furnish compensation schedules for preparation and delivery work and warranty work performed by franchisee. *Veh. Code §§ 3064, 3065.*

Manufacturer's or distributor's obligation to provide recreational vehicle dealer with written dealer agreement that complies with statutory franchise requirements in *Veh. Code §§ 331, 331.3. Veh. Code § 11713.22.*

Licensed recreational vehicle manufacturer, manufacturer branch, distributor, or distributor branch prohibited from selling new recreational vehicle in California to or through recreational vehicle dealer without fully executed written dealer franchise that complies with requirements of *Veh. Code § 331.3. Veh. Code § 11713.23.*

[2] Regulations

Franchise investments. *10 Cal. Code Reg. § 310.002 et seq.*

[3] Commissioner of Corporations Releases

Commissioner of Corporations Release 3-F, *When Does an Agreement Constitute a "Franchise?"* (rev.'d 1994).



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A. Primary Sources

21-51 California Legal Forms--Transaction Guide § 51.02

§ 51.02 Federal Sources

[1] Statutes

Sherman Antitrust Act. *15 U.S.C. § 1 et seq.*

Limitation of effect of Sherman Act on international commerce. *15 U.S.C. § 7.1.*

Clayton Act. *15 U.S.C. § 12 et seq.*

Robinson-Patman Act. *15 U.S.C. § 13.*

Federal Trade Commission Act. *15 U.S.C. § 41 et seq.*

McGuire Act. *15 U.S.C. § 45(a).*

Limitation of effect of Federal Trade Commission Act on international commerce. *15 U.S.C. § 45(a)(3).*

Automobile Dealers Franchise Act. *15 U.S.C. § 1221 et seq.*

Petroleum Marketing Practices Act. *15 U.S.C. § 2801 et seq.*

Deduction of trade or business expenses. *I.R.C. § 162.*

Intangibles. *I.R.C. § 197.*

Tax-free transfers of assets to a newly formed corporation. *I.R.C. § 351.*

Franchise tax treatment. *I.R.C. § 1253.*

[2] Regulations

Disclosure requirements (FTC Rule 436). *16 C.F.R.* §§ 436.2, 436.5.



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§ 51.05 Law Reviews and Periodicals

Root, *The Meaning of "Franchise" Under the California Franchise Investment Law: A Definition in Search of a Concept*, 30 McGeorge L. Rev. 1163 (1999).

Note, *Vylene Enterprises v. Naugles: Remedies for Franchisor Encroachment*, 27 Sw. U. L. Rev. 353 (1997).

Laufer, *The Safe Way to Terminate a Franchise* (Part 2), 41(3) Prac. Law. 63 (1995).

Laufer, *The Safe Way to Terminate a Franchise* (Part 1), 41(2) Prac. Law. 69 (1995).

McErlean & Cannon, *Disclosure for Franchisors*, 40(6) Prac. Law. 23 (1994).

Classen, *Judicial Intervention in Contractual Relationships Under the Uniform Commercial Code and Common Law*, 23 U.C.C. L.J. 260 (1991).

Joseph, *Do Franchisors Owe a Duty of Competence?* 46 Bus. Law. 471 (1991).

Tannenbaum, *The Twelve Most Important Questions to Ask in a Franchisor-Franchisee Relationship*, 36 Prac. Law. 15 (Sept. 1990).

Pitegoff, *Franchise Relationship Laws: A Minefield for Franchisors*, 45 Bus. Law. 289 (1989).

Stara, *Taxation of the Franchisee and Franchisor*, 20 Tax Advisor 44 (1989).

Note, *The Professional Sports Community protection Act: Congress' Best Response to Raiders?* 38 Hastings L.J. 345 (1987).

Sutherland, *The Risks and Exposures Associated With Franchise Noncompliance*, 42 *Bus. Law*. 369 (1987).

Comment, *Keeping the Team at Home*, 74 *Cal. L. Rev.* 1329 (1986).

Gurnick, *Consumer Cooperatives: What They Are and How They Work*, 8 *L.A. Law*. 22 (July/August 1985).

Braun, *Policy Issues of Franchising*, 14 *Sw. U.L. Rev.* 155 (1984).

Mair, *Unconscionability and the Enforcement of Standardized Contracts in Commercial Transactions*, 16 *Pac. L.J.* 247 (1984).

Cantor, *The Federal and State regulation of Franchises (Part 1)*, 27(6) *Prac. Law*. 55 (1981).



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§ 51.06 Annotations

Annot., Pre-Emptive Scope of § 106(a) of Petroleum Marketing Practices Act (*15 USCS § 2806(a)*), *103 A.L.R. Fed. 698 (1991)* .

Annot., What Constitutes Adequate Compliance With Notice Requirements, Under § 104 of Petroleum Marketing Practices Act (*15 USCS § 2804*), in Connection With Termination or Nonrenewal of Gasoline Station Franchise Relationship, *101 A.L.R. Fed. 813 (1991)* .

Annot., Validity, Construction, and Application of State Statutes Regulating Dealings Between Automobile Manufacturers, Dealers, and Franchisees, *82 A.L.R.4th 624 (1990)* .



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21-51 California Legal Forms--Transaction Guide § 51.07

§ 51.07 Text References

[1] Matthew Bender Sources

California Forms of Jury Instructions (Matthew Bender), Ch. 24, *Franchise Agreements*.

California Forms of Pleading and Practice (Matthew Bender).

Ch. 330, *Landlord and Tenant: Eviction Actions*.

Ch. 332, *Landlord and Tenant: The Tenancy*.

Ch. 515, *Securities and Franchise Regulation*.

Ch. 549, *Trademarks and Trade Names*.

California Legal Forms(Matthew Bender).

Ch. 91, *Contracts With Sales Representatives*.

California Points and Authorities, Ch. 141, *Landlord and Tenant* (Matthew Bender).

Cavitch, *Business Organizations with Tax Planning*(Matthew Bender).

Ch. 161, *Review of Factors to be Considered in Selecting Form of Acquisition* .

Ch. 232, *Introduction to Trade Secrets*.

Gilson on Trademarks (Matthew Bender).

Glickman, Franchising (Matthew Bender).

Ch. 3, *Choice of Franchise Method of Expansion*

Ch. 4, *Legal Pitfalls of Franchise Operations*

Ch. 4A, *Consumer Protection*.

Ch. 5, *Taxation of Franchisors and Subfranchisors*.

Ch. 6, *Conversion from a Company Operated to a Franchised Sales Operation*.

Ch. 8, *Selling Franchise Opportunities: Disclosure and Registration Requirements*.

Ch. 9, *Considerations in Developing the Agreement*.

Ch. 9A, *Negotiating and Administering the Franchise Agreement*.

Ch. 10, *Provisions of the Franchise Agreement*.

Ch. 11, *Analysis of Typical Franchise Agreements*.

Ch. 12, *Real Property and the Franchised Business*.

Ch. 13, *Litigation and Dispute Settlement*.

Ch. 13A, *The Effect of Bankruptcy on Franchising*.

Ch. 14, *Advising the Prospective Franchisee*.

Ch. 15, *Financing the Franchise Purchase*.

Ch. 16, *Federal Taxation of Franchisee's Operation*.

Ch. 17, *Franchise Business and Estate Planning*.

Marsh & Volk, Practice Under the California Corporate Securities Laws(Matthew Bender), Ch. 40, *Registration of Franchises Under the California Franchise Investment Law*.

Rabkin & Johnson, Current Legal Forms with Tax Analysis (Matthew Bender), Ch. 3A, *Business Franchises* .

Von Kalinowski, Antitrust Laws and Trade Regulation(Matthew Bender).

Ch. 22, *Tying Arrangements*.

Ch. 23, *Exclusive Dealing/Requirements Contracts and Reciprocal Dealing Arrangements*.

Ch. 105, *California*.

[2] Additional Text References

Brown, Franchising: Trap for the Trusting.

Rosenfeld, The Law of Franchising.

Thompson, Franchising Operations and Antitrust.



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PART II. LEGAL BACKGROUND

A. Governing Law

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§ 51.10 California Law

[1] Franchise Investment law

California's Franchise Investment Law [*Corp. Code § 31000 et seq.*], requiring registration of franchise offerings with the Commissioner of Corporations and the making of prescribed disclosures to prospective franchisees, is the most comprehensive California law affecting the offer and sale of franchises. If a franchise is subject to registration under the Franchise Investment Law, or is exempted from registration by rule of the Commissioner or under the seasoned franchisor exemption [*see Corp. Code §§ 31100, 31101; see also Ch. 51A, Franchise Registration*], the franchise is not subject to the Corporate Securities Law [*Corp. Code § 25019; People v. Kline (1980) 110 Cal. App. 3d 587, 168 Cal. Rptr. 185*] .

The disclosure requirements mandated by the Act are discussed in greater detail in Ch. 51A, *Franchise Registration*. However, several Franchise Investment Law provisions merit special comment in connection with franchise agreements as opposed to franchise registration. First, any written or oral representations made to prospective franchisee that include an untrue statement of a material fact, or omit a material fact necessary to make the statements made not misleading, can be the basis for both civil action by the franchisee and criminal liability [*see Corp. Code §§ 31201, 31301, 31410, 31411*]. Second, the Franchise Investment Law is violated when a franchisor, directly or indirectly, restricts or inhibits the right of franchisees to join a trade association or to prohibit the right of free association among franchisees for any lawful purpose [*Corp. Code § 31220*]. Violation of this prohibition is the basis for a civil suit for injunctive relief and damages [*Corp. Code § 31302.5*].

The Franchise Investment Law is modeled after the federal Securities Act of 1933 and many provisions closely track the California Corporate Securities Act. The Commissioner of the Department of Corporations administers the Franchise Investment Law [*see Corp. Code § 31502; see also 10 Cal. Code Reg. § 310.002 et seq.*].

The Commissioner of Corporations may halt the sale of franchises when, in the case of a franchise other than a subfranchise [*see Corp. Code § 31008.5*], a major inducement to prospective franchisees is compensation that they may earn from the participation in the sale of additional franchises [*Corp. Code § 31115(b)*].

The California statute voiding any franchise agreement provision binding a franchisee to waive compliance with the Franchise Investment Law (or any rule or order) [*see Corp. Code § 31512*] directly conflicts with the Federal Arbitration Act [*see 9 U.S.C. § 2*] and violates the Supremacy Clause to the extent that the California statute requires judicial consideration of claims brought under that law rather than arbitration [*Southland Corp. v. Keating* (1984) 465 U.S. 1, 16, 104 S. Ct. 852, 79 L. Ed. 2d 1] .

[2] Cartwright Act

The Cartwright Act [*Bus. & Prof. Code §§ 16720-16760*] basically codifies common law prohibitions against restraint of trade. The Act is closely patterned on the Sherman Antitrust Act [*see 15 U.S.C. § 1*] and, with respect to tying agreements, on Section 3 of the Clayton Act [*see 15 U.S.C. § 14*]. Consequently, federal decisions interpreting the Sherman Act and the Clayton Act [*see § 51.11*] are applicable in construing the Cartwright Act [*Corwin v. Los Angeles Newspaper Serv. Bureau, Inc.* (1971) 4 Cal. 3d 842, 852-853, 94 Cal. Rptr. 785, 484 P.2d 953] .

[3] Franchise Relations Act

The California Franchise Relations Act [*Bus. & Prof. Code § 20000 et seq.*] regulates the substantive terms of franchise agreements, specifically with respect to the termination and nonrenewal of franchises, offers to repurchase inventories, and the use of binding arbitration. The Act applies under the following conditions [*Bus. & Prof. Code §§ 20001, 20015, 20041, 20042*]:

- The franchised business is neither a motor vehicle dealership nor a petroleum distributorship or service station; and
- The franchisee is domiciled in California or the franchise business is or has been operated in California;
- The franchise was granted or renewed on or after January 1, 1981; or
- The franchise is of an indefinite duration that may be terminated by either party without cause.

In general, the Act prohibits a franchisor from terminating a franchise before the expiration of its term, except for good cause [*Bus. & Prof. Code § 20020*]. "Good cause" is not defined, but it does include breach of the franchise agreement, if not cured within a reasonable period after the franchisee is notified of the breach [*Bus. & Prof. Code § 20020*]. The Act's provisions govern regardless of any contractual terms to the contrary [*Bus. & Prof. Code § 20010*].

For further discussion of termination and nonrenewal, see § 51.26.

[4] Fair Dealership Law

The California Fair Dealership Law [*Civ. Code §§ 80-86*] prohibits discrimination on the basis of any characteristic listed in *Civ. Code § 51(b)* or defined in *Civ. Code § 51(e)* in the granting, sale, transfer, bequest, termination, or nonrenewal of dealerships [*Civ. Code § 82(a)*; *see Civ. Code § 51(b)* ("All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation...")]. It further prohibits grantors and dealers from refusing to consent to assignment or transfer of a dealership on any of the grounds listed or defined in *Civ. Code § 51* [*Civ. Code § 85*].

The statute defines "dealership" to include any express or implied contract between two or more persons that grants the right to sell or distribute goods or services under a trade name, trademark, or other commercial symbol, and in which

there is a continuing financial interest between the grantor and the grantee in the operation of the dealership or the marketing of the goods or services [see *Civ. Code* § 81(b), (d)]; thus, the Fair Dealership Law applies to franchises.

Any portion of a contract which attempts to waive the provisions of the Fair Dealership Law is void and unenforceable [*Civ. Code* § 82]. In any action based on a violation of the statute, the prevailing party is entitled to recover reasonable attorneys' fees and taxable court costs [*Civ. Code* § 86].

For further discussion of termination and nonrenewal, see § 51.26.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Private Actions Injuries & Remedies Sherman Act Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Business & Corporate Law Distributorships & Franchises General Overview Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Agreements



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A. Governing Law

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§ 51.11 Federal Law

[1] Miscellaneous Antitrust Laws Governing Franchises

A typical franchise agreement imposes controls over the franchise to ensure that the method of doing business perfected by the franchisor is followed. These controls are generally recognized as essential to the franchise system. Moreover, controls over the use of the franchisor's trademark are required in order to avoid any implication that the trademark has been abandoned [see 15 U.S.C. §§ 1055, 1127]. However, the use of these controls cannot violate the antitrust laws [see 15 U.S.C. § 1115(b)(7)]. The facts and circumstances of a particular franchise arrangement will determine whether it has the desirable effect of increasing competition or whether it will tend to monopolize and restrain trade because of the restrictive controls. The written agreement and other practices of the parties to a franchise agreement must be carefully considered in the light of the federal antitrust and restraint of trade laws.

The Sherman Antitrust Act contains the broadest antitrust language. Every contract, combination, or conspiracy in restraint of trade or commerce among the states or with foreign nations is illegal [see 15 U.S.C. § 1]. For further discussion, see [2], *below*.

The Clayton Act prohibits price discrimination and certain "tying" and exclusive dealing agreements when the effect of any pertinent agreement, condition, understanding, lease, sale, or contract for sale may be to substantially lessen competition, or to tend to create a monopoly in any line of commerce [see 15 U.S.C. §§ 12-27]. Requirements that a franchisee buy all supplies from the franchisor are subject to prohibition under the Act except possibly when quality control and goodwill or trademark protection are essential.

The Robinson-Patman Act prohibits price discrimination if that discrimination substantially lessens competition or tends to create a monopoly [15 U.S.C. § 13]. For further discussion, see [3], *below*.

The Federal Trade Commission Act prohibits "unfair methods of competition" and "unfair or deceptive acts or practices in commerce" [15 U.S.C. §§ 41, 45]. The Act is broader than many of the other anti-monopoly and restraint of trade laws, and is enforced by the Federal Trade Commission. Unreasonable or unfair practices of franchisors are subject to

regulation under the Act, and specific franchise offering disclosures have been mandated under the Act under Rule 436 [16 C.F.R. § 436.1 *et seq.*; see [4], *below*; see also Ch. 51A, *Franchise Registration*].

[2] Sherman Act

[a] Broad Prohibition Against Restraint of Trade

The Sherman Antitrust Act contains the broadest antitrust language. Every contract, combination, or conspiracy in restraint of trade or commerce among the states or with foreign nations is illegal [see 15 U.S.C. § 1]. The prevailing standard of analysis in determining the existence of a violation of this statutory provision is the "rule of reason" under which the fact finder weighs all of the circumstances of the case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition [*Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977) 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568] . Certain restrictions, because of their pernicious effect on competition and lack of any redeeming virtue, are per se violations; that is, they are conclusively presumed to be unreasonable and therefore illegal. Per se violation rules are appropriate only when they relate to conduct that is manifestly anticompetitive [*Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977) 433 U.S. 36, 49-50, 97 S. Ct. 2549, 53 L. Ed. 2d 568] .

[b] Monopolization Claims

Monopolization under Section 2 of the Sherman Act [15 U.S.C. § 2] assumes a number of forms, including the use of monopoly power in one market to gain an unwarranted competitive advantage in another. The plaintiff who alleges this type of monopolization must identify the relevant product and geographic markets. Proof of the existence of two separate product or service markets is necessary. Market definition is characterized in terms of cross-elasticity of demand for or reasonable interchangeability of a given set of products or services. If the product and its substitutes are reasonably interchangeable by consumers for the same purposes, or if they have a high cross-elasticity of demand in the trade, they will be included in the same market [see *M.A.P. Oil Co., Inc. v. Texaco Inc.* (9th Cir. 1982) 691 F.2d 1303, 1306, 1307] . A monopoly claim under Section 2 of the Sherman Act [15 U.S.C. § 2] must include a specific intent to control prices or destroy competition in some part of commerce, predatory or anticompetitive conduct directed to accomplishing that unlawful purpose, and a dangerous possibility of success [see *Zoslaw v. MCA Distributing Corp.* (9th Cir. 1982) 693 F.2d 870, 887] .

[c] Refusal to Deal Claims

The Sherman Antitrust Act bars contracts and combinations that would unduly interfere with the free exercise of the right of freedom to trade by those engaged in trade and commerce. Absent any purpose to create or maintain a monopoly, the Act does not restrict the right of a trader or manufacturer to freely exercise independent discretion as to the parties with whom he or she will deal. A trader or manufacturer may even announce in advance the circumstances under which he or she will refuse to sell [*United States v. Colgate & Co.* (1919) 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992] .

A manufacturer of a product may select his or her customers and franchise certain dealers to whom, alone, he or she will sell the goods provided that other and equivalent brands are readily available in the market. If the refusal to deal stops at this point, there is no violation of the Sherman Act [*United States v. Arnold, Schwinn & Co.* (1967) 388 U.S. 365, 376, 87 S. Ct. 1856, 18 L. Ed. 2d 1249] . However, if the refusal to deal results from a group boycott or concerted refusals by traders to deal with other traders, as distinguished from an agreement between a manufacturer and a dealer granting the latter an exclusive distributorship, the Act has been violated [see *Klor's v. Broadway-Hale Stores* (1959) 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741] . Thus, for example, if a franchisor is substantially owned by its franchisees, an agreement between the franchisor and the franchisees forbidding the franchisor to establish new franchisees within existing exclusive territories constitutes an illegal horizontal restraint or refusal to deal [see *United States v. Sealy* (1967) 388 U.S. 350, 351-354, 87 S. Ct. 1847, 18 L. Ed. 2d 1238] . This does not mean, however, that the

state, acting under its police power, cannot require a franchisor to submit to an administrative hearing on the propriety of granting a new franchise in accordance with a procedure which is triggered by the protests of existing franchisees [*New Motor Vehicle Bd. v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 109-111, 99 S. Ct. 403, 58 L. Ed. 2d 361 (*Veh. Code* §§ 3062, 3063, permitting franchisees within a 10-mile radius of proposed new or relocated automobile franchisee to cause hearing to be held to determine whether new or relocated franchise can be established, come within "state action" exemption to the provisions of the Sherman Act)].

Although a simple refusal of a manufacturer to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Antitrust Act, an unlawful combination results if the manufacturer secures adherence to its suggested prices by means that go beyond merely declining to sell to customers who will not resell at the suggested price. Use of a refusal to deal with wholesalers to elicit their willingness to deny the manufacturer's products to retailers and thereby ensure the retailers' adherence to the manufacturer's suggested minimum retail price constitutes an unlawful combination [*United States v. Parke, Davis & Co.* (1960) 362 U.S. 29, 43-46, 80 S. Ct. 503, 4 L. Ed. 2d 505] .

[d] Territorial and Customer Restrictions on Franchisees

Territorial and customer restrictions on franchisees are also known as nonprice vertical restrictions. Territorial or location restrictions are those that prevent franchisees from selling franchised products at outlets other than the one covered by the franchise agreement [*Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977) 433 U.S. 36, 54, 97 S. Ct. 2549, 53 L. Ed. 2d 568] . A customer restriction is one that prohibits franchisees from selling franchised products to other retailers or wholesalers [*Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977) 433 U.S. 36, 46, 97 S. Ct. 2549, 53 L. Ed. 2d 568] .

In the case of either a territorial or a customer restriction, the existence of a violation of the Sherman Antitrust Act is determined by applying the rule of reason in most cases. Departure from the rule of reason standard; that is, application of the principle that the transaction is illegal per se, may be justified, but any departure from the rule of reason must be based on demonstrable economic effect [*Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977) 433 U.S. 36, 57-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568] . The basic inquiry under the rule of reason is whether the challenged vertical restriction promotes competition or suppresses it. Courts determine whether the distribution restraint is unreasonable in view of (1) the facts peculiar to the business involved, (2) the condition of competition before and after the restraint was imposed, and (3) the nature of the restraint, and its actual or probable effect [*Cowley v. Braden Industries, Inc.* (9th Cir. 1980) 613 F.2d 751, 754] . For example, a territorial restriction was found reasonable when it promoted sales, appeared to be the only efficient method of product distribution, and did not harm competition with other brands [*Cowley v. Braden Industries, Inc.* (9th Cir. 1980) 613 F.2d 751, 754-756] . Customer restrictions have been found reasonable when created either to protect the public from a potentially dangerous line of products for professional use or to protect the manufacturer against potential product liability [*Tripoli Co., Inc. v. Wella Corp.* (3d Cir. 1970) 425 F.2d 932, 938] . A restriction that prevents a franchisee from selling franchised products from outlets other than the one covered by the franchise agreement is permissible under the rule of reason, regardless of whether the product is sold to the franchisee or on consignment to him [*Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977) 433 U.S. 36, 57-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568] . However, if the restriction is enforced through a conspiracy in restraint of trade, such as through collaborative action by the franchisor and its franchisees to prevent certain franchisees from dealing with third parties in violation of the franchise location clause, the Sherman Act has been violated [see *United States v. General Motors Corp.* (1966) 384 U.S. 127, 139-140, 86 S. Ct. 1321, 16 L. Ed. 2d 415] .

A dual distribution system, in which a franchisor (1) licenses independent area franchisors to manufacture products to be sold under the franchisor's trademark (a vertical system), and (2) operates as an area franchisor (a horizontal system), is not a per se unlawful horizontal market allocation. The hallmark of a horizontal market allocation is collusion among competitors to confer on each a monopoly in a specific area. When the allocation of territories is dictated at all times by the franchisor, it is seeking to compete with other manufacturers by imposing reasonable vertical restraints that are not per se illegal [*Krehl v. Baskin-Robbins Ice Cream Co.* (9th Cir. 1982) 664 F.2d 1348, 1354, 1355] . The combination

of a vertical system with a horizontal system into a dual distribution system is not subject to the rule of per se illegality because the test for determining whether that standard should be extended to a business practice is whether, on its face, the practice appears to be one that would always or almost always tend to restrict competition and decrease output rather than one that is designed to increase economic efficiency and render markets more competitive. Absent any showing of any significant adverse impact on either interbrand or intrabrand competition, and when evidence indicates that the effect of the system was to promote competition, the system should be evaluated under the traditional rule of reason standard [*Krehl v. Baskin-Robbins Ice Cream Co.* (9th Cir. 1982) 664 F.2d 1348, 1355-1357] .

When an agreement grants one party the exclusive right to sell products to a specialized type of customer only, it is not a violation of Section 1 of the Sherman Act [15 U.S.C. § 1] to grant another party the exclusive right to sell products to other types of customers if the effect is to increase rather than decrease competition. Since the second agreement does not violate antitrust law, the second party can legitimately ask for aid in enforcing the agreement without incurring antitrust liability [see *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.* (9th Cir. 1983) 698 F.2d 1011, 1018-1019] .

[e] Price Restraints Imposed on Franchisees

The fixing of prices at which others may sell is anticompetitive and unlawful [see *United States v. Arnold, Schwinn & Co.* (1967) 388 U.S. 365, 376, 87 S. Ct. 1856, 18 L. Ed. 2d 1249] . Restraints as to territory or customers, vertical or horizontal, are unlawful if they are ancillary to price-fixing [*White Motor Co. v. United States* (1963) 372 U.S. 253, 260, 83 S. Ct. 696, 9 L. Ed. 2d 738] . Price-fixing is also illegal if it is an integral part of a whole distribution system [*United States v. Bausch & Lomb Co.* (1944) 321 U.S. 707, 720, 64 S. Ct. 805, 88 L. Ed. 1024] . However, the mere suggestion of resale prices, without attempts to enforce the suggestion, is permissible [see *United States v. Parke, Davis & Co.* (1960) 362 U.S. 29, 43, 80 S. Ct. 503, 4 L. Ed. 2d 505] .

A supplier's attempt to fix the prices charged by those who resell its products, "vertical price fixing," violates Section 1 of the Sherman Act [15 U.S.C. § 1] and is per se illegal. Any claim of vertical price fixing must be supported by a demonstration of affirmative action that will induce or coerce customers to adhere to a uniform price rather than engage in price competition. Although suppliers engage in a variety of actions that might influence resale prices, these actions are not unlawful unless they sufficiently induce avoidance of price competition. Thus, even though a supplier of movies to exhibitors announced its prices to the exhibitors in advance, this did not show any attempt to induce or coerce those exhibitors to set a resale price other than a competitive price [see *General Cinema Corp. v. Buena Vista Distribution* (9th Cir. 1982) 681 F.2d 594, 597] . For discussion of the legal right of a manufacturer to announce its resale prices in advance and refuse to deal with those who fail to comply, see [f], *below*.

If a manufacturer requires retailers to sell its products only from authorized locations, a vertical restraint on trade, the retailer has the burden of proving that the restraint is unreasonable and therefore unlawful under Section 1 of the Sherman Act. The issue is whether the restraint promotes or suppresses competition. A vertical restraint may be reasonable if it is likely to promote interbrand competition without overly restricting intrabrand competition [*Continental T.V., Inc. v. G.T.E. Sylvania Inc.* (9th Cir. 1982) 694 F.2d 1132, 1136-1137] .

[f] Termination of Franchises

A manufacturer has a right to select its customers and to refuse to sell its goods to anyone, for reasons sufficient to itself [see *United States v. Colgate & Co.* (1919) 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992] . A refusal to deal becomes illegal under the Sherman Act only when it produces an unreasonable restraint of trade, such as price-fixing, elimination of competition, or the creation of a monopoly [see *United States v. Parke, Davis & Co.* (1960) 362 U.S. 29, 32, 80 S. Ct. 503, 4 L. Ed. 2d 505] . Thus, unless it can be shown that the termination of a franchise results from an attempt to enforce a price-fixing policy, involves an attempt to create a monopoly, has the result of suppressing competition, or constitutes a restraint of trade, the Sherman Act is not violated when the franchisor terminates one distributor and substitutes another [*Ace Beer Distributors, Inc. v. Kohn, Inc.* (6th Cir. 1963) 318 F.2d 283, 286-287] .

Accordingly, a franchisor may set forth the terms under which it will deal and under which the agreement will be terminated in the franchise agreement. Further, a franchisee's failure to meet sales quotas or quality standards is a valid ground for termination [see Glickman, Franchising, Ch. 4, *Legal Pitfalls of Franchise Operations* (Matthew Bender)].

In distributor termination cases, there are two important distinctions. First, there is the basic distinction between concerted and independent action; the former is proscribed under the Sherman Act, the latter is not [see 15 U.S.C. § 1]. A manufacturer may deal or refuse to deal with whomever it likes, as long as it does so independently, and it can announce its resale prices in advance and refuse to deal with those who fail to comply. A distributor is free to acquiesce in the manufacturer's demand in order to avoid termination [*Monsanto Co. v. Spray-Rite Service Corp.* (1984) 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 ; see *United States v. Colgate & Co.* (1919) 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992] . The second important distinction is that between concerted action to set prices and concerted action on nonprice restrictions. The former are per se illegal; the latter are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to determine whether the practice in question is an unreasonable restraint on competition [*Monsanto Co. v. Spray-Rite Service Corp.* (1984) 465 U.S. 752, 763, 104 S. Ct. 1464, 79 L. Ed. 2d 775 ; see *Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977) 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568] .

Independent action by the manufacturer and concerted action on nonprice restrictions are distinguished from price-fixing agreements. On a claim of concerted price-fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving the existence of the agreement [*Monsanto Co. v. Spray-Rite Service Corp.* (1984) 465 U.S. 752, 763, 104 S. Ct. 1464, 79 L. Ed. 2d 775] . The United States Supreme Court has stated that permitting an agreement to be inferred merely from the existence of complaints about the terminated distributor from other or competing distributors, or even from the fact that termination came about in response to complaints, could deter or penalize perfectly legitimate conduct [*Monsanto Co. v. Spray-Rite Service Corp.* (1984) 465 U.S. 752, 763, 104 S. Ct. 1464, 79 L. Ed. 2d 775] . Therefore, evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently must be introduced. The antitrust plaintiff should present direct or circumstantial evidence reasonably tending to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective [*Monsanto Co. v. Spray-Rite Service Corp.* (1984) 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775] .

[3] Robinson-Patman Act

The Robinson-Patman Act generally prohibits price discrimination if that discrimination substantially lessens competition or tends to create a monopoly [15 U.S.C. § 13]. However, it is permissible to discriminate in good faith to meet competition. Differences in price are also permissible if based on bona fide differences in the quality and quantity of good sold and other marketing factors.

A prima facie showing of illegal price discrimination under the Robinson-Patman Act may be rebutted by establishing that the extension of a lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor [see 15 U.S.C. § 13(b)]. This defense is not so inflexible that it applies only if the defendant sets its lower price on a customer-by-customer basis and creates the price discrimination by lowering rather than by raising prices [*Falls City Industries v. Vanco Beverage* (1983) 460 U.S. 428, 431, 451, 103 S. Ct. 1282, 75 L. Ed. 2d 174] . However, the "meeting-competition" defense requires the seller at least to show the existence of facts that would lead a reasonable and prudent person to believe that the seller's lower price would meet the equally low price of a competitor's; the defense also requires the seller to demonstrate that its lower price was a good faith response to a competitor's lower price [*Falls City Industries v. Vanco Beverage* (1983) 460 U.S. 428, 431, 451, 103 S. Ct. 1282, 75 L. Ed. 2d 174] .

The Act centrally addresses price discrimination in cases involving competition between different purchasers for resale of the purchased product. Competition of that character ordinarily is not involved when a product subject to special order is sold through a customer-specific competitive bidding process. Thus, a manufacturer offering its dealers

different wholesale prices may not be held liable for price discrimination proscribed by the Robinson-Patman Act, in the absence of a showing that the manufacturer discriminated between dealers contemporaneously competing to resell to the same retail customer [*Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.* (2006) 546 U.S. 164, 126 S. Ct. 860, 866, 163 L. Ed. 2d 663] .

[4] Federal Trade Commission Rule 436

Federal Trade Commission Rule 436 [16 C.F.R. §§ 436.1-436.3], entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," establishes minimum federal standards of disclosure that are applicable to all offerings covered by the Rule and mandates time periods within which those disclosures must occur. This Rule has the force and effect of federal law [*National Petroleum Refiners Ass'n v. FTC* (D.C. Cir. 1973) 482 F.2d 672 , cert. denied, 415 U.S. 951 (1974)] . For further discussion, see Ch. 51A, *Franchise Registration* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law
 Clayton Act
 General Overview
 Antitrust & Trade Law
 Consumer Protection
 Deceptive Acts & Practices
 Federal Trade Commission Act
 Antitrust & Trade Law
 Robinson-Patman Act
 General Overview
 Antitrust & Trade Law
 Sherman Act
 General Overview
 Business & Corporate Law
 Distributorships & Franchises
 General Overview
 Business & Corporate Law
 Distributorships & Franchises
 Causes of Action
 Restraints of Trade
 Business & Corporate Law
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 Franchise Relationships
 Franchise Agreements



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51 FRANCHISE AGREEMENTS

PART II. LEGAL BACKGROUND

A. Governing Law

21-51 California Legal Forms--Transaction Guide § 51.12

§ 51.12 Preemption Issues

Both California and federal law may apply to a proposed franchise, or one but not the other. When both may apply, it is important to determine which law applies to the proposed transaction.

Federal Trade Commission Rule 436 [16 C.F.R. § 436.1 *et seq.*; see § 51.11[4]] raises federal preemption issues with regard to the California Franchise Investment Law [see § 51.10[1]]. This rule has the force and effect of federal law and, as a substantive regulation, may preempt state or local laws to the extent they conflict with the federal rule [see *Free v. Bland* (1962) 369 U.S. 663, 82 S. Ct. 1089, 8 L. Ed. 2d 180]. However, the Rule 436 preemption standard indicates that state and local laws or regulations are only preempted to the extent that they provide less protection to the franchisee than that afforded by the Rule [see 16 C.F.R. §§ 436.1-436.3, Note 2; see also 43 Fed. Reg. No. 246, pp. 59719-59720 (1978)]. California rules generally are stricter than federal law and therefore are not preempted.

In addition, the federal Petroleum Marketing Practices Act [15 U.S.C. § 2801 *et seq.*] governs the termination of gasoline dealer or petroleum distributor franchises. Because the California statute permitting franchises to be terminated for "other legitimate reasons" [see *Bus. & Prof. Code* § 20999.1] is an obstacle to the accomplishment and execution of the purposes and objectives of the federal Act, the California statute is therefore preempted by the federal statute [see *California ARCO Distributors, Inc. v. Atlantic Richfield Co.* (1984) 158 Cal. App. 3d 349, 363, 204 Cal. Rptr. 743]. Further, the Petroleum Marketing Practices Act preempts state common-law claims arising out of a petroleum franchise termination or nonrenewal [*Mobil Oil Corp. v. Superior Court* (1987) 189 Cal. App. 3d 485, 488-489, 234 Cal. Rptr. 482].

For further discussion of preemption issues, see Ch. 51A, *Franchise Registration*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection General Overview Business & Corporate Law Distributorships & Franchises General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51 FRANCHISE AGREEMENTS

PART II. LEGAL BACKGROUND

A. Governing Law

21-51 California Legal Forms--Transaction Guide § 51.13

§ 51.13 Definitions

[1] Franchise

[a] California Law

Under the Franchise Investment law, a "franchise" is any contract or agreement, either expressed or implied, whether oral or written, between two or more persons to which the following apply [*Corp. Code § 31005(a)*; see Commissioner of Corporations Release No. 3-F (revised 1994)]:

- The franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services;
- The right is granted to engage in business under a marketing plan or system prescribed in substantial part by a franchisor [*see* [6], *below*];
- The operation of the franchisee's business pursuant to the plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and
- The franchisee is required to pay, directly or indirectly, a franchise fee for the right to enter into the business [*see* [7], *below*].

The term "franchise" does not include a nonprofit organization operated on a cooperative basis by and for independent retailers that wholesales goods and services primarily to its member retailers and to which all of the following applies [*Corp. Code § 31005(c)*]:

- Control and ownership of each member is substantially equal.
- Membership is limited to those who will avail themselves of the services furnished by the

organization.

- Transfer of ownership is prohibited or limited.
- Capital investment receives no return.
- Substantially equal benefits pass to the members on the basis of patronage of the organization.
- Members are not personally liable for obligations of the organization in the absence of a direct undertaking or authorization by them.
- Services of the organization are furnished primarily for the use of the members.
- Each member and prospective member is provided with an offering circular that complies with statutory specifications [*see Corp. Code § 31111*].
- No part of the receipts, income, or profit of the organization is paid to any profit making entity, except for arms-length payments for necessary goods and services, and members are not required to purchase goods or services from any designated profit making entity.

The nonprofit organization is subject to an action for rescission or damages under *Civ. Code § 3343.7* if the organization fraudulently induced the plaintiff to join the organization [*Corp. Code § 31005(d)*]. For this purpose, "fraudulently induced" includes the failure to disclose all required information [*see Corp. Code §§ 31005(c)(8), 31111*] unless the defendant proves that (1) the plaintiff knows the facts concerning the untruth or omission, or (2) the defendant exercised reasonable care and did not know (or would not have known) of the untruth or omission [*Civ. Code § 3343.7*]. As a consequence of being fraudulently induced to join the organization, a plaintiff is entitled to rescission of the membership contract and any damages sustained as a consequence of joining [*Civ. Code § 3343.7*].

[b] Federal Law

As the Federal Trade Commission observed in the course of holding hearings on the regulation of sales of franchises [*see Ch. 51A, Franchise Registration*], although there is not complete agreement on precisely what elements are common to all franchises, it is clear that "... franchising is not an industry, a product or a service, but is instead a method of doing business or a method of distribution. Typically, a company (the franchisor) owns a trademark that it licenses others to use upon condition that the user (the franchisee) conform its business operations to the franchisor's standards, insofar as it is associated with the trademark. The franchisor is usually distributing or marketing a product, service, or a method of selling a product or service through a limited number of distributors (franchisees), whose methods of operation may be subject to the control and supervision of the franchisor. A franchisor may also provide extensive assistance to its franchisees in terms of their organization, promotional activities, management, marketing plan, methods of operation or other business affairs" [*43 Fed. Reg. 246, 59623 (1978)*].

The Federal Trade Commission defines "franchise" as follows [*16 C.F.R. § 436.2(a)*]:

- The term "franchise" means any continuing commercial relationship created by any arrangement or arrangements whereby a person (the "franchisee") offers, sells, or distributes to any person other than a "franchisor", goods, commodities, or services that are: (1) identified by a trademark, service mark, trade name, advertising or other commercial symbol designating another person, the franchisor; or (2) indirectly or directly required or advised to meet the quality standards prescribed by a franchisor when the franchisee operates under a name using the trademark, service mark, trade name, advertising or other commercial symbol designating the franchisor; or

- The franchisor exerts or has authority to exert a significant degree of control over the franchisee's method of operation, including but not limited to, the franchisee's business organization, promotional activities, management, marketing plan or business affairs; or
- The franchisor gives significant assistance to the franchisee in the latter's method of operation, including, but not limited to, the franchisee's business organization, management, marketing plan, promotional activities, or business affairs; provided, however, that assistance in the franchisee's promotional activities does not, in the absence of assistance in other areas of the franchisee's method of operation, constitute significant assistance; or
- The franchisee offers, sells, or distributes to any person other than a franchisor goods, commodities, or services that are: (1) supplied by a franchisor; (2) supplied by a third person (such as a supplier) with whom the franchisee is directly or indirectly required to do business by the franchisor; or (3) supplied by a third person (such as a supplier) with whom the franchisee is directly or indirectly advised to do business by a franchisor when that third person is affiliated with the franchisor; and
- The franchisor (1) secures for the franchisee retail outlets or accounts for the goods, commodities, or services; (2) secures for the franchisee locations or sites for vending machines, rack displays, or any other product sales display used by the franchisee in the offering, sale, or distribution of the goods, commodities, or services; or (3) provides to the franchisee the services of a person able to secure the retail outlets, accounts, sites or locations; and
- The franchisee is required as a condition of obtaining or commencing the franchise operation to make a payment or a commitment to pay to the franchisor, or to a person affiliated with the franchisor.

Rule 436.2 defines a package or business format franchise as a franchise whereby the franchisee is authorized by the franchisor to operate a business conforming to a format established by the franchisor and identified by the franchisor's trademark. The exercise by the franchisor of "significant control" or the granting of "significant assistance" is the key to coverage under the Rule. "Significant types of control" include site approval, site design or appearance requirements, hours of operation, production techniques, accounting practices, personnel policies and practices, promotional campaigns requiring, franchisee participation or financial contribution, customer restrictions, location or territorial restrictions. Significant assistance is deemed to include: formal sales, repair or business training programs, establishing accounting systems, furnishing management, marketing or personnel advice, selecting site locations, furnishing a detailed operating manual. "Significant control" or "significant assistance" may also include: requirements that a franchisee service or repair a product (except warranty work), inventory controls, required displays of goods, and on-the-job assistance in sales or repairs. Controls not considered significant in this context include trademark controls designed solely to protect the owner's legal ownership rights under state and federal law; health or safety restrictions required by law; and assistance to distributors in obtaining financing necessary to transact business [see 16 C.F.R. § 436.2(a)(i)(A)(2), (B), 436.2(a)(2)].

Rule 436.2 also includes in its definition of franchise "business opportunity ventures," which are systems of distribution of goods or services that do not bear the franchisor's trademark [see 16 C.F.R. § 436.2(a)(1)(ii)].

For tax purposes, the term "franchise" includes an agreement that gives one of the parties to the agreement the right to distribute, sell, or provide goods, services, or facilities within a specified area [I.R.C. § 1253(b)(1)].

[c] Applicable Law

The federal definition of "franchise" is controlling. Although generally broader than the California FIL definition, the

federal definition does not cover certain franchises that are subject to registration under state law. Further, certain exemptions from registration under California laws are not available under the federal rule. If a business venture would not be a franchise or is exempt from registration under California law, but would still be subject to the federal rules, the federal rules control [*see* 44 Fed. Reg. No. 166, p. 49971 (1979)].

[2] Petroleum Products Franchise

[a] California Law

For purposes of the Franchise Investment law, the term "franchise" also means the following [*Corp. Code* § 31005(b)]:

- Any contractual agreement between a petroleum corporation or distributor and a gasoline dealer, or between a petroleum corporation and distributor, under which the petroleum distributor or the gasoline dealer is granted the right to use a trademark, trade name, service mark, or other identifying symbol or name owned by the other party to the agreement, or any agreement between a petroleum corporation or distributor and a gasoline dealer, or between a petroleum corporation and distributor, under which the petroleum distributor or the gasoline dealer is granted the right to occupy premises owned, leased, or controlled by the other party to the agreement, for the purposes of engaging in the retail sale of petroleum and other products of the other party to the agreement.
- Any contract between a refiner and a petroleum distributor, between a refiner and a petroleum retailer, between a petroleum distributor and another petroleum distributor, or between a petroleum distributor and a petroleum retailer, under which a refiner or petroleum distributor authorizes or permits a petroleum retailer or petroleum distributor to use, in connection with the sale, consignment, or distribution of gasoline, diesel, gasohol, or aviation fuel, a trade mark that is owned or controlled by that refiner or by a refiner that supplies fuel to the petroleum distributor authorizing or permitting the use.

The term "franchise" as defined in the second category above specifically includes any of the following [*Corp. Code* § 31005(b)]:

- Any contract under which a petroleum retailer or petroleum distributor is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of fuel under a trademark that is owned or controlled by that refiner, or by a refiner that supplies fuel to the petroleum distributor authorizing or permitting the occupancy.
- Any contract pertaining to the supply of fuel that is to be sold, consigned, or distributed under a trademark owned or controlled by a refiner, or under a contract that has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, fuel was sold, consigned, or distributed under a trademark owned and controlled on that date by a refiner.
- The unexpired portion of any franchise, that is transferred or assigned as authorized by the provisions of that franchise or by any applicable provision of state law that permits that transfer or assignment without regard to any provision of the franchise.

For purposes of the Franchise Dealers Fair Practices Act, "franchise" is defined to mean any contract between a refiner and a distributor, between a refiner and a retailer, between a distributor and another distributor, or between a distributor and a retailer, under which a refiner or distributor authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of gasoline, diesel, gasohol, or aviation fuel, a trademark that is owned or controlled by that refiner or by a refiner that supplies fuel to the distributor that authorizes or permits that use. The term "franchise" includes the following [*Bus. & Prof. Code* § 21140]:

- Any contract under which a retailer or distributor is authorized or permitted to occupy leased marketing premises, which are to be used in connection with the sale, consignment, or distribution of fuel under a trademark that is owned or controlled by that refiner or by a refiner that supplies fuel to the distributor that authorizes or permits the occupancy.

- Any contract pertaining to the supply of fuel that is to be sold, consigned, or distributed under a trademark owned or controlled by a refiner, or under a contract that has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, fuel was sold, consigned, or distributed under a trademark owned and controlled on that date by a refiner.

- The unexpired portion of any franchise, as defined by the preceding provisions of this section, that is transferred or assigned as authorized by the provisions of the franchise or by any applicable provision of state law permitting transfer or assignment without regard to any provision of the franchise.

[b] Federal Law

The term "franchise" includes a contract under which a retailer or distributor is authorized or permitted to occupy leased marketing premises that are to be used in connection with the sale, consignment, or distribution of motor fuel under a trademark. The trademark is owned or controlled by the refiner that supplies motor fuel to the distributor that authorizes or permits the occupancy. "Franchise" includes a contract pertaining to the supply of motor fuel to be sold, consigned, or distributed under a trademark owned or controlled by the refiner. The term includes the unexpired portion of a franchise properly transferred or assigned [*see 15 U.S.C. § 2801(1)(B)*].

[3] Marketing Plan

The presence of a prescribed marketing plan is considered crucial to the concept of a franchise. The Commissioner has stated that the following elements in an agreement, alone or together, may suggest the existence of a marketing plan [Commissioner of Corporations Release No. 3-F (revised 1994)]:

- Prescribing or limiting resale prices.
- Restrictions on use of advertising or mail order business.
- Requiring display racks.
- Giving detailed directions and advice concerning operating techniques.
- Assigning exclusive territory.
- Providing for uniformity or distinctiveness of appearance.
- Limiting sale of competitive products.
- Limiting use of products.
- Requiring approval of advertising and signs.
- Prohibiting engaging in other activities.

- Providing training sessions.
- Assigning contract.
- Use of manual.
- Providing "trade secrets."

While any one of the examples of restrictions may not amount to "a marketing plan or system prescribed in substantial part by a franchisor," several such restrictions taken together may be sufficient to amount to a marketing plan or system.

A marketing plan or system may be "prescribed by implication," even absent an obligation on the part of the franchisee to observe it, if a specific sales program is outlined, suggested, recommended, or otherwise originated by the franchisor. Thus, a sales program may be "prescribed" by the franchisor when the franchisor supplies the franchisee with sales aids or props, such as demonstration kits, films, or detailed instructions for personal introduction and presentation of the product, possibly including the text of a sales pitch and especially when the program is supported by training material, courses, or seminars. Even a non-mandatory program may constitute a prescribed program, particularly when there are negative covenants against the use of specified modes of distribution such as a prohibition of sales to retail stores. Therefore, a provision in the agreement that the franchisee is to be considered an independent contractor or that the franchisor is not concerned with the means employed by the franchisee to make sales, or with the manner in which the business of the franchisee is, does not preclude the possibility that the franchisor's business is operated pursuant to a marketing plan or system prescribed in substantial part by the franchisor. As a result, such an agreement, if other requirements of the definition are satisfied, may be a franchise [Commissioner of Corporations Release No. 3-F (revised 1994)].

Nevertheless, the prescribed marketing plan or system requirement is not satisfied merely because an agreement imposes procedures or techniques on the business operator that are customarily observed in business relationships in the particular trade or industry, even though, to some extent, they may restrict the freedom of action or the discretion of the operator. Thus, an obligation imposed on a distributor to use best efforts to make or increase sales of the licensor's product is too general a requirement to amount to a marketing plan or system. If a television station is licensed to produce a copyrighted game show, there is no marketing plan or system merely because the station is required to follow the format of the show and use props provided by the licensor. If a restaurant is authorized to be conducted under a trade name without the imposition of any other marketing plan or system, a requirement that public liability insurance be maintained in a certain amount does not characterize the agreement as a franchise because that requirement is not a substantial limitation and is normal and customary in an agreement in which the licensor may be exposed to liability as a result of the licensee's operation of the business. Likewise, if a manufacturer is licensed by an inventor to make and sell a patented device subject to a royalty reserved by the inventor, or if a retail store is licensed to distribute trademarked articles subject to a royalty reserved by the manufacturer, it would be customary to require maintenance of records and accounts by the licensee for verification of the royalty due under the agreement. Specifications to be observed by a licensee in the manufacture of a patented device designed to protect the quality of the product are normal in those circumstances. These requirements in and of themselves do not amount to a marketing plan or system [Commissioner of Corporations Release No. 3-F (revised 1994)].

[4] Area Franchise

An "area franchise" is any franchise between a franchisor and a franchisee whereby the franchisee is granted the right to operate more than one unit within a specified geographical area [*Corp. Code § 31008; see Corp. Code § 31010* ("franchise" includes "area franchise")].

[5] Subfranchise

A "subfranchise" is any contract or agreement between a franchisor and a subfranchisor whereby the subfranchisor is granted the right, for consideration given in whole or in part for that right, to sell or negotiate the sale of franchises in the name or on behalf of the franchisor. A contract or agreement that is a franchise does not become a subfranchise merely because under its terms a person is granted the right to receive compensation for referrals to a franchisor or subfranchisor or to receive compensation for acting as a sales representative on their behalf [*Corp. Code § 31008.5*; see *Corp. Code § 31010* ("franchise" includes "subfranchise")]. A "subfranchisor" is any person to whom a subfranchise is granted [*Corp. Code § 31009*].

[6] Substantially Associated With Trademark or Other Commercial Symbol

To constitute a franchise, the operation of the franchisee's business must be substantially associated with the franchisor's commercial symbol, such as a trademark, service mark, trade name, or logotype. An agreement is not a franchise, even though it prescribes a detailed marketing plan or system for the operation of the business authorized by the plan, if that business is not substantially associated with a commercial symbol of the franchisor or the franchisor's affiliate. If a franchisee is granted the right to use a franchisor's symbol, that part of the franchise definition is satisfied even if the franchisee is not obligated to display the symbol [Commissioner of Corporations Release No. 3-F (revised 1994)].

Moreover, in line with the objective of the Franchise Investment Law, for the operation of the franchisee's business to be substantially associated with the symbol, it must be communicated to the customers of the franchisee. A commercial symbol that a supplier of goods or services only uses on its invoices or in its advertising to distributors, but that the supplier does not permit the distributors to show in dealing with their customers, is not in the eyes of the public substantially associated with the operation of the supplier. However, if the trademark is communicated to the supplier's customers, the appearance of a unified operation is established and it is immaterial whether the advertising containing the trademark is originated, distributed, or paid for by the supplier or by the distributor. In resolving the question whether there is a substantial association between the licensee's business and the licensor's commercial symbol, it is necessary to consider whether that commercial symbol is brought to the attention of the licensee's customers to such an extent that the customers regard the licensee's establishment as one in a chain identified with the licensor. Thus for example, the various manufacturing plants with which the franchisor entered into service contracts with, and that were later assigned to the franchisees, were considered "customers" of the franchisees. Since the franchisor communicated its name to these customers as a result of negotiating the service contracts and by being a named party to the service contracts, the franchisees' businesses were substantially associated with the commercial symbol of the franchisor [Commissioner of Corporations Release No. 3-F (revised 1994)].

[7] Franchise Fee

A "franchise fee" is any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay for the right to enter into a business under a franchise agreement, including, but not limited to, payments for those goods and services [*Corp. Code § 31011*]. However, the following are not considered to constitute the payment of a franchise fee [*Corp. Code § 31011*]:

- The purchase or agreement to purchase goods at a bona fide wholesale price if no obligation is imposed on the purchaser to purchase or pay for a quantity of goods in excess of that which a reasonable businessman normally would purchase by way of a starting inventory or supply or to maintain a going inventory or supply.
- The payment of a reasonable service charge to the issuer of a credit card by an establishment accepting or honoring that credit card.
- Amounts paid to a licensed trading stamp company [*see Bus. & Prof. Code § 17750 et seq.*] by a

person issuing trading stamps in connection with the retail sale of merchandise or service.

A franchise fee may be payable in a lump sum or in installments. The amount of the installment payments may be made to depend on gross receipts or net profits in the form of a royalty, or it may be charged on units of merchandise ordered or sold by the franchisee. Thus, the franchise fee may be contained in the price charged by the franchisor or an affiliate of the franchisor for goods or services supplied to the franchisee or in the rental fee payable by the franchisee for business premises or equipment rented from the franchisor or an affiliate of the franchisor [Commissioner of Corporations Release No. 3-F (revised 1994)].

The franchise law defines a franchise fee as a fee paid for the right to do business. A person is not a franchisee if the person does not invest anything in return for the right to enter into business with or for a so-called franchisor, makes no required contribution of capital, makes no unrecoverable investment in the so-called franchisor, is not required to purchase any inventory, is not required to purchase services from the so-called franchisor in order to become a dealer, and places none of his or her own funds, even the de minimis amounts required under the franchise law, at risk in exchange for a dealership. Ordinary business expenses paid during the course of business cannot be counted as a franchise fee [*Thueson v. U-Haul Int'l, Inc.* (2006) 144 Cal. App. 4th 664, 676, 50 Cal. Rptr. 3d 669] .

The Corporations Commissioner considers this statutory definition to be broad, including any fee or charge that a franchisee is required to pay or agrees to pay for the right to enter into a business under a franchise agreement. In accordance with this definition, any fee or charge that the franchisee is required to pay to the franchisor or an affiliate of the franchisor for the right to engage in business is a franchise fee regardless of the designation given to, or the form of, that payment. Whether or not a fee or charge is "required" and whether it is made "for the right to enter into a business," is a mixed question of fact and law [Commissioner of Corporations Release No. 3-F (revised 1994)].

The Corporations Commissioner's opinions have considered the following types of payments as constituting a "franchise fee" [Commissioner of Corporations Release No. 3-F (revised 1994) (citing individual opinions dealing with each of the following)]:

- Performance guarantee or deposit.
- Deposit of money.
- An initial or set-up fee.
- Fee for advertising.
- Nonrefundable bookkeeping charge.
- A payment for training and school expenses.
- Royalty or percentage of gross receipts.
- Charges for sales kits, brochures, programs, forms, decals, shirts, displays and announcements.
- Rental or lease fee.
- Payment for services, such as consulting or management fees.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesGeneral OverviewBusiness & Corporate LawDistributorships
& FranchisesFranchise RelationshipsFranchise Agreements



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A. Governing Law

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[Reserved]

§§ 51.14[Reserved]



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21-51 California Legal Forms--Transaction Guide § 51.20

§ 51.20 Nature of Franchising

A franchise is invariably granted as part of a package, reflecting the franchisor's business and designed to ensure the success of the franchisee's new outlet. Successful franchising is dependent on the existence of a salable product or service. As a rule, therefore, the salability of the product or service (both referred to in the text as product) is established before franchising is attempted. Salability normally is determined by market surveys and either the use of an outlet owned by the producer of the product, or distribution through regular trade channels, wholesalers and retailers, to the ultimate consumers. The franchise itself is typically granted for a period of years and renewed automatically for successive periods of the same duration. The franchise also is also typically limited to a specified geographical area.

Accompanying the franchise are both tangibles and intangibles that vary from company to company and with the nature of the business. The tangibles include inventory and supplies, such as office and promotional items, and may include equipment and even the site itself. Among the intangibles that a franchisor may provide are the following services:

- Location analysis and counsel.
- Store development aid, including lease negotiation.
- Store design and equipment purchasing.
- Initial employee and management training, and continuing management counsel and assistance.
- Advertising and merchandising counsel and assistance.
- Standardized procedures and operations.
- Centralized purchasing with consequent savings.
- Financial assistance in the establishment of the business.

In addition to providing location analysis and counsel, many franchisors insist on the right to approve the franchisee's site, recognizing the importance of location to the success of the business. Furthermore, a number of franchisors, particularly in the food business, prescribe the building design and furnishings because the franchisor has found a design with great appeal to the public.

In return for the franchisee's costs, a franchisee should expect, at a minimum, the following items:

- Home office training.
- Field training.
- Field back-up training.
- A continual flow of promotional business-getting material.
- The availability of a "trouble shooter" to help overcome special and recurring problems.
- Regional and national franchise clinics to make possible beneficial interchange of ideas, experiences, and viewpoints.
- Basic supplies including stationery, flow and control forms, signs, showcards, sales manuals, sales brochures, collection aids, and the like.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises General Overview Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Agreements



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21-51 California Legal Forms--Transaction Guide § 51.21

§ 51.21 Advantages and Disadvantages of Franchising

[1] Basic Considerations

To expand the number of outlets or points of distribution for goods or services, firms have two primary options: the creation of branch or chain operations or franchising independent dealer/distributors. There are four main considerations to be evaluated in determining whether franchising is the more desirable option.

[2] Flexibility and Control

The first factor is flexibility and control. The branch office system allows the firm a free hand to determine how expansion is financed, the setting of prices, the hiring of personnel, purchasing policies, and when unprofitable operations should be shut down or moved. A franchise operation provides little direct control over additional capital investment. Although under-financing could constitute grounds for terminating a franchise, this procedure could entail costly accounting, litigation, and delay. A franchisor also is limited in its power to impose pricing policies and to dictate the sources for the franchisee's supplies.

[3] Financial Considerations

The second factor involves financial considerations. Branch or chain outlets require a considerable capital outlay, including the acquisition of suitable space, the hiring of personnel, inventory storage, and the payment of applicable local taxes. Under a franchise system, these items of capital investment are borne by the franchisee, who must typically pay an annual fee or royalty for the privilege of exercising the franchise.

[4] Compliance With State and Local Laws

The third factor involves the responsibility for compliance with state and local laws. If a business is operated in several states through independent franchisees rather than through branch offices or outlets, the franchisee ordinarily is obligated to ensure that all sales taxes are collected and paid, that state wage and hour laws are observed, that employment taxes and payroll taxes are deducted and paid, and that all other laws relating to employee welfare are

obeyed. In a branch operation, the cost in terms of time and record keeping burdens entailed in meeting these obligations may make a business with a narrow profit margin uncompetitive with locally based independent outlets.

[5] Franchisor's Liability

The fourth factor involves the relative liability of the franchisor for acts of branch managers and franchisees. A branch manager is an agent of the company with authority to bind the company, at least with respect to acts within the scope of the manager's authority. The company may also be secondarily liable for the negligence of the manager in the course of performing his or her duties. Whether a franchisee is considered the agent of the franchisor turns on the degree of control the franchisor may exercise under the franchise agreement, and the extent to which the franchisor, either intentionally or through want of ordinary care, leads third persons to believe that the franchisor and the franchisee are part of the same business [see, e.g., *Kuchta v. Allied Builders Corp.* (1971) 21 Cal. App. 3d 541, 547-548, 98 Cal. Rptr. 588] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesBusiness OpportunitiesBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsGeneral Overview



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21-51 California Legal Forms--Transaction Guide § 51.22

§ 51.22 Trademark Protection

[1] Importance of Trademarks to Franchising

The existence of a trademark is indispensable to franchising. The FTC's compliance guide makes it clear that the Commission considers the franchisor's mark a crucial element of the franchise relationship. The Guide states that the Commission does not intend to cover package or product franchises in which no mark is involved. If a mark is not necessary to a particular distribution arrangement, the supplier may avoid coverage under the rule by expressly prohibiting the use of the mark by the distributor [Final Guide to Compliance With Franchising Rule 436.2]. Thus, the provisions of a distribution and dealership agreement between a petroleum marketer and a gasoline dealer authorizing the dealer to use the petroleum marketer's registered marks in the resale of gasoline were sufficient to constitute the relationship a franchise subject to the rule [Final Guide to Compliance With Franchising Rule 436.2].

[2] Restrictions Over Use

A trademark owner has a legal right to license or assign the use of the trademark [see 15 U.S.C. § 1060]. However, if the trademark owner has caused the mark to lose its significance as an indication of origin, either through acts of commission or omission, it may be found that the owner has abandoned the rights to the trademark [see 15 U.S.C. § 1127]. Purchaser motivation is not a test for determining whether a trade or service mark holder has abandoned the mark [15 U.S.C. § 1127]. In determining whether a registered mark has become a common descriptive name, the primary significance of the mark to the relevant public, rather than purchaser motivation, is the test. A registered mark will not be deemed a common descriptive name solely because it is also used as a name of or to identify a unique product or service [15 U.S.C. § 1064(3)].

Although a registered trademark may not be used in such a way as to restrain trade in violation of the federal antitrust laws [see 15 U.S.C. § 1115(b)], the trademark owner may legitimately control trademark licensees with respect to the nature and quality of the goods or services in connection with which the mark is used, and to see that the mark is not used in a manner as to deceive the public [see 15 U.S.C. §§ 1055, 1127]. Thus, the owner of a trademark has an affirmative duty to invoke some type of control on licensees to prevent loss of property rights under the trademark [see *Siegel v. Chicken Delight, Inc.* (9th Cir. 1971) 448 F.2d 43, 51, cert. denied, 405 U.S. 955 (1972)] .

For discussion of copyrights, see Ch. 103A, *Copyrights* . For detailed coverage of trademark protection, refer to Gilson on Trademarks (Matthew Bender).

[3] Controls Over Premises

A franchisor may require a particular physical layout of the franchise store premises in the interest of protecting the goodwill of the franchisor's trademark. The franchisor may specify design, color of paint, quality of materials, and uniform arrangement of equipment. The franchisor may require the use of distinctive symbols or architectural features, and the franchisor may specify the placement and size of those features and symbols. In addition, the franchisor may also set standards for maintenance of the premises. These requirements may be imposed by the franchise agreement without violating the antitrust laws [see *Susser v. Carvel Corp.* (2d Cir. 1964) 332 F.2d 505, 517] .

[4] Exclusive Trade Provisions

The establishment of exclusive territories in the protection of a trademark does not violate the antitrust laws. Further, a restriction barring the licensee of a trademark from using the licensor's specifications in the manufacture of products sold under another brand name does not violate the antitrust laws [see *Denison Mattress Factory v. Spring-Air Co.* (5th Cir. 1962) 308 F.2d 403, 409, 412] .

The antitrust laws do not require that the licensor of a trademark permit licensees to associate with that trademark other products that are unrelated to those customarily sold under the mark. Trademark licensing agreements requiring the sole use of the trademarked item are not in violation of the antitrust laws if they are reasonably necessary to the protection of the goodwill interest of the trademark owner [*Susser v. Carvel Corp.* (2d Cir. 1964) 332 F.2d 505, 517] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesTrademark LicensingTrademark LawConveyancesFranchises



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21-51 California Legal Forms--Transaction Guide § 51.23

§ 51.23 Equipping the Franchise Premises

Depending on the amount and kind of equipment needed to operate a franchise, the franchisor may do any of the following:

- Require no special equipment or furnishings;
- Sell equipment and furnishings to the franchisee;
- Lease equipment; or
- Make arrangements for the franchisee to purchase or lease the equipment from one or more recommended suppliers [see § 51.24].

Traditionally, tying the purchase of equipment to the sale of a franchise was deemed a tie-in sale in violation of antitrust law. However, the courts now recognize that most franchisees want and expect equipment as part of a total franchise package. Thus, only when the franchisee is *coerced* into purchasing equipment does the issue of antitrust violation arise. If the franchisor has a sound business reason for requiring the franchisee to use certain equipment, a requirement that it be purchased from the franchisor or a specified supplier ordinarily will be upheld. If the equipment is not customized or otherwise tailored to the needs of the franchised business, the franchisor can avoid antitrust problems by listing the equipment needed, and the specifications required, but otherwise leaving the franchisee free to obtain the equipment from another source.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsGeneral Overview



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§ 51.24 Buying Restrictions Imposed on Franchisees

[1] Tying Arrangements

Franchise agreement requirements that the franchisee buy goods or services only from the franchisor ("tying arrangements") may be viewed as exclusionary conditions, violative of both Section 3 of the Clayton Act [15 U.S.C. § 14] and Section 1 of the Sherman Antitrust Act [15 U.S.C. § 1]. These arrangements may also be treated as unfair or deceptive trade practices under Section 5 of the Federal Trade Commission Act [15 U.S.C. § 45]. To establish that an unlawful tying arrangement exists, the following must be shown [see *Siegel v. Chicken Delight, Inc.* (9th Cir. 1971) 448 F.2d 43, 47] :

- That the scheme in question involves two distinct items and provides that one, the tying product, may not be obtained unless the other, the tied product, is also purchased;
- That the tying product possesses sufficient economic power appreciably to restrain competition in the tied product market; and
- That a not insubstantial amount of commerce is affected by the arrangement.

Until 2006, the fact of sufficient economic power could be presumed if the tying product was patented. The Supreme Court concluded, however, that the presumption cannot be supported in view of the patent law [*Ill. Tool Works, Inc. v. Indep. Ink, Inc.* (2006) 547 U.S. 28, 126 S. Ct. 1281, 1284, 1291, 164 L. Ed. 2d 26 (any conclusion that particular tying arrangement is unlawful must be supported by proof of power in relevant market rather than by mere presumption, whether or not tying product is patented)].

Legal justification may exist for certain types of tying arrangements. For example, a trademark licensor owes an affirmative duty to the public to ensure that the trademark continues to represent that which it purports to represent in the hands of licensees. However, restraint of trade in protection of the trademark can be justified only in the absence of less restrictive alternatives. Thus, the only situation in which the protection of the goodwill related to the trademark may

necessitate the use of tying clauses is when specifications for a substitute would be so detailed that they could not practicably be supplied. In most situations, mere specification of the type and quality of the product to be used in connection with the tying item is protection enough [see *Siegel v. Chicken Delight, Inc.* (9th Cir. 1971) 448 F.2d 43, 51] .

A tie-in that is instituted at the inception of a new business with a highly uncertain future will be viewed as reasonable and not in violation of the Sherman Antitrust Act for a limited period of time [see *United States v. Jerrold Electronics Corp.* (E.D. Pa. 1960) 187 F. Supp. 545, 557-558 , *aff'd*, 365 U.S. 567 (1961)] . A decision to tie the sale of one type of goods to the sale of another type of goods may also be reasonable when it can be shown that a sound business reason exists to do so. For example, if it is reasonable to tie the sale of equipment to a requirement that franchisees agree to a contract for the service and repair of that equipment, and the limited knowledge and instability of the equipment make specifications an impractical if not impossible alternative, a policy requiring the purchase of all components of the equipment from the franchisor would be viewed as legitimate under the Sherman Antitrust and the Clayton Act until the need for compulsory service contracts disappears and the need for the exclusive sale of complete systems is eliminated [see *United States v. Jerrold Electronics Corp.* (E.D. Pa. 1960) 187 F. Supp. 545, 560 , *aff'd*, 365 U.S. 567 (1961)] . When the franchise agreement prohibits the franchisee from using supplies from other sources that, in the franchisor's opinion, would not be suitable, and the franchisor's approval of supplies from other sources is not unreasonably withheld, the restraint will be viewed as legitimate [see *United States v. Jerrold Electronics Corp.* (E.D. Pa. 1960) 187 F. Supp. 545, 561-562 , *aff'd*, 365 U.S. 567 (1961)] .

A trademark may constitute a separate tying item if the trademark can be viewed as a separate and distinct product; an agreement granting a franchisee the right to use this type of trademark on the condition that the franchisee sell only the franchisor's products under the trademark can constitute an illegal tying arrangement. There are two functional categories of trademarks: (1) those that identify the source of a product; and (2) those that warrant a certain method of doing business and certain quality standards, in which case the franchisee does not pass on a branded product but actually prepares a product under the franchisor's standards. In the latter category, the trademark and the tied items (ingredients for the finished product) may be separate products. In the former category, the source trademark, the product, and the trademark are so inextricably interrelated in the mind of the consumer as to preclude any finding that the trademark is a separate item for tie-in purposes [*Hamro v. Shell Oil Co.* (9th Cir. 1982) 674 F.2d 784, 787, 788 ; see *Krehl v. Baskin-Robbins Ice Cream Co.* (9th Cir. 1982) 664 F.2d 1348, 1354] .

[2] Requirements for Purchases From Third Parties

Requirements imposed on franchisees that the franchisees make purchases of materials or services from third parties "sponsored" by the franchisor are viewed as illegal restraints on competition. Thus, if an agreement between a franchisor and a third-party supplier provides that the franchisor will assist the supplier in perfecting sales arrangements with its franchisees and then bolsters its agreement with threats and coercive practices directed towards its franchisees, the Federal Trade Commission is warranted in finding that the effect of the plan is as though the franchisor had agreed to require its franchisees to buy the supplier's products, and had indeed done so. The effect of such a plan is an unfair and illegal restraint on competition [*Atlantic Refining Co. v. Federal Trade Comm'n* (1965) 381 U.S. 357, 369-371, 85 S. Ct. 1498, 14 L. Ed. 2d 443] . In this situation, an unfair method of competition will be found if the franchisor has dominant economic power over its franchisees, the franchisor exercises that power in order to fulfill its agreement to sponsor the supplier's products, and anticompetitive effects result from the exercise of that power [see *FTC v. Texaco, Inc.* (1968) 393 U.S. 223, 226, 89 S. Ct. 429, 21 L. Ed. 2d 394] . Similarly, a requirement imposed on franchisees by the franchisor that they use the services of one of a number of specified third parties approved by the franchisor compels contracts in restraint of commerce in violation of the Sherman Antitrust Act [see *Arthur Murray, Inc. v. Reserve Plan, Inc.* (8th Cir. 1969) 406 F.2d 1138, 1143-1145] .

An exception to this general rule exists if protection of the goodwill embodied in a trademark is involved. Some quality control is essential for the protection of goodwill and required by law for a proper trademark licensing agreement [see

Susser v. Carvel Corp. (2d Cir. 1964) 332 F.2d 505, 515] . However, the only situation in which the protection of the trademark's goodwill may necessitate the use of tying clauses is when the specifications for a substitute for the tied product would be so detailed that they could not practicably be supplied [see *Standard Oil Co. v. United States* (1949) 337 U.S. 293, 306, 69 S. Ct. 1051, 93 L. Ed. 1371] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade LawPrice Fixing & Restraints of TradeTying ArrangementsGeneral OverviewAntitrust & Trade LawTrade Practices & Unfair CompetitionGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsFranchise AgreementsBusiness & Corporate LawDistributorships & FranchisesTrademark Licensing



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§ 51.25 Payments to Franchisor

A franchisor is typically compensated by one of the following four different methods or combinations:

- One sizable franchise charge payable at the time of grant of the franchise, without any royalties on the franchisee's sales and without any profit on supplies that the franchisor provides.
- A small franchise charge, plus royalties on the franchisee's sales.
- A smaller franchise charge, plus a profit on supplies that the franchisor furnishes.
- A smaller franchise charge, plus royalties on the franchisee's sales and a profit on the supplies that the franchisor provides.

The compensation to the franchisor, regardless of the method of payment, pays for the rights granted in the form of the franchise, at least those tangibles that the franchisor initially provides, and the intangibles provided throughout the duration of the franchise, including the renewal periods. The franchisor invariably charges for subsequent tangibles, either at approximate cost or cost plus some profit, as appropriate to the overall method of compensation. At the expiration of the initial franchise period, the franchise typically is renewed without charge, or at a minimal charge to apply toward payment of the record keeping costs.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Franchise Relationships General Overview Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Fees



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§ 51.26 Termination and Nonrenewal

[1] Termination for Good Cause

Under the Franchise Relations Act [*Bus. & Prof. Code § 20000 et seq.*], a franchisor may not terminate a franchise before the expiration of its term except for good cause [*Bus. & Prof. Code § 20020*]. "Good cause" is not defined, but it does include breach of the franchise agreement, if not cured within a reasonable period after the franchisee is notified of the breach [*Bus. & Prof. Code § 20020*]. In addition, the Act specifies a number of occurrences that suffice to make immediate termination without opportunity to cure "reasonable" [*Bus. & Prof. Code § 20021*]. Presumably a "reasonable" termination will be deemed to have been based on good cause, but the Act fails to make this explicit. The specified events giving rise to reasonable termination include, among other things, the inability to continue operating the business, illegal conduct or conduct reflecting materially and unfavorably on the franchise system, repeated breaches of the franchise agreement, and failure to pay sums due to the franchisor within five days of receipt of a delinquency notice [*Bus. & Prof. Code § 20021*].

[2] Nonrenewal

A franchisor may not refuse to renew a franchise unless the franchisor provides the franchisee at least 180 days prior written notice of its intention not to renew; and one of the following grounds exists [*Bus. & Prof. Code § 20025*]:

- During the 180 days before the expiration of the franchise, the franchisor permits the franchisee to sell the business to a purchaser meeting the franchisor's then current requirements for granting new franchises, or, if the franchisor is not granting a significant number of new franchises, the then current requirements for granting renewal franchises.
- The refusal to renew is not for the purpose of converting the franchisee's business premises to operation by employees or agents of the franchisor for the franchisor's own account, except that a franchisor may exercise a right of first refusal to purchase the franchisee's business, and the franchisor agrees not to seek to enforce any covenant of the nonrenewed franchisee not to compete with the franchisor or the franchisor's other franchisees after the expiration of the franchise.

- The existence of grounds that would justify termination before expiration of the franchise [*see Bus. & Prof. Code §§ 20020, 20021; see also [1], above*].
- The franchisee and the franchisor agree not to renew the franchise.
- The franchisor withdraws from distributing its products or services through franchises in the geographic market served by the franchisee, provided that the following conditions are satisfied:
 - The franchisor agrees not to seek to enforce any covenant of the nonrenewed franchisee not to compete with the franchisor or the franchisor's other franchisees after the expiration of the franchise.
 - The failure to renew is not for the purpose of converting the business conducted by the franchisee pursuant to the franchise agreement to operation by employees or agents of the franchisor for that franchisor's own account.
 - If the franchisor determines to sell, transfer, or assign its interest in a marketing premises occupied by a franchisee whose franchise agreement is not renewed and (1) the franchisor, during the 180-day period after giving notice offers the franchisee a right of first refusal of at least 30 days duration of a bona fide offer, made by another to purchase the franchisor's interest in the premises; or (2) in the case of the sale, transfer, or assignment of the franchisor's interest in one or more other controlled marketing premises, the prospective transferee in good faith offers the franchisee a franchise on substantially the same terms and conditions currently being offered by that other person to other franchisees.
- The franchisee fails to agree to changes in the terms of the franchise that conform the agreement to the franchisor's current customary renewal franchises.

[3] Notice

Required notices of termination or nonrenewal must be in writing; and delivered personally, by registered, certified or other receipted mail, or by telegram. The notice must state the intention to terminate or not renew, the reasons for the action, and the effective date of termination, nonrenewal, or expiration [*Bus. & Prof. Code § 20030*].

[4] Inventory

Under the Franchise Relations Act, the only sanction expressly provided is a requirement that the franchisor terminating or failing to renew a franchise in violation of the Act must offer to repurchase the franchisee's resalable inventory meeting the franchisor's present standards that is required by the franchise agreement or commercial practice and held for use or sale in the franchised business. The price is the lower of the fair wholesale market value or the price paid by the franchisee. The franchisor is not liable for offering to purchase personalized items that have no value to the franchisor in the business that it franchises. [*Bus. & Prof. Code § 20035; see JRS Products, Inc. v. Matsushita Electric Corporation of America (2004) 115 Cal. App. 4th 168, 178, 8 Cal. Rptr. 3d 840 (repurchase of inventory is not exclusive remedy for wrongful termination of franchise pursuant to Bus. & Prof. Code § 20035); see discussion below*]. The franchisor may offset any sums owed the franchisor or its subsidiaries by the franchisee pursuant to the franchise or any ancillary agreement against the repurchase offer [*Bus. & Prof. Code § 20036*].

A franchisee may seek legal or equitable relief for termination or nonrenewal prohibited by the statute [*see Bus. & Prof.*

Code § 20037 (right to sue under any other law remains); *JRS Products, Inc. v. Matsushita Electric Corporation of America* (2004) 115 Cal. App. 4th 168, 178, 8 Cal. Rptr. 3d 840 (plaintiff could pursue breach of contract claim against franchisor for wrongful termination of franchise agreement, but compensatory and punitive damage awards for intentional interference with prospective economic advantage were not permissible); *Civ. Code § 1428* (obligation arising from operation of law enforceable in civil proceeding); *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.* (1976) 65 Cal. App. 3d 121, 131, 135 Cal. Rptr. 192 (enforceability in law or equity of right created by statute which does not prescribe remedy)].

[5] Survivorship

Under the Franchise Relations Act, franchisors are prohibited from denying the surviving spouse, heirs, or estate of a deceased franchisee (or majority shareholder of the franchisee) the opportunity to participate in the ownership of a franchise for a reasonable time after the death of that person. During that period, the survivor must either satisfy all of the then current requirements for qualification as a purchaser or transfer the franchise to one who satisfies the then current standards for new franchisees, or sell, transfer, or assign the franchise to a person who satisfies the franchisor's then current standards for new franchisees. The survivor must maintain all standards and obligations of the franchise [*Bus. & Prof. Code § 20027(a)*]. This restriction, however, does not prohibit a franchisor from exercising its right of first refusal to buy the franchise after receipt of a good faith offer [*Bus. & Prof. Code § 20027(b)*]. The foregoing does not apply to bequests or intestate successions before January 1, 1984, or to any agreement in effect before that date except an agreement for an indefinite term [*Bus. & Prof. Code § 20027(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesRemediesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesTerminationsGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesTerminationsGood Cause



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51 FRANCHISE AGREEMENTS

PART II. LEGAL BACKGROUND

C. Specific Types of Franchises

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§ 51.40 Motor Vehicle Franchises

[1] Motor Vehicle Franchise Agreement

A "franchise" is a written agreement between two or more persons to which all of the following apply [*Veh. Code* § 331(a)]:

- The franchisee and franchisor have a commercial relationship of definite duration or continuing indefinite duration.
- The franchisee is granted the right to:
 - Offer for sale or lease, or to sell or lease, at retail, new motor vehicles or new trailers subject to identification [*see Veh. Code* § 5014.1] manufactured or distributed by the franchisor; or
 - The right to perform authorized warranty repairs and service; or
 - The right to perform any combination of these activities.
- The franchisee constitutes a component of the franchisor's distribution system.
- The operation of the franchisee's business is substantially associated with the franchisor's trademark, trade name, advertising, or other commercial symbol designating the franchisor.
- The operation of a portion of the franchisee's business is substantially reliant on the franchisor for a continued supply of new vehicles, parts, or accessories.

The term "franchise" does not include an agreement entered into by a manufacturer or distributor and a person if all the

following apply [*Veh. Code* § 331(b)]:

- The person is authorized to perform warranty repairs and service on vehicles manufactured or distributed by the manufacturer or distributor.
- The person is not a new motor vehicle dealer franchisee of the manufacturer or distributor.
- The person's repair and service facility is not located within the relevant market area of a new motor vehicle dealer franchisee of the manufacturer or distributor.

[2] Procedure for Terminating Existing Franchise

Veh. Code § 3060 *et seq.* regulate the termination, establishment, and relocation of motor vehicle dealership franchises and business dealings between a motor vehicle franchisor and its franchisees [*see Veh. Code* § 3062(e)(1) ("motor vehicle dealership" defined)]. Several distinct procedural steps must be followed before a franchisor may terminate or refuse to continue any existing franchise.

With respect to the termination of a franchise, the franchisor must give the franchisee and the New Motor Vehicle Board written notice of the termination, specifying the grounds for terminating or refusing to continue a franchise. Sixty days before the effective date of any proposed termination or refusal to continue the franchise, the franchisor must send a written notice to the franchisee and to the New Motor Vehicle Board stating the specific grounds for termination or refusal to continue [*Veh. Code* §§ 3060(a)(1)(A)]. The franchisor must send a second written notice to the franchisee and the Board 15 days before the effective date setting forth the specific grounds for termination or refusal to continue if due to any of the following [*Veh. Code* § 3060(a)(1)(B)]:

- Transfer of any ownership or interest in the franchise without the consent of the franchisor (which may not be unreasonably withheld).
- Misrepresentation by the franchisee in applying for the franchise.
- Insolvency of the franchisee, or filing of a petition for bankruptcy or receivership by or against the franchisee.
- Any unfair business practice by the franchisee after a written warning of the practice.
- Failure of the dealer to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer is in fact going out of business, except for circumstances beyond the direct control of the dealer or by order of the department.

[3] Statutory Notice Requirements

When a written notice of termination is given by the franchisor, the first page of the notice must contain, in at least 12-point bold type and circumscribed by a line to segregate it from the rest of the text, one of two prescribed statements [*Veh. Code* § 3060(a)(1)(C)]. The 60-day notice of termination must contain the following statement [*Veh. Code* § 3060(a)(1)(C)]:

"NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the termination of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 30

calendar days after receiving this notice or within 30 days after the end of any appeal procedure provided by the franchisor or your protest right will be waived."

The 15-day notice of termination must contain the following statement [*Veh. Code § 3060(a)(1)(C)*]:

"NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the termination of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 10 calendar days after receiving this notice or within 10 days after the end of any appeal procedure provided by the franchisor or your protest appeal right will be waived."

[4] Filing Protest With Board

The franchisee may file a protest with the Board within 30 days after receiving a 60-day notice that satisfies the statutory notice requirements, or within 30 days after the end of any appeal procedure provided by the franchisor, or within 10 days after receiving a 15-day notice that satisfies the statutory notice requirements, or within 10 days after the end of any appeal procedure provided by the franchisor [*Veh. Code § 3060(a)(2)*]. The Board then must notify the franchisor that a timely protest has been filed, that a hearing is required, and that the franchisor may not terminate or refuse to continue until the Board makes its findings [*Veh. Code § 3060(a)(2)*]. In the absence of a protest, the franchisor cannot act until either the period for filing a protest has elapsed or the franchisor has received the consent of the franchisee to the termination or refusal to continue [*Veh. Code § 3060(a)(3)*].

One or more specific issues raised by a protest or petition filed with the Board may be resolved without a hearing if stipulated decisions and orders submitted by the parties are adopted by the Board [*Veh. Code § 3050.7(a)*]. Except for stipulated issues, the Board must conduct a hearing and find good cause for termination or refusal to continue [*Veh. Code § 3060(a)(2)*; see *Duarte & Witting, Inc. v. New Motor Vehicle Board* (2002) 104 Cal. App. 4th 626, 637, 128 Cal. Rptr. 2d 501 (Board had implied authority to dismiss protest when undisputed facts demonstrated good cause for franchise termination as matter of law)]. Guidelines for the Board are set forth in *Veh. Code § 3061*.

[5] Board's Jurisdiction to Modify or Replace Existing Franchises

The Board's jurisdiction also extends to the modification and replacement of existing franchises. A franchisor may not act to adversely affect a franchisee by modifying or replacing the franchise unless the Board and each affected franchisee is given written notice at least 60 days in advance of any action [*Veh. Code § 3060(b)(1)*]. When a written notice of modification or replacement is given by the franchisor, the first page of the notice must contain, in at least 12-point bold type and circumscribed by a line to segregate it from the rest of the text, the following statement [*Veh. Code § 3060(b)(2)*]:

"NOTICE TO DEALER: Your franchise agreement is being modified or replaced. If the modification or replacement will substantially affect your sales or service obligations or investment, you have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the proposed modification or replacement of your franchise under the provisions of the California Vehicle Code. You must file your protest with the board within 30 calendar days of your receipt of this notice or within 30 days after the end of any appeal procedure provided by the franchisor or your protest rights will be waived."

The franchisee may file a protest within 30 days of receipt of the notice satisfying the statutory requirements, or within 30 days after the end of any appeal procedure provided by the franchisor, thus staying the franchisor's acts until resolution of the protest by the Board [*Veh. Code § 3060(b)(1)*].

[6] Notification of Intent to Establish New Franchise or to Relocate Existing Franchise

An automobile franchisor must give written notice to the Board and all affected franchisees in a relevant market area [see *Veh. Code* § 507 (defining relevant market area as any area within 10-mile radius from site of potential new dealership)] in which the same line-make is then represented of its intention to establish an additional franchise, or to relocate an existing one representing the same line-make [*Veh. Code* § 3062(a)(1); see *Veh. Code* § 3062(a)(2) (rules for establishment or relocation of satellite warranty facility); see also *Veh. Code* § 3062(e)(2) ("satellite warranty facility" defined)]. For these purposes, the reopening of a dealership that has not been in operation for one year or more is considered to be the establishment of an additional motor vehicle dealership [*Veh. Code* § 3062(d)]. The written notice must contain, on the first page, in at least 12-point bold type and circumscribed by a line to segregate it from the rest of the text, the following statement [*Veh. Code* § 3062(a)(3)]:

"NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing on your protest under the terms of the California Vehicle Code if you oppose this action. You must file your protest with the board within 20 days of your receipt of this notice, or within 20 days after the end of any appeal procedure that is provided by us to you. If within this time you file with the board a request for additional time to file a protest, the board or its executive director, upon a showing of good cause, may grant you an additional 10 days to file a protest."

Within 20 days of receiving statutory notice, or within 20 days after the end of any appeal procedure provided by the franchisor, any franchisor required to be given notice may file a protest with the Board in order that a hearing may be held to determine whether good cause exists for not permitting the establishment or relocation of a franchise [*Veh. Code* § 3062(a)(1)]. This procedure has been held not to conflict with the Sherman Antitrust Act, even though it permits dealers to invoke state power for the purpose of restraining intrabrand competition [*New Motor Vehicle Bd. v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 109-111, 99 S. Ct. 403, 58 L. Ed. 2d 361 ; see § 51.13]. The circumstances that the Board must consider in making its good-cause determination are listed in *Veh. Code* § 3063.

The duty of the franchisor to notify the Board and all affected franchisees about, and the right of other franchisees to protest, the modification or replacement of an existing franchise is subject to three exceptions [*Veh. Code* § 3062(b)]. The franchisor's duty to notify and the right of other franchisees to protest do not arise in the following situations [see *Veh. Code* § 3062(b), (c)]:

- When an existing dealership has been relocated both within the same city as, and within one mile from, its existing location.
- When a replacement for a dealership of the same line-make that has been out of operation for less than 90 days is established both within the same city and within one-quarter mile from the location of the dealership that is out of operation.
- When there is a display of vehicles at a fair, exposition, or similar event of less than 30 days duration and no sales are made.

[7] Compensation Schedule Requirement

Every franchisor must specify the delivery and preparation obligations of its franchisees before the delivery of new motor vehicles to retail buyers. The franchisor must file a copy of the delivery and preparation obligations (which constitute the franchisee's only responsibility for product liability between the franchisee and the franchisor but that do not in any way affect the franchisee's responsibility for product liability between the purchaser and either the franchisee or the franchisor) with the New Motor Vehicle Board [*Veh. Code* § 3064(a)]. The franchisee must give a copy of the delivery and preparation obligations to the purchaser on delivery of the vehicle, as well as a written certification that these obligations have been fulfilled [*Veh. Code* § 3064(b)].

The franchisor must also file a schedule of compensation to be paid franchisees for the required work and services with the board. The schedule of compensation must be reasonable. If the franchisee files a notice of protest with the board, the board must approve the reasonableness of the schedule. In determining the reasonableness of the schedules, the board must consider all relevant circumstances, including, but not limited to, the time required to perform each function that the dealer is obligated to perform and the appropriate labor rate [*Veh. Code § 3064(a)*; see *Veh. Code § 3066* (hearing)].

All claims made by franchisees for labor and parts must be paid within 30 days following the franchisor's approval. However, the failure to approve or pay within this time limit, in individual instances for reasons beyond the reasonable control of the franchisor, does not constitute a statutory violation [*Veh. Code § 3065(d)*].

[8] Warranty Reimbursement Schedule Requirement

Every franchisor must properly fulfill warranty agreements and adequately and fairly compensate each of its franchisees for labor and parts used to fulfill a warranty when the franchisee fulfills warranty obligations of repair and servicing. The franchisor must file a copy of its warranty reimbursement schedule or formula with the board. The warranty reimbursement schedule or formula must be reasonable with respect to the time and compensation allowed the franchisee for the warranty work and all other conditions of the obligation. The board will determine the reasonableness of the warranty reimbursement schedule or formula if a franchisee files a notice of protest with the board [*Veh. Code § 3065(a)*; see *Veh. Code § 3066* (hearing)].

All claims made by franchisees for warranty reimbursement must be approved or disapproved within 30 days after their receipt by the franchisor. Any claim not specifically disapproved in writing within the 30-day period are deemed approved on the 30th day. If the franchisor disapproves any claim, the franchisor must notify the franchisee in writing of the disapproval within the required period and state the specific grounds for disapproval. The franchisor must pay all approved claims within 30 days following approval. However, the failure to approve or pay within this time limit, in individual instances for reasons beyond the reasonable control of the franchisor, does not constitute a statutory violation [*Veh. Code § 3065(d)*].

The franchisor may conduct audits of a franchisee's warranty records on a reasonable basis, and for a period of 12 months after a claim is paid or credit issued. Franchisee claims for warranty compensation may not be disapproved except for good cause, such as performance of nonwarranty repairs, lack of material documentation, or fraud. Any chargeback to a franchisee for warranty parts or service compensation must be made within 90 days of the completion of the audit. If a false claim was submitted by a franchisee with intent to defraud the franchisor, a longer period for audit and any resulting chargeback may be permitted if the franchisor obtains an order from the board [*Veh. Code § 3065(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesTerminationsGeneral Overview



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CHAPTER 51 FRANCHISE AGREEMENTS

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C. Specific Types of Franchises

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§ 51.41 Gasoline Distributor or Dealer Franchise

[1] In General

State and federal law each contain a number of provisions designed to protect franchisees distributing or retailing gasoline. These protections generally extend to agreements granting petroleum distributors or retailers the right to use trade names, as well as to leases of premises by refiners or distributors to distributors or retailers, for the sale of petroleum products [see *Bus. & Prof. Code* §§ 20999, 21140, 21150; 15 U.S.C. § 2801; see also *Forty-Niner Truck Plaza, Inc. v. Union Oil Co. of California* (1997) 58 Cal. App. 4th 1261, 1273, 68 Cal. Rptr. 2d 532 (Petroleum Marketing Practices Act as federal counterpart of California Act)]. The statutes governing petroleum franchises also generally apply to refiners, distributors, and retailers of "fuel," which is defined to include gasoline, diesel, gasohol, and aviation fuel [*Bus. & Prof. Code* §§ 20999(l), 21140(k), 21150(k)].

State law prohibits a franchisor from denying a current or prospective retail dealer the right of representation by counsel or other personal representative during negotiations on the terms of a franchise [*Bus. & Prof. Code* § 20999.2].

[2] Operating Restrictions

[a] Supplies

Notwithstanding the terms of any franchise agreement, a franchised gasoline dealer may purchase gasoline, diesel fuel, or gasohol from any available source if the franchisor is unable or refuses to supply the franchisee with the agreed on or contracted quantities of these fuels within 72 hours of the specified contract time, agreement, or request to deliver. Requests for deliveries of fuel may be telephoned to the franchisor; however, if the franchisee intends to seek fuel from another supplier under this statute because the franchisor is unable or refuses to supply, a request for fuel must be made in writing to a franchisor at least 48 hours before desired delivery. Once the notice has been given and the franchisor has failed to deliver, no further written request will be required from the franchisee until the franchisor notifies the franchisee in writing that the franchisor is prepared to deliver the contracted, agreed on, or requested quantities of fuel. Nondelivery due to accident, fire, theft, or other similar acts does not constitute inability or refusal to deliver. If the franchisee does procure and sell fuel from another source, the franchisee must prominently post the sign required by the

statute indicating that the fuel is from a source other than the franchisor. This provision shall not be construed to permit a franchisee to purchase more fuel than may be allowed by any federal statute or regulation [*Bus. & Prof. Code* § 21140.1].

With respect to other automotive accessories sold by the franchisee, such as tires, batteries, and motor oil, the franchisor is prohibited from tying these items to the other rights or products granted or supplied under the franchise agreement. A franchised retail gasoline dealer may sell any tires, batteries, motor oil, and other automotive accessories that may be available to him or her for retail sale [*Bus. & Prof. Code* § 21140.2].

The franchisor's executive officer, representative, or agent who negotiates any contract in violation of these rules, or who otherwise coerces a franchisee in violation of the Franchise Dealers Fair Practices Act will be subject to civil penalties [*Bus. & Prof. Code* § 21140.3] and to civil actions by injured persons [*Bus. & Prof. Code* § 21140.4]. In both types of actions, attorneys' fees and costs may be recovered [*Bus. & Prof. Code* §§ 21140.3, 21140.4]; if suit is brought by an injured person, treble damages are available [*Bus. & Prof. Code* § 21140.4].

[b] Operating Hours

A franchise agreement cannot require a franchised retail gasoline dealer to operate a service station during hours that are "not profitable" [*see Bus. & Prof. Code* § 21150.1(f)] to the franchisee, provided that the franchisee's hours of operation are for a continuing period of time [*Bus. & Prof. Code* § 21150.1(a)]. If the terms and conditions of the franchise agreement prescribe hours of operation that the franchisee determines in good faith to be unprofitable, the franchisee must notify the franchisor in writing of that determination and provide the franchisor with any documentation prepared or reviewed in connection with the determination [*Bus. & Prof. Code* § 21150.1(b)]. If the franchisor in good faith disagrees with the franchisee's determination, the franchisor may prepare its own documentation on the matter and then be reimbursed by the franchisee for the actual cost (up to \$300) incurred in preparing that documentation [*Bus. & Prof. Code* § 21150.1(c)]. Thereafter, if an agreement cannot be reached, the franchisor and franchisee must conduct arbitration in accordance with the rules of the American Arbitration Association, and the arbitrator's decision will be final [*Bus. & Prof. Code* § 21150.1(d)].

The franchisee may establish its own hours of operation without regard to the hours specified in the franchise if any of the following events occur in connection with the above-mentioned statutory procedure [*Bus. & Prof. Code* § 21150.1(e)]:

- The franchisor fails to notify the franchisee, within 15 days after receipt of the franchisee's notice, of its intent to prepare documentation;
- The franchisor fails to complete the documentation within 30 days after receipt of the franchisee's notice; or
- It is established that the operation of the service station is not profitable during the period or periods specified by the franchisee.

None of the above provisions dealing with hours of operation apply in the following instances [*Bus. & Prof. Code* § 21150.1(g)]:

- When different hours of business or operation are required under the franchisor's prime lease or license from any governmental entity, airport, parking, marine or port authority, shopping center, or any private investor not affiliated with or controlled by the franchisor;
- When the gasoline station is within one half mile access of any highway that is part of a California

freeway and expressway system, or, if there is no commercial property developed within the one half mile limit, then within a quarter mile beyond the first such development existing at any distance from such a highway entry or exit; or

- When the business is not primarily a gasoline station but sells gasoline incidentally to its business.

[3] Restrictions on Transfer

For franchise agreements entered into after January 1, 1981, there are also restrictions on a petroleum franchisor's ability to limit the franchisee's transfer of the franchise. Regardless of the terms of the franchise, the franchisor may only withhold consent to a sale, transfer, or assignment if the franchisor demonstrates in writing to the franchisee within 45 days of receiving the application or required paperwork from the potential buyer that the transferee fails to meet financial or experience requirements that the franchisor normally applies to prospective franchisees, or other requirements that are uniformly applied; or if the franchisee has not extended to the franchisor a written offer, good for 30 days, to sell, transfer, or assign the franchise to the franchisor on the same terms offered to the proposed transferee [*Bus. & Prof. Code § 21148(a)*]. In addition, regardless of the terms of the franchise, a franchisor may not withhold its consent to a sale, transfer, or assignment for purposes of diminishing the market value of the franchise [*Bus. & Prof. Code § 21148(b)*]. Furthermore, regardless of the terms of the franchise, a franchisor may not withhold its consent to a sale, transfer, or assignment because the prospective franchisee is of foreign origin or is non-English-speaking, as long as the prospective franchisee is able to adequately communicate with the franchisor and with the appropriate government agencies concerning matters of management, operations, environmental compliance, and public safety [*Bus. & Prof. Code § 21148(c)*]. In addition, the franchisor may not prohibit the transfer of the franchise to a corporation, if the franchisee has a controlling interest in the corporation and offers in writing to personally guarantee the corporation's performance of its obligations under the franchise [*Bus. & Prof. Code § 21149*].

[4] Termination and Nonrenewal

Under federal law, a franchisor may terminate an existing franchise only for specified reasons and by complying with various restrictions. The approved reasons basically amount to material breaches of the franchise by the franchisee or changes in circumstances that make termination reasonable [*15 U.S.C. § 2802*]. Moreover, a franchisor may only refuse to renew an expired franchise for one of these reasons or for certain other bona fide business reasons [*15 U.S.C. § 2802*]. The franchisor seeking to terminate or to refuse to renew a franchise must meet particular notification requirements [*15 U.S.C. §§ 2802, 2804*] and, in some cases, compensate the franchisee or offer the franchisee specified alternative opportunities [*15 U.S.C. § 2802(b)(2)(E)(iii), (3)(D)(iii), (d)*]. Under some conditions the franchisor may write the franchise agreement to create a trial franchise or an interim one, in which case nonrenewal is restricted only by notice requirements [*15 U.S.C. § 2803*].

Similar restrictions exist under state law [*Bus. & Prof. Code § 20999 et seq.*]. However, to the extent that a provision of the federal statute applies to the termination or nonrenewal of a franchise relationship, state provisions are preempted, except those that are "the same as" the applicable provisions of the federal law [*15 U.S.C. § 2806; see § 51.12*]. State restrictions on other aspects of the franchise relationship, of which California has several, are unaffected [*see 15 U.S.C. § 2806; 1978 U.S.C.C.A.N. 877, 900-901*].

The California statutory provision that gasoline dealer or petroleum distributor franchises may be terminated for "other legitimate reasons" [*see Bus. & Prof. Code § 20999.1*] is an obstacle to the accomplishment and execution of the purposes and objectives of the federal Petroleum Marketing Practices Act [*15 U.S.C. §§ 2801-2806*] and therefore is preempted by the federal statute [*see California ARCO Distributors, Inc. v. Atlantic Richfield Co. (1984) 158 Cal. App. 3d 349, 363, 204 Cal. Rptr. 743*]. The Petroleum Marketing Practices Act preempts state common law claims arising out of a petroleum franchise termination or nonrenewal [*Mobil Oil Corp. v. Superior Court (1987) 189 Cal. App. 3d 485, 488-489, 234 Cal. Rptr. 482*].

Under state law, good cause is required for "failure to renew" [*Bus. & Prof. Code* § 20999.1]. This term is defined to include a failure to reinstate, continue, or extend the franchise relationship [*Bus. & Prof. Code* § 20999(n)]:

- At the conclusion of the term or on the expiration date stated in the franchise agreement;
- At any time, in the case of a franchise that does not have a specific expiration date; or
- Following a termination on or after January 1, 1982, of a franchise that was entered into before that date and that was not renewed after that date (preexisting franchise agreements).

A franchisor that intends to withdraw from retail sales and distribution in California or in a standard metropolitan statistical area (as defined by the Office of Management and Budget) within California must promptly notify the Governor of its intention to withdraw, and must furnish a plan describing the schedule and conditions of the withdrawal [*Bus. & Prof. Code* § 20999.4].

[5] Franchisee's Right of First Refusal

In the case of leased marketing premises as to which the franchisor owns a fee interest, the franchisor may not sell, transfer, or assign its interest to another person without first either [*Bus. & Prof. Code* § 20999.25(a); *see* 15 U.S.C. § 2802(b)(2)(E)(iii); *see, e.g., Abraham & Sons Enterprises v. Equilon Enters., LLC* (2002) 292 F.3d 958, 963-964 (lessor gas companies violated *Bus. & Prof. Code* § 20999.25(a) by relinquishing title, possession, and control of gas stations to LLP without offering lessees chance to purchase stations; LLP was "another person" under statute, even though it was owned and controlled by gas companies, and oil companies' contribution of assets to LLP was "sale, transfer, or assignment" under statute)]:

- Making a bona fide offer to sell, transfer, or assign to the franchisee the franchisor's interest in the premises (other than signs displaying the franchisor's insignia and any other trademarked, service marked, copyrighted or patented items of the franchisor); or
- Offering the franchisee the right of first refusal of any bona fide offer acceptable to the franchisor from a third party to purchase the franchisor's interest in the premises.

For example, when oil companies contribute title, possession, and control of franchised gas stations to a limited liability company wholly owned by the oil companies, the contribution constitutes a "transfer to another person" under this statute; if the oil companies do not first offer to sell their fee interest in the leased marketing premises stations to the franchisee operators before the transfer, the transfer violates this statute [*Abraham & Sons Enters. v. Equilon Enters.* (9th Cir. 2002) 292 F.3d 958, 961-963 (noting that no California cases interpret phrase "sell, transfer, or assign to another person" and no cases interpret identical language in Petroleum Marketing Practices Act; rejecting argument that tax-free nature of transfer prevents transaction from constituting transfer)].

If the franchisor leases the franchise premises from a third party and notifies the franchisee of the termination or nonrenewal of the franchise by reason of the expiration of the franchisor's underlying lease, that is a lawful ground for the termination or nonrenewal [15 U.S.C. § 2802(b)(2)(C),(c)(4)], as long as the franchisor actually anticipates losing possession of the premises [*see, e.g., Mustang Mktg., Inc. v. Chevron Prods. Co.* (9th Cir. 2005) 406 F.3d 600, 609-610 (franchisor pretended to act in compliance with statute but actually manipulated negotiations with ground lessor and with franchisee so as to remove franchisee, and franchisor then made new ground lease for franchisor's own direct operation of service station)]. The franchisee has certain priority rights under both federal law and state law.

- Under federal law, the franchisor is required to offer to assign to the franchisee any option that the

franchisor has to extend the underlying lease or to purchase the premises [15 U.S.C. § 2802(c)(4)(B); e.g., *Mustang Mktg., Inc. v. Chevron Prods. Co.* (9th Cir. 2005) 406 F.3d 600, 607-608] .

■ Under state law, the franchisor, on request by the franchisee and subject to the franchisee purchasing or leasing the premises from the third party before the date of termination or nonrenewal set forth in the notice, must make a bona fide offer to sell the franchisee any interest that the franchisor has in the improvements on the property (other than signs displaying the franchisor's insignia and other proprietary items). The offer price may not exceed the greater of the fair market value of the improvements or their book value [Bus. & Prof. Code § 20999.25(b) ("book value" means actual cost less actual depreciation taken)]. If applicable, the franchisor must offer the franchisee a right of first refusal of any bona fide offer acceptable to the franchisor made by another to purchase the franchisor's interest in the improvements [Bus. & Prof. Code § 20999.25(b)].

However, nothing in Bus. & Prof. Code § 20999.25 may be deemed to require a franchisor to continue an existing franchise agreement, or to renew a franchise relationship, if not otherwise required by federal law [Bus. & Prof. Code § 20999.25(c)].

[6] No Termination on Franchisee's Death if Successor Properly Designated

An additional restriction on franchise termination provides that it is unlawful to include a provision terminating the agreement on the death of the franchisee if the franchisee, designates a successor in interest in a form prescribed by and delivered to the franchisor before death [Bus. & Prof. Code § 21140.6(a) (applicable on or after January 1, 1980); see Bus. & Prof. Code § 21140.6(c) (statute inapplicable to trial franchises as defined in the Petroleum Marketing Practices Act)]. A successor in interest may only be a surviving spouse or adult child of the franchisee, but the franchisee may designate a primary and one alternate successor in interest. Any successor in interest so designated must meet the reasonable qualifications then being required of dealers by the franchisor for the operation of service stations [Bus. & Prof. Code § 21140.6(b), (g)]. The statute permitting designation of a successor in interest by a franchisee contains detailed provisions concerning the successor in interest's election to operate the franchise [see Bus. & Prof. Code § 21140.6(d)]; the franchisee's obligation to deposit security with the franchisor [Bus. & Prof. Code 21140.6(e)]; the franchisor's election to operate the franchise prior to full assumption of franchise obligations by the successor [Bus. & Prof. Code § 21140.6(i), (j)]; and the requirement that the successor account to the heirs of the deceased [Bus. & Prof. Code § 21140.6(k)]. Except for the accounting provisions, all of the provisions affecting the designation of a successor in interest and the mutual obligations entailed by this procedure should be incorporated into the gasoline dealer franchise agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRemediesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesTerminationsGeneral OverviewEnergy & Utilities LawGas IndustryDistribution & Sale



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[Reserved]

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D. Tax Considerations

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§ 51.50 Taxation of Franchisors

[1] Basic Tax Classifications

[a] Categories

Traditionally, the tax consequences of the transfer of a franchise and the receipt of payments by a franchisor (or subfranchisor) from the transfer and franchise operations depend on which of the following classifications applies to the arrangement:

- A license rather than a sale;
- A sale of a capital asset; or
- A sale of a noncapital asset (sold in the ordinary course of business).

[b] License

If the transfer is treated as a license [*see* [2], *below*], then all payments for the franchise are treated as royalties and are taxable to the franchisor as ordinary income without any offset for basis. Specifically, the consequences are as follows:

- All payments are taxable and there is no deduction for the franchisor's basis, if any.
- There can be no deductible loss because there is no deduction for basis.
- The income is taxable at ordinary income tax rates.
- If the franchisor is a corporation, the receipt of royalties may cause the franchisor to be penalized as a personal holding company, or to lose the benefit of Subchapter S despite an S election, or to lose a loss deduction [*see I.R.C. § 1244*].

[c] Sale of Capital Asset

If the transfer is treated as a sale of a capital asset [see [3], *below*], then the franchisor will be entitled to capital gain treatment. The franchisor will treat the initial fee portion as capital gain, and be entitled to recover all or a portion of its basis. If the fixed fee portion is payable in installments, the franchisor will be entitled to installment sales treatment. The deferred payments may have to be discounted (and partially accounted for as ordinary interest income) if a below-market rate of interest applies or no interest accrues. Contingent payments will be treated as amounts received from the sale of a noncapital asset and treated as ordinary income or loss. Specifically, the consequences are as follows:

- The franchisor will recognize taxable income only to the extent that the amount realized from the sale exceeds the franchisor's basis in the sold franchise.
- If the franchisor's basis in the sold franchise exceeds the amount realized from the sale, the franchisor will be entitled to a loss deduction, which may or may not be currently usable.
- The taxable gain may be taxed at a lower tax rate. For individuals, the maximum tax rate applicable to long-term capital gain currently is 15 percent, significantly less than the 35 percent maximum rate that applies to ordinary income [I.R.C. § 1(a)-(e), (h), (i)(2)]; for corporations, the maximum tax rate applicable to long-term capital gain currently is 35 percent, which is equal to the maximum tax rate applicable to ordinary income [see I.R.C. § 1201].
- Losses generally are deductible, but only as capital losses, which are subject to limits on deductibility [see I.R.C. §§ 1211(a), (b), 1212(a), (b)].

[d] Sale of Noncapital Asset

If the transfer of a franchise is treated as a sale of a noncapital asset [see [3], *below*], then the franchisor will recognize gain equal to the excess of its amount realized over its basis, and the gain will be taxable as ordinary income. If the fixed fee portion is paid in installments, the franchisor will be entitled to installment sales treatment. Specifically, the consequences are as follows:

- The franchisor recognizes taxable income only to the extent its amount realized from the sale exceeds its basis in the sold franchise.
- If the franchisor's basis in the sold franchise exceeds its amount realized from the sale, the franchisor is entitled to a loss deduction.
- The taxable gain is taxed at ordinary income tax rates, not at the possibly preferential capital gain tax rates.
- Losses are currently deductible against ordinary income without limitation. If the sale of a franchise results in a tax loss, it is better tax-wise for the franchisor if the sale is treated as a sale of a noncapital asset rather than of a capital asset.

[2] Distinguishing Between License and Sale

Historically, it was quite difficult to characterize franchise transfers as sales or licenses. In general, the distinction between a sale and a license is that in the former the transferor vests the transferee with all substantial rights in the intangible property. However, courts have diverged sharply on the issue of how much must be transferred to qualify. In the franchising context, if a transfer is not treated for tax purposes as a sale, it will be treated as a license. Before the

adoption of *I.R.C. § 1253* [*I.R.C. § 1253*; see [e], *below*], no clear line existed between sales and licenses. Judicial decisions probably were dictated by the judge's visceral reaction to the franchisor's level of participation in the franchisee's business--whether the franchisor was acting only like a creditor trying to protect an interest that already exists, or acting as an owner trying to enlarge his or her interests.

The difficulty in distinguishing a sale from a license arises in particular in deferred payment sales of franchises. In this situation, the seller takes a security interest in the transferred assets and imposes conditions on the purchaser's operations to protect the security interest until the purchase price is fully paid. In addition, the nature of the franchise relationship usually results in the franchisor retaining controls over the franchisee's operations. The retention of an interest in the assets sold sometimes has been viewed by the courts as a transfer of less than the franchisor's entire interest and therefore not a sale.

Security interest restrictions have not precluded a "sale" from capital gains treatment in sales of trademarks, copyrights, and patents. Payment for the sale of these assets is generally extended over a period of time, and the seller requires a retained interest in the property to ensure payment. Cancellation provisions, such as the reservation of a right to terminate for the transferee's default or dissolution, bankruptcy, or receivership, are generally insufficient protection for the seller of a franchise since the deferred payment is not only extended but is also contingent on future sales. Similarly, a franchise involves a high degree of risk in its exploitation, which makes its value, before realization, extremely difficult to determine. A lump-sum sale price would have to be small to make it attractive to franchisees, but a low price would deprive the franchisor of a share in the profits from the successful exploitation of the franchise.

If the franchisor will receive periodic royalty payments, the franchisor typically retains the right to cancel the license if the franchisee files a bankruptcy petition or is adjudicated a bankrupt. Although these retained rights result in a franchisee receiving something less than outright ownership, the nature of the retained interest is a "condition subsequent" that does not preclude a transfer from being held a sale. Further, the retention of a right to cancel the license for failure to make the payments does not preclude capital gains treatment. However, some restrictions, such as requiring that records be kept, that payments be made, and that the franchise may be assigned only with the approval of the franchisor, are similar to conditions held consistent with the "sale" requirement in cases involving other intangible rights.

[3] Distinguishing Between Capital Assets and Noncapital Assets

To qualify for capital gain treatment, the transfer of property must qualify as (1) the sale or exchange of (2) a capital asset [*I.R.C. § 1221*] or a Section 1231 asset [*I.R.C. § 1231* (assets *used* in trade or business and capital assets *held* for more than one year and *held* in trade or business or transaction entered into for profit)]. In general, courts have held that a franchise is a capital asset [see, e.g., *Moberg v. Commissioner* (9th Cir. 1962) 310 F.2d 782]. However, if a franchisor or subfranchisor is held to be a dealer (in the business of selling franchises), the asset will be treated as inventory-type property and excluded from capital asset treatment [*I.R.C. § 1221(a)(1)* (property held primarily for sale to customers in ordinary course of trade of business)]. The proceeds from the sale of franchises by a dealer are ordinary income, and any losses on the sales are ordinary losses.

I.R.C. § 1253 provides that a transfer of a franchise, trademark, or trade name is not treated as a sale or exchange of a capital asset if the transferor retains sufficient any significant power, right, or continuing interest with respect to the subject matter of the franchise, trademark, or trade name [*I.R.C. § 1253(a)*; see [5], *below*].

[4] Determining Franchisor's Basis

If the transfer of a franchise is treated as a sale rather than as a license, the franchisor will be entitled to deduct its basis in the transferred franchise when it computes its taxable gain or loss.

When a franchisor sells an entire franchise it developed rather than purchased, the franchisor's basis equals all of its capitalized development cost. When a franchisor develops its own franchise and sells less than the whole franchise, it must equitably allocate its capitalized development costs.

When a franchisor purchases the franchise rights from another franchisor and then sells the entire franchise, the franchisor's basis will be the purchase price less any amortization it was entitled to deduct. If the franchise had a reasonably ascertainable useful life, the franchisor could amortize its purchase price so that its adjusted basis at any time could be less than its initial acquisition cost. If the franchisor is selling less than its entire franchise, it must equitably allocate its initial acquisition cost to the portion sold [see *Treas. Reg. § 1.61-6*].

[5] Application of I.R.C. § 1253

I.R.C. § 1253 provides for the tax treatment of both the transferor and the transferee of a franchise [see § 51.51]. For this purpose, "franchise" includes an agreement that gives one of the parties to the agreement the right to distribute, sell, or provide goods, services, or facilities within a specified area [*I.R.C. § 1253(b)(1)*]. With respect to the transferor of a franchise, *I.R.C. § 1253* determines whether any revenues, gain, or loss is treated as capital gain or loss, or as ordinary income or loss [see *I.R.C. § 1253*]. Under general tax principles, capital gain or loss treatment requires that the asset transferred must be a capital asset and the transfer must be a sale or exchange. Although *I.R.C. § 1253* codifies many general tax principles defining a sale; it does not codify the general tax principles defining a capital asset. Accordingly, if the asset transferred is not a capital asset, as determined under general tax principles, any income or loss will be taxable as ordinary and there is no need to refer to *I.R.C. § 1253* [see [2], [3], *above*].

The effect of *I.R.C. § 1253* generally is to eliminate capital gain treatment of any franchise or initial fee received on the grant of a franchise in the typical case. Because the heart of the franchise system is the trade name and the trademarks of the franchisor, and a franchisor is required by the Lanham Act and other consumer protection laws to prescribe and police standards of quality of products or services associated with the trademark to retain the trademark, the franchisor would put the trademark at risk to obtain capital gain treatment.

I.R.C. § 1253 provides that a transfer of a franchise, trademark, or trade name is not treated as a sale or exchange of a capital asset if the transferor retains sufficient any significant power, right, or continuing interest with respect to the subject matter of the franchise, trademark, or trade name [*I.R.C. § 1253(a)*]. The section provides a nonexclusive list of six retained rights resulting in the transferor having retained a significant power, right, or continuing interest for which capital gain treatment will be denied [*I.R.C. § 1253(b)(2)*]:

- A right to disapprove any assignment of all or any part of the transferred interest.
- A right to terminate at will.
- A right to prescribe the standards of quality of products used or sold, or of services furnished, and of the equipment and facilities used to promote those products or services.
- A right to require that the transferee sell or advertise only products or services of the transferor.
- A right to require that the transferee purchase substantially all supplies and equipment from the transferor.
- A right to payments contingent on the productivity, use, or disposition of the subject matter of the interest transferred, if the payments constitute a substantial element under the transfer agreement.

If a franchisor retains any one of these rights, the transfer is not treated as a sale and the franchisor's income is taxable

as ordinary income. A franchisor may be treated as retaining one or more of these rights even if the actual transfer agreement does not so state because the retention of the right might be implied in fact from the conduct of the parties.

[6] Contingent Payments Under I.R.C. § 1253

A franchisor typically grants a franchise in exchange for a fixed fee plus a continuing royalty [see § 51.25]. The continuing royalty is usually a percentage of sales, or some other measure of the franchisee's productivity. As such, the royalty constitutes a "contingent payment" and is entitled to special tax treatment. Amounts received or accrued on account of a transfer, sale, or other disposition of a franchise, trademark, or trade name that are contingent on the productivity, use, or disposition of the transferred franchise, trademark, or trade name are treated as amounts received or accrued from the sale or other disposition of property that is not a capital asset [I.R.C. § 1253(c)].

In the rare instances when a transfer qualifies as a sale, the franchisor is taxed as having sold a noncapital asset and may deduct its basis when determining its gain (or loss) with respect to the contingent payments, and the gain (or loss) is taxable as ordinary income (or loss). If the franchisor's disposition of the franchise is characterized as a license, then the contingent payments are taxable as royalties, entirely includible in ordinary income without any offset for basis.

Sometimes the initial fixed fee portion of the consideration for the franchise is not paid as a lump sum, but is paid over time in installments that are themselves contingent on the franchisee's sales or other measure of performance. Although these specific installments are contingent, they are not treated as "contingent payments" under I.R.C. § 1253.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises General Overview Tax Law Federal Income Tax Computation General Overview Tax Law Federal Income Tax Computation Ordinary Income (IRC sec. 64) Tax Law Federal Income Tax Computation Sales & Exchanges Basis (IRC secs. 1011-1017, 1019, 1021, 1023) General Overview Tax Law Federal Income Tax Computation Sales & Exchanges Capital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298) Capital Assets Tax Law Federal Income Tax Computation Sales & Exchanges Intangible Property (IRC secs. 1234-1235, 1241, 1253) Franchise, Trademark & Trade Name Transfers



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21-51 California Legal Forms--Transaction Guide § 51.51

§ 51.51 Taxation of Franchisees

[1] Overview

In the typical purchase of a franchise, the franchisee makes a lump-sum payment and agrees to make future periodic payments based on performance. Payments by the franchisee to the franchisor for a franchise are allowed as an offset against income at some time. The important question from the franchisee's point of view is the timing of the deduction. The payment will be either currently deducted, capitalized and eligible for amortization, or capitalized and not amortizable. Ordinarily, the most desirable tax consequence for the franchisee is for the payment to be currently deductible. A current deduction reduces ordinary taxable income in the current year and saves tax dollars at the earliest possible time.

If the payment is not currently deductible, it will be capitalized. If the payment is capitalized, it may or may not be amortizable. For a capitalized payment to be amortized, either the acquired franchise must have a limited and determinable useful life, it must qualify for special amortization treatment under *I.R.C. § 1253*, or it must qualify for amortization under *I.R.C. § 197*. If amortizable, the payment will be deducted from ordinary income in ratable portions over a period of years. Because the tax savings are partially deferred, the present value of the tax savings will be less than if the payment were entirely currently deductible. If a capitalized payment is not amortizable, the franchisee will not secure any tax benefit from the payment until the franchisee sells or abandons the franchise. Furthermore, the deduction at that time may be from capital gain rather than from ordinary income. If the tax rate applicable to capital gains is less than the tax rate applicable to ordinary income, a reduction in capital gain does not save as much tax money as a deduction from ordinary income.

The Revenue Reconciliation Act of 1993 amended *I.R.C. § 1253* and enacted new *I.R.C. § 197* [*I.R.C. §§ 197, 1253*]. These amendments, which simplify the tax treatment of payments made to acquire a franchise, apply to acquisition after August 10, 1993. By special election, a franchisee may rely upon these amendments for acquisitions made after July 25, 1991. Following these amendments, there are only two types of payments [*I.R.C. § 1253(d)*]: (1) contingent serial payments, and (2) all other payments, contingent or fixed [*see [2], [3], below*].

[2] Contingent Serial Payments

Contingent serial payments that are paid or incurred during the taxable year on account of a transfer, sale, or other disposition of a franchise, trademark, or trade name are deductible as a trade or business expense when paid or incurred [I.R.C. § 1253(d)(1)(A); see I.R.C. § 162(a); see also I.R.C. § 197(f)(4)(C)]. "Contingent serial payments" are amounts that are contingent on the productivity, use, or disposition of a franchise, trademark, or trade name that are payable at least annually throughout the entire term of the franchise agreement and that are payable under a fixed formula or are substantially equal in amount [I.R.C. § 1253(d)(1)(B)]. This rule applies regardless of whether a transfer is treated as a sale or as a license.

To determine the term of a transfer agreement, all renewal options, and any other period for which the parties reasonably expect the agreement to be renewed, must be taken into account [I.R.C. § 1253(d)(3)].

[3] Other Payments

Any amount paid or incurred during the taxable year on account of a transfer, sale, or other disposition of a franchise, trademark, or trade name that are not contingent serial payments [see [2], *above*] are treated as an amount chargeable to the capital account and must be capitalized [I.R.C. § 1253(d)(2)]. These payments, whether fixed or contingent, are amortized over 15 years [I.R.C. § 197(a), (d)(1)(F)]. This amortization is determined on a monthly basis, beginning with the month in which the franchise is acquired [I.R.C. § 197(a)].

A special rule applies to covenants not to compete (or other arrangement having substantially the same effect) [see I.R.C. § 197(d)(1)(E), (f)(1)(B)]. Amounts paid or incurred pursuant to a covenant or similar arrangement must be treated as an amount chargeable to the capital account [I.R.C. § 197(f)(3)]. However, the covenant or other arrangement cannot be treated as disposed of, or as becoming worthless, before the disposition of the entire interest in the trade or business to which the covenant relates [I.R.C. § 197(f)(1)(B)].

I.R.C. § 197, and its definition of intangible property, does not apply to a franchise to engage in professional football, basketball, baseball, or other professional sport, or to any item acquired in connection with the franchise [I.R.C. § 197(e)(7)].

[4] Investigation and Negotiation Costs

Before a prospective franchisee actually enters into a franchise agreement, the franchisee may incur expenses other than the actual cost of the franchise, including (1) the cost of exploring for and finding franchise opportunities; (2) the cost of investigating the value of the franchise; and (3) expenses incurred in negotiating the franchise agreement. Because these expenditures are incurred when the franchisee has not yet entered into the operation of the franchised business, a noncorporate taxpayer may not deduct these amounts as a trade or business deductions [see I.R.C. § 162]. However, a corporate taxpayer may take a Section 162 deduction when the search or investigation has been abandoned. Further, these costs may be deductible as losses [see I.R.C. § 165 (taxpayer must actually enter into transaction for profit)], or as depreciation allowances [see I.R.C. § 167].

Expenses incurred in the investigation or creation of a new business venture, as well as pre-opening expenses incurred before a trade or business begins, must ordinarily be capitalized unless the taxpayer properly elects to amortize the costs over a period of not less than 60 months [see I.R.C. § 248(a)]. If the interest is disposed of before the costs have been fully amortized, the unamortized expenses are deductible losses [see I.R.C. § 165]. However, if no franchise agreement is ultimately agreed to, there can be no depreciation deduction because no property has been brought into existence with a determinable useful life.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesGeneral OverviewTax LawFederal Income Tax
ComputationDeductions for Business ExpensesGeneral OverviewTax LawFederal Income Tax ComputationSales &
ExchangesIntangible Property (IRC secs. 1234-1235, 1241, 1253)Franchise, Trademark & Trade Name Transfers



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§ 51.52 Estate Tax Considerations

[1] Use of Retirement Plans

As an individual franchisee ages, certain issues will become increasingly important, such as planning for retirement income security. Retirement plans defer an employee's recognition of taxable income until he or she actually receives the cash. Deferral is ordinarily desirable, because money that would have been paid in taxes can be invested and earn additional income. Further, the deferred income may be taxed at a lower tax rate. Types of retirement plans include:

- Deferred compensation plans [*see Treas. Reg. § 1.451-1(a)*; *see also I.R.C. § 3121(v)* (deferred compensation is subject to employment taxes, including old-age, survivors, and disability portions and Medicare portion in year of deferral)].
- Pension plans [*see I.R.C. §§ 402, 404, 501*; *see also I.R.C. §§ 410(a)(1), 411* (nondiscrimination rules permit exclusion of employees under 21 or with less than one year of service)].
- Profit-sharing plans [*see I.R.C. § 415(c)* (limitations)].

[2] Franchise Security Ownership Plan

A franchisor typically has a long-term commitment to and interest in its franchisees; a franchisor wants its franchisees to stay in business as long as possible, increase sales as much as possible, improve quality as much as possible, and pay their bills to the franchisor as promptly as possible. One way to motivate franchisees is to design an economic incentive program that rewards desired behavior and punishes undesired behavior. A franchise security ownership plan, referred to as a ZSOP or ZEESOP, is a nonqualified deferred compensation plan sponsored by a franchisor for the benefit of its franchisees. In a ZSOP, a franchisor contributes money to a trust in which the franchisee is beneficiary. A franchisor might contribute a portion of the franchise fee plus periodic payments depending on the franchisee's performance. For example, a franchisor might contribute a percentage of each bill paid by the franchisee, provided that the payment is received according to the terms of the franchise agreement. Alternatively, the contribution might take the form of a rebate of money paid to the franchisor by the franchisee, or simply a contribution out of the franchisor's general funds,

triggered by the franchisee's accomplishment of some standard.

The ZSOP trust fund is invested by the trustee in accordance with the fiduciary guidelines established by the trust document. Presumably, the trust will earn income or appreciate in value as a result of these investments. A ZSOP is useful because the accumulated funds are typically payable to the franchisee only at the end of a stated term, which might last several years. If the franchisee is somehow disqualified before the end of the term, all or a portion of the fund typically reverts to the franchisor. This forfeiture provision becomes increasingly compelling as the years pass and the fund grows, and keeps the franchisor's contributions from being taxable to the franchisee under the economic benefit doctrine. From a federal income tax standpoint, the franchisor's contributions to the trust are nondeductible at the time of the contributions. Correspondingly, franchisees do not recognize taxable income at that time either. Only when the funds become payable to the franchisee will the franchisee report income and the franchisor take a deduction. Because a ZSOP is a nonqualified plan, the income earned by the trust is currently taxable to the franchisor.

[3] Income-Splitting With Family Members

Splitting income with other members of the franchisee's family can save taxes. However, tax practitioners must be alert to three simple caveats

- First, the plan will not work with respect to children under 14 years of age because they will be taxed at their parent's marginal tax rate [see *I.R.C. § 1(g)*].
- Second, if the parent diverts so much income to the children that the parent does not adequately compensate himself or herself for services performed, the IRS may reallocate all or a portion of the children's taxable income back to the parent, and then treat the parent as having made taxable gifts to the children.
- Third, if the parent splits income by paying taxable compensation to the children, the parent may reduce the marginal income tax rate, but may create a liability for state and federal employment taxes.

The use of an S corporation [see Ch. 2B, *Electing Subchapter S Status*] or a family partnership or family limited liability company may be helpful in this regard. For further discussion, see Ch. 68A, *Using Family Limited Partnerships and Other Business Entities in Estate Planning* .

[4] Succession Planning

At some stage during the life of a franchise, the business owner may begin to plan for his or her succession, shifting control to other family members, unrelated managers, or key employees. The business owner may desire to vacation more or retire, or the owner may become disabled or die. However, the transfer of equity and eventually control has profound tax implications and will most likely require franchisor approval.

A business owner may want to provide managers and key employees with a compelling incentive to stay with the business. Transferring an equity interest affords the manager or key employee an opportunity to accumulate wealth. If the corporation issues stock to the manager, there is no taxable event. However, if the manager is permitted to acquire a limited equity interest, either without cost or at a price substantially less than fair market value, the employee recognizes ordinary taxable income equal to the amount of the bargain [*I.R.C. § 83(a)*]. The corporation is entitled to a corresponding deduction [*I.R.C. §§ 83(h), 162*].

A manager's receipt of stock typically is subject to restrictions that further bind the manager to the company. For example, the manager might be required to forfeit the stock if the employment terminates before a certain date. Such a transfer restriction, referred to as a substantial risk of forfeiture [see *I.R.C. § 83(c)(1)* (definition)], profoundly affects

the tax consequences to the employee and to the corporation. In this situation, the taxable event does not occur until the risk of forfeiture or restriction on transfer ends [see *I.R.C. § 83(a)*]. Although deferral normally favors taxpayers, deferral in this situation can prove disastrous: the amount of the bargain (taxable as ordinary income) is determined at the time the risk of forfeiture ends, presumably with built-in appreciation. However, the manager or employee may make a "Section 83(b) election" on receipt of the stock. If the election is properly made, the taxable event occurs at that time, and not at some later date when the risk of forfeiture or restriction on transfer terminate. If the property is subsequently forfeited, no deduction is allowed in respect of that forfeiture [*I.R.C. § 83(b)*].

Another method to entice a key manager is to issue incentive stock options. A stock option permits the holder to choose to buy stock at a later date, typically at a time when the holder knows whether or not the purchase price is a bargain. The key advantage of an option over an outright transfer of stock is that the employee does not have to risk money to purchase the stock before he or she knows how the company will perform. For tax purposes, there are two different kinds of stock options: an incentive stock option, that is, one that meets certain statutory qualifications and entitles its holder to certain tax benefits [see *I.R.C. § 422*] and a nonstatutory stock option, which refers to any stock option not qualifying as an incentive stock option.

A franchisee might also seek to retain and motivate key personnel by recapitalizing and issuing common stock to the key employees. However, this plan can result in gift tax liability if the stock is issued to the franchisee's family members.

[5] Reducing Estate Tax Liability

At some point a business owner begins to anticipate his or her own death and starts analyzing the after-tax position not only with respect to income taxes, but with an eye toward reducing estate tax liability. The business owner will be concerned about what will happen to his or her equity interest at death, as well as about how the estate taxes will be paid. Although these issues are not unique to franchisees, but are relevant to every owner of a successful business, these issues are often complicated by the fact that a franchisee is constrained by a franchise agreement and the enforceable interests of a franchisor.

With advance planning, a franchisee can reduce federal estate taxes payable at death and increase the portion of the overall estate transferable to members of the franchisee's family. Appropriate methods of reducing the taxable estate include the taking of minority discounts, the selection of a valuation date, the use of a buy-sell agreement, the implementation of a recapitalization, the creation of a family business, the sale of a remainder interest, the payment of compensation and the making of gifts, and the use of the marital deduction and the unified credit. For further discussion, including the prospective repeal of the federal estate tax and the effect of that repeal on estate planning, see Ch. 60, *Estate Planning*, and Ch. 68A, *Using Family Limited Partnerships and Other Business Entities in Estate Planning*.

[6] Deferring Payment of Estate Taxes

If the value of an interest in a closely held business exceeds 35 percent of the adjusted gross estate of a decedent, the executor may elect to pay part of the estate tax in as many as ten equal annual installments [*I.R.C. § 6166(a)(1)*], beginning as many as five years after the due date for the filing of the estate tax return, and subject to a below-market interest rate [*I.R.C. §§ 6166(a)(3), 6601(j)*]. The maximum percentage of the estate tax liability that may be deferred equals the ratio of the value of the closely held interest to the amount of the adjusted gross estate [*I.R.C. § 6166(a)(2)*]. For further discussion, see Ch. 68A, *Using Family Limited Partnerships and Other Business Entities in Estate Planning*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesGeneral OverviewPensions & Benefits LawEmployee Benefit
PlansGeneral OverviewTax LawFederal Estate & Gift TaxesGeneral Overview



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[Reserved]

§§ 51.53[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

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PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

21-51 California Legal Forms--Transaction Guide § 51.100

§ 51.100 Facts and Documents Related to Franchisor

[1] Facts

1. Name, address, and telephone number of client.
2. Form of business organization:
 - a. Corporation or S corporation.
 - b. General or limited partnership.
 - c. Limited liability company.
 - d. Sole proprietorship.
3. Name, address, and telephone number for business and principals.
4. Product or service involved in franchise and all relevant business experience.
5. Capitalization source, including amount available for investment, financial statements, and loan commitments.
6. Credit rating, ability to obtain equity or debt financing, and profitability of business and/or prior ventures.
7. Client's reasons for wanting to establish franchise relationship rather than chain store operation or completely independent business.

8. Any previous experience with franchise operation or with company-owned chain stores and the relative success of previous business.
9. Current state of preparation or planning for entering into franchise relationship.
10. Names, addresses, and telephone numbers of any other advisors or consultants being used or to be used in determining feasibility of franchise relationship.
11. Observable personal characteristics of potential franchisee that would tend to establish or affect business ability.
12. All available market data concerning territory where franchise or franchises will be located.

[2] Documents**NOTE:**

Most of the documents listed below will be required for registration of the franchise offering under the Franchise Investment Law. See the Transaction Guide to Ch. 51B, ***Franchise Registration***.

1. Organizational documents of franchisor:
 - a. Articles of incorporation, amendments, and bylaws.
 - b. Partnership agreement and certificate of partnership.
 - c. Operating agreement and limited liability company certificate.
 - d. Other business documents.
2. All available financial statements, bank account statements, and documents of indebtedness.
3. All written plans, proposals, or advertising concerning prospective franchise.
4. Franchise agreements currently in use proposed for use, and any desired amendments, corrections, or changes.
5. Any written opinions, decisions, or orders by any governmental authority affecting franchise, including determinations whether:
 - a. Previously issued franchises are considered independent businesses or subsidiaries.
 - b. Small Loan Administration loans are available.
 - c. Any monopoly or other restraint of trade problems exist.
6. All business licenses held and evidence of patents, trademarks, or copyrights involved in franchise business.

7. Any miscellaneous documents involved with franchise business, including insurance policies, leases, documents of title, supply contracts, and all other agreements.

8. Reports received from other consultants or advisors regarding feasibility of franchise.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51 FRANCHISE AGREEMENTS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

21-51 California Legal Forms--Transaction Guide § 51.101

§ 51.101 Facts and Documents Related to Franchisee

[1] Facts

1. Name, address, and telephone number of prospective franchisee.

2. Form of business organization of franchise [see § 51.111, P 4]:

NOTE:

If the form of the franchise business has not yet been determined, see Ch. 1B, **Selecting Form of Business Entity**, for an analysis of the advantages and disadvantages of each form of business entity.

e. Corporation or S corporation.

f. General or limited partnership.

g. Limited liability company.

h. Sole proprietorship.

3. Name, address, and telephone number for business and principals.

4. Description of prospective franchisee's potential or aptitude for operation as franchisee, including following:

NOTE:

This inquiry relates primarily to business rather than legal considerations. Business considerations should be worked out in advance by a person seeking legal advice relating to a franchise agreement. However, if the client interview reveals that the client has not considered these matters, the client should be referred to competent business advisers before proceeding with the drafting or execution of an agreement.

- a. General experience in business.
 - b. Prior experience in franchise operations or with company-operated chain stores.
 - c. Current state of planning and preparation for entry into proposed franchise agreement.
 - d. Current state of financial preparation, including sources of capital, and credit rating.
 - e. Availability of market data concerning proposed franchise location.
 - f. Level of proposed franchisee's understanding of nature of proposed franchise arrangement and its risks and advantages.
4. Names, addresses, and telephone numbers of prospective franchisee's advisors or consultants, including accountant and insurance agent.

[2] Documents

1. Copy of franchisor's offering circular.
2. Copy of resolution of prospective franchisee's board or general partners authorizing firm to enter into franchise agreement and designating specific person to represent firm in all dealings related to franchise.
3. If prospective franchisee is foreign business entity, copy of its certificate of qualification to do business in California.
4. Copy of any fictitious name statement filed by prospective franchisee.
5. Current financial statement, complete with recent bank statements and documents of indebtedness.
6. Copy of three most recent tax returns of prospective franchisee.
7. Prospective franchisee's written business plan and financing proposals, if any.
8. Copy of any business licenses held by prospective franchisee.
9. Any written opinions, decisions, or orders issued by any governmental authority regarding proposed franchise, including determinations as to whether previously issued franchises are considered independent businesses or subsidiaries.
10. Documents bearing on prospective franchisee's ability to obtain Small Business Administration

financing (i.e., documents indicating that prospective franchisee is unable to obtain regular commercial bank financing).

11. Miscellaneous documents involved in franchise business, including insurance policies, leases or deeds for premises, supply contracts, and other related agreements.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesGeneral Overview



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CHAPTER 51 FRANCHISE AGREEMENTS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

21-51 California Legal Forms--Transaction Guide §§ 51.102-51.109

[Reserved]

§§ 51.102[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51 FRANCHISE AGREEMENTS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

21-51 California Legal Forms--Transaction Guide § 51.110

§ 51.110 Franchisor's Preliminary Determinations

1. Evaluate advantages and disadvantages of franchising from business owner's viewpoint:

- a. Business owner has greater flexibility and control over branch outlet rather than franchise.
- b. Business owner faces less capital outlay for franchise rather than branch outlet.
- c. Business owner is responsible for branch outlet's compliance with state and local laws while franchisee is typically responsible for these matters.
- d. Business owner is more likely to be held liable for branch outlet manager's actions than those of franchisee.

NOTE:

The degree to which a franchisor will be held liable for the acts of a franchisee turns on whether the franchisee is determined to be an agent of the franchisor. This determination turns on the degree of control that the franchisor may exercise over the franchisee and whether the franchisor has intentionally or negligently led third parties to believe that the franchisor and franchisee are part of the same business.

- e. Potential for expanding distribution network through outside investment.
- f. Reducing increasing costs of employee fringe benefits.

NOTE:

The costs of fringe benefits for employees, including such mandated costs as social security,

unemployment insurance, and workers' compensation, typically reach over 25 percent of payroll. Franchising is one method by which employers can avoid adding new employees or share their cost.

2. Determine whether franchisor should restrict franchisee's form of business organization [*see also* P 3, *below*]:

NOTE:

Of primary concern in this determination is whether the franchisee will require sufficient amounts of working capital and personal skills and supervision that the franchisee should be an entity other than a sole proprietorship, such as a partnership, limited liability company, or corporation.

a. Sole proprietor.

(1) Determine whether franchisee can be permitted to form and operate as sole proprietorship within goals of franchise.

(2) Determine whether arrangement depends on franchisee's personal skill and ability.

(3) Determine whether arrangement depends on franchisee being personally liable for business debts.

b. General or limited partnership.

NOTE:

If the franchisee will be a partnership, the franchisor might want to bargain for veto power over new general or limited partners or the right to terminate franchise on any change in controlling partners. Counsel should evaluate the allocation of liability for the franchise business whenever an entity has participants with limited liability.

c. Limited liability company.

NOTE:

If the franchisee will be a limited liability company, the franchisor might want to bargain for veto power over new members or managing members or the right to terminate the franchise on any change in controlling members. Counsel should evaluate the allocation of liability for the franchise business whenever an entity has participants with limited liability.

d. Corporation or S corporation.

NOTE:

If the franchisee will be a corporation, the franchisor might want to bargain for the right to restrict stock ownership. Counsel should evaluate the allocation of liability for the franchise business whenever an entity has participants with limited liability.

3. Determine whether franchisor should require franchisee to devote entire time and skill to franchise operation.

a. Determine whether arrangement depends on franchisee's personal skill and ability.

b. Determine whether arrangement depends franchisee being personally liable for business debts.

4. Determine whether grant of license to use franchisor's patents, trademarks, service marks, trade names, copyrights,

and other indicia should be:

- a. Limited as to time, subject to automatic or other renewal, or limited simply to duration of franchise agreement.
- b. If patent, should patent be accompanied by license to manufacture or assemble patented item or items.

5. Determine what controls franchisor should exercise over franchisees to ensure uniform quality of product or service rendered by franchisees to protect franchisor's trademark rights and whether agreement should include provisions covering or governing any of following:

- a. Site selection by franchisor.
- b. Appearance of franchised premises and the size, color, and placement of franchisor's trademark or trade name.
- c. Hours of franchise establishment operation to ensure uniformity of service to public, while clarifying that franchisee is independent contractor not agent or employee.
- d. Type and quality of merchandise or services to be sold, to ensure identity of franchisor's indicia with franchisor's products or services.
- e. Sources of franchisee's supply to protect secret formulae and maintain quality.
- f. Franchisee's bookkeeping procedures, to facilitate uniform reporting of receipts and profits for computation of royalties and orderly record keeping.
- g. Standards to be made applicable to franchisee's employees, including minimum standards of service (e.g., politeness, courteousness, efficiency, etc.) and dress or uniform.

6. Determine whether initial franchise fee should be uniform for all franchisees, negotiable for each franchisee, or varied on basis of market analysis of territory involved.

NOTE:

For discussion of the federal tax implications of the treatment of income from the transfer of a franchise trademark or trade name [*see* I.R.C. § 1253], and the methods of accounting for initial fee income, see Glickman, Franchising, Ch. 9, *Considerations in Developing the Agreement*, § 9.03[4][a] (Matthew Bender).

7. Determine structure of royalty provisions of agreement:

- a. Whether royalty should be paid fortnightly, monthly, or annually.
- b. Whether royalty should be set amount or percentage of gross or net income.
- c. Whether record keeping and reporting should be required in conjunction with royalties.

8. Determine whether franchise agreement should address following matters:

- a. Deposits to be made with orders, or as consideration for future orders, for goods from franchisor:

(1) Whether agreement should provide for refund of deposit as credit against purchases.

(2) Whether portion of deposit will be forfeited if franchisee fails to make requisite number of purchases.

b. Payments for supplies or services furnished by franchisor, including whether agreement should provide for separate ordering and billing.

c. Payment for equipment furnished by franchisor and whether equipment should be sold or leased.

d. Payment for inventory manufactured by franchisor and delivered to franchisees, and whether inventory should be sold on consignment or financed.

e. Payment for administrative services provided by franchisor, including accounting services, business advice, site inspection, and quality control.

f. Payment for advertising and promotion expenses.

9. Determine whether agreement should require franchisees to maintain specific level of working capital.

10. Determine whether franchisee should be required to purchase or lease suitable premises and, if leased, whether franchisor should purchase property and lease or sublease to franchisees.

11. Determine amount and types of insurance franchisees should be required to carry:

a. Whether franchise agreement should include provisions indemnifying franchisor.

b. Whether franchisee should be required to obtain and retain insurance naming franchisor as additional insured.

12. Determine whether agreement should include dispute settlement provisions and, if so, whether agreement should include arbitration procedures covering following matters [see §§ 51.210[2], Section 8.03, 51.250[2]]:

a. Nature of disputes to be arbitrated.

b. Procedures required before arbitration.

c. Selection and qualifications of arbitrators.

d. Location where arbitration proceedings will be held.

e. Allocation to parties of expenses of arbitration.

f. Whether arbitrator's award is final and binding.

g. Whether award is judicially enforceable and, if so, in which court.

13. Determine events that agreement should specify as cause for termination of agreement, including any of following:

NOTE:

The following list is of general applicability to franchise agreements. However, in the case of automobile franchises and gasoline dealer franchises, California has imposed certain limitations on the grounds for termination and granted franchisees remedies for the franchisor's failure to observe these limitations. See the discussion in §§ 51.40, 51.41[4]-[6].

- a. Voluntary termination by franchisee.
 - b. Termination on incapacity, insolvency, or death of franchisee.
 - c. Termination on mutual agreement of parties.
 - d. Termination on occurrence of specified events constituting default, identifying particular events and elements of proof required before actual termination.
14. Determine whether agreement should permit or prohibit assignment of franchise by franchisee.
15. Determine whether trade secrets of franchisor will be adequately protected by requiring return of documents (i.e., customer lists and secret formulae) or whether further protection, in form of covenant not to compete for limited time in limited area following termination, will be necessary.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51 FRANCHISE AGREEMENTS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

21-51 California Legal Forms--Transaction Guide § 51.111

§ 51.111 Franchisee's Preliminary Determinations

1. Determine if client fully understands nature of franchise arrangement.

NOTE:

Franchising is a method of expanding and financing a business and delivering goods and services. It has enabled a large number of companies to achieve national and even international trademark and trade name recognition within a short time and with little outlay of their own capital. At the same time, franchising has enabled innumerable individuals with little capital to achieve independent businessman status under the guidance of an experienced company and backed by the reputation of a well-known product or trade name. A franchise arrangement typically allows for relatively independent business ownership and a larger defined market than might otherwise be available at an early stage. However, this advantage is subject to numerous trade-offs, primarily the lack of flexibility in business operations.

2. Identify advantages of franchise arrangement:

- a. Business and financial expertise.
- b. Market and product analysis and experience.
- c. Additional sources of capital.
- d. Name recognition for product or service.
- e. Initial and ongoing training.

f. Supplies.

3. Identify disadvantages of franchise arrangement:

- a. Initial capital outlay may be higher than independent business.
- b. Payment of annual fee or royalty for privilege of exercising franchise.
- c. Business and market restrictions.
- d. Ongoing capital requirements for advertising, training expenses, required amounts and types of insurance.
- e. Less control over business [*see* P 13, *below*].

4. If not restricted by franchise offering, select form of franchise business entity, considering following:

NOTE:

Although the form of business entity selected will not ensure the ultimate economic success or failure of the business, the form may greatly facilitate or hinder operations and substantially influence the amount of net profit ultimately accruing to the beneficial owners of the enterprise. Therefore, it is critical to determine which form of business organization is most suitable for the particular business and its owner. Tax factors may be determinative. For federal income tax purposes, there are only two basic types of business organization: the partnership and the corporation. Regardless of their differences for nontax purposes, associations, joint stock companies, and insurance companies are all taxed as corporations. Practically all other types of business organizations outside the sole proprietorship, including syndicates, groups, pools, joint ventures, limited liability companies, and any organization that is not an association, are taxed as partnerships. For further discussion, see Ch. 1B, *Selecting Form of Business Entity*.

a. Is it more advantageous if income is earned by corporation, rather than by franchisee as individual or partner?

NOTE:

A corporation is an entity distinct from its shareholders and is subject to state and federal taxation. Items of gain and deduction are determined at the corporate level and reported on the corporate income tax return. Any corporate income distributed to the shareholders is taxed a second time as dividend income to them. Items of income and deduction are subject to special disallowance and deferral rules.

An S corporation is an entity distinct from its shareholders and is exempt from federal income taxation. S corporate status must be elected. The election allows items of gain and deduction to be passed through to the shareholders and taxation occurs at this level. In this respect, the S corporation resembles a partnership. Specific statutory requirements must be met in order to qualify for S corporation status [*see* Ch. 2B, *Electing Subchapter S Status*].

A general partnership is a tax-reporting entity distinct from its individual partners. While

the venture's items of gain and deduction are determined at the partnership level, the partnership itself is not subject to federal taxation. Each partner is required to report a portion of these items of gain and deduction on the partner's personal income tax return based on the interest in the partnership. Special rules require adjustments to a partner's interest in a partnership to reflect the initial contribution of property to the partnership; any assumption of partnership liabilities; and distributions received from the partnership.

Limited partnerships are taxed in the same way as a general partnership. The limited partnership form of organization allows investors to contribute capital to a business venture without incurring unlimited liability. One of the most important differences among the states' limited partnership statutes is the extent to which they permit an investor to participate in management without forfeiting his limited liability. A limited partnership will be taxable as a partnership unless it elects to be taxable as a corporation.

Limited liability companies (LLCs) are unincorporated business entities that provide the limited liability of a corporation and the tax advantages of a partnership. Unless it elects otherwise, an LLC is treated as a partnership for federal tax purposes. For discussion, see *Ch. 12C, Limited Liability Companies*, § 12C.50.

b. Will capital gains constitute significant part of business' income and can franchisee use capital gains to offset capital losses or otherwise to reduce tax?

c. What types of deductions may business take in computing its taxable income, and can deductions be timed to secure maximum tax advantage?

d. Will particular form of business organization secure tax-related benefits not otherwise obtainable through another form of operation?

e. If franchisee has substantial income from other sources and reasonably anticipates that new franchise venture will show loss in early development stages, would it be tax wise to start franchised business as sole proprietorship to give franchisee tax benefit of losses?

NOTE:

When a sole proprietor sells a business, each asset is treated individually, and the gain or loss is capital or ordinary, depending on the nature of the individual item. Sole proprietorships cannot allocate income and expenses because income and expenses automatically belong to the sole proprietor.

5. Determine franchisor's financial and business background by analyzing franchisor's capitalization, financing, and affiliations and franchisor's personnel:

NOTE:

An attorney representing a prospective franchisee needs to investigate the prospective franchisor. Counsel should analyze the economic and legal aspects of the franchise offering, comparing different business opportunities and evaluating financing potential. The economic analysis should estimate initial, continuing, and operating costs, including royalty payments and the franchisor's costs of advertising and administrative services; revenue sources; controls that might limit business profits; and termination provisions that might limit the recoupment of investment costs.

- a. Examine Dun and Bradstreet or financial report.
- b. Analyze franchisor's disclosures [*see* Ch. 51A, *Franchise Registration*].
- c. Determine from local Better Business Bureau, Chamber of Commerce, or industry sources, whether reports or complaints have been made with respect to franchisor.

6. Determine litigation background of franchisor and franchisor's personnel.

NOTE:

This background must be disclosed by the franchisor to prospective franchisees [*see* Ch. 51A, *Franchise Registration*]. This information may be confirmed by references to state and federal court litigation indices, the Federal Trade Commission's case indices, and state and local consumer protection agencies.

7. Determine whether any of franchisor's other franchisees have failed and, if so, why.

8. Determine whether other franchisees have encountered problems:

- a. Nature of problem, e.g. conflict with franchisor or litigation with third parties.
- b. Method of resolving problems, including whether franchisor assisted or hindered resolution of issues.

9. Determine from nonfranchised businesses furnishing similar products or services whether franchisor's charges and terms are reasonable or economically suitable.

10. Determine initial costs to franchisee.

- a. Estimate costs related to starting business.
- b. Estimate costs related to starting franchise.

11. Estimate volume of business franchisee would have to obtain to break even.

NOTE:

If the franchisor makes earnings claims for typical franchisees or for a particular franchise area, the bases for such claims must be disclosed to the prospective franchisee [*see* Ch. 51A, *Franchise Registration*]. If the franchisor furnishes projections of cost, volume, and anticipated profits at various volume levels, these projections must be analyzed from the standpoint of how realistic they are for the specific area under consideration.

12. Determine percentage of profit that may be reasonably anticipated, based on initial and recurring costs, including royalties based on gross income.

- a. As percentage of sales.
- b. As percentage of capital investment (to enable franchisee to compare forms of investment).

13. Determine whether franchisor will provide sufficient guidance and training to enable franchisee to succeed, given level of the franchisee's knowledge and experience.

14. Determine practical effect that following controls will have on franchisee, as well as any antitrust implications.

- a. Limitations on business site.
- b. Limitations on form of franchisee's business organization.
- c. Requirements for purchase of supplies and equipment from specified parties.
- d. Limitations on products or services that franchisee may sell.
- e. Imposition of sales quotas.
- f. Price suggestions.
- g. Uniform bookkeeping requirements.
- h. Restrictions on sale, lease, or assignment of franchise.

15. Determine effect of termination provisions of franchise agreement.

- a. Determine causes for which franchisor may terminate agreement.
- b. If failure of franchisee to meet stated quotas can cause termination, determine whether provision is fair and flexible.

NOTE:

This analysis requires a determination as to whether the quota is fixed or subject to variation based on economic and other conditions, the time within which quotas must be met, whether the time limits are themselves flexible, and whether failure to meet the quota may be excused for reasons beyond the franchisee's control.

- c. Determine whether any breach, no matter how minor, can be cause for termination, or whether only specified major breaches constitute cause for termination.
- d. Determine whether termination provision permits franchisee to cure any breach following notice by franchisor.
- e. Determine whether agreement provides for arbitration of termination disputes.

16. Determine whether agreement permits franchisee to terminate agreement.

- a. Whether franchisee may transfer franchise to reasonably satisfactory substitute.
- b. Whether franchisee is required to return franchise to franchisor for reasonable price.

17. Determine whether agreement provides for incapacity, death, or bankruptcy of franchisee, such as whether agreement permits heirs to inherit or provides for reasonable buy-out by franchisor.

18. Determine whether agreement provides reasonable terms for windup of business on termination.

NOTE:

This determination requires inquiry into whether the franchisee will be permitted to return unused merchandise; whether the franchisor agrees to assist in disposing of premises, equipment, and supplies; whether the franchisee will be permitted to retain the premises and use them for other business; and, if the franchisor is to repurchase the business, whether the agreement contains a fair formula for determining the price and a method of settling price disputes.

19. Determine effect of any covenant not to compete.
20. Determine economic effect of separate agreements (e.g., premise leases or supply contracts) executed concurrently with franchise agreements.
21. Determine whether any discrepancies exist between written agreement or agreements and prospective franchisee's understanding of any oral agreements that may have been made in amplification or supplementation of written documentation.
22. If agreement refers to franchisor's manual, determine whether manual materially changes or expands provisions set forth in agreement.
23. Determine effect of antitrust and business protection laws of state whose law governs interpretation of agreement.
24. Determine whether franchisor's agreement form is subject to negotiation.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsFormationGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesFormation



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21-51 California Legal Forms--Transaction Guide §§ 51.112-51.119

[Reserved]

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C. Procedural Guide

21-51 California Legal Forms--Transaction Guide § 51.120

§ 51.120 Establishing Franchise System

1. Incorporate or otherwise establish franchisor's business organization.

NOTE:

The selection of a the appropriate business entity is covered in Ch. 1B, ***Selecting Form of Business Entity*** . Preincorporation and incorporation procedures are covered in Ch. 2, ***Formation of Corporations*** , and Ch. 2A, ***Incorporating a Going Business*** . Organization of other business entities are covered in Ch. 12C, ***Limited Liability Companies*** ; Ch. 15, Part A, ***Formation of General Partnerships*** ; and Ch. 15A, ***Formation of Limited Partnerships*** .

2. Protect franchisor's trademarks, service marks, copyrights, and patents.
 - a. Federal and state trademark, service mark, and trade name protection [see Ch. 103A, *Copyrights* , and Gilson on Trademarks, Chs. 1, 3 (Matthew Bender)].
 - b. Copyrights on all original works of authorship [see Ch. 103A, *Copyrights*].
 - c. Patents on all devices, processes, or inventions [see Ch. 103, *Invention Development Services*].
 - d. Protect trade secrets, including unpatented items, by following types of provisions in franchise agreement:
 - (1) Binding franchisee not to reveal trade secrets.
 - (2) Binding franchisee not to compete with franchisor with respect to matters designated as trade secrets after termination of franchise.

3. Devise operating procedures for franchises and reduce to written form:

- a. Bookkeeping procedures, forms, and records systems.
- b. Training methods and procedures.
- c. Franchise operating procedures in operations manual.
- d. Compliance with inspection procedures in internal procedures manual.
- e. Advertising and public relations program to attract franchisees and to bring business to franchisees.
- f. Personnel system applicable to all franchisees.

4. Develop procedures for attracting and obtaining franchisees.

- a. Attract potential franchisees either through direct advertising, subfranchisors, or franchise opportunities brokers.
- b. Select franchisees based on their qualifications, as shown by interviews and application forms, ability to invest time, skills, and money to extent necessary [*see § 51.200 (franchisee evaluation sheet)*].

5. Select suitable locations for franchise outlets, either through market surveys, advice from real estate specialists, or in connection with potential franchisees.

6. Map out areas of exclusive operation for selected franchise sites.

7. Register franchise offering in state where franchise opportunity will be offered [*see Ch. 51A, Franchise Registration*].

8. Make required disclosures regarding franchise, franchise business and litigation background, franchise agreement, and related matters, to prospective franchisees before execution of any franchise agreement [*see Ch. 51A, Franchise Registration*].

Legal Topics:

For related research and practice materials, see the following legal topics:
 Business & Corporate Law
 Distributorships & Franchises
 General Overview



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[Reserved]

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D. Drafting Guide

21-51 California Legal Forms--Transaction Guide § 51.130

§ 51.130 Statutory Restraints on Agreement Provisions

1. Review effect of antitrust laws on proposed terms of franchise agreement in following areas:

NOTE:

The following list by no means exhausts the potential areas of conflict between the franchisor's desire to exploit its system or product and the pro-competitive spirit of the antitrust laws. The following is only intended to suggest some major questions that may arise in the course of drafting a franchise agreement. Depending on the specific type of franchise (e.g., either a "package" or a "product" type) and a number of other variables, analysis of the antitrust implications of a proposed franchise agreement may require a fairly sophisticated appraisal of its economic impact. Such an appraisal is beyond the scope of this chapter. For analysis, see Glickman, *Franchising*(Matthew Bender).

- a. Reasonableness of location and territorial restrictions on franchisee.

NOTE:

The anti-competitive effect of these non-price vertical restraints are judged according to the "rule of reason" [*Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977) 433 U.S. 36, 57-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568] . Although the determination of anti-competitive effect may require an economic evaluation of several factors, including the franchisor's relative share of the market and the benefits in terms of efficiency bestowed on the franchisee, the most salient issue to be resolved is whether, although perhaps limiting intrabrand competition, restriction of a franchisee's business to a specific outlet or area in fact enhances interbrand competition [see *Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977) 433 U.S. 36, 54, 97 S. Ct. 2549, 53 L. Ed. 2d 568] .

b. Reasonableness of restrictions limiting type of customer to whom franchisee may sell.

NOTE:

Customer limitations are reasonable when, for example, they are created to prevent the franchisor's product from being used by nonprofessionals, which could expose the franchisor to potential products liability [*Tripoli Co., Inc. v. Wella Corp.* (3d Cir. 1970) 425 F.2d 932, 938] .

c. Fixing of prices at which franchisor's product or services may be sold by franchisee.

NOTE:

Although the mere suggestion of prices is legal [*see United States v. Parke, Davis & Co.* (1960) 362 U.S. 29, 43, 80 S. Ct. 503, 4 L. Ed. 2d 505] , the fixing of prices at which others may sell is per se illegal whether by an express term of the agreement or secured by coercive methods such as a threat of termination [*see United States v. Arnold, Schwinn & Co.* (1967) 388 U.S. 365, 376, 87 S. Ct. 1856, 18 L. Ed. 2d 1249] .

d. Prohibitions on sales of noncompeting products by franchisee operating under trademark license granted by franchisor.

NOTE:

The antitrust laws do not require that the licensor of a trademark permit licensees to associate that mark with unrelated products [*Susser v. Carvel Corp.* (2d Cir. 1964) 332 F.2d 505, 515] .

e. Prohibitions on sales of competing products by franchisee operating under trademark license granted by franchisor.

NOTE:

If the franchisor licenses a trademark, the duty to protect the significance of the mark, to ensure that the public is not deceived, and to preserve the goodwill value of the mark, permits the franchisor to exclude competing products and require sole use of the trademarked product, particularly when the franchisor has created a series of franchises resembling a chain operation [*Susser v. Carvel Corp.* (2d Cir. 1964) 332 F.2d 505, 515 ; but *see Bus. & Prof. Code § 21140.1* (gasoline dealers, permitting purchase of fuel from other sources if franchisor refuses or is unable to deliver)]. However, depending on the size of the franchisor and the potential impact on the market, an exclusive dealing provision may run afoul of the Federal Trade Commission Act's proscription of "unfair trade practices" [*Federal Trade Comm'n v. Brown Shoe Co.* (1966) 384 U.S. 316, 321-322, 86 S. Ct. 1501, 16 L. Ed. 2d 587 (franchise agreement giving retail shoe store franchisees certain valuable services in exchange for agreement not to handle shoes conflicting with franchisor's lines violated spirit of Sherman and Clayton Acts)].

f. Restrictions on sources of supplies that tie sales of product or package to purchase of franchisor's supplies or those sponsored by franchisor.

NOTE:

Restrictions on sources of supplies are most often sought to be imposed by franchisors of "package" franchises, such as fast food outlets where equipment and/or containers and the like are sold by the franchisor or a franchisor-sponsored company. Generally, the product (e.g., paper packaging) that is tied to a trademarked franchise system must be one that

cannot be satisfactorily substituted through specification in order for the tying arrangement to be legal [*Siegel v. Chicken Delight, Inc.* (9th Cir. 1971) 448 F.2d 43, 51 , **cert. denied**, 405 U.S. 955 (1972)] . An exception may be made if the business is unseasoned and has an uncertain future, and the nature of the product, its servicing requirements, and the impracticability of obtaining specified substitutes make the tying arrangement reasonable [*United States v. Jerrold Electronics Corp.* (E.D. Pa. 1960) 187 F. Supp. 545, 557-558 , *aff'd*, 365 U.S. 567 (1961)] .

If the franchisor requires the franchisee to purchase franchisor-sponsored products or services and protection of the goodwill embodied in a trademark is not the motive for the requirement (or at least it cannot be shown that other products may not easily be substituted for the tied products), the tying arrangement will violate the Sherman Act [*Atlantic Refining Co. v. Federal Trade Comm'n* (1965) 381 U.S. 357, 369, 85 S. Ct. 1498, 14 L. Ed. 2d 443 ; *Arthur Murray, Inc. v. Reserve Plan, Inc.* (8th Cir. 1969) 406 F.2d 1138, 1143-1145] .

2. Ensure that major inducement to prospective franchisees is not compensation that they may earn from participation in sale of additional franchises [*Corp. Code* § 31115(b)].

NOTE:

This prohibition applies to all franchises except subfranchises [*Corp. Code* § 31115(b); **see** *Corp. Code* § 31008.5 ("subfranchise" defined)].

3. If gasoline distributor or dealer franchise agreement is involved, ensure that following state and federal limitations are observed:

a. Grounds for termination, nonrenewal, or refusal to renew may not be broader than those permitted by statute [see 15 U.S.C. §§ 2802-2804; *Bus. & Prof. Code* §§ 20999-20999.3; see also § 51.41[4]-[6]].

b. Agreement's terms concerning franchisee's right to transfer franchise and franchisor's right to disapprove transfer correspond to parties' statutory rights [see *Bus. & Prof. Code* §§ 21148-21149.5].

c. Provision is made for designation of successor in interest in event of death of franchisee, and this provision comports with all statutory requirements relating to designation of successors-in-interest [see *Bus. & Prof. Code* § 21140.6; see also § 51.41[6], 51.210[2], Art. 7].

d. Agreement contains no provision requiring franchisee to purchase tires, batteries, motor oil, or other accessories from franchisor or franchisor-sponsored source [*Bus. & Prof. Code* § 21140.2].

e. Agreement does not include exclusive dealing provisions that would prohibit dealer from obtaining fuel from other sources when permitted by statute [see *Bus. & Prof. Code* § 21140.1].

f. Agreement does not prescribe business hours that are unprofitable, provided that [*Bus. & Prof. Code* § 21150.1]:

(1) Franchisee's hours of operation are for continuing period of time; and

(2) Dealership is not within one of three statutory exceptions to this rule [see § 51.41[2][b]].

g. If franchisor owns fee interest in leased marketing premises [see *Bus. & Prof. Code* § 20999(i) (definition)], franchisor may not sell or transfer its interest without first offering to do one of following [*Bus. & Prof. Code* § 20999.25(a); see *Abraham & Sons Enterprises v. Equilon Enters., LLC* (2002) 292 F.3d 958, 963-964 (lessor gas companies violated *Bus. & Prof. Code* § 20999.25(a) by relinquishing title, possession, and control of gas stations to LLP without offering lessees chance to purchase stations; LLP was "another person" under statute, even though it was owned and controlled by gas companies, and oil companies' contribution of assets to LLP was "sale, transfer, or assignment" under statute); see also *Forty-Niner Truck Plaza, Inc. v. Union Oil Co.* (1997) 58 Cal. App. 4th 1261, 1276-1278, 68 Cal. Rptr. 2d 532 (*Bus. & Prof. Code* § 20999.25(a) is not preempted by Federal Petroleum Marketing Practices Act (15 U.S.C. § 2806(a)(1)))]:

- (1) Sell or transfer that interest to franchisee; or
- (2) Give franchisee right of first refusal of bona fide offer from third party.

h. If franchisor leases franchise premises from third party and franchisee terminates by reason of expiration of lease, on request by franchisee and before termination or nonrenewal date on notice, franchisor must do following [*Bus. & Prof. Code* § 20999.25(b)]:

- (1) Make bona fide offer to sell franchisee its interest in improvements on property.
- (2) Make sale offer at greater of fair market or book value.

4. If a motor vehicle dealership franchise is involved [see *Veh. Code* § 3062(e)(1) ("motor vehicle dealership" defined); see also § 51.40], incorporate following terms and conditions:

a. Provision requiring written notice to franchisee of franchisor's intention to terminate or refuse to continue an existing franchise, setting forth specific grounds for termination or nonrenewal, s follows [*Veh. Code* § 3060(a)(1)]:

NOTE:

Notwithstanding the statute requiring good cause for termination of a franchise [see *Bus. & Prof. Code* § 20999.1] and the terms of the franchise agreement, no franchisor may terminate or refuse to continue any existing franchise unless the notices provided for in (a), **above**, and (b), **below**, and are given [*Veh. Code* § 3060(a), (b)]. When a written notice of termination is given, the first page of the notice must contain, in at least 12-point bold type and circumscribed by a line to segregate it from the rest of the text, a 60-day or 15-day statement, whichever is applicable [*Veh. Code* § 3060(a)(1)(C)].

If no protest is filed, or if the franchisor receives the franchisee's written consent to the termination, the franchise may then be terminated [see *Veh. Code* § 3060(a)(3)]. However, if a protest is filed, the Board must hold a hearing. The franchise may only be terminated if the Board finds that there is good cause for the franchisor's action [see *Veh. Code* § 3060(a)(2); see also *Veh. Code* §§ 3050.7 (stipulated decisions and orders), 3066 (procedure for hearing)].

- (1) 60 days before effective date of termination or refusal to continue; or

NOTE:

The 60-day notice of termination must contain the following statement [*Veh. Code* § 3060(a)(1)(C)]:

"NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the termination of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 30 calendar days after the end of any appeal procedure provided by the franchisor or your protest appeal right will be waived."

(2) 15 days before effective date of termination or refusal to continue if grounds relate to:

NOTE:

The 15-day notice of termination must contain the following statement [*Veh. Code* § 3060(a)(1)(C)]:

"NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the termination of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 10 calendar days after receiving this notice or within 10 days after the end of any appeal procedure provided by the franchisor or your protest appeal right will be waived."

(a) Transfer of any ownership or interest in franchise without consent of franchisor, which consent must not be unreasonably withheld.

(b) Misrepresentation by franchisee in applying for franchise.

(c) Insolvency of franchisee or filing of any petition by or against franchisee under any bankruptcy or receivership law.

(d) Any unfair business practice, after written warning.

NOTE:

On receipt of this notice, the franchisee may protest the termination or refusal to continue and is entitled to a good cause hearing before the New Motor Vehicle Board [*Veh. Code* §§ 3060(a)(2), 3061, 3066; *see Duarte & Witting, Inc. v. New Motor Vehicle Board* (2002) 104 Cal. App. 4th 626, 637, 128 Cal. Rptr. 2d 501 (Board had implied authority to dismiss protest when undisputed facts demonstrated good cause for franchise termination as matter of law)].

(e) Failure of franchisee to conduct customary sales and service operations during customary business hours for seven consecutive business days, except when beyond direct control of franchisee or by order of DMV [*Veh. Code* § 3060(a)(1)(B)(v)].

b. Provision that franchisor will not modify or replace franchise with succeeding franchise if modification or replacement substantially affects franchisee's sales or service obligations or its investment, unless franchisor first gives franchisee 60 days prior written notice [*Veh. Code* § 3060(b)(1)].

NOTE:

This written notice must contain on the first page, in at least 12-point bold type and circumscribed by a line to segregate it from the rest of the text, the following statement [*Veh. Code § 3060(b)(2)*]:

"NOTICE TO DEALER: Your franchise agreement is being modified or replaced. If the modification or replacement will substantially affect your sales or service obligations or investment, you have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the proposed modification or replacement of your franchise under the provisions of the California Vehicle Code. You must file your protest with the board within 30 calendar days of your receipt of this notice or within 30 days after the end of any appeal procedure provided by the franchisor or your protest rights will be waived."

c. Provision for notice to franchisee of franchisor's intention to establish or relocate dealership within relevant market area [*see Veh. Code § 507* (defining "relevant market area" as any area within radius of 10 miles from site of potential new dealership)] in which same line-make is already represented [*Veh. Code § 3062(a)(1)*; *see Veh. Code § 3062(a)(2)* (rules relating to establishment or relocation of satellite warranty facility); *see also Veh. Code § 3062(e)(2)* ("satellite warranty facility" defined)], except under following circumstances:

NOTE:

For these purposes, the reopening of a dealership that has not been in operation for one year or more is considered to be the establishment of an additional motor vehicle dealership [*Veh. Code § 3062(d)*].

(1) Relocation of existing dealership to any location that is both within same city as, and is within one mile from, existing dealership location [*Veh. Code § 3062(b)(1)*].

(2) Establishment at any location that is both within same city as, and is within one-quarter mile from, location of dealership of same line-make that has been out of operation for less than 90 days [*Veh. Code § 3062(b)(2)*].

(3) Display of vehicles at fair, exposition, or similar exhibit if no actual sales are made at event and display does not exceed 30 days [*Veh. Code § 3062(c)*].

NOTE:

The written notice must contain, on the first page, in at least 12-point bold type and circumscribed by a line to segregate it from the rest of the text, the following statement [*Veh. Code § 3062(a)(3)*]:

"NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing on your protest under the terms of the California Vehicle Code if you oppose this action. You must file your protest with the board within 20 days of your receipt of this notice, or within 20 days after the end of any appeal procedure that is provided by us to you. If within this time you file with the board a request for additional time to file a protest, the board or its executive director, upon a showing of good cause, may grant you an additional 10 days to file a protest."

5. If franchise agreement involving neither petroleum business nor automobile dealership is involved, observe following California limitations:

a. Franchisor has no right to terminate franchise before expiration without good cause [*Bus. & Prof.*].

Code § 20020].

NOTE:

The definitions of good cause and reasonable termination are quite broad [*see Bus. & Prof. Code §§ 20020, 20021*]. The main effect of the statute on the terms of an agreement would be to void any provision permitting termination at will by the franchisor. Depending on judicial interpretation of the statute, it is also possible that good cause will not include business reasons unrelated to any breach by the franchisee of the agreement.

b. Franchisee is entitled to renew franchise at its expiration, unless circumstances permitting franchisor's refusal to renew are present and franchisor has not provided 180 days written notice of intention not to renew [*Bus. & Prof. Code § 20025; see § 51.26[2]*].

c. Notice of termination or nonrenewal must be made in writing and to be delivered personally or by receipted mail or telegram to franchisee [*Bus. & Prof. Code § 20030*].

NOTE:

The notice must state the reasons for and the effective date of termination or nonrenewal [*Bus. & Prof. Code § 20030*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises General Overview Business & Corporate Law Distributorships & Franchises Causes of Action Restraints of Trade Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Agreements Business & Corporate Law Distributorships & Franchises Trademark Licensing



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51 FRANCHISE AGREEMENTS

PART III. TRANSACTION GUIDE

D. Drafting Guide

21-51 California Legal Forms--Transaction Guide § 51.131

§ 51.131 Drafting Guide for Franchise Agreement

NOTE:

This guide lists the kinds of provisions that should be considered when drafting a franchise agreement. Because there are so many different types of franchise businesses, it is impossible to list every provision that might be appropriate in any particular franchise agreement. For an exhaustive drafting guide for business franchise agreements, see Rabkin & Johnson, *Current Legal Forms*, Ch. 3, ***Licenses and Franchises***, (Matthew Bender) (business franchise drafting checklist). For drafting considerations relevant to contracts in general, and provisions common to all contracts, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions***.

Although franchisors and franchisees each have distinct and sometimes conflicting interests in a prospective franchise arrangement, both have common interests in the creation of a successful and legally permissible franchise relationship. The franchisor ordinarily prepares the franchise agreement and the franchisee can accept it or reject it. Although changes in some of the terms of the agreement may be possible, it is the better practice to be fair and treat all franchisees equally and to make similar changes in all outstanding agreements. It can be expected that the usual franchise agreement would tend to favor the franchisor. However, the franchisee should be alert to any unconscionable provisions that the franchisee should demand to be changed or refuse to execute the agreement. It has been noted that if a franchisor is not hesitant about changing provisions of its franchise agreement to induce a prospect to enter into a franchise relationship, it tends to show lack of experience and possibly an unethical organization. Responsible franchisors attempt to prepare a reasonable agreement and will not vary it to make sales to individual franchisees. However, they commonly do make changes because of economic, competitive, and other changed conditions.

1. Essential elements of legally effective franchise agreement.

a. Grant of license.

- b. Description of consideration.
- c. Obligations of franchisor.
- d. Obligations of franchisee.
- e. Provisions for controls, including the following:
 - (1) Reasonable controls over use of trademarks [see § 51.22].
 - (2) Controls over franchisee.
 - (3) Extent and duration of franchise.

NOTE:

Restrictions on the extent and duration of the franchise granted and an almost unlimited number of possible controls, rules, and restrictions placed on the franchisee by the franchisor comprise the bulk of most franchise agreements.

2. Identification of parties.

- a. Franchisor's name, address of its principal office, and state of incorporation.
- b. Franchisee's name and address.

3. Recitals [see § 51.210]:

- a. State that franchisor has developed a unique and successful system for the establishment and operation of a business, identifying nature of business and designating it as the "franchise system."
- b. Describe trademarks, service and other marks, copyrights, devices, logos, distinctive designs or features, and similar items used in franchise and designate them as proprietary marks and indicia.
- c. Indicate that all proprietary marks and indicia are property of franchisor, and set forth all trademark, copyright, and patent numbers assigned to franchisor.
- d. Describe franchise system as having established goodwill attributable to franchise business as whole.
- e. Set forth franchisee's acknowledgments that franchisee:
 - (1) Has investigated franchise system.
 - (2) Has investigated market for franchise system and goods or services involved.
 - (3) Desires to act as franchisee.
 - (4) Desires to adhere to all elements of franchise system.

4. Grant and acceptance of right, franchise, and license to conduct franchise business subject to terms and conditions of

agreement [see §§ 51.210[2], Section 1.01, 51.211[2], Section 1.01].

NOTE:

This type of provision should include the grant and acceptance of the right to establish and operate a facility or premises from which the business is to be conducted, to use the franchise system and the franchisor's marks and indicia, and to sell the products or services involved. When this provision is read together with an entire agreement clause [see § 51.210[2], Section 10.09], the grant will be limited to the rights expressly provided in the agreement.

5. Duration of franchise.

a. From a specified commencement date to a designated ending date, with an option to renew if desired [see § 51.210[2], Sections 1.02, 9.02].

NOTE:

A date by which the franchisee must commence business may be included in the agreement [see § 51.211[2], Section 4.02]. Commencement of operation may be made dependent on the franchisee's business or premises being in conformity with the franchisor's system or specifications and subject to the franchisor's approval.

b. For a designated period of time [see § 51.211[2], Section 1.02], coupled with renewal terms if desired [see § 51.211, Section 1.03].

c. Same as any term of lease of franchise premises, renewable when lease is renewed.

6. Initial fee.

a. Set forth promise by franchisee to pay a specified initial fee as consideration for rights granted [see §§ 51.210[2], Section 1.03, 51.211[2], Section 2.01].

NOTE:

The initial franchise fee may be made payable in a lump sum or in installments. In the latter case, the number of installments and the amount and due date of each should be specified. In addition, the franchise agreement should specify exactly what is being given in exchange for the initial fee.

b. Specify that payment of initial fee is in addition to royalties and other specified payments [see § 51.210[2], Section 1.03].

c. Include provisions governing refund of all or a portion of the initial fee, if desired [see § 51.210[2], Section 1.04].

7. Specify conditions applicable to premises of franchised business.

a. Specify whether premises are to be constructed or are presently in existence.

b. If presently in existence, set forth exact address [see § 51.210[2], Section 2.01].

c. If premises are owned by franchisor, state whether they will be sold or leased to franchisee.

(1) If premises will be sold to franchisee, agreement should state terms and conditions of sale or incorporate separate sales contract by reference.

(2) If premises will be leased to franchisee, agreement should set forth terms of lease or incorporate separate lease by reference.

d. If premises are leased by franchisor, state whether franchisor will sublease or assign lease to franchisee, and set forth terms of sublease or assignment.

e. If premises will be constructed, state whether site will be owned or leased by franchisor or franchisee.

(1) If site is owned by franchisor, state whether it is to be sold or leased to franchisee.

(2) If site is leased by franchisor, state either that the lease will be assigned to franchisee or that sublease will be executed.

(3) Either include terms and conditions of transaction in agreement or incorporate separate sale or lease agreement incorporated by reference.

f. If franchise site is owned by or leased to franchisee, provide that location (and provisions of ease, if applicable) has or have been approved by franchisor and stipulate that no changes will be made in lease provisions (if applicable) by franchisee without franchisor's consent.

8. State any territorial restrictions applicable to franchise and means of protecting those restrictions.

a. If desired, provide for specifically described exclusive area for franchise [see § 51.211[2], Section 1.05].

NOTE:

For a provision specifying the general area in which the franchisee is granted a franchise, which may be used when the parties have not yet determined an exact location for the franchise premises, *see* § 51.220[2]. For an alternative provision containing a promise by the franchisor neither to operate nor to enfranchise any other business bearing the franchise name within a specified radius of the franchisee's location, or an additional alternative provision granting the franchisee a specifically described territory, *see* § 51.221[2].

b. Alternatively, provide for specifically prescribed "protected area" for franchise that would be subject to change unilaterally by franchisor under specified circumstances [see § 51.210[2], Section 2.03] or by mutual consent of both parties.

NOTE:

The protected area provision may give the franchisee the first right to open additional franchises in any new areas created by the franchisor within the original protected area [see § 51.210[2], Section 2.02(c)-(e)] and should spell out the procedures to follow in exercising that right [see § 51.210[2], Section 2.04].

c. If agreement provides for exclusive or protected area, include undertaking on part of franchisor to protect franchisee against competition in area by other franchisees or by franchisor [see §§ 51.210[2], Section 2.02, 51.211[2], Section 1.05].

d. Alternatively, provide for nonexclusive franchise [see § 51.222].

e. Set forth franchisee's agreement not to interfere with or attempt to prohibit any other franchisee from using franchise business name in any area other than franchisee's protected or exclusive area [see § 51.210[2], Section 2.05].

f. Provide that all franchisees may sell to any customer, regardless of the exclusivity of their territories, in order to avoid restraint of trade [see § 51.210[2], Section 2.06].

9. Specify circumstances under which franchisee's premises may be relocated and in accordance with specified procedures [see §§ 51.210[2], Sections 2.07-2.10, 51.211[2], Section 1.04].

10. Provide for or restrict operation of franchise outlets.

NOTE:

More than one outlet within the territory described in the agreement may be permitted and, if so, the agreement must specify whether written consent of the franchisor will be required.

11. Include provisions governing use of franchise system, its marks, trade names, copyrights, and patents [see § 51.210[2], Sections 3.01, 3.02]:

a. Franchisee should acknowledge validity of franchisor's trademarks, service marks, and trade names, which may be designated as proprietary marks and indicia, and acknowledge that they are franchisor's property.

b. Franchisee should agree to use marks and indicia only during term of franchise and in connection with franchise business.

c. Franchisee should agree not to do anything to violate franchisor's rights in those marks or indicia.

d. Franchisee should agree not to use any other marks or indicia in connection with franchise business.

e. Franchisee should agree that future marks or indicia and future rights will accrue to benefit of franchisor [see § 51.210[2], Section 3.03].

f. Franchisee should agree to use franchise business name without additional words and should further agree not to use franchise name or franchisor's marks or indicia as part of franchisee's firm or corporate name [see § 51.210[2], Section 3.04].

12. Protect confidentiality of franchisor's trade secrets [see § 51.210[2], Section 3.05; see also § 51.211[2], Section 4.09].

NOTE:

Under the Uniform Trade Secrets Act [*Civ. Code* § 3426 *et seq.*], an actual or threatened misappropriation of a trade secret may be enjoined or otherwise limited [*see Civ. Code* § 3426.2] and damages can be recovered for the misappropriation [*see Civ. Code* § 3426.3].

13. Specify rights of parties to discoveries and ideas initiated by franchisee [see § 51.211[2], Section 4.10].

14. Include provisions governing goodwill.

NOTE:

The agreement should provide that all goodwill arising from the use of the franchise system and the franchisor's marks and indicia is the franchisor's property but that the franchisee may receive a price for goodwill upon the sale of the business [*see* § 51.210[2], Section 3.06].

15. Require franchisee to report any unauthorized or confusingly similar use of franchisor's marks or indicia to franchisor [*see* § 51.210[2], Section 3.07].

16. Describe assistance and training to be provided by franchisor to franchisee.

- a. Expert opinions on locating business based on market surveys and real estate knowledge and trends.
- b. Assistance with negotiations for, and preparation of, any lease or deed.
- c. Information and plans on construction, layout, design, equipping, and initial supplying and inventory of business involved.
- d. Plans, procedure, and supplies for advance pre-opening promotion or grand opening program.
- e. Continuing supplies, material, and ideas for local advertising and promotion.
- f. Initial and continuing training programs for franchisee and employees, together with information in form of bulletins, brochures, reports, and notices covering franchisor's new plans and developments [*see* § 51.210[2], Section 4.01(a)].
- g. Management counseling by franchisor's field representatives or executives and analysis of franchisee's financial statements, together with training in merchandise buying and inventory control [*see* § 51.210[2], Section 4.01(c); *see also* § 51.211[2], Sections 3.01, 3.04, 3.07].
- h. Supplies of operating forms, record books, sales kits and information and forms necessary to set up accounting system.
- i. Provision of operations manual to franchisee by franchisor, conditioned on franchisee's acknowledgment of receipt and agreement to return manual to franchisor on termination [*see* § 51.211[2], Section 3.03].
- j. Franchisor will make available to franchisee all necessary plans and specifications for buildings, equipment, layout, and displays [*see* § 51.211[2], Section 3.02].
- k. If franchisor makes improvements or additions to franchise system, requirement that franchisor will make them available to franchisee [*see* § 51.210[2], Section 4.01(b)].

17. Specify franchisor's advertising and promotion responsibilities [*see* § 51.210[2], Section 4.01(d)].

- a. Whether franchisee will be required to make specified contributions (either fixed fee, percentage of sales, net profit, or other) at designated times.
- b. Whether franchisor will have exclusive discretion regarding advertising policy.

c. Amount of money that franchisor will be required to spend for advertising, or formula governing that amount.

18. Specify franchisee's advertising and promotion responsibilities.

a. Whether franchisee has duty to assist in advertising and promotion programs [see § 51.210[2], Section 4.01] or has right to purchase advertising in addition to that purchased by franchisor at franchisee's discretion.

b. If franchisee is required to purchase advertising, specify sums that franchisee must spend, whether that advertising must be limited to franchisee's territory, and whether franchisee must secure franchisor's prior approval [see § 51.210[2], Section 4.01(d)].

c. Amount of money that franchisee must pay to franchisor for advertising [see § 51.211[2], Section 4.13].

19. Provide for purchase and sale of products or supplies.

a. Agreement by franchisor to sell its products to franchisee, providing for discontinuation of product lines under specified circumstances [see § 51.210[2], Section 4.02].

b. Provision that price, delivery, payment, and other terms of sales by franchisor will be as prescribed by franchisor from time to time [see § 51.210[2], Section 4.03].

c. Provision that franchisor will make no further sales to franchisee after termination of agreement [see § 51.210[2], Section 4.04].

d. Provision that franchisor will not be liable for unavailability of products or delivery delays [see § 51.210[2], Section 4.05].

e. Provision that franchisor will assist franchisee in selecting suppliers capable of providing supplies in compliance with franchisor's specifications [see § 51.211[2], Sections 3.05, 4.07(f)].

f. If product is unique or its quality depends on particular ingredients, consider requiring franchisee to purchase only from franchisor.

NOTE:

Care must be exercised in this area to avoid adverse antitrust implications [see §§ 51.11, 51.24].

g. If agreement will provide for purchases of supplies from franchisor or approved suppliers, add provision detailing method by which franchisee may obtain franchisor's approval of alternative suppliers or supplies [see § 51.211[2], Section 4.07(g)].

20. Specify payment for equipment and fixtures.

a. If standardization of equipment and fixtures is essential, or there is difficulty in obtaining them, consider requiring purchase from franchisor or source approved by franchisor [see §§ 51.23, 51.24, 51.210[2], Section 4.07].

b. Consider providing that franchisor will finance or help obtain financing.

21. Specify franchisee's obligations with respect to operation of franchise business, including controls imposed by franchisor.

a. Prescribing business days and hours of operation [*see* § 51.210[2], Section 5.01].

b. Requiring franchisee to promote sales or business [*see* § 51.210[2], Section 5.02].

c. Requiring franchisee to maintain adequate inventory of supplies or products [*see* § 51.210[2], Section 5.03; *see also* § 51.211[2], Section 4.02].

d. Designating persons responsible for managing franchisee's business and specifying those persons' duties [*see* § 51.210[2], Section 5.04].

e. Requiring franchisee to maintain franchisee's premises [*see* § 51.210[2], Section 5.06; *see also* § 51.211[2], Sections 4.07(a) (repairs, alterations, improvements), 4.08 (refurbishment)].

f. Specifying standards of operation of franchised business [*see* § 51.210[2], Section 5.07 (efficient, honest, etc.); *see also* § 51.211[2], Sections 4.02 (operate quietly and respectably), 4.04 (clean and in accordance with law)].

g. Specifying use of advertising materials and requiring prior approval of franchisee-initiated advertising by franchisor [*see* § 51.210[2], Section 5.08].

h. Requiring payments to franchisor for supplies, including promises to make timely payments on all invoices and to pay interest on overdue payments [*see* § 51.210[2], Section 5.11].

i. Governing payments by franchisee to third parties [*see* § 51.210[2], Section 5.11].

j. Requiring compliance with all applicable laws and regulations [*see* § 51.210[2], Section 5.12; *see also* § 51.211[2], Section 4.04].

NOTE:

The responsibility for state and local taxes should be placed directly on the franchisee, together with a provision indemnifying the franchisor from any claim arising out of the franchisee's failure to pay. For discussion of the need for such a provision, see Glickman, Franchising, § 4.05[3][c][ii] (Matthew Bender).

k. Prohibiting employment by franchisee of persons employed by the franchisor or other franchisees without consent of that person's employer [*see* § 51.210[2], Section 5.13].

l. Requiring franchisee to comply with franchisor's policies, rules, and procedures, and/or franchisor's operations manual [*see* § 51.210[2], Section 5.15; *see also* § 51.11, Section 4.07].

m. Granting franchisor right to visit franchisee's premises to inspect merchandise, equipment, conduct of business, books, and records [*see* § 51.210[2], Section 5.16].

22. Specify design and appearance of franchisee's business premises.

- a. Agreement that premises are to be constructed or improved by franchisee at franchisee's expense in accordance with franchisor's plans and specifications [*see* § 51.211[2], Sections 4.01, 4.07].
 - b. Covenant by franchisee to maintain uniformity of appearance between franchisee's premises and those of other franchisees [*see* § 51.210[2], Section 5.05; *see also* § 51.211[2], Section 4.07(a)].
 - c. Covenant by franchisee to purchase and display franchisor's marks or indicia on premises [*see* § 51.210[2], Section 5.05(d); *see also* § 51.211[2], Section 4.07(b)].
23. Specify franchisee's liability for losses and damages and obligation to secure insurance [*see* § 51.210[2], Section 5.09].
24. Specify financial data to be submitted by franchisee to franchisor [*see* § 51.210[2], Section 5.10].
- a. Annual financial statements.
 - b. Sales, cost, and other financial data, either periodically or as required by franchisor.
 - c. Royalty-related financial data.
 - d. Submission of personal financial statements by those having interest in franchisee.
25. Describe relationship of parties.
- a. Franchisee may not act as franchisor's agent and will not represent franchisee as such [*see* § 51.210[2], Section 5.14].
 - b. Franchisee is independent contractor rather than franchisor's agent [*see* § 51.211[2], Section 6.02].
 - c. Franchisee is responsible for requirements and results specified in agreement, but is not subject to franchisor's control as to physical actions in operating business [*see* § 51.211[2], Section 6.01].
- NOTE:**
- Although the foregoing provisions are intended to insulate the franchisor from liability for the negligence of the franchisee, the franchisor nevertheless will be liable if the franchisor, either intentionally or through want of ordinary care, leads third persons to believe that the franchisor and the franchisee are part of the same business [*see* *Kuchta v. Allied Builders Corp.* (1971) 21 Cal. App. 3d 541, 547-548, 98 Cal. Rptr. 588].
26. Require franchisee to obtain consent of associates to franchise agreement [*see* § 51.211[2], Section 4.11].
27. Require franchisee to become member of industry or other type of association or organization [*see* § 51.211[2], Section 4.12].
28. Include royalty provisions.
- a. Requirement to pay royalties [*see* § 51.210[2], Section 6.01; *see also* § 51.211[2], Section 2.02].
 - b. Specify royalty accounting period (fortnightly, monthly, etc.) and date following close of that period

by which royalties must be paid [*see* § 51.210[2], Section 6.01; *see also* § 51.211[2], Section 2.02].

c. Specify basis for computing royalties [*see* P 29, *below*].

d. Specify requirements for maintenance and audit of books and records [*see* P 30, *below*].

e. Specify requirements for reports of revenue on which royalties are computed [*see* § 51.210[2], Sections 6.03 (royalty period report), 6.04 (annual report)].

f. Provide for interest on late royalties [*see* § 51.210[2], Section 6.06].

29. Specify one of following for computing royalties:

a. As fixed percentage of net revenue [*see* § 51.210[2], Section 6.01], with "net revenue" separately defined [*see* § 51.210[2], Section 6.02].

b. As fixed percentage of gross receipts [*see* § 51.211[2], Section 2.02].

c. As variable percentage of net revenue or gross receipts, with variations attributable to increases or decreases as sales or profits vary.

d. As service fee in consideration of franchisor's services, payable on basis of percentage of gross receipts or net revenue, periodically after close of the period [*see* § 51.240].

e. As fixed amount, rather than royalty computed on basis of revenue figure, attributable to specific services to be provided by franchisor, and payable in advance of each period [*see* § 51.241].

f. As royalty expressed as percentage of revenues or fixed amount, whichever is greater, to guarantee franchisor minimum royalty [*see* § 51.242].

30. Requirements for maintenance and audit of books and records related to royalties [*see* § 51.210[2], Section 6.05].

NOTE:

The agreement should obligate the franchisee to maintain records that will reflect the basis on which royalties are computed, prescribe the period during which they are to be preserved, provide that the records be open for inspection and audit by the franchisor, specify who is to pay for the audit, include an agreement by the franchisee to cooperate in any audit, and provide for credit for overpayment or underpayment of royalties discovered in any audit.

31. Include financing provisions.

a. Financing by franchisor for merchandise (e.g., sold to franchisee on consignment or on specified trade credit terms).

b. Financing by franchisor for equipment and machinery (e.g., on installment terms).

c. Direct loans in specified situations.

d. Provision that franchisee is not required to make financial arrangements with franchisor if better terms can be obtained elsewhere.

32. Provide for transfer or assignment of franchise.

- a. General prohibition against assignment, defining "assignment," except as permitted elsewhere in agreement [see § 51.210[2], Section 7.01].
- b. Transfer to corporation controlled by franchisee permitted [see § 51.210[2], Section 7.02].
- c. Transfer on sale of franchise business permitted under specified circumstances [see § 51.210[2], Section 7.03].
- d. Conditions precedent to franchisor's consent to voluntary assignment [see § 51.210[2], Section 7.04].
- e. Conditions precedent to franchisor's consent to encumbrances by franchisee [see § 51.210[2], Section 7.05].
- f. Conditions for franchisor's approval of transferee [see § 51.210[2], Section 7.06].
- g. Transfers on death of franchisee [see § 51.210[2], Section 7.07].
- h. Conditions precedent to franchisor's consent to transfer of managerial responsibility [see § 51.210[2], Section 7.08].
- i. Time limit on consent to transfer [see § 51.210[2], Section 7.09].
- j. Arbitration of refusal to consent to transfer [see § 51.210[2], Section 7.11].
- k. Assignment by franchisor permitted [see § 51.210[2], Section 7.12].

33. Specify consequences of default and termination.

NOTE:

The franchisor's right to terminate is subject to statutory restrictions [see § 51.130].

- a. Specify elements of default that will result in automatic termination of franchise agreement [see § 51.210[2], Section 8.06].
- b. Identify grounds on which franchisor may elect to terminate franchise agreement [see § 51.210[2], Section 8.02].
- c. Termination of franchise by franchisee at will, following notice [see § 51.210[2], Section 8.01].
- d. Termination by franchisee following approved assignment [see § 51.210[2], Section 8.10(c)].
- e. Specify method for giving notice of default or termination [see § 51.210[2], Section 8.04].
- f. Consider providing for arbitration of termination issue [see §§ 51.210[2], Section 8.03, 51.250[2]].
- g. Consider providing for relief in equity on breach or default by franchisee [see § 51.210[2], Section

8.07].

h. Consider including liquidated damages provision [*see* § 51.210[2] Section 8.08].

i. Specify obligations of parties after termination [*see* § 51.210[2], Sections 8.09, 8.10].

34. Provide for expiration and renewal of franchise.

NOTE:

The franchisee has a limited statutory right to renew, as well as a right to notice of the franchisor's intention not to renew [*see* § 51.130].

a. Specify expiration date as number of years from date of agreement or from date franchisee commences operations [*see* § 51.210[2], Section 9.01].

b. Specify renewal option, including details of renewal fee, new period, and required notice [*see* § 51.210[2], Section 9.02; § 51.11, Section 1.03].

c. Specify renewal fee as percentage of gross revenues or then-current initial franchise fee [*see* § 51.210[2], Section 9.03].

d. Specify royalties due under renewal agreement, either as average of royalties then being paid by current franchisees or same as provided in then current franchise agreements [*see* § 51.210[2], Section 9.04].

e. Specify conditions to exercise of renewal option [*see* § 51.210[2], Section 9.05].

f. Consider requiring remodeling as condition precedent to renewal [*see* § 51.210[2], Section 9.06].

g. State conditions under which franchisor may elect not to renew franchise [*see* § 51.210[2], Section 9.07].

35. Miscellaneous or generally applicable provisions.

a. "Franchisee" as including assignees [*see* § 51.210[2], Section 10.01].

b. Section headings [*see* § 51.210[2], Section 10.02].

c. Cost of enforcement or defense [*see* § 51.210[2], Section 10.03].

d. Cumulative remedies [*see* § 51.210[2], Section 10.04].

e. Nonwaiver of rights through failure of franchisor to act [*see* § 51.210[2], Section 10.05].

f. Invalidity and severability [*see* § 51.210[2], Section 10.06].

g. Delivery of notices and effectiveness on receipt [*see* § 51.210[2], Section 10.07].

h. Entire agreement [*see* § 51.210[2], Section 10.08].

- i. Binding effect [*see* § 51.210[2], Section 10.09].
- j. Controlling law [*see* § 51.210[2], Section 10.10].
- k. Use of counterparts [*see* § 51.210[2], Section 10.11].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Agreements Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Fees



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51 FRANCHISE AGREEMENTS

PART III. TRANSACTION GUIDE

D. Drafting Guide

21-51 California Legal Forms--Transaction Guide §§ 51.132-51.139

[Reserved]

§§ 51.132[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51 FRANCHISE AGREEMENTS

PART III. TRANSACTION GUIDE

E. Related and Subsequent Procedures

21-51 California Legal Forms--Transaction Guide § 51.140

§ 51.140 Modifying Franchise

1. Register modification of existing California franchise as franchise offering, unless exempt [see Ch. 51A, *Franchise Registration*].
2. Take either of following steps:
 - a. Disclose any material modification of existing California franchise to franchisee at least five business days before franchisee's execution of binding agreement to modification; or
 - b. Provide for franchisee's right to rescind within five business days of agreeing to modification, unless exemption from disclosure requirement applies [*Corp. Code* § 31125(b); see *Corp. Code* § 31125(c), (d) (exceptions); see also Ch. 51A, *Franchise Registration*].
3. If "large franchisor" exemption from California registration is used, give franchisee written disclosure of information concerning specific sections of franchise agreement proposed to be modified, and any additional information as may be required by rule or order of Corporations Commissioner [*Corp. Code* § 31101(c)(2)].

NOTE:

Nothing in the Commissioner's rules regarding franchises [see 10 Cal. Code Reg. §§ 310.002-310.505] currently specifies additional information to be disclosed.

The franchisee has a statutory right to rescind the agreement to the modification by giving the franchisor written notice of rescission within 10 business days of receipt of the disclosure statement regarding the modification [*Corp. Code* § 31101(c)(2)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law
Distributorships & Franchises
General Overview
Business & Corporate Law
Distributorships & Franchises
Registration & Disclosure
General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51 FRANCHISE AGREEMENTS

PART III. TRANSACTION GUIDE

E. Related and Subsequent Procedures

21-51 California Legal Forms--Transaction Guide §§ 51.141-51.199

[Reserved]

§§ 51.141[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51 FRANCHISE AGREEMENTS

PART IV. FORMS

A. Evaluation of Franchisee

21-51 California Legal Forms--Transaction Guide § 51.200

§ 51.200 Information Sheet for Use in Preliminary Evaluation of Potential Franchisee

[1] Comment--Use of Form

This form is designed for use in evaluating the qualifications of a potential franchisee in a service-type franchise. This form may be modified to meet the particular needs of other franchise businesses. However, regardless of the type of business, the ensuing personal interview with the potential franchisee will reveal significant information about the prospect's attitudes and aptitudes that cannot be elicited by a written questionnaire. Thus, the form should be regarded as a screening device rather than a definitive indicator of a potential franchisee's suitability.

The end of the form contains space for the prospective franchisee to explain why he or she is a good candidate for a franchise, as well as space for the prospective franchisee to ask specific questions about the franchise opportunity.

[2] FORM

Information Sheet for Use in Preliminary Evaluation of Potential Franchisee

Information Sheet for Use in Preliminary Evaluation of Potential Franchisee

CONFIDENTIAL

THIS IS NOT AN APPLICATION

Date _____

The information you supply below will be used only to evaluate your qualifications as a _____[company franchisee] or to help answer your questions more fully. This is NOT an application.

Personal

Name: _____

Date of birth: _____

Address: _____

Telephone number: _____

Fax number: _____

Email address: _____

Do you wish to remain at present address or are you willing to relocate? _____

If relocating, what areas would you prefer? _____

Education

University or Equivalent: _____

Type of degree: _____

Year: _____

Area of study: _____

Additional relevant education: _____

Experience

Title and principal duties of last two employment or managerial positions:

Last or current position: _____

Next to last position: _____

Other relevant experience, including any business that you owned or were a principal: _____

Financial

Check current salary level:

☐ Under \$25,000

☐ \$25,000 to \$50,000

☐ \$50,000 to \$75,000

☐ \$75,000 to \$150,000

☐ Over \$150,000

Are you prepared to invest _____ [*specify, e.g., \$50,000*] in a business of your own? ☐ Yes ☐ No

Check planned sources of investment capital:

☐ Bank Account ☐ Savings Account ☐ Stocks and Bonds
☐ Real Estate ☐ Life Insurance Loan ☐ Other

Current line of credit: _____

Any letter of credit or other commitment letter: _____

General

Have you ever operated your own business? _____

When could you start working in your own business? _____

Why are you seeking a business of your own? _____

Please check ONE of the following boxes:

☐ I am definitely interested in becoming a

_____ [*company franchisee*] and believe I am qualified. Please arrange a personal interview as soon as possible.

☐ I am interested in becoming a

_____ [*company franchisee*] but am uncertain of my qualifications. Please review and give me your opinion and advice.

☐ I may be interested in becoming a

_____ [*company franchisee*] but I cannot make a career change until

_____ [*date*].

☐ I genuinely want to find a business of my own but am uncertain of my interest until I have more information. Please arrange an interview for this purpose, without any obligation.

Explain briefly why you feel you could be successful as a company franchisee: _____

Questions About the Franchise

Please use the space below for specific questions that you have about the franchise opportunity. Please state your questions as clearly as possible: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesGeneral OverviewBusiness & Corporate LawDistributorships
& FranchisesFranchise RelationshipsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51 FRANCHISE AGREEMENTS

PART IV. FORMS

A. Evaluation of Franchisee

21-51 California Legal Forms--Transaction Guide §§ 51.201-51.209

[Reserved]

§§ 51.201[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 51 FRANCHISE AGREEMENTS
PART IV. FORMS
B. AGREEMENTS

21-51 California Legal Forms--Transaction Guide § 51.210

§ 51.210 Complete Form for Basic Franchise Agreement--Products and Services Franchise System

[1] Comment

[a] Use of Form

This form is a complete long form franchise agreement. It is drafted specifically for use in the franchising of products and service franchise system. It is also designed as a basic form that may be adapted for use in any type of franchise business with the addition or substitution of alternative language more appropriate to the particular type of franchise business involved. For example, § 51.211 is a restaurant/fast food franchise agreement that incorporates many standard franchise agreement provisions, found in this form, and sets forth alternative provisions and language more appropriate to the restaurant/fast food business.

The standard features of any franchise agreement include the grant of a license to a franchisee for the use of the franchisor's system, which typically includes certain trademarks, trade names, and other indicia, as well as certain specified operating methods, default and termination provisions, transfer and assignment provisions, covenants of the two parties, and so on. The chief area of difference between different types of franchise systems lies in the operating methods prescribed in the franchise agreements. Thus, for example, the operating method specified in product and service franchise agreements typically revolves around the sale and installation of products manufactured by the franchisor or by others to the franchisor's specifications. This form incorporates such an operating method. On the other hand, restaurant/fast food franchises typically prescribe adherence to specified menus and recipes and other operating methods peculiar to restaurant enterprises. Those terms are illustrated in § 51.211.

[b] Drafting Franchise Agreements

Apart from the terms and conditions of a franchise agreement that are dictated by the particular type of franchise, the state and federal antitrust laws and specific protections afforded certain franchisees under California law must be taken account of in the drafting process. These considerations are treated in § 51.130. Of particular note with respect to this form are the California requirements for automobile franchises and gasoline dealer franchises. In addition, under the California Franchise Relations Act, franchisors in fields other than automobile and petroleum sales are subject to

restrictions on terminating and on refusing to renew franchises [see § 51.130, P 5]. The modifications listed in this guide for these types of franchises should be incorporated in this form as applicable.

For a general drafting guide, see § 51.131. For detailed coverage of franchise agreements, see Glickman, *Franchising*, Chapters 9-11 (Matthew Bender).

[c] Negotiation of Terms of Agreement

The franchisor ordinarily prepares the franchise agreement, and it often appears that the agreement is closed to further negotiation. Although it generally can be expected that the agreement will tend to favor the franchisor, responsible franchisors attempt to prepare a reasonable agreement, particularly in light of the disclosure requirements [see Ch. 51A, *Franchise Registration*] and the statutory restrictions on franchise agreements [see § 51.130]. However, franchisors may be willing to agree to changes or concessions on request and commonly make changes because of changed economic, competitive, and other conditions.

[d] Default and Termination

The California Franchise Relations Act restricts the franchisor's right to terminate a franchise before the expiration of the franchise agreement. All the situations specified in Section 8.02 of this form for termination are clearly in compliance with the Act [see *Bus. & Prof. Code* §§ 20020, 20021], with the possible exception of the authorization in Section 8.02(d)(3) of immediate termination for a purported assignment of the franchise. A franchisee could at least theoretically challenge this termination event as illegal for lack of "good cause" [*Bus. & Prof. Code* § 20020]. However, "good cause" specifically includes breach of the franchise agreement, if the franchisee is first given notice of the breach and a reasonable time, which need not exceed 30 days in any event, to cure it [*Bus. & Prof. Code* § 20020]. The prudent franchisor therefore should give notice and time to cure, if possible. However, there is no need to foreclose the franchisor's options by removing assignments from the list of events "constituting grounds for immediate termination."

The Franchise Relations Act can also affect the franchisor's right of automatic termination. Termination must be for good cause [*Bus. & Prof. Code* § 20020]. Moreover, if termination is for any of the causes listed in Section 8.06(a) through (c) of the form, the franchisor apparently is entitled to a conclusive presumption that the facts, if true, do constitute good cause [*Bus. & Prof. Code* § 20021]. However, to secure the benefit of this presumption, the franchisor cannot rely on the "automatic termination" language of the agreement. Written notice stating the reason for and effective date of the termination is required [*Bus. & Prof. Code* § 20021].

Notices to the franchisee of termination and nonrenewal must be personally delivered, sent by telegram, or posted by registered, certified, or other receipted mail [*Bus. & Prof. Code* § 20030]. Although Section 10.08, the general notice provision of the agreement, covers some situations not covered by the statute, specification of one or more of the legally sufficient means of delivery would help ensure that the franchisor complies with statutory requirements when is applicable.

[2] FORM

Complete Form for Basic Franchise Agreement--Products and Services Franchise System

FRANCHISE AGREEMENT

for

_____ [name of franchise]

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FRANCHISE AGREEMENT

Products and Services Franchise System

This AGREEMENT is made on _____ [date], between _____ [name of franchisor entity], a _____ [e.g., _____ corporation or limited partnership or limited liability company], with its principal place of business located at _____ [address], referred to as _____ [Franchisor or name by which franchise business is commonly known], and _____ [name of franchisee], of _____ [address], referred to as Franchisee.

RECITALS

Franchisor and Franchisee mutually acknowledge the following:

I. The Franchise System

Franchisor has developed a unique and successful system for the establishment and operation of _____ [describe type of business] shops known nationally as _____ [name of franchise business] ("Franchise System").

Franchisor is in the business of _____ [operating or operating and licensing the operation by others of] _____ [name of franchise business] shops, which engage in the _____ [specify, e.g., sale and installation of _____ (names or types of products or those products listed in Schedule A attached to this Agreement) or the performance of _____ (describe services or those services listed in Schedule A attached to this Agreement)] as part of the Franchise System.

As part of the Franchise System, Franchisor provides certain services to its franchisees, including _____ [e.g., site selection, shop construction and layout, equipment selection and installation, purchasing and inventory control methods, accounting methods, merchandising, advertising, sales, and promotional techniques, _____ (installation or repair or installation and repair) techniques, personnel training, and other services] related to the efficient and successful operation of _____ [name of franchise business] shops within the System and the maintenance of high standards of quality.

To assist _____ [name of franchise business] franchisees to get started in business and to achieve maximum results, Franchisor makes available to all franchisees both initial and continuing information, experience, advice, guidance, and know-how with respect to shop management, operation, financing, and promotion, as part of the Franchise System. [Add if franchisor makes available to franchisees products that carry its guaranty: As a further part of the Franchise System, Franchisor makes available and furnishes to its franchisees genuine _____ (name of franchise business) products to be offered, sold, and installed by its franchisees. _____ (Certain or All) of these products carry a unique and valuable guaranty to the consumer public.]

II. Proprietary Marks and Indicia

Franchisor, all _____ [name of franchise business] shops, and the Franchise System, are operated in connection with and through the use of various trademarks, trade names, and service marks, _____ [as follows: _____ (set forth marks and trade names in full) or as illustrated in Schedule B attached to this Agreement], referred to in this Agreement as "Proprietary Marks." Franchisor's Proprietary Marks include, but are not limited to, those registered with the United States Patent Office under Numbers _____ [set forth all trademark, design patent, or other applicable registration numbers].

Franchisor, all franchise business shops, and the Franchise System are also operated in connection with certain designs for signs, buildings, logos, and copyrighted materials, referred to in this Agreement as "Indicia." Franchisor's Indicia include, but are not limited to, those registered with the United States Copyright Office under Numbers _____[*set forth all copyright registration numbers*]. In addition, other applications for registration _____[*are presently pending or may be applied for in the future*].

III. Goodwill

Franchisor has expended large sums of money as well as effort over a period of many years in developing and improving the Franchise System and in advertising, promoting, and publicizing _____[*the Franchise System's Proprietary Marks and Indicia or the Franchise System's Proprietary Marks and Indicia and the Franchisor's guaranties*], all of which have become well and favorably known to the public throughout _____[*the United States or the United States and Canada and Mexico*], and Franchisor has acquired valuable goodwill in connection with the Franchise. The public has come to associate the Proprietary Marks and Indicia exclusively with the Franchise System, and the products and services offered, sold, installed, and rendered by _____[*name of franchise business*] shops.

IV. Franchisee's Acknowledgments

Franchisee has had the opportunity to investigate the Franchise System and the competitive market in which it operates and, based on the conclusions drawn from this investigation, desires to establish a _____[*name of franchise business*] shop at the location designated below; use the Franchise System and its Proprietary Marks and Indicia; have the right to _____[*engage in the business of offering or offer*] to the public the Franchise System's _____[*products or services or products and services*]; issue and honor the Franchisor's guaranties in connection with its products; and to derive benefit from the Franchisor's information, experience, advice, guidance, know-how, and customer goodwill.

Franchisee acknowledges that each _____[*name of franchise business*] operation is dependent on each of the franchisees in the Franchise System to establish and maintain the goodwill necessary for a successful operation of the Franchise System. Franchisee further acknowledges that it is essential to the maintenance of the high standards that the public has come to expect of _____[*name of franchise business*] shops, to the preservation of the integrity of the Franchisor's Proprietary Marks, Indicia, and goodwill, and to the value of the Franchisor's guaranties, that each franchisee adhere to the uniform standards, procedures, and policies described in this Agreement.

THEREFORE, in accordance with the above, Franchisor and Franchisee do hereby agree as follows:

ARTICLE I. GRANT AND USE OF FRANCHISE

Grant of Franchise

Section 1.01. Subject to the terms and conditions contained in this Agreement, Franchisor hereby grants to Franchisee, and Franchisee hereby accepts from Franchisor, the right, franchise, and license:

- (a) To establish and operate a _____[*name of franchise business*] shop at the location designated in Article 2 of this Agreement.
- (b) To use, in connection with the operations of said shop, the Franchise System and its Proprietary and Indicia.
- (c) To purchase those products listed in Schedule A attached to this Agreement which carry Franchisor's trademark

from _____ [Franchisor or sources which manufacture such products to Franchisor's specifications], and to sell and install said products in or from Franchisee's shop.

(d) To perform, in Franchisee's shop, those services listed in Schedule A attached to this Agreement.

[(e) To issue and honor the guaranties extended by Franchisor on those trademarked products and authorized services listed in Schedule A attached to this Agreement or such guaranties as may be extended by Franchisor from time to time in the future.]

Term of Franchise

Section 1.02. The term of this Agreement and of the right, franchise, and license granted in this Agreement will commence _____ [on _____ (date) or as of the date of final execution of this Agreement by all parties] and will continue in effect until [_____ (date) or its expiration pursuant to Article 9 of this Agreement], unless sooner terminated in accordance with Article 8 of this Agreement.

Initial Franchise Fee

Section 1.03. Franchisee _____ [has paid or will pay, concurrently with the execution of this Agreement,] to Franchisor the sum of \$ _____ as an initial fee for the right, franchise, and license granted by this Agreement. This initial franchise fee is in addition to the periodic royalty payable pursuant to Article 6 of this Agreement [, and to any and all amounts paid or to be paid by Franchisee to _____ (set forth additional obligations under the agreement, e.g., Franchisor's wholly owned subsidiary, _____ (name), for its services in relation to the location and development of the shop, and any and all other amounts, whether for merchandise, or for any other reason, that may be owed to Franchisor from time to time)].

Refund of Fee

Section 1.04. The initial franchise fee referred to in Section 1.03, above, will be deemed fully earned by Franchisor on the execution and delivery of this Agreement by Franchisor. However, if this Agreement is terminated by either party or in any manner in accordance with the terms of this Agreement, effective on any date within one year from the date of this Agreement, the initial franchise fee will be refunded to Franchisee to the extent of \$ _____ [amount less than full fee] only, without interest. Except as expressly provided in this Agreement, the initial franchise fee will not be refunded, in whole or in part, on any termination of this Agreement nor at any other time or under any other circumstances whatsoever.

ARTICLE 2. LOCATION AND TERRITORY

Address

Section 2.01. The exact address of Franchisee's shop is _____ [street address], _____ [city], _____ [state].

Exclusive Operations in Protected Area; Exceptions

Section 2.02. Franchisor will not operate or allow any other party to operate a _____ [name of

franchise business] shop within the protected area designated in Section 2.03 of this Agreement unless Franchisor determines that one or more additional _____ [*franchise business name*] shops are necessary within the protected area for market coverage. In the event that Franchisor makes this determination, Franchisor or a franchisee licensed by Franchisor may operate those additional shops as long as the following conditions are met:

- (a) Reasonable projections based on pertinent marketing data demonstrate that the protected area can support one or more additional _____ [*name of franchise business*] shops and Franchisor concludes that the opening of an additional shop or shops is desirable to avoid loss of market position and business to competitors.
- (b) Franchisor communicates in writing to Franchisee its intention to open an additional shop or shops, based on the reasonable market projections and determinations set forth in subsection (a), above.
- (c) Franchisee has first rights to open any additional shop or shops after receiving notification from Franchisor. The election to open an additional shop or shops must be made in the manner provided in Section 2.04.
- (d) In the event that Franchisee elects not to open additional shops pursuant to subsection (c), above, or fails to proceed with the election procedures set forth in Section 2.04, any option price paid will be retained by Franchisor as consideration for the delay. The Franchisor may accept offers from other parties to become franchisees in the area or areas designated for the additional shop or shops, or to operate Franchisor-owned shops in the designated area.
- (e) Franchises granted under the right of first refusal set forth in subsection (c), above, will not be governed by the terms and conditions of this Agreement, but by the Franchise Agreement employed by Franchisor at the time Franchisee exercises its right to open additional shop or shops. However, the franchise fee and royalty provisions of Section 2.04(b), (e) apply to the new shop or shops.

Protected Area

Section 2.03. The "protected area" referred to in Section 2.02 is _____ [*describe area, either by name of county or counties, definable marketing area, city or town, portion of state, or other*].

Exercise of Right to New Franchise

Section 2.04. If Franchisor communicates to Franchisee its intent to open additional _____ [*name of franchise business*] shops in Franchisee's protected area, and Franchisee decides to elect to open those shops, pursuant to Section 2.02, Franchisor will grant Franchisee a franchise under which Franchisee may operate the shops pursuant to the following terms and conditions:

- (a) Within 30 days after receiving notice of Franchisor's intent to open additional shops in the protected area, Franchisee may elect to purchase a nontransferable option, under all the terms and conditions of the Franchise Agreement then currently employed by Franchisor, to open the first additional shop under the notice. The option price will be \$ _____, and the option price is not refundable. Purchase of the option will reserve the entire protected area for _____ [*number*] months from the date of receipt of the notice.
- (b) Within six months after receipt of the notice, Franchisee will pay Franchisor the franchise fee for the additional shop to be opened under this section. The franchise fee and royalty rate for the additional shop will be _____ [*specify, e.g., the same amount and rate as the franchise fee and royalty rate stipulated in this Agreement*]. The option price _____ [*will or will not*] be credited against that franchise fee.

(c) Franchisee will proceed to open the additional shop under this section within _____ [specify, e.g., six months] following payment of the franchise fee.

(d) In the event that more than one shop is involved, Franchisee will notify Franchisor within 30 days of _____ [e.g., opening the first shop under this section] of Franchisee's intention to open an additional shop, after which Franchisee will proceed again as outlined in this section.

(e) The franchise fee and royalty rate for each additional shop will be as specified _____ [in subsection (b), above or in the Franchise Agreement used by Franchisor at the time Franchisee exercises the right to open the additional shop].

Use of Franchise Name

Section 2.05. Franchisee agrees not to interfere in any manner with or attempt to prohibit the use of the name _____ [name of franchise business] by any other franchisee of franchisor in any area other than the protected area described in Section 2.03. Franchisee further agrees to execute any and all other necessary papers, documents, and assurances to effectuate this purpose and agrees to cooperate fully with Franchisor or any franchisee of Franchisor in securing all necessary and required authority from any secretary of state, licensing authority, or any other state or federal authority to the use of the name " _____ " [name of franchise business] whenever and wherever needed.

Exclusivity of Territory or Clientele

Section 2.06. The designation of Franchisee's address and its protected area does not grant exclusivity of marketing territory or clientele. All _____ [name of franchise business] shops may sell their products and services to any customer.

Relocation of Premises

Section 2.07. If Franchisee's right to possession of the premises designated in Section 2.01 is terminated before the expiration of the term of this Agreement without fault or affirmative action on the part of Franchisee (including, without limitation, the expiration of the term of Franchisee's lease or sublease by lapse of time, destruction by casualty, or taking by eminent domain of all or part of the premises resulting in termination of the lease or sublease by its terms or by action of a party other than Franchisee, or the taking by eminent domain of all or a material part of the premises if the premises are owned by Franchisee), then Franchisee must notify Franchisor in writing that such an event has occurred or will occur on a date certain not more than six months after the date of the notice. Within 120 days after Franchisee notifies Franchisor, Franchisor, subject to the provisions of Sections 2.08 through 2.10, must propose to Franchisee a new location at which Franchisee's shop may be operated for the remainder of the term of this Agreement.

Selection of New Location

Section 2.08. The location to be proposed by Franchisor must be within the trading area of the shop operated by Franchisee. However, if Franchisor determines that no appropriate location is available within that trading area, then Franchisor must propose the next nearest location determined by it to be appropriate and available.

The definition of the trading area of Franchisee's shop, the selection of a particular location within that trading area, the determination that an appropriate location is not available within that trading area, and the determination, if necessary,

of the next nearest appropriate and available location outside Franchisee's trading area, are within the sole and absolute discretion of Franchisor and Franchisor's decisions are final. However, any given location within or without the trading area of the shop operated by Franchisee will not be deemed inappropriate or unavailable pursuant to this section solely based on a decision by Franchisor to establish and operate itself, or to license any party other than Franchisee to establish and operate, a shop at that location, if Franchisor has not become legally committed with respect that decision.

Relocation Proposal

Section 2.09. Franchisor's proposal of a new location at which Franchisee's shop may be operated must be given to Franchisee in writing. If that location is to be leased, subleased, or sold by Franchisor or any affiliated corporation to Franchisee, the proposal must be accompanied by a statement of any requirements prescribed by Franchisor relating to the construction or alteration of improvements on the premises. Franchisor may not require that Franchisee sell, assign, grant, or transfer to Franchisor or any affiliated entity, on termination of this Agreement, ownership of or a leasehold interest in the premises. Franchisor may not submit to Franchisee any lease or sublease with Franchisor or any affiliated entity the term of which extends beyond the term of this Agreement.

Acceptance of Relocation

Section 2.10. If Franchisee gives written notice of the acceptance of the Franchisor's new location proposal within 30 days after receipt of the proposal, and either enters into the tendered lease, sublease, or sale contract, or, if none is tendered, agrees in writing to comply with any and all requirements prescribed by Franchisor relating to the construction or alteration of improvements on the premises, then notwithstanding the automatic termination provisions of Section 8.06(a), this Agreement will be reinstated for the remainder of the term specified in Section 1.02, as if it had not been terminated, and Section 2.01, will be deemed amended to refer to that new location.

If Franchisee fails to comply with these provisions within the 30-day period, then the termination of this Agreement pursuant to Section 8.06(a), is and will remain effective and Franchisee will have no further rights under or by virtue of Sections 2.07 through 2.10 of this Article.

ARTICLE 3. USE OF SYSTEM, MARKS, AND INDICIA

Validity and Use of Proprietary Marks

Section 3.01. Franchisee acknowledges the validity of the Proprietary Marks identified above and acknowledges that they are the sole property of Franchisor. Franchisee may use these Proprietary Marks only for so long as the right, franchise, and license granted in this Agreement remains in force, and only in connection with the _____ [e.g., conduct of the franchise business or sale and installation of products bearing Franchisor's trademark or rendition of genuine _____ (name of franchise business) services], in the manner and for the purposes specified in this Agreement. Franchisee may not, either during or after the term of this Agreement, do anything, or aid or assist any other party to do anything, that would infringe on, harm, or contest the rights of Franchisor in any of its Proprietary Marks or in any other mark or name that incorporates the _____ [word or words] " _____ " [name of franchise business]. Franchisee will not use any mark or name other than as licensed in this Agreement in connection with the conduct of the franchise business, and will not place any name or mark other than the original names or marks on any products, packages, or other materials that Franchisee obtains from _____ [Franchisor or any manufacturer designated by Franchisor as qualified to supply products conforming to Franchisor's specifications].

Validity and Use of Indicia

Section 3.02. Franchisee acknowledges that Franchisor's Indicia are the exclusive property of Franchisor. Franchisee will not, either during or after the term of this Agreement, utilize any of Franchisor's Indicia, or any confusingly similar indicia, except in accordance with the terms of this Agreement.

Future Marks or Indicia

Section 3.03. Franchisee agrees that any further rights that may develop in any of Franchisor's Proprietary Marks or in any of the Franchisor's Indicia in the future, whether as trade names, trademarks, service marks, or copyrighted materials, will inure and accrue to the benefit of Franchisor.

Use of Franchise Business Name

Section 3.04. Franchisee will operate, advertise, and promote Franchisee's shop under the designation " _____ " *[name of franchise business]*, without the addition of any prefix, suffix, or any other name or names, or under any other name or names as Franchisor may from time to time designate, and under no other name or designation whatsoever. Franchisee will not use the name " _____ " *[name of franchise business]*, any word in that name, or any other Franchisor's Proprietary Marks in or as part of Franchisee's firm or corporate name.

Confidentiality of Franchise System

Section 3.05. Franchisee acknowledges that Franchisor is the sole owner of all proprietary rights in and to the Franchise System and all material and information relating to the System now or subsequently revealed to Franchisee under this Agreement. Franchisee further acknowledges that the System, in its entirety, constitutes trade secrets of Franchisor and that they have been revealed to Franchisee in confidence, solely for the purpose of enabling Franchisee to establish and operate the _____ *[name of franchise business]* shop licensed in accordance with the terms of this Agreement. These trade secrets include, but are not limited to, _____ *[e.g., product catalogues, price lists, training manuals, operating manuals, policy manuals, sales promotion aids, business forms, accounting procedures, marketing reports, informational bulletins, and inventory systems]*. Franchisee agrees that, both during and after the term of this Agreement, the Franchisee will not reveal any trade secrets to any other person or entity and that the Franchisee will not use any trade secrets in connection with any business or venture in which the Franchisee has a direct or indirect interest, whether as a proprietor, partner, joint venturer, shareholder, officer, director, or in any other capacity whatsoever, other than in connection with the operation of the _____ *[name of franchise business]* shop licensed under this Agreement.

Nothing contained in this section will be deemed to prohibit Franchisee from engaging or participating in any lawful trade or business, either during or after the term of this Agreement, whether or not competitive with Franchisor or its franchisees, provided that Franchisee does not reveal, use, or appropriate in connection that business any of the proprietary rights, confidential information, or trade secrets referred to in this section and does not violate any other provision of this Agreement.

Rights to Goodwill

Section 3.06. Franchisee acknowledges that all goodwill that may arise from Franchisee's use of Franchisor's Proprietary Marks, the Indicia, or System, is and will at all times remain the sole and exclusive property of Franchisor and will inure to the sole benefit of Franchisor. However, nothing in the preceding sentence will be construed to prohibit Franchisee from receiving a price that includes payment for any goodwill belonging to Franchisee for the sale

of the Franchisee's business made in compliance with the provisions of this Agreement.

Unauthorized Use

Section 3.07. Franchise must promptly report to Franchisor any unauthorized use of Franchisor's Proprietary Marks or Indicia that comes to Franchisee's attention in any manner whatsoever. If requested by Franchisor, Franchisee will cooperate with Franchisor in precluding unauthorized use of Franchisor's Proprietary Marks and Indicia, or any confusingly similar mark or indicia, but at the sole expense of Franchisor.

ARTICLE 4. FRANCHISOR'S CONTINUING OBLIGATIONS

Services to Be Rendered

Section 4.01. In addition to any assistance that Franchisor may have rendered to Franchisee relating to site selection, shop construction and layout, and equipment selection and installation, Franchisor agrees that it will perform the following continuing services for the benefit of Franchisee:

(a) If Franchisee's shop has not yet opened, Franchisor will instruct Franchisee, before the opening of Franchisee's shop, in all aspects of the System by providing a training program that must be attended by Franchisee and as much of Franchisee's management and supervisory personnel as Franchisor may reasonably designate. From time to time after the opening of Franchisee's _____[*name of franchise business*] shop, Franchisor may reasonably designate, and Franchisee agrees to attend and to cause all designated employees to attend ongoing training program or programs. All expenses of travel, lodging, meals, and other living expenses, incurred by Franchisee and/or such employees in attending the initial or subsequent program or programs will be borne and paid by Franchisee.

(b) Franchisor agrees to make available to Franchisee from time to time all improvements and additions to the System, to the same extent and in the same manner as they are made available to Franchisor's franchisees generally.

(c) Franchisor agrees to counsel and assist Franchisee on a continuing basis with respect to the management and operation of Franchisee's _____[*name of franchise business*] shop, and will make available to Franchisee the benefits of Franchisor's information, experience, advice, guidance, and know-how in that connection.

(d) Franchisor agrees to purchase and place from time to time advertising promoting Franchisor's franchisees and the products and services sold by them. Subject to the provisions set forth in this Agreement, all decisions from time to time regarding whether to utilize national, regional, or local advertising, or some combination, and regarding selection of the particular medium and advertising content, are within the sole discretion of Franchisor and the agencies or others as Franchisor may appoint. Franchisor agrees that it will expend for media costs, commissions and fees, production costs, and other costs of advertising, with respect to all of Franchisor's franchisees, an amount not less than the sum of _____[*set forth formula, e.g., _____ (percentage) of the royalties received by Franchisor from all of Franchisor's franchisees, plus all advertising fees actually received by Franchisor from all franchisees*]. These amounts must be expended for advertising that is published, broadcast, displayed, or otherwise disseminated either during the calendar year within which the royalties and advertising fees are received by Franchisor or during the immediately succeeding calendar year.

Nothing in this Agreement will be deemed to prohibit Franchisee from engaging in any advertising or promotion of Franchisee's shop or business, in addition to the advertising paid for by Franchisor. However, this additional advertising or promotion will be at the sole cost of Franchisee, without deduction or credit against royalties or other amounts owed by Franchisee to Franchisor, and will be subject to the provisions of Section 5.08, below.

Sale of Products

Section 4.02. Franchisor agrees to sell to Franchisee, during the term of this Agreement and subject to the terms of this Agreement, the quantities of those products referred to in Schedule A as Franchisee may order from time to time. However, Franchisor may at any time and from time to time, in its sole discretion, discontinue the sale to all its franchisees of any product or products, if, in the opinion of Franchisor, the continued sale of the product or products becomes unfeasible, unprofitable, or otherwise undesirable. The discontinuation of the license granted in this Agreement with respect to the product or products terminates the Agreement unless Franchisor has provided for alternative sources of supply that meet Franchisor's standards and specifications and expressly elects to continue that license subject to these standards and specifications.

Price and Terms of Sale

Section 4.03. The prices, delivery terms, terms of payment, and other terms relating to the sale of such products by Franchisor are as prescribed by Franchisor from time to time, and will be subject to change by Franchisor without prior notice at any time.

Sales Following Termination

Section 4.04. On the giving by Franchisee of notice of termination of this Agreement, or on the giving by Franchisor of notice of termination, or on the termination of this Agreement, Franchisor will not be obligated to fill or ship any outstanding orders for merchandise or any orders received thereafter from Franchisee.

Unavailability or Delay

Section 4.05. Franchisor will in no event be liable to Franchisee for any unavailability of or delay in shipment or receipt of merchandise due to temporary product shortages or unavailabilities, order backlogs, production difficulties, delays in or unavailability of transportation, fire, strikes, work stoppages, or other causes beyond the reasonable control of Franchisor.

ARTICLE 5. OPERATION OF FRANCHISEE'S BUSINESS**Operation of Shop**

Section 5.01. Franchisee agrees to keep the _____ [*name of franchise business*] shop open to the public during all normal business days and hours throughout the year during the term of this Agreement, and will at all times operate the shop diligently so as to maximize its revenues and profits.

Promotion of Sales

Section 5.02. Franchisee agrees to actively promote the sale of Franchisor's products and services at all times, and will use best efforts to cultivate, develop, and expand the market for Franchisor's products and services.

Maintenance of Inventory

Section 5.03. Franchisee acknowledges that a large public demand has been created and exists for genuine products carrying Franchisor's trademark, and that members of the public have come to expect that they will be able to obtain these products at an authorized _____[*name of franchise business*] shop. Accordingly, Franchisee agrees that Franchisee, at all times during the term of this Agreement, will maintain an inventory of the products listed in Schedule A that is adequate, both in terms of range of items covered and in terms of the quantities of the respective items, to fulfill the public demand in Franchisee's market for these products and to promptly satisfy customers seeking these products at Franchisee's shop [, including customers' requests for replacement under the terms of Franchisor's guaranties].

Managerial Responsibility

Section 5.04. Subject to the provisions of subsections (a) and (b) of this section, it is agreed that at all times during the term of this Agreement, _____[*name or names of individuals who will actually manage franchisee's business*] will (1) devote _____[*his or her or their*] full time and effort to the active management and operation of Franchisee's shop; (2) reserve and exercise ultimate authority and responsibility with respect to the management and operation of Franchisee's shop, regardless of any delegation of authority not inconsistent with this section; and (3) Represent and act on behalf of Franchisee in all dealings with Franchisor.

If two or more individuals are named in this Agreement, each of them must fulfill the requirements of this section, and both or each of them must jointly fulfill the requirements of this section.

(a) If Franchisee operates or subsequently commences to operate under license from Franchisor, one or more additional _____[*name of franchise business*] shops, and if _____[*the individual or individuals*] named in this Agreement _____[*is or are*] also named in the corresponding provision of the other agreement or agreements, then these provisions will be deemed to apply to all shops in the aggregate.

(b) In the event of the resignation, disability, or death of the individual or individuals actually managing the franchise, the provisions of Article 7 of this Agreement govern. However, if two or more individuals are named in this Agreement then on the resignation, disability, or death of one or more but less than all of the named individuals, the provisions of Article 7 do not govern and the provisions of this section apply to the remaining or surviving individual or individuals.

Design and Appearance of Premises

Section 5.05. Franchisee acknowledges that the design and appearance of both the exterior and interior of the shop building are part of the Franchisor's Indicia, subject to modification of that Indicia from time to time by Franchisor, and that it is essential to the integrity of Franchisor's Indicia that as great a degree of uniformity as possible be maintained among the various shop premises of Franchisor's franchisees. Accordingly, Franchisee agrees that:

(a) Franchisee will make no change, addition, or alteration of any kind to the structural elements of the shop building or to the adjacent areas, without the prior written consent of Franchisor.

(b) Franchisee will at Franchisee's sole expense maintain interior and exterior painting and decor in the manner and form as may be reasonably prescribed from time to time by Franchisor.

(c) Franchisee will follow the reasonable instructions of Franchisor with respect to floor layout and character of interior furnishings.

(d) Franchisee will purchase and display, on and about the interior and exterior and the shop building, only the signs, emblems, logos, lettering, and pictorial materials that may be reasonably prescribed by Franchisor from time to time.

Maintenance of Premises

Section 5.06. Franchisee agrees that Franchisee will at all times maintain the shop premises in a clean, wholesome, attractive, and safe condition, and will keep the same in good maintenance and repair.

Standards of Operation

Section 5.07. Franchisee agrees that Franchisee will at all times give prompt, courteous, and efficient service to the public; will perform work competently and in a professional manner; and will be governed by the highest standards of honesty, integrity, fair dealing, and ethical conduct in all business dealings with members of the public. Franchisee will do nothing that would tend to discredit, dishonor, reflect adversely on, or in any manner injure the reputation of Franchisor, Franchisee, or any other franchisee of Franchisor.

Advertising by Franchisee

Section 5.08. Franchisee will not use, display, publish, broadcast, or in any manner disseminate any advertising or promotional material unless the same has first been approved in writing by Franchisor. In the event that Franchisor from time to time furnishes to Franchisee any advertising, promotional, or informational materials to be used, displayed, or distributed in or about Franchisee's shop, Franchisee agrees to follow the instructions of Franchisor in connection with those materials.

Franchisee's Liability and Insurance

Section 5.09. Franchisee is solely responsible for all loss or damage arising out of or relating to the operation of Franchisee's _____ [*name of franchise business*] shop or arising out of the acts or omissions of Franchisee or any of Franchisee's agents, servants, or contractors in connection with the sale of products or rendering of services by Franchisee, and for all claims for damage to property or for injury or death of any persons directly or indirectly resulting therefrom. Franchisee agrees to indemnify and hold Franchisor harmless against and from any and all claims, loss, and damage, including costs and reasonable attorneys' fees.

Franchisee will obtain and at all times during the term of this Agreement maintain in force and pay the premiums for _____ [*public liability or specify other*] insurance, with complete operations coverage, in companies acceptable to Franchisor, with limits of liability for bodily injury of not less than \$ _____ for each injury and \$ _____ for all injuries in each accident, and of not less than \$ _____ for property damage in each occurrence. These limits of liability will be increased and modified, or additional types of coverage will be obtained, at the direction of Franchisor, as and when changed circumstances reasonably so require. These policies of insurance must expressly protect both Franchisee and Franchisor and must require the insurer to defend both Franchisee and Franchisor in any action. Franchisee will furnish to Franchisor a certified copy or certificate with respect to each insurance policy, evidencing coverage as set forth above, naming Franchisor as an additional insured, and providing that the policy may not be canceled, amended, or modified except on 10 days prior written notice to Franchisor. Maintenance of the insurance required under this section does not relieve Franchisee of the obligations of indemnification contained in the first sentence of this section. If Franchisee fails to procure or maintain in force any insurance as required by this section, or to furnish the requisite certified copies or certificates to Franchisor, then Franchisor may, in addition to all other remedies it may have, procure that insurance and/or certified copies or

certificates, and Franchisee must promptly reimburse Franchisor for all premiums and other costs incurred in connection with securing the insurance.

Submission of Financial Data

Section 5.10. In addition to the reports required of Franchisee pursuant to Sections 6.03 and 6.04, Franchisee must submit to Franchisor, within 90 days after the end of each fiscal year of Franchisee, complete financial statements in the form prescribed by Franchisor, including balance sheet, profit and loss statement, and statement of source and disposition of funds. In addition, Franchisee must submit to Franchisor any other reports and financial information as Franchisor may from time to time require, including by way of example and not limitation, _____ [specify, e.g., sales and cost data and analyses, data on jobs performed under the Franchisor's guaranty, and personal financial statements of any persons having a material financial interest in Franchisee's business].

Payment of Bills

Section 5.11. Franchisee will pay all invoices rendered by Franchisor for merchandise or other items sold to Franchisee in strict accordance with the applicable payment and credit terms. Any amounts not paid when due, as well as any amount due from Franchisee pursuant to Section 5.09, bear interest at the rate of _____ percent per annum from 30 days after the date due until paid. The payment of interest does not authorize any delay in payment of other invoices or other amounts. Franchisee will further pay when due all bills and other amounts owed to third parties under any purchasing arrangement in which Franchisor may be involved, but Franchisor does not become liable to any third party.

Compliance With Laws

Section 5.12. Franchisee will comply with all federal, state, county, municipal, or other statutes, laws, ordinances, regulations, rules or orders of any governmental or quasi-governmental entity, body, agency, commission, board, or official applicable to Franchisee's shop or business. Nothing in this Agreement prevents Franchisee from engaging in a bona fide contest of the validity or applicability thereof in any manner permitted by law.

Employment Practices

Section 5.13. During the term of this Agreement, and for a period of _____ [number] months thereafter, Franchisee, without the written consent of that person's employer, will not employ or attempt to employ any person who is then employed by Franchisor or by any other franchisee of Franchisor. Franchisor, without the written consent of Franchisee, will not employ or attempt to employ any person who is at the time employed by Franchisee. Neither Franchisee nor Franchisor will otherwise directly or indirectly induce or attempt to induce any person to leave employment.

Franchisee Not Franchisor's Agent

Section 5.14. This Agreement does not in any way create the relationship of principal and agent between Franchisor and Franchisee, and in no circumstances will Franchisee be considered an agent of Franchisor. Franchisee may not act or attempt to act, or represent _____ [himself or herself], directly, or by implication, as an agent of Franchisor or in any manner assume or create or attempt to assume or create any obligation on behalf of or in the name of Franchisor. Franchisee may not act or represent _____ [himself or herself] as an affiliate of any

other authorized franchisee of Franchisor.

Compliance With Franchisor's Policies

Section 5.15. Franchisee will at all times comply with all lawful and reasonable policies, regulations, and procedures promulgated or prescribed from time to time by Franchisor in connection with Franchisee's shop or business, including but not limited to standards, techniques, and procedures in installation or servicing of products or the rendering of other services, selection, supervision, and training of personnel, sales, advertising, and promotional techniques, programs, and procedures, maintenance and appearance of shop and shop premises, policies and procedures relating to warranties or guaranties, payment, credit, and accounting, and financial reporting policies and procedures.

Franchisor's Right to Inspect

Section 5.16. Franchisor, through its authorized representatives, has the right at all reasonable times, to visit Franchisee's shop for the purpose of inspecting the merchandise and equipment on hand, inspecting the nature and quality of goods sold and services rendered, examining and auditing Franchisee's books and records, and observing the manner and method of operating the shop. If any of Franchisee's books, records, or inventory is located outside the shop premises, Franchisor has similar rights with regard to the same.

ARTICLE 6. ROYALTIES

Royalty Based on Net Revenue

Section 6.01. Franchisee agrees to pay to Franchisor, within _____ [number] days after the close of each calendar month during the term of this Agreement, a royalty in an amount equal to _____ percent of Franchisee's net revenue for the preceding month. If the term of this Agreement commences or ends on a day other than the first or last day of a calendar month, respectively, the royalty for that month will be based on net revenue for the portion of the month commencing or ending with the date of commencement or termination of the term of this Agreement, as the case may be.

"Net Revenue" Defined

Section 6.02. For the purpose of Section 6.01, the term "net revenue" is defined as the total gross revenue derived by Franchisee from the operation of the shop, whether from sales for cash or credit [optional: determined without regard to the collection of the debt], including sales of both merchandise and services, and including installation charges, exclusive of all sales taxes, use taxes, gross receipts taxes, and other similar taxes added to the sales price and collected from the customer, and less any bona fide refunds, rebates, and discounts. Royalties received by Franchisor pursuant to this section will be deemed general funds of Franchisor for all purposes; royalties will not be deemed trust funds and Franchisor is not required to segregate these funds in any way.

Net Revenue Report

Section 6.03. Franchisee will submit to Franchisor, with and at the time each monthly royalty payment is required pursuant to Section 6.01, a true, correct, and complete statement of net revenue on forms provided by Franchisor, containing all information requested by those forms and certified to by Franchisee.

Annual Revenue Report

Section 6.04. Within 60 days after the close of Franchisee's fiscal year, Franchisee will furnish a statement, on forms provided by Franchisor, containing all information requested by those forms, certified to by Franchisee and signed by Franchisee's accountant, showing the total net revenue for the preceding fiscal year, as finally adjusted and reconciled after the closing and review of Franchisee's books and records for that fiscal year. If the statement discloses any underpayment of royalties for that fiscal year, Franchisee will pay to Franchisor, at the time of submitting the statement, the amount of any underpayment. Any overpayment will be credited to Franchisee's account.

Maintenance and Audit of Records

Section 6.05. Franchisee will maintain books and records in a manner as to clearly and accurately reflect net revenue. All books and records must be preserved for a period of not less than _____ [e.g., six] years after the close of the fiscal year to which they relate and will be open at all reasonable times to inspection and verification by Franchisor or any of Franchisor's representatives. Franchisor is entitled to have Franchisee's books and records examined or audited at any time at Franchisor's expense, and Franchisee will cooperate fully with the party or parties examining the books or conducting an audit on behalf of Franchisor. Franchisee will promptly pay to Franchisor or Franchisor will credit to Franchisee's account, as the case may be, any underpayment or overpayment of royalties disclosed by the examination or audit.

If any examination or audit is necessitated by (1) Franchisee's failure to submit statements of net revenue, (2) Franchisee's failure to maintain books and records as required by this Article 6, or (3) if net revenues reported by Franchisee for any period of 12 consecutive months are more than _____ [e.g., 5] percent below the actual net revenues of Franchisee for the period as determined by any examination or audit, then Franchisee must immediately pay to Franchisor the cost of the examination or audit (including reasonable compensation for any time necessarily expended by Franchisor's own employees and reimbursement for expenses necessarily incurred by them), as well as any additional amount of royalties shown to be due. These payments are without prejudice to any right of Franchisor to terminate this Agreement on account of these defaults by Franchisee, in accordance with the terms of Section 8.02.

Interest

Section 6.06. Any amount properly owing from Franchisee to Franchisor for royalties, if not paid when due, (whether that amount has been shown on any report required to be submitted by Franchisee or has subsequently been determined by verification, examination, or audit to have been due for any month), will bear interest at the rate of _____ [e.g., 7 percent per annum accruing from 30 days after the date that the amount was or would have been due until paid].

ARTICLE 7. TRANSFER OR ASSIGNMENT**General Prohibition**

Section 7.01. Except as *set forth in Sections 7.02 through 7.10*, and subject to all their terms and provisions and the terms and provisions of Section 7.11, Franchisee will not make or suffer any assignment of this Agreement, or of any rights or interest in this Agreement. For all purposes of this Agreement, each of the following will be deemed to be an assignment of this Agreement:

(a) Any sale, assignment, transfer, subfranchise, or sublicense by Franchisee of or with respect to this Agreement or any rights or interest in this Agreement.

(b) Any pledge, encumbrance, or grant of any security interest in this Agreement by Franchisee.

(c) Any sale at judicial sale or under power of sale, conveyance or retention of collateral in satisfaction of debt, or other procedure to enforce the terms of any pledge, encumbrance, or security interest in this Agreement that results in disposition of Franchisee's interest in this Agreement.

(c) The passing by operation of law to any other party or parties of Franchisee's interest in this Agreement or any part of this Agreement.

(d) If Franchisee is a corporation, partnership, or other form of business association, any act, transaction, or event of a nature described above, that, instead of operating on this Agreement as such, operates on or affects any interest in the corporation, partnership, or association and results in any change in the present controlling interest in that corporation, partnership, or association, whether by means of one or a sequence of more than one transaction or event. If Franchisee is two or more individuals, Franchisee will be deemed to be a partnership for all purposes of this Article 7, irrespective of whether or not the individuals are designated in this Agreement as a partnership.

(e) In the event the person or persons designated in Section 5.04 of this Agreement ceases to comply with any one or more of the provisions of that section, whether by reason of voluntary action or inaction, disability, death, or other cause, subject however, to the proviso of Section 5.04(b).

Any assignment of this Agreement, other than in accordance with and subject to all the terms and provisions of Sections 7.02 through 7.11, constitutes a breach of this Agreement subject to the provisions of Section 8.02(d)(3), and confers no rights or interest whatsoever under this Agreement on any other party.

Transfer to Controlled Corporation

Section 7.02. If Franchisee is an individual or a partnership, Franchisee may at any time assign and transfer this Agreement to a corporation organized and operated for the sole purpose of conducting the business for which Franchisee is franchised and licensed under this Agreement, subject to the following conditions:

(a) Franchisee will be and remain the owner of 100 percent of the issued and outstanding capital stock of the corporation, provided that Franchisee may cause stock possessing not more than 49 percent of the total voting power in said corporation to be issued to Franchisee's spouse.

(b) The person or persons designated in Section 5.04, above, continue to comply with all the requirements of that section.

(c) The assignment and transfer is evidenced by a written instrument, in form reasonably satisfactory to Franchisor, in which the corporation expressly assumes all obligations of Franchisee under this Agreement, whether accrued at the time of the assignment or arising thereafter, and agrees to be bound by all the terms and provisions of this Agreement to the same extent and in the same manner as Franchisee. A copy of the instrument of assignment and transfer, executed by both Franchisee and the corporation, must be promptly delivered to Franchisor.

(d) Franchisee will execute and deliver to Franchisor its then standard forms of personal guaranty of the corporation's debts and subordination agreement. Further, Franchisee will not be released from but will remain personally bound and liable to Franchisor notwithstanding the assignment and transfer, with respect to all nonmonetary obligations of

Franchisee under this Agreement then accrued or thereafter arising, and to evidence those obligations will execute the personal undertaking set forth at the end of this Agreement, following the signatures of Franchisor and Franchisee.

Sale of Business

Section 7.03. In the event that Franchisee proposes to sell the business operated pursuant to this Agreement, whether by sale of the assets, by sale of a controlling interest in Franchisee if Franchisee is a corporation, partnership, or other form of business association, or by any other means that directly or indirectly transfers the business or its control, Franchisee must first submit to Franchisor a copy of any bona fide written offer made or received, or if none, a statement in writing of all the terms of the proposed sale and the identity of any proposed purchaser. Franchisor has the irrevocable first right and option to purchase the business on the same terms as stated in this Agreement, exercisable by notifying Franchisee in writing of its election to do so within 14 days after receipt of the written offer or statement. If Franchisor does not so notify Franchisee within this 14-day period, then a sale of the business to a third party may be consummated, but only on all the same terms as are set forth in the written offer or statement and to the same party, if any, identified in the offer, and subject to all the provisions, conditions, and limitations of Sections 7.01 and 7.04. If the sale is not consummated with the third party within 120 days after receipt by Franchisor of the written offer or statement, then the proposed sale will be deemed withdrawn, and all the provisions of this section will again become fully applicable, as if no sale had been proposed. Nothing contained in this section abrogates, impairs, or limits the application of any of the provisions of Section 7.01 or 7.04.

Franchisor's Consent to Voluntary Assignment

Section 7.04. In the event Franchisee desires or proposes to voluntarily sell, assign, or transfer this Agreement to any party other than a corporation described in Section 7.02, or, if Franchisee is a corporation, partnership, or other form of business association, then in the event Franchisee and/or the holder or holders of any interest in that corporation, partnership, or association desire or propose to take any action that would constitute or create an assignment of this Agreement within the meaning of Section 7.01, Franchisee or the holders of that interest, as the case may be, must first notify Franchisor in writing of the proposed sale, assignment, transfer, or other action, setting forth in detail the nature of the item or interest to be sold, assigned, transferred, or otherwise acted on; the name and address of the proposed purchaser, assignee, or transferee, or party acquiring any interest; and any consideration. Subject to prior compliance with the provisions of Section 7.03, Franchisor will consent to the proposed transaction provided that each of the following conditions is fulfilled:

(a) It is demonstrated to Franchisor's reasonable satisfaction that the proposed purchaser, assignee, transferee, or person otherwise to acquire an interest, is of good moral character, and possesses the business experience and capability, credit standing, health, and financial resources necessary to successfully operate Franchisee's shop in accordance with the terms of this Agreement. If the proposed purchaser, assignee, or transferee is a corporation, partnership, or other business association, the provisions of the preceding sentence apply to the individuals who are to own the corporation, partnership, or association. Franchisee will cooperate with Franchisor in making available such information as Franchisor may require to make the above-described determinations.

(b) The person who is to be substituted in Section 5.04 of this Agreement has been approved by Franchisor and has successfully completed the training course then in effect for Franchisor's franchisees. On consummation of the transaction, this Agreement will be deemed amended to insert the name of the substituted person in Section 5.04 of this Agreement.

(c) Franchisee is not in default under any provision of this Agreement, and pays in full all amounts owed to Franchisor at or before the closing of the transaction.

(d) Any sale, assignment, or transfer of this Agreement to be made by Franchisee must be evidenced by a written instrument, in form reasonably satisfactory to Franchisor, in which the purchaser, assignee, or transferee expressly assumes all obligations of Franchisee under this Agreement, whether accrued at the time of the assignment or arising thereafter, and agrees to be bound by all the terms and provisions of this Agreement to the same extent and in the same manner as Franchisee. A copy of this written instrument executed by both Franchisee and the purchaser, assignee, or transferee, must be promptly delivered to Franchisor. If the purchaser, assignee, or transferee is a corporation, limited partnership, or other entity whose owners enjoy limited liability by law, the individual or individuals who own the controlling interest in the entity must execute and deliver to Franchisor its then standard forms of personal guaranty and subordination agreement, and will further execute the personal undertaking set forth at the end of this Agreement following the signatures of Franchisor and Franchisee.

(e) In the case of any party or parties who are to acquire an interest in Franchisee, the individual or individuals who are to acquire, directly or indirectly, the controlling interest in Franchisee must have executed and delivered to Franchisor its then standard forms of personal guaranty and subordination agreement, and will further execute the personal undertaking set forth at the end of this Agreement, following the signatures of Franchisor and Franchisee.

(f) Franchisee and each of its stockholders, directors, and officers must have executed and delivered to Franchisor a general release of any and all claims and causes of action against Franchisor, its affiliated corporations, and their respective officers, agents, and employees.

Franchisor's Consent to Encumbrances

Section 7.05. In the event Franchisee desires or proposes to pledge, encumber, or grant any security interest in this Agreement, or, if Franchisee is a corporation, partnership, or other form of business association, then in the event the holder of any interest in that corporation, partnership, or association desires or proposes to pledge, encumber, or grant any security interest under circumstances that would constitute or create an assignment of this Agreement within the meaning of Section 7.01, Franchisee or the holder of that interest, as the case may be, must first notify Franchisor in writing of the proposed transaction. Franchisor will not unreasonably withhold its consent to the transaction, subject to the following conditions:

(a) Any consent so granted may not be deemed to consent to the pledgee, encumbrancer, or secured party exercising any rights to prerogatives of Franchisee under this Agreement, nor to its exercise of any rights or prerogatives of a holder of an ownership interest in Franchisee.

(b) Any consent so granted may not be deemed a consent to any subsequent disposition described in Section 7.01(c), or so much of Section 7.01(e) as refers to Section 7.01(c). Any subsequent disposition will be deemed an assignment of this Agreement within the meaning of Section 7.01, and will be subject to the provisions of Section 7.06.

(c) The pledgee, encumbrancer, or secured party must have executed and delivered to Franchisor an instrument in writing agreeing to be bound by the provisions of this Article.

Approval of Transferee

Section 7.06. In the event any party proposes to acquire the interest of Franchisee in this Agreement, if Franchisee is an individual, in a transaction described in Section 7.01(c), or if any such party proposes to acquire the interest of any party or parties having an interest in Franchisee, if of a type described in Section 7.01(e), the party proposing to acquire the interest must notify Franchisor in writing. Subject to prior compliance with the provisions of Section 7.03, Franchisor

will consent to the proposed transaction, provided that each of the following conditions is fulfilled:

(a) It is demonstrated to Franchisor's reasonable satisfaction that the party is of good moral character, and possesses the business experience and capability, credit standing, health, and financial resources necessary to successfully operate Franchisee's shop in accordance with the terms of this Agreement. If the party is a corporation, partnership, or other business association other than a corporation whose stock is publicly traded, the provisions of the preceding sentence apply to the individuals who own the same.

(b) The person who is to be substituted in Section 5.04 of this Agreement has been approved by Franchisor and has successfully completed the training course then in effect for Franchisor's franchisees. On consummation of the transaction, this Agreement will be deemed amended to insert the name of the transferee in Section 5.04 of this Agreement.

(c) Franchisee is not in default under any provision of this Agreement, and pays in full all amounts owed to Franchisor at or before the closing of the transaction.

(d) The transferee submits to Franchisor satisfactory evidence that the transferee has acquired and has become entitled to all rights of Franchisee under this Agreement, or to all rights in Franchisee belonging to the party or parties whose interests have been acquired, as the case may be. If the interest of Franchisee under this Agreement is to be acquired, the acquiring party must have executed and delivered to Franchisor a written instrument, in form reasonably satisfactory to Franchisor, by which the transferee expressly assumes all obligations of Franchisee under this Agreement, whether then accrued or thereafter arising, and agrees to be bound by all the terms and provisions of this Agreement to the same extent and in the same manner as Franchisee. In addition, if the acquiring party is a corporation other than a corporation whose stock is publicly traded, a limited partnership, limited liability company or other entity any of whose owners enjoy limited liability by law, the individual or individuals holding the controlling interest in the entity must execute and deliver to Franchisor its then standard forms of personal guaranty and subordination agreement, and will further execute the personal undertaking set forth at the end of this Agreement, following the signatures of Franchisee and Franchisor. If an interest in Franchisee is to be acquired, the individual or individuals who are to acquire, directly or indirectly, the controlling interest in Franchisee must have executed and delivered to Franchisor these forms of guaranty and subordination agreement and must have further executed the personal undertaking set forth at the end of this Agreement, following the signatures of Franchisor and Franchisee.

Death of Franchisee

Section 7.07. In the event of the Franchise's death if Franchisee is an individual, or in the event of the death of any party or parties owning an interest in Franchisee if Franchisee is a corporation, partnership, or other form of business association, and that death results in an assignment of this Agreement within the meaning of Section 7.01, Franchisor will consent to an assignment and transfer of this Agreement to the executor, administrator, or other personal representative of the deceased, and subsequently to the person or persons entitled to distribution from the deceased's estate (or directly to the latter persons if no probate proceedings are instituted with respect to the estate), provided that each of the following conditions is fulfilled with respect to each assignment and transfer:

(a) It is shown to the Franchisor's reasonable satisfaction that the executor, administrator, personal representative, or distributee is of good moral character, and possesses the business experience and capability, credit standing, health, and financial resources necessary to successfully operate Franchisee's shop in accordance with the terms of this Agreement. The executor, administrator, personal representative, or distributee must cooperate with Franchisor in making available any information that Franchisor requires to make these determinations.

(b) The person who is to be substituted in Section 5.04 of this Agreement has been approved by Franchisor and has

successfully completed the training course then in effect for Franchisor's franchisees. On approval and completion, this Agreement will be deemed amended to insert the name of that person in Section 5.04 of this Agreement.

(c) Franchisee is not in default under any provision of this Agreement, and pays in full all amounts owed to Franchisor as of the date of death.

(d) The executor, administrator, personal representative, or distributee must have submitted to Franchisor satisfactory evidence that he or she has succeeded or otherwise become entitled to all rights of Franchisee under this Agreement, or to all rights of the deceased in Franchisee, as the case may be. If the deceased was the Franchisee, the executor, administrator, personal representative, or distributee must have executed and delivered to Franchisor a written instrument, in form satisfactory to Franchisor, by which he or she expressly assumes all obligations of Franchisee under this Agreement, whether accrued at the date of Franchisee's death or arising thereafter, and agrees to be bound by all the terms and provisions of this Agreement to the same extent and in the same manner as Franchisee. If the deceased was the owner of an interest in Franchisee, the executor, administrator, personal representative, or distributee must execute and deliver to Franchisor its then standard forms of personal guaranty and subordination agreement (limited, in the case of an executor, administrator, or personal representative to his or her representative capacity), and must execute the personal undertaking (similarly limited to that representative capacity) set forth at the end of this Agreement, following the signatures of Franchisor and Franchisee.

Any consent by Franchisor to an assignment and transfer of this Agreement or of any interest in Franchisee to the executor, administrator, or personal representative of the deceased does not constitute consent to any subsequent assignment or transfer from the executor, administrator, or personal representative to any distributee of the estate. Any consent by Franchisor to any subsequent assignment or transfer will be subject to the fulfillment, with respect to the subsequent assignment or transfer separately and specifically, of all the conditions stated in this section.

Consent to Transfer of Managerial Responsibility

Section 7.08. In the event the person designated in Section 5.04 of this Agreement ceases to comply with any one or more of the provisions of this Agreement, whether by reason of voluntary action or inaction, disability, death, or other cause (or, if two or more persons are designated in Section 5.04, then in the event all of them cease to comply), other than in connection with a transaction described in Section 7.04, 7.06, or 7.07, Franchisor will consent to the designation by Franchisee of another person or persons to be substituted, and Section 5.04 will be amended accordingly, but only if Franchisor in its reasonable discretion finds the person or persons acceptable and _____ [he or she or they] then successfully complete the training course then in effect for Franchisor's franchisees.

Time Limitation

Section 7.09. In the case of any transaction described in either Section 7.02, or 7.04 through 7.07, Franchisor will not be required to consent to the transaction unless each condition precedent to that consent requiring action by Franchisee or any third party has been fulfilled within 90 days from the date of the event giving rise to the requirement of the consent. However, if the person who is to be substituted in Section 5.04 of this Agreement has been unable to complete the required training course within the 90-day period, solely because that course has not been offered by Franchisor at an earlier date, and if all other conditions to Franchisor's consent have been fulfilled within the 90-day period, then Franchisor will consent to the transaction conditioned on successful completion of that training course by that person at the earliest practicable date.

Exclusion

Section 7.10. Nothing contained in this Article will be deemed to refer to any event referred to in subsection (b), (c), or (d) of Section 8.06, as causing automatic termination of this Agreement.

Arbitration

Section 7.11. In the event that Franchisor is required, pursuant to Section 7.04, 7.05, 7.06, 7.07, or 7.08, to grant any consent, subject to the conditions set forth in those sections and in Section 7.09, and if Franchisor fails or refuses to grant that consent, then on written demand made by Franchisee on Franchisor at any time within 10 days after Franchisee's receipt of written refusal by Franchisor to grant consent or, if no written refusal is sent by Franchisor, then at any time within 10 days after the expiration of the period defined in Section 7.09, within which the conditions to Franchisor's consent are to be fulfilled, or within 10 days after earlier written notice of Franchisee's binding election to waive the balance of that period and to stand on the circumstances then existing, the dispute must be submitted to arbitration in accordance with and subject to all the same terms, provisions, and conditions as are set forth in Section 8.03, (except subsections (e) and (f)). However, the time within which the arbitration is to be requested must be as provided in this section, and the issues of fact and law referred to in subsection (b) of Section 8.03, will be those whose determination is needed to determine whether Franchisor is required, pursuant to and subject to all the conditions of Sections 7.04, 7.05, 7.06, 7.07, or 7.08, and of Section 7.09, to grant that consent.

If Franchisee makes proper and timely written demand for arbitration pursuant to this section, then Franchisor must grant the requisite consent promptly after the termination of the proceedings in favor of Franchisee, either by final decision or award by the arbitrator or by entry of a final and nonappealable order of any court of competent jurisdiction in which lawful review of the arbitrator's decision or award may be sought by Franchisor or Franchisee. Franchisor is not liable to Franchisee for any damage alleged to have accrued to Franchisee by reason of the fact that the Franchisor's consent was delayed until termination of the arbitration proceedings.

If Franchisee fails to serve proper written demand for arbitration as set forth in this section within the specified time, Franchisee will be barred from seeking any relief, whether by way of arbitration or by way of action or defense in any court, with respect to any matter or issue that was subject to arbitration pursuant to this section.

Assignability by Franchisor

Section 7.12. This Agreement may be assigned by Franchisor or by any hereafter referred to successor, to any corporation that may succeed to the business of Franchisor or of the successor by sale of assets, merger, or consolidation, and may also be assigned by Franchisor or by the successor to the shareholder or shareholders in connection with any distribution of the assets of that corporation.

ARTICLE 8. DEFAULT AND TERMINATION

Termination by Franchisee

Section 8.01. Franchisee may terminate this Agreement at any time, at the will of Franchisee and without cause, by giving Franchisor written notice of termination at least 30 days before the date of termination.

Termination by Franchisor

Section 8.02. (a) In the event Franchisee fails to make any payment of money owed to Franchisor when due, or fails to

submit to Franchisor when due any report required by this Agreement and that default is not totally cured within 30 days after Franchisor gives written notice of the default to Franchisee, then Franchisor may terminate this Agreement at any time thereafter by giving written notice of termination to Franchisee.

(b) In the event Franchisee fails to perform any obligation imposed on Franchisee by this Agreement, other than those referred to in subsections (a) and (d) of this section, and the default is not totally cured within 30 days after Franchisor gives written notice of the default to Franchisee, then Franchisor may terminate this Agreement at any time thereafter by giving written notice of the termination to Franchisee. However, if the default is of such a nature that it is not capable of being totally cured with reasonable diligence by Franchisee within the 30-day period, then this Agreement may not be terminated by Franchisor if Franchisee has commenced, immediately on receipt of the notice, to exercise reasonable diligence to cure the default, Franchisee continues to be diligently engaged in curing the default on the expiration of the 30-day period, and the curing is completed as soon after the expiration of the 30-day period as is reasonably practicable.

(c) In the event Franchisee has been given written notice of default by Franchisor _____[*e.g.*, 3] times within any period of 12 consecutive months pursuant to subsections (a) and/or (b), above, and in each of the previous instances Franchisee has cured the default within the time permitted, then in the event Franchisee again fails, within that 12-month period, to perform any obligation referred to in subsection (a) or (b), Franchisor may at any time thereafter terminate this Agreement forthwith, without giving prior notice of default and without affording Franchisee any period within which to cure the default, by giving written notice of termination to Franchisee.

(d) Franchisor may terminate this Agreement forthwith, by giving written notice to Franchisee, on account of any of the following matters:

(a) Any willful and material falsification by Franchisee of any report, statement, or other written data furnished to Franchisor. Any report submitted pursuant to Article 6 will be conclusively deemed to be materially false if it understates net revenue by more than _____ [*specify, e.g.*, 5 percent].

(b) Any willful and repeated deception of customers by Franchisee, relating to the source, nature, or quality of goods sold, or relating to the applicable terms of any of Franchisor's guaranties.

(c) Any attempted or purported assignment of this Agreement not in compliance with Sections 7.02 through 7.11, provided that if Franchisor does not elect to exercise its right to terminate this Agreement pursuant to this subsection, this inaction will not be deemed to (1) constitute a consent to the assignment or (2) confer any rights or interest whatever on the purported assignee. However, this Agreement remains binding and in full force and effect as between Franchisor and Franchisee unless and until Franchisor elects to terminate the Agreement.

(d) Any willful and repeated refusal to honor any of the Franchisor's guaranties or any willful and repeated issuance of guaranties other than those permitted and authorized by this Agreement.

(e) Any act or omission described in subsection (c) or (d), above, will be conclusively deemed to be willful and repeated if it occurs after written notice from Franchisor to cease and desist. Nothing in the preceding sentence may be construed to mean that acts or omissions described in either of those subsections may not be considered to be willful and repeated in the absence of notice from Franchisor. Any notice of termination given by Franchisor pursuant to this subsection is fully effective, and this Agreement is terminated, notwithstanding that Franchisee may have ceased engaging in, or may not at the time of the notice be engaged in, any of the acts which give rise to the notice, and notwithstanding that Franchisee may have taken steps to counteract the effects of any these acts.

Arbitration

[For an alternative arbitration provision, see § 51.250[2]]

Section 8.03. In the event that Franchisor gives to Franchisee any notice of default and/or notice of termination pursuant to Section 8.02, and Franchisee disputes the right of Franchisor to terminate this Agreement pursuant to that notice or notices, then on written demand made by Franchisee on Franchisor at any time before or within 10 days after notice of termination, the dispute will be submitted to arbitration in accordance with the rules and procedures for commercial arbitration of the American Arbitration Association or any successor organization, and in accordance with and subject to all the provisions of the Uniform Arbitration Act as in force in the State of _____. The place of arbitration will be _____ [city], _____ [state].

(a) The procedure for selection of the arbitrator will be as may then be prescribed by the Association or its successor. If the Association or a successor is not in existence or does not provide an arbitration procedure, then Franchisor and Franchisee will each select one arbitrator and those two arbitrators will select a third. In the event of the death, resignation, or disability of any arbitrator, a successor will be chosen in the same manner as the arbitrator being succeeded.

(b) The arbitrator or arbitrators have full authority to determine all issues of fact and of law necessary to determine whether Franchisor has the right to terminate this Agreement pursuant to the notice or notices given. The determination of the arbitrators will be final and conclusive on the parties, subject only to the provisions of the Uniform Arbitration Act. Any determination of an issue of fact or law made by the arbitrators, however, binds the parties only with respect to and in connection with the particular arbitration proceeding and the specific final decision or award of the arbitrators, and does not bind the parties nor will it be admissible in any other proceeding or for any other purpose. Nothing in this Agreement prevents any party from enforcing the specific decision or award of the arbitrators by any appropriate and lawful means.

(c) The costs of arbitration (not including attorneys' fees) will be taxed and borne as provided in the Uniform Arbitration Act.

(d) The arbitrators do not have the authority to decide any issue other than those expressly set forth above. In no event do the arbitrators have authority to award or assess damages to or against any party.

(e) The serving of a proper and timely demand for arbitration suspends the running of any period for curing a default or the effectiveness of any termination of this Agreement until the decision or award of the arbitrator is made. If the decision or award is in favor of Franchisor, the curative period immediately resumes running or the termination takes immediate effect, notwithstanding the pendency of any proceedings to modify, set aside, or vacate the decision or award, whether taken or brought before the arbitrators or in any court.

(f) If Franchisee fails to serve proper written demand for arbitration within the time specified, Franchisee will be barred from seeking any relief, whether by way of arbitration or by way of action or defense in any court, with respect to any matter or issue that was subject to arbitration in accordance with this section.

Notice of Default or Termination

Section 8.04. No notice of default or notice of termination purporting to be given pursuant to this Article 8 will be of any force or effect unless signed by a corporate officer of Franchisor. [Optional: Regional directors, district managers, and other agents of Franchisor having authority with respect to a specific geographic area will in no event be deemed corporate officers for purposes of this section.]

Nonexclusive Remedy

Section 8.05. The right of Franchisor to terminate this Agreement pursuant to this Article, whether or not exercised, is not exclusive of any other remedies given Franchisor by this Agreement, or by law on account of any default by Franchisee under this Agreement.

Automatic Termination

Section 8.06. This Agreement terminates immediately on the occurrence of any of the following events, without the necessity of notice of any kind by Franchisor or Franchisee:

- (a) Any termination of Franchisee's right to possession of the premises designated in Section 2.01, subject however, to the provisions of Sections 2.07 through 2.10.
- (b) The Franchisee has been subject to an order for relief in bankruptcy, or the filing of any petition by or against Franchisee, under the federal bankruptcy laws or the laws of any state or territory relating to relief of debtors, for reorganization, arrangement, or other similar relief, unless the petition filed against Franchisee is dismissed within 30 days.
- (c) The making by Franchisee of a general assignment for the benefit of creditors.
- (d) The appointment of any receiver, trustee, sequestrator, or similar officer to take charge of Franchisee's business, or any attachment, execution, levy, seizure, or appropriation by any legal process of Franchisee's interest in this Agreement, unless the appointment of the officer is vacated or discharged or the effect of that legal process is otherwise released within 30 days.
- (e) If Franchisee is a corporation, partnership, or other business association, the occurrence of any act of a type described in subsection (b) or (d), above, that relates to, involves, or affects the interest of any person owning a controlling interest in Franchisee.

Relief in Equity

Section 8.07. Franchisee agrees that neither termination of this Agreement, nor an action at law, nor both, would be an adequate remedy for a breach or default by Franchisee, or by any other persons bound by this Agreement, in the performance of any obligation relating to Franchisor's Proprietary Marks or Indicia, the trade secrets revealed to Franchisee in confidence pursuant to this Agreement, Franchisor's guaranties, or the obligations of Franchisee and other persons, on and after termination of this Agreement. It is agreed that in the event of any such breach or default, in addition to all other remedies provided elsewhere in this Agreement or by law, Franchisor will be entitled to relief in equity (including a temporary restraining order, temporary or preliminary injunction, and permanent mandatory or prohibitory injunction) to restrain the continuation of any breach or default, or to compel compliance with the provisions of this Agreement.

Liquidated Damages

Section 8.08. Franchisor, Franchisee, and all other parties bound under this Agreement, mutually acknowledge that it would be difficult to ascertain the exact amount of damages incurred by Franchisor in the event of any breach of this Agreement or default, as defined in this Article, and that, in addition to all other remedies provided elsewhere in this

Agreement or by law, Franchisor will be entitled to recover from all parties, jointly and severally, as and for its liquidated damages, the sum of \$_____ for each day's continuance of the breach or default after written notification by Franchisor to Franchisee. It is agreed that this sum represents a reasonable estimate of the damage that would accrue to Franchisor, reserving to Franchisor the right to recover such other or additional damages as may be provided by law.

Obligations After Termination

Section 8.09. On termination of this Agreement, whether by lapse of time, by termination pursuant to any provision of this Article, by mutual consent of the parties, by operation of law, or in any other manner whatsoever, and in the absence of renewal of this Agreement pursuant to Article 9, Franchisee will cease to be an authorized _____[*name of franchise business*] franchisee as to any products or services whatsoever, and Franchisee and all persons directly or indirectly owning any interest in Franchisee or in any way associated with or related to Franchisee will:

- (a) Promptly cause Franchisee to pay Franchisor all liquidated or ascertainable sums owing from Franchisee to Franchisor, without set-off or other diminution on account of unliquidated claims.
- (b) Immediately and permanently discontinue the use of any of Franchisor's Proprietary Marks or Indicia or the System, or any marks, names, or indicia that in the opinion of Franchisor are confusingly similar thereto, or any other materials that may in any way indicate or tend to indicate that Franchisee is or was an authorized franchisee of Franchisor, or is or was in any way associated with Franchisor.
- (c) Immediately and permanently remove, destroy, or obliterate, at Franchisee's expense, all signs containing any of the marks, names, indicia, or other things the use of which is prohibited by subsection (b), above, and will also sell to Franchisor, f.o.b., Franchisee's shop, any of the aforesaid signs requested by Franchisor, at a price equal to the original installed cost to Franchisee minus a reasonable allowance for depreciation, wear and tear, and obsolescence.
- (d) Promptly destroy or surrender to Franchisor all stationery, letterheads, forms, printed matter, promotional displays, and advertising containing any of the marks, names, indicia, or other things the use of that is prohibited by subsection (b), above.
- (e) Immediately and permanently discontinue all advertising placed by Franchisee as an authorized franchisee of Franchisor or that contains or makes reference to any of the marks, names, indicia, or other things the use of which is prohibited by subsection (b), above, and will cancel all advertising already placed or contracted for that would otherwise be published, broadcast, displayed, or disseminated after the date of the termination of this Agreement.
- (f) Immediately cease using or claiming any right to use any telephone number that Franchisor, as the subscriber, has allowed Franchisee to use during the term of this Agreement, and pay all bills incurred for the period during which Franchisee used those number or numbers. As to each telephone number for which Franchisee may be the subscriber and that have been listed or advertised by Franchisee at any time within the 24-month period before termination in any telephone directory or other medium in connection with any of the Proprietary Marks or any similar designation, Franchisee will immediately transfer and assign the number to Franchisor or to the person or firm designated by Franchisor, and must immediately execute any instruments and take any steps that the Franchisor reasonably believes necessary or appropriate to transfer and assign each telephone number. Franchisee further irrevocably appoints the then acting President of _____[*franchisor's corporate name*] or its successor as Franchisee's duly authorized agent and attorney-in-fact to execute all instruments and take all steps to transfer and assign each telephone number.

(g) Immediately and permanently discontinue any use of the name " _____ " [name of franchise business] or any word confusingly similar name in Franchisee's firm name, corporate name, or trade name, and take all steps as necessary or appropriate in the opinion of Franchisor to change those names to eliminate the name " _____ " [name of franchise business] or any word confusingly similar to that name.

(h) Sell to Franchisor, f.o.b., Franchisee's shop, all or any part of inventories of genuine products bearing Franchisor's Proprietary Marks or Indicia on hand as of the date of termination as Franchisor may request in writing before or within 30 days after the date of termination at the current published prices then being charged by Franchisor to authorized franchisees operating under agreements in form similar to this Agreement, not including any costs of storage or transportation paid by Franchisee to bring the goods initially to the shop, minus all costs incurred or to be incurred by Franchisor to restore the goods or packaging to a salable condition, and minus a reasonable allowance for physical deterioration, obsolescence, or damage to the extent not restored under the preceding clause. Franchisor has the right to set off and apply any amounts due to Franchisee pursuant to this subsection against any and all other amounts that may be due from Franchisee to Franchisor. [Optional: Franchisee will surrender all guaranty certificates in Franchisee's possession or control.]

(i) Refrain from doing anything tending to indicate that Franchisee is or was an authorized franchisee of Franchisor, or is or was in any way associated with Franchisor.

General Provisions Regarding Termination

Section 8.10. (a) Termination of this Agreement under any circumstances does not abrogate, impair, release, or extinguish any debt, obligation, or liability of Franchisee to Franchisor that may have accrued under this Agreement, including without limitation, any debt, obligation, or liability that was the cause of termination or arose out of that cause.

(b) All covenants and agreements of Franchisee that by their terms or by reasonable implication are to be performed, in whole or in part, after the termination of this Agreement survive termination.

(c) In the event this Agreement is assigned by Franchisee and that assignment is consented to by Franchisor, this Agreement will be deemed to have terminated as to the assignor or assignors as of the date of that consent, and the assignor or assignors will then be bound by all provisions of Section 8.09, above, (except subsection (h)) and this section to the same extent and in the same manner as if this Agreement had been terminated in its entirety as of that date.

(d) Nothing contained in Section 8.09 will be deemed to apply to or affect the operation by Franchisee or by any other party bound thereby of a _____ [name of franchise business] shop at any other location pursuant to and in accordance with the provisions of any other valid and outstanding agreement with Franchisor.

ARTICLE 9. EXPIRATION AND RENEWAL

Expiration

Section 9.01. Unless sooner terminated or modified in accordance with the provisions of this Agreement, the expiration date of this Agreement and the right, franchise, and license granted is _____ [specify date or _____ (e.g., 10 years from the date of this Agreement or 10 years from the last day of the month following the month in which Franchisee's shop first opens for business)].

Renewal Option

Section 9.02. Subject to the provisions of Section 9.07, and pursuant to *Bus. & Prof. Code § 20025*, Franchisee is granted an option to extend this Agreement for a successive _____ [e.g., 10-year] period. This option may be exercised by Franchisee at its sole election by sending to Franchisor written notice of its intention to do so, by _____ [specify type of mail] mail, at least _____ [number, e.g., 90 days] before the expiration date specified in *Section 9.01, above*. On payment of the renewal fee at least _____ [number] days before the expiration date, the franchise will be renewed for an additional _____ [number] years.

Renewal Fee

Section 9.03. The renewal fee is _____ [set forth formula or other terms, e.g., _____ percent of Franchisee's gross revenues for the fiscal year immediately preceding exercise of the renewal option referred to in Section 9.02, or the initial franchise fee specified in franchise agreements then being used by Franchisor].

Royalties After Renewal

9.04. At the beginning of the renewal period, the royalties payable to Franchisor _____ [may be adjusted, at the option of Franchisor, to equal the unweighted average of the royalty rates then currently being paid by all other existing franchisees or will be the same as the royalties provided for in franchise agreements then being used by Franchisor].

Conditions for Renewal Option

Section 9.05. Franchisee may not exercise the renewal option referred to in *Section 9.02, above*, unless all amounts to be paid by Franchisee to Franchisor are currently paid, and no default under this Agreement exists uncured five days after the Franchisee has received written notice of any overdue amounts. Even if no default exists, Franchisor may revoke the renewal option and refuse to allow renewal if, during the franchise period, Franchisee has repeatedly and unreasonably been in material default of this Agreement. Franchisor and Franchisee agree that, for the purposes of this section, repeated, unreasonable, material default includes, but is not limited to, failure to make at least _____ percent of all payments and reports within _____ [number] days of the date they are actually due. It is further agreed that repeated, unreasonable, material default also includes, if Franchisee's sales have been consistently low as compared with all franchisees similarly situated over at least a _____ [number]-year period, Franchisee's consistently demonstrated unwillingness to take remedial actions as recommended by Franchisor to improve Franchisee's sales and marketing methods, in accordance with Franchisee's obligations under Article 5 of this Agreement.

Remodeling Requirement

Section 9.06. As a further condition of renewal, Franchisee will remodel, redecorate, or otherwise update its franchise premises to conform with the then current physical appearance of new comparably located _____ [name of franchise business] shops, to the extent that the work can be accomplished within the physical, architectural, and design limitations and requirements applying to the existing shop or at its location. Completion of this work at any time within two years before the expiration of this Agreement or actual commencement of the work, or a written agreement to do the work within two years after the renewal date, will be deemed to meet this

requirement. The requirement for remodeling, redecoration, or updating specified in this Agreement must be reasonably construed, taking into account marketing conditions (including past and projected revenues of Franchisee), community and local market size, competition, and the effectiveness of the existing design of Franchisee's premises. The completion of the work, or the agreement to do the work, is a condition precedent to any renewal of this franchise. In the event that Franchisee agrees to perform the work and then fails to complete the same within 21/2 years after the renewal date, this franchise will expire at the end of that 21/2 -year period.

Franchisor's Election Not to Renew

Section 9.07. In the event Franchisor determines that Franchisee would not have the right to exercise the renewal option referred to in Section 9.02, pursuant to Section 9.05, and Franchisor is unwilling to renew the right, franchise, and option granted by this Agreement, Franchisor must mail to Franchisee, by _____[*type of mail*] mail, not less than _____[*number of months, earlier than time given franchisee to exercise option, e.g., nine months*] before expiration, a Notice of Probable Intention Not to Renew ("Notice"). This Notice must set forth the acts and/or omissions of Franchisee that constitute the reasons under this Agreement that Franchisor is unwilling to renew.

In the event Franchisor is convinced that Franchisee is incapable of fulfilling its obligations under this Agreement, Franchisor will then send to Franchisee a Notice of Refusal to Renew by registered or certified mail at least _____[*number of months, which must be less than that for original notice, greater than 180 days, and greater than period given to franchisee to exercise option, e.g., six months*] before the expiration of this Agreement. The notice must state the reasons for the refusal to renew and the effective date of the nonrenewal or expiration of this Agreement. To the extent permitted by *Bus. & Prof. Code § 20025*, the Notice of Refusal to Renew will be deemed to supersede, revoke, and otherwise withdraw the option of Franchisee to renew.

In the event Franchisor is satisfied that Franchisee is able to and will correct any uncured deficiencies claimed in its Notice of Probable Intention Not to Renew, Franchisee will be so advised and will be allowed to exercise its option to renew referred to in Section 9.02.

ARTICLE 10. MISCELLANEOUS PROVISIONS

"Franchisee"

Section 10.01. On any effective assignment of Franchisee's interest in this Agreement, any and all references to "Franchisee", unless the context otherwise requires, will refer to the assignee.

Section Headings

Section 10.02. Section headings are for convenience of reference only. They are not construed as part of this Agreement and do not limit or define the meaning of any provision in this Agreement.

Cost of Enforcement or Defense

Section 10.03 In the event Franchisor is required to employ legal counsel or to incur other expense to enforce any obligation of Franchisee under this Agreement, or to defend against any claim, demand, action, or proceeding by reason of Franchisee's failure to perform any obligation imposed on Franchisee by this Agreement, and provided that legal action is filed by or against Franchisor and the action or its settlement establishes Franchisee's default, then Franchisor will be entitled to recover from Franchisee the amount of all reasonable attorneys' fees and all other costs and expenses

incurred in enforcing the obligation or in defending against that claim, demand, action, or proceeding, whether incurred before, in preparation for, or in contemplation of the filing of an action or thereafter. Nothing contained in this section relates to arbitration proceedings pursuant to this Agreement.

Remedies Cumulative

Section 10.04. All rights and remedies conferred on Franchisor by this Agreement and by law are cumulative of each other, and neither the exercise nor the failure to exercise any right or remedy precludes the exercise of any other right or remedy.

Nonwaiver

Section 10.05. No failure by Franchisor to take action on account of any default by Franchisee, whether in a single instance or repeatedly, constitutes a waiver of any default or of the performance required of Franchisee. No express waiver by Franchisor of any provision or performance under this Agreement or of any default by Franchisee will be construed as a waiver of any other or future provision, performance, or default.

Invalidity and Severability

Section 10.06. If any provision of this Agreement is found to be invalid or unenforceable, either in its entirety or by virtue of its scope or application to given circumstances, that provision will be deemed modified to the extent necessary to render the same valid, as not applicable to the given circumstances, or to be excised from this Agreement, as the situation may require. This Agreement will be construed and enforced as if that provision had been included in this Agreement as so modified in scope or application, or had not been included in this Agreement, as the case may be. It is the stated intention of the parties that had they known of any invalidity or unenforceability at the time of entering into this Agreement, they would have nevertheless contracted on the terms contained in this Agreement, either excluding those provisions, or including those provisions only to the maximum scope and application permitted by law, as the case may be. If the total or partial invalidity or unenforceability of any provision of this Agreement exists only with respect to the laws of a particular jurisdiction, this section operates on that provision only to the extent that the laws of that jurisdiction are applicable to that provision.

Notices

Section 10.07. Any notice or demand given or made pursuant to the terms of this Agreement must be served in the following manner:

(a) If given to Franchisor, notices and demands must be sent by *[type of mail]* mail, postage fully prepaid, addressed to _____ *[franchisor's corporate name]*, _____ *[street address]*, _____ *[city, state, zip]*, or at the changed address or addresses as Franchisor may from time to time designate.

(b) If given to Franchisee, notices and demands must be delivered personally to person (or any one of the persons) designated in Section 5.04, or be sent by _____ *[type of mail]* mail, postage fully prepaid, addressed to Franchisee at the address of Franchisee's shop as shown in Section 2.01.

(c) Notices and demands will be deemed to have been given or made, and deemed effective, on receipt, provided that any demand for arbitration or any relocation notice pursuant to Section 2.10, will be deemed to have been given or

made, and deemed effective, when mailed in accordance with this section, provided that the same is received by Franchisor within five business days after expiration of the period for giving or making that demand or notice.

Entire Agreement

Section 10.08. This Agreement, together with any written lease or sublease of the shop premises described in Section 2.01, entered into between Franchisee and Franchisor or any of its subsidiaries or affiliated corporations, constitutes and contains the entire agreement and understanding of the parties with respect to the subject matter of the franchise. There are no representations, undertakings, agreements, terms, or conditions not contained or referred to in this Agreement or in any lease or sublease.

This Agreement supersedes and extinguishes any prior written agreement between the parties relating to the shop location described in Section 2.01. However, this Agreement does not abrogate, impair, release, or extinguish any debt, obligation, or liability of Franchisee to Franchisor that accrued before the execution of this Agreement, nor cancel any credit owned by Franchisor to Franchisee at that time. Further this Agreement does not abrogate or impair any understandings or approvals relating to plans and specifications for the shop building and premises, or the equipment and opening inventory. Nothing contained in this Agreement affects or relates to any agreement between the parties or any of them relating to any shop location other than the one described in Section 2.01, except as expressly stated in Section 5.04.

Binding Effect

Section 10.09. Subject to all the provisions of Article 7 and Section 8.10(c), above, this Agreement is binding on and inures to the benefit of the parties (including the parties whose signatures follow those of Franchisor and Franchisee) and their respective heirs, executors, administrators, personal representatives, successors, and assigns.

Governing Law

Section 10.10. The validity of this agreement and of any of its terms or provisions, as well as the rights and duties of the parties under this agreement, shall be construed pursuant to and in accordance with the laws of _____ [*specify jurisdiction, e.g., the state of California*].

Counterparts

Section 10.11. This Agreement may be executed in any number of identical counterparts, and each counterpart will be deemed a duplicate original of this Agreement.

Executed at _____ [*city*], _____ [*state*], on the day and year first above written.

FRANCHISOR

_____ [*name of franchisor*]

By _____ [*signature*]

[*typed name and title*]

FRANCHISEE

_____ [*name of franchisee*]

By _____ [signature]
[typed name and title]

GUARANTY

Each of the undersigned, being directly or indirectly beneficially interested in the business to be conducted by Franchisee pursuant to this Agreement, and in order to induce Franchisor to enter into this Agreement and in consideration of franchisor's doing so, joins in and agrees to be personally bound by all the terms and provisions of this Agreement, other than those requiring the payment of money by Franchisee, to the same extent and in the same manner as Franchisee is bound. Nothing in this Agreement will be deemed to abrogate or impair any separate instrument of guaranty or subordination that any of the undersigned may have executed, may contemporaneously with this Agreement, or may execute in the future.

_____ [signature]
[typed name]

_____ [signature]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesAssignments & TransfersBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsFranchise AgreementsBusiness & Corporate LawDistributorships & FranchisesTerminationsGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesTerminationsNotice Requirements



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 51 FRANCHISE AGREEMENTS
PART IV. FORMS
B. AGREEMENTS

21-51 California Legal Forms--Transaction Guide § 51.211

§ 51.211 Franchise Agreement-Restaurant/Fast Food Franchise

[1] Comment

[a] Use of Form

This form is a franchise agreement containing provisions peculiar to restaurant or fast food types of franchise operations. The form also includes certain provisions that are found in all types of franchise agreements, either set forth as alternatives to language found in the complete basic franchise agreement form illustrated in § 51.210[2] or by cross-reference to that form. For further comment regarding the use and drafting of franchise agreements, see § 51.210[1].

[b] Default and Termination

A franchisor may not terminate a franchise without good cause [*Bus. & Prof. Code § 20020*]. Section 9.01(a)-(c) describes events under which immediate termination is "deemed reasonable" under the statute, which presumably means with good cause [*see Bus. & Prof. Code § 20021*]. A franchisor intending to terminate on any of the remaining grounds could avoid litigation over the existence of good cause by first giving the franchisee written notice of the default and a reasonable opportunity, which need not exceed 30 days, to cure. Failure to comply with any requirement of the franchise agreement within a reasonable time after notice constitutes good cause for termination [*Bus. & Prof. Code § 20020*].

Although the statute is ambiguous on this point, a franchisor intending to terminate should provide written notice of intent to terminate, with a statement of the effective date and the reasons for the action [*Bus. & Prof. Code § 20030*]. The notice should be personally delivered to the franchisee or sent by telegram or registered or certified mail [*Bus. & Prof. Code § 20030*].

[2] FORM

Franchise Agreement-Restaurant/Fast Food Franchise

FRANCHISE AGREEMENT

Restaurant/Fast Food Franchise

This Agreement is made on _____ [date], by _____ [name of franchisor entity], a _____ [e.g., _____ (state) corporation or limited partnership or limited liability company], with its principal place of business located at _____ [address], referred to as Franchisor, and _____ [name of franchisee], of _____ [address], referred to as Franchisee.

RECITALS

Franchisor and Franchisee mutually acknowledge the following:

I. The System

Franchisor is the owner of a _____ [describe franchise business, e.g., self-service, drive-in, carry-out food establishment system], referred to as the "_____ [name of franchise business] System" or "System." The System includes a special design and color scheme of building, equipment, layout, food formulae and specifications for designated food products, methods of inventory and operation control, bookkeeping and accounting procedures, and a manual of business practices and policies. The System is being used and widely advertised in the United States and elsewhere throughout the world.

II. Proprietary Rights

Franchisor is the sole and exclusive owner of all proprietary and other property rights and interests in and to the trade names and/or trademarks "_____, "_____, and "_____ " [set forth all marks and names], and all other trademarks and service marks used in connection with this System, including but not limited to those trademarks, service marks, and rights residing in the appearance of buildings, signs, and portions thereof by which the franchise and the products are known and identified.

III. Right to Use System

[Include if franchisor has acquired the right from a predecessor:]

Franchisor has obtained by license agreement the right to franchise others in the adoption and use of the System and these names and marks in the United States and elsewhere throughout the world.

IV. Promotion and Development

Franchisor has promoted and developed the System.

V. Franchisee's Acknowledgment

Franchisee acknowledges Franchisor's rights in the System and desires to acquire the right to adopt and use this System and its trade names and trademarks at the location referred to below.

THEREFORE, in accordance with the above, Franchisor and Franchisee do hereby agree as follows:

ARTICLE 1. GRANT AND USE OF FRANCHISE

Grant of Franchise

Section 1.01. Subject to the terms and conditions of this Agreement, Franchisor grants to Franchisee and Franchisee accepts from Franchisor, the _____ [nonassignable *or* assignable] right, franchise, and license:

(a) To use Franchisee's _____ [Proprietary Marks and Indicia *or* trademark, service mark, or trade name] in the operation of a food service business ("the franchised business") at the location designated in Section 1.04.

(b) To use _____ [the Franchise System *or* Franchisor's system of operation and method of doing business] at that location.

(c) To _____ [sell the products and render the services specified *or* use the menus and recipes provided and developed] by Franchisor in the conduct of the franchised business at that location.

Initial Term of Franchise

Section 1.02. Unless earlier terminated for good cause as provided in this Agreement, the franchise granted under and pursuant to the terms of this Agreement continues in full force and effect for a period of _____ [number] years from the date of this Agreement.

Renewal Terms

Section 1.03. Provided that Franchisee fully, faithfully, and timely performs all obligations under this Agreement, Franchisee may renew the franchise granted under this Agreement for successive terms of _____ [number] years each on the expiration of the then current term. Any failure by Franchisee to perform its obligation under this Agreement that does not constitute grounds for nonrenewal under *California Business and Professions Code Sections 20025, 20020, and 20021* does not affect Franchisee's right to renew. Regardless of any nonperformance under this Agreement, Franchisee may renew the franchise if the Franchisee has not received, within 180 days before the expiration of this Agreement, Franchisor's written notice of intention not to renew. The notice of intention not to renew must state the reasons for nonrenewal and the effective date of nonrenewal or expiration, and it must be delivered personally to Franchisee or sent by registered or certified mail.

Renewal of the franchise will be effected by the execution by Franchisor and Franchisee of Franchisor's then current form of franchise agreement and all other documents then customarily used by Franchisor in the grant of renewal franchises.

Location and Relocation

Section 1.04. The franchised business will be located at _____ [address]. In the event the franchised business premises at that location are rendered unusable by fire or other casualty or by the proper exercise of the power of eminent domain; if Franchisee's possession of the franchised business premise is lost without Franchisee's fault; or, in the event that, in Franchisor's judgment, the character of the location has sufficiently changed as to be detrimental to its business potential to warrant relocation, Franchisor will grant permission for the relocation of the franchised business to a site acceptable to Franchisor. Any relocation is at Franchisee's sole expense. On relocation outside the exclusive area designated in Section 1.05, below, Franchisee will be accorded a new exclusive area as determined by Franchisor in its

sole discretion.

Exclusive Area

Section 1.05. To facilitate the successful development of the franchised business and to protect Franchisee's investment, Franchisor grants to Franchisee the exclusive right to operate a _____[*name of franchise business*] restaurant within the following area: _____[*describe area*]. During the term of this Agreement, neither Franchisor nor any other of its franchisees are authorized to establish a _____[*name of franchise business*] restaurant within that exclusive area, nor may Franchisor establish other food service establishments selling products or services similar to those offered by _____[*name of franchise business*] restaurants under any other _____[Proprietary Marks or Indicia or trademark, service mark, or trade name] within that exclusive area.

ARTICLE 2. FRANCHISE PAYMENTS

Initial Franchise Fee

Section 2.01. In consideration of the right, franchise, and license granted by Franchisor to Franchisee and the services to be rendered to Franchisee by Franchisor under this Agreement, Franchisee agrees to pay to Franchisor an initial franchise fee of \$_____.

Royalty Based on Gross Receipts

Section 2.02. In consideration of the right, franchise, and license granted by Franchisor to Franchisee and the services to be rendered to Franchisee by Franchisor under this Agreement, Franchisee agrees to pay to Franchisor a royalty equal to _____ percent of the gross receipts of the franchised business, excluding _____[*e.g., sales taxes*]. Franchisee will pay this royalty for each month on or before the last day of the month following the month for which payment is due during the operation of the franchised business. Each payment must be accompanied by a written statement certified to be true and correct by Franchisee, showing the gross receipts received during the month for which the payment is due.

ARTICLE 3. FRANCHISOR'S CONTINUING OBLIGATIONS

Knowledge and Experience

Section 3.01. Franchisor agrees to make available to Franchisee the benefit of its knowledge and experience in the installation of a _____[*name of franchise business*] restaurant.

Building Plans and Specifications

Section 3.02. Franchisor agrees to make available to Franchisee all initially required plans and specifications for the building, equipment, furnishings, decor, layout, menu and menu display, and all signs for or identified with _____[*name of franchise business*] restaurants, together with advice and consultation concerning them. Franchisee will bear the cost of duplicating these plans and specifications and the cost of adapting the same to the franchised business premises. Franchisee agrees to return all copies of these plans and specifications to Franchisor on completion of _____[the construction of a new building or the improvement of an existing building]

meeting these plans and specifications.

Operations Manual

Section 3.03. Franchisor agrees to provide Franchisee with a copy of the _____[*name of franchise business*] Manual of Standard Operating Procedures ("the manual"), on execution of this Agreement, the receipt of which Franchisee acknowledges by the execution of this Agreement. The manual is designed to ensure uniform and high standards of quality, service, and appearance among all _____[*name of franchise business*] restaurants to create and maintain _____[*name of franchise business*] goodwill and widespread consumer acceptance. Therefore, this manual and all amendments, as made from time to time, are incorporated into and made a part of this Agreement, as if fully set forth in this Agreement. Franchisee agrees that on termination of this Agreement, Franchisee will immediately return the manual, and all amendments, to Franchisor.

Advisory Services

Section 3.04. Franchisor agrees to render advisory services regarding the operation of the franchised business. These services include, but are not limited to, advice with respect to the following: preparation of food products in accordance with the manual, management of food supplies, styles and type of service, operation of the restaurant, the development of a personnel policy, and the training of Franchisee and Franchisee's employees in the operation of the franchised business. All training is to be given at the _____[*name of franchise business*] restaurant, which _____[*specify, e.g., is being used at that time for this purpose by Franchisor*].

Supplies

Section 3.05. Franchisor agrees to assist Franchisee in selecting suppliers of food ingredients, paper products, and other necessary supplies. Franchisor will not limit the suppliers from which these items may be purchased, so long as these items comply with the standards of quality specified in the manual.

Advertising and Public Relations

[See § 51.210[2], Section 4.01(d) for alternative provision.]

Section 3.06. Franchisor agrees to assist Franchisee in promoting the franchised business through advertising and public relations campaigns.

Field Consultation

Section 3.07. Franchisor agrees to provide consultation and advice by Franchisor's field representatives. This consultation may be made either through personal visits from field representatives or by telephone, mail, or otherwise, as may from time to time be reasonably required.

ARTICLE 4. OBLIGATIONS OF FRANCHISEE

Franchised Business Premises

Section 4.01. Franchisee agrees that the premises from which Franchisee will conduct the franchised business will be _____ [constructed or improved] by Franchisee at Franchisee's expense at the location designated in Section 1.01, in strict accordance with the plans and specifications made available to Franchisee pursuant to Section 3.02. These premises will be decorated, furnished, equipped, and maintained in strict accordance with these plans and specifications and any applicable provisions of the manual made available to Franchisee pursuant to Section 3.03 of this Agreement.

Operation of Premises

Section 4.02. Franchisee agrees to commence operation of the franchise business using the franchised business trademarks, trade name, and other indicia, immediately after the premises in which the franchised business is located are ready for occupancy and to continue to operate the franchise business on days and during the business hours specified in this Agreement (except when the premises are untenable as a result of fire or casualty or similar circumstances beyond Franchisee's control). Franchisee further agrees to operate the business premises in a quiet, dignified, and respectable manner, in strict accordance with the business standards and practices set forth in the manual as it presently exists or as it may be amended from time to time in the future. Franchisee also agrees to maintain sufficient supplies and employ sufficient help at the premises to operate at maximum capacity and with maximum efficiency so as to maximize the revenues and profits from the franchise business.

Business Hours

[See § 51.210[2], Section 5.01 for alternative provision.]

Section 4.03. Franchisee agrees to operate the franchised business _____ [number] days per week throughout the year and at least during the hours from _____ A.M. to _____ P.M. or other hours as may from time to time be specified by Franchisor. The franchised business may be closed on the following holidays: _____ [specify]. [Optional: Franchisee and Franchisor agree that these days and hours of operation may be amended if the complex within which the franchise business will be located mandates other days and hours of operation.]

Operating Standards

Section 4.04. Franchisee agrees to maintain a high and uniform standard of cleanliness and sanitation in the operation of the franchise premises and to conduct the franchised business in accordance with the standards, procedures, and methods established and prescribed by Franchisor from time to time. Franchisee agrees to comply with all laws, ordinances, and regulations relating to the operation of the franchised business to ensure the highest quality of food products and services to the consuming public.

Inspection of Premises and Products

Section 4.05. Franchisee agrees to permit Franchisor to inspect Franchisee's entire premises at any time during regular business hours, without notice, and to obtain and test specimen food items and ingredients and to observe all aspects of the conduct of the franchised business by Franchisee. Franchisee further agrees to take immediate remedial action to correct any deficiencies and to maintain the standards of quality referred to in this Agreement and in the manual.

Products, Services, and Supplies

Section 4.06. Franchisee acknowledges that uniform and high standards of quality, service, and appearance among all _____ [name of franchise business] restaurants are necessary to create and maintain the goodwill and widespread consumer acceptance of _____ [name of franchise business]. Therefore, Franchisee agrees that it will always prepare, sell, and dispense all food products and beverages in compliance with the specifications as to contents and weight or size set forth in the manual. Franchisee further agrees to use only those cups, containers, napkins, uniforms, paper goods, and other packaging, supplies, or items bearing the franchised business trade name or marks that conform to the manual.

Adherence to Manual and Standards

Section 4.07. Franchisee agrees that adherence to the manual and to Franchisor's standardized design and specifications for decor of the franchised business premises and uniformity of equipment, layout, signs, menus, and other incidents of the franchised business are essential to the image and goodwill of the franchise. In recognition of the mutual benefits accruing from the maintenance of uniformity of appearance, service, products, and marketing procedures, it is mutually agreed as follows:

- (a) Except as specifically authorized by Franchisor, Franchisee will not alter the appearance of the premises, or the improvements to the premises necessitated by this Agreement. Franchisee will promptly make all repairs and alterations to the premises and improvements as may be determined by Franchisor to be reasonably necessary.
- (b) Franchisee agrees to display Franchisor's trade names and trademarks at the premises in the manner authorized by Franchisor. Franchisee further agrees to maintain and display signs of the color, size, and design and in the locations specified by Franchisor. Franchisee will not place additional signs or posters on the premises without the written consent of Franchisor.
- (c) Franchisee agrees to maintain all specified equipment, furnishings, signs, and other personal property in excellent working condition. As items of equipment become obsolete or in need of replacement, Franchisee will replace them with the same or substantially similar types and kinds of equipment as are being installed in _____ [name of franchise business] restaurants when replacement becomes necessary. All equipment used in Franchisee's restaurant must meet Franchisor's specifications.
- (d) Pay telephones, newspaper racks, jukeboxes, gum machines, games, rides, or coin vending machines will not be installed on the premises without the prior written approval of Franchisor. However, Franchisor will not object to the installation of _____ [specify, e.g., _____ (number) cigarette vending machines and _____ (number) pay telephones in locations that meet Franchisor's specifications].
- (e) Franchisee agrees to serve the menu items specified by Franchisor and to sell no other food or drink item or any other merchandise of any kind without the prior written approval of Franchisor.
- (f) Franchisee agrees that cups, containers, napkins, paper goods, packaging, and other items imprinted with Franchisor's trade name, trademark, or other indicia will be purchased by Franchisee through a supplier or manufacturer approved in writing by Franchisor. Franchisor agrees to assist Franchisee in establishing approved sources for these items. Franchisor further agrees to assist Franchisee in establishing approved sources of supply of food items or ingredients.
- (g) Regardless of any provision in this Agreement, if Franchisee gives Franchisor notice sufficiently in advance to

permit Franchisor to verify adherence to Franchisor's standards and specifications, that Franchisee desires to purchase equipment, food supplies, containers, or other products from reputable, dependable sources other than those previously approved, Franchisor will not unreasonably withhold the prompt approval of purchase, provided that the items purchased conform to the appearance, quality, size or portion (and, where applicable, taste), and uniformity standards and other specifications of Franchisor. Franchisor may require that samples from these alternative suppliers be delivered to Franchisor for testing before approval and use. Further, Franchisor may charge and Franchisee will pay an amount, not to exceed the actual costs of testing.

Refurbishments

Section 4.08. Franchisee agrees to effect any refurbishment of the franchised business premises as Franchisor may from time to time require to maintain or improve the appearance and efficient operation of the franchised business and/or increase its sales potential. Franchisee may not be required to make aggregate expenditures for refurbishments in excess of _____ percent of the gross receipts from the date of its opening to the date of any required refurbishment or, except in connection with the renewal of the franchise, to effect any refurbishment during the last _____[number] months of the initial term or any renewal of the franchise.

Nondisclosure of Information

Section 4.09. Neither Franchisee nor any of its partners, officers, director, agents, members, or employees will, except as required in the performance of the duties contemplated by this Agreement, disclose or use at any time, whether during the term of this Agreement or thereafter, any information disclosed to or known by Franchisee or any such person as a result of or through this Agreement without the express prior written consent of Franchisor. This confidential information includes, but is not limited to, information conceived, originated, discovered, or developed by Franchisee or by any employee of Franchisee that is not generally known in the trade or industry, about Franchisor's products, services, or licenses, including information relating to discoveries, ideas, manufacturing, purchasing, accounting, engineering, marketing, merchandising, or selling.

Right to Discoveries and Ideas

[Select one of the following alternative sections:]

Section 4.10. Franchisee must promptly disclose to Franchisor all discoveries and ideas, whether patentable or not, relating to Franchisor's business, that are conceived or made by Franchisee or any partner, officer, director, agent, or employee of Franchisee, solely or jointly with others, during the term of this Agreement. This duty of disclosure applies regardless of whether Franchisor's facilities, materials, or personnel are utilized in the conception or making of the discoveries or ideas. Franchisee acknowledges and agrees that all such discoveries and ideas are the exclusive property of Franchisor, and that Franchisor has no obligation to Franchisee with respect to them.

[OR]

Section 4.10. Neither Franchisor nor any of Franchisor's franchisees has any rights in or to any products, equipment, discoveries, or ideas conceived, developed, or independently acquired by Franchisee. Franchisee is not restricted or prevented in any way by the terms of this Agreement from using, manufacturing, selling, or licensing any such products, equipment, discoveries, or ideas to any other person, firm, or corporation.

[Continue with the following:]

Consent and Compliance

Section 4.11. Franchisee will obtain, within a reasonable time after the execution of this Agreement, written consents to the provisions contained in this Article, signed by each of its partners, members, officers, and directors holding office at that time. Thereafter, Franchisee will obtain these consents from such other persons who take office after that time. In addition, Franchisee will take all necessary action to ensure compliance with the provisions of this Article by these persons as well as by all other employees or agents of Franchisee.

Restaurant Association Membership

Section 4.12. Franchisee agrees to become a member of the _____ [name of local restaurant association] and the _____ [name of national restaurant association] and to maintain those memberships throughout the term of this Agreement.

Contributions to Advertising

Section 4.13. Franchisee will pay an amount equal to the _____ [greater or lesser] of _____ percent of its monthly gross receipts or \$_____ per month to a special advertising account established and administered by Franchisor for the purpose of advertising for the benefit of Franchisor's franchisees. All payments to this account will be made on or before the last day of each month.

Franchisor warrants that all sums in the account will be used for advertising purposes. Franchisor will maintain good and adequate books and records of each expenditure and hold these books and records available for inspection by Franchisee at all reasonable times.

Promotion of Business

Section 4.14. Franchisee will diligently and fully exploit all rights under this Agreement in every manner by devoting best efforts and adequate time to the operation of the franchise business. Franchisee will not be involved in any conflicting enterprises or any other activities that would be detrimental to or interfere with either the operation of the franchise or with any similar establishment conducted by another franchisee of Franchisor.

Compliance with Laws

Section 4.15. Franchisee will comply with all federal, state, county, and municipal laws, ordinances, and regulations affecting, either directly or indirectly, the operation of the franchised food establishment.

Interference With Employment Relations

4.16. During the term of this Agreement, Franchisee will not employ or seek to employ any person who is at the time employed by Franchisor, its subsidiaries, or any franchisee of Franchisor. Franchisee will neither directly or indirectly induce or attempt to induce such person to leave his or her employment.

ARTICLE 5. USE OF SYSTEM

Use or Duplication of System

Section 5.01. Franchisee acknowledges that Franchisor is engaged in nationwide franchising of the System and that Franchisor's franchises are valuable because its franchisees obtain the benefit of a System that provides expert and experienced organization, meticulous instruction in every detail of building, planning, equipping, purchasing, accounting, marketing, promotion, advertising, and operation of a _____ [*describe restaurant, e.g., self-service, carry-out food*] establishment, including the goodwill of a nationally established name and reputation. Franchisee further acknowledges that any appropriation or duplication of this System or any part of this System for any use or purpose other than for the operation of the establishment at the location specified in this Agreement will seriously impair the value of Franchisor's national franchising business, as well as the value of the franchises granted by Franchisor to all of its franchisees throughout the United States. Accordingly, Franchisee agrees that, except as to any of Franchisor's establishments operating under bona fide franchises granted by Franchisor or any direct or beneficial ownership in a company listed on any national exchange, Franchisee, for the duration of this Agreement, without the prior written consent of Franchisor, will not directly or indirectly engage in or acquire any financial or beneficial interest in any business, or otherwise directly or indirectly use or duplicate the System (or any portion of the System) at any location other than that specified in this Agreement at which food or beverages are dispensed by any establishment that is the same as or similar to the franchised business other than pursuant to this Agreement.

Trade Secrets

Section 5.02. Franchisee acknowledges that Franchisor is the owner of all proprietary rights in and to the System and each and every part of the System, as well as the material and information now and subsequently provided and/or revealed to Franchisee under this Agreement relating to the System. Franchisee further acknowledges that the System, in its entirety, constitutes trade secrets of Franchisor, that they are revealed to Franchisee in confidence, and that no right is given to or acquired by Franchisee to disclose any portion of the System. Franchisee covenants and agrees to keep and respect the confidentiality of these matters.

Ownership of Names, Marks, Goodwill

Section 5.03. Franchisee acknowledges that Franchisor is the sole owner of all names and marks and goodwill associated with the System, now or subsequently associated with the System, and used in connection with the System. Franchisee, by this Agreement, acquires no right, title, or interest in or to the same whatsoever, other than the right to use the same in the manner prescribed and approved by Franchisor and in accordance with this Agreement.

Violation as Breach

Section 5.04. Franchisee agrees that any violation of the provisions of Sections 5.01 through 5.03 of this Agreement will be deemed to be a substantial breach of this Agreement and will give Franchisor the right to terminate this Agreement in accordance with the terms and provisions of Article 9 of this Agreement.

ARTICLE 6. RELATIONSHIP OF PARTIES

Franchisor's Control

Section 6.01. Franchisee will be responsible to Franchisor only for the requirements and results specified by this Agreement. Franchisee is not subject to Franchisor's control with respect to the physical actions or activities of Franchisee or of Franchisee's employees or agents in connection with the operation of the franchised business or Franchisee's fulfillment of the requirements of this Agreement, except as specifically provided in this Agreement.

Scope of Authority

Section 6.02. Franchisee is, and at all times during the term of this Agreement will represent and conduct himself or herself as, an independent contractor and not as an agent of Franchisor. Franchisee does not have the authority, express or implied, to bind or obligate Franchisor in any way.

ARTICLE 7. LIABILITY INSURANCE AND INDEMNITY

Insurance Coverage

Section 7.01. Franchisee agrees to carry products liability insurance and public liability insurance in amounts not less than \$_____ per person and \$_____ per incident for bodily injury, and \$_____ property damage covering the franchised business and its premises and products. Franchisee further agrees to name Franchisor as an additional insured in all insurance policies procured pursuant to this Article.

Indemnity

Section 7.02. Franchisee covenants and agrees that if Franchisor is or becomes, without fault on franchisor's part, or is made or becomes a party to any suit by reason of this Agreement or by any act or omission by Franchisee under this Agreement, Franchisee will pay all costs and expenses, including attorneys' fees, incurred by or imposed on Franchisor by or in connection with the litigation.

ARTICLE 8. ASSIGNMENT

[See § 51.210[2], Article 7 for alternative assignment provisions.]

Section 8.01. Neither this Agreement nor any interest in this Agreement may be assigned by Franchisee unless Franchisee secures the prior written consent from Franchisor. If consent is given, Franchisee will continue to be obligated for the performance of Franchisee's obligations under this Agreement, notwithstanding the grant of that consent.

ARTICLE 9. DEFAULT AND TERMINATION

Termination On Default

Section 9.01. Franchisor, at its option and without prejudice to any and all legal and equitable remedies that Franchisor may otherwise have or under the terms of this Agreement, may immediately terminate the franchise granted under this Agreement on the occurrence of any of the following events of default:

(a) The franchisee or the franchise has been subject to an order for relief in bankruptcy, is judicially determined to be insolvent, all or a substantial part of the franchise's assets are assigned to or for the benefit of creditors, or the franchisee

admits its inability to pay its debts as they come due.

(b) The franchisee abandons the franchise by failing to operate the business for five consecutive days during which the franchisee is required to operate the business under the terms of the franchise, or any shorter period after which it is not unreasonable under the facts and circumstances for the franchisor to conclude that the franchisee does not intend to continue to operate the franchise. Exceptions include a failure to operate due to fire, flood, earthquake, or other similar causes beyond the franchisee's control.

(c) The franchisor and franchisee agree in writing to terminate the franchise.

d) The franchisee makes any material misrepresentations relating to the acquisition of the franchise business or the franchisee engages in conduct that reflects materially and unfavorably on the operation and reputation of the franchise business or system.

(e) The franchisee fails, for a period of 10 days after notification of noncompliance, to comply with any federal, state, or local law or regulation applicable to the operation of the franchise.

(f) The franchisee, after curing any failure in accordance with *Business and Professions Code Section 20020*, engages in the same noncompliance whether or not that noncompliance is corrected after notice.

(g) The franchisee repeatedly fails to comply with one or more requirements of the franchise, whether or not corrected after notice.

(h) The franchised business or its business premises are seized, taken over or foreclosed by a government official, or seized, taken over, or foreclosed by a creditor, lienholder or lessor, if a final judgment against the franchisee remains unsatisfied for 30 days (unless a supersedeas or other appeal bond has been filed).

(i) A levy of execution has been made on the license granted by the franchise agreement or on any property used in the franchise, and it is not discharged within five days.

(j) The franchisee is convicted of a felony or any other criminal misconduct relevant to the operation of the franchise;

(k) The franchisee fails to pay any franchise fees or other amounts due to the franchisor or its affiliate within five days after receiving written notice that the fees are overdue.

(l) The franchisor makes a reasonable determination that continued operation of the franchise by the franchisee will result in an imminent danger to public health or safety.

Notice and Cure of Default

Section 9.02. If Franchisee defaults in the performance of any of the terms and conditions of this Agreement [optional: or any other agreement with Franchisor pertaining to the operation of the franchised business or any lease or sublease of the premises in which Franchisee operates the franchised business], Franchisor, at its option, will serve on Franchisee by _____ [specify type] mail, a _____ [specify number of days] -day notice of default. The notice must specify those acts that constitute a default of this Agreement. Franchisee then has _____ [number] days from the receipt of the notice in which to fully cure all of the described defaults and Franchisee's action in curing the defaults operates to reinstate Franchisee's rights under this Agreement. If Franchisee does not fully cure the default or defaults within the specified time period, Franchisor has the absolute right to fully and finally terminate this Agreement without further notice.

Option to Purchase

Section 9.03. On the termination of this Agreement, Franchisor has an option for _____[*number*] days following the termination to purchase from Franchisee the franchised business at its fair market value. Franchisor may deduct and withhold from the purchase price all amounts then due Franchisor from Franchisee, including liens or security interests on any of the assets so purchased, rentals due under any lease or sublease, or any other indebtedness of Franchisee with respect to the franchise business and the assets being purchased under the Agreement.

On request by Franchisor, Franchisee must forthwith furnish Franchisor with an affidavit and other instruments required by applicable sales tax or other statute. In addition, Franchisee must assign and convey to Franchisor, at Franchisor's option, all rights, title, and interest of Franchisee in or under any lease or sublease of any real or personal property used by Franchisee in the operation of the franchised business. In addition to all other remedies provided for in this Agreement, Franchisor is entitled to specific performance of the option granted in this Agreement.

Effect of Termination

Section 9.04. On termination of this Agreement, Franchisee's right to use the System or Franchisor's trademarks, service marks, trade names, or other indicia immediately terminates. Franchisee will not thereafter, directly or indirectly, identify himself or herself in any manner as a _____[*name of franchise business*] franchisee, or publicly identify himself or herself as a former _____[*name of franchise business*] franchisee, or use any of Franchisor's trade secrets or materials constituting part of Franchisor's System.

If Franchisor does not exercise the option to require the assignment and conveyance to Franchisor of Franchisee's rights, title, and interest in or under any lease or sublease of the premises, Franchisee agrees on termination of this Agreement that Franchisee will immediately remove or make changes in signs and colors of buildings and structures as Franchisor reasonably requests so as to distinguish the premises from their former appearance and from any other _____[*name of franchise business*] establishment. If Franchisee fails to make the requested changes _____[*specify, e.g., within 30 days or as soon as practicable, but in no event later than 60 days*], Franchisor may enter Franchisee's premises and make the changes at Franchisee's expense.

Attorneys' Fees

Section 9.05. If any _____[*legal action or specify more limited provision, e.g., legal action based in contract law*], including an action for declaratory relief, is commenced by either party to this Agreement, the prevailing party is entitled to recover from the other party, in addition to any other costs and relief that may be granted, the reasonable attorneys' fees incurred in the action or proceeding by the prevailing party. This award will include any court costs and attorneys' fees incurred on appeal.

ARTICLE 10. MISCELLANEOUS PROVISIONS

Governing Law

Section 10.01. The validity of this agreement and of any of its terms or provisions, as well as the rights and duties of the parties under this agreement, shall be construed pursuant to and in accordance with the laws of _____[*specify jurisdiction, e.g., the state of California*].

Section Headings

Section 10.02. Section headings are for convenience of reference only. They are not construed as part of this Agreement and do not limit or define the meaning of any provision in this Agreement.

Remedies Cumulative

Section 10.03. All rights and remedies conferred on Franchisor by this Agreement and by law are cumulative of each other, and neither the exercise nor the failure to exercise any right or remedy precludes the exercise of any other right or remedy.

Nonwaiver

Section 10.04. No waiver of any condition or covenant contained in this Agreement, or failure to exercise a right or remedy, by either of the parties to the Agreement will be considered to imply or constitute a further waiver by the party of the condition or covenant in the Agreement or any other condition, covenant, right, or remedy. No express waiver by Franchisor of any provision or performance under this Agreement or of any default by Franchisee will be construed as a waiver of any other or future provision, performance, or default.

Execution of Documents

Section 10.05. Each party to this Agreement will from time to time, on request by the other party, execute, acknowledge, and deliver to the other party a written statement certifying that this Agreement has not been modified and is in full force and effect (or, if there have been modifications, that they are in full force and effect and stating the modifications). Each party to this Agreement will also, from time to time, on request by the other party, execute any additional documents that may reasonably be required to effectuate the purposes of this Agreement.

Successors and Assigns

Section 10.06. The provisions of this Agreement inure to the benefit of and are binding on the parties and their respective representatives, successors, and assigns.

Invalidity and Severability

Section 10.07. If any provision of this Agreement is held invalid, illegal, or unenforceable by any tribunal in a final decision from which no appeal is or can be taken, either in its entirety or by virtue of its scope or application to given circumstances, that provision will be deemed modified to the extent necessary to render the same valid, as not applicable to the given circumstances, or to be excised from this Agreement, as the situation may require. This Agreement will be construed and enforced as if that provision had been included in this Agreement as so modified in scope or application, or had not been included in this Agreement, as the case may be. The remaining provisions of this Agreement shall not be affected by the modification. It is the stated intention of the parties that had they known of any invalidity or unenforceability at the time of entering into this Agreement, they would have nevertheless contracted on the terms contained in this Agreement, either excluding those provisions, or including those provisions only to the maximum scope and application permitted by law, as the case may be. If the total or partial invalidity or unenforceability of any provision of this Agreement exists only with respect to the laws of a particular jurisdiction, this

section operates on that provision only to the extent that the laws of that jurisdiction are applicable to that provision.

Entire Agreement

Section 10.08. This Agreement represents the entire agreement between Franchisor and Franchisee, and supersedes all prior negotiations, representations, or agreements, either written or oral. This Agreement may be amended only by a written instrument signed by Franchisor and Franchisee.

Notices

Section 10.09. All notices under this Agreement must be in writing and may be given by personal delivery or by mailing by _____ [*specify type*] mail, addressed to Franchisor at _____ [*address*] or to Franchisee at _____ [*address*], or at any other address as either party may designate in a notice to the other party given in such manner. Any notice given by mail will be considered given when deposited in the United States mail, postage prepaid, addressed as provided in this Agreement.

Executed at _____ [*city*], _____ [*state*], on the day and year first above written.

FRANCHISOR

_____ [*name of franchisor*]

By _____ [*signature*]

[*typed name and title*]

FRANCHISEE

_____ [*name of franchisee*]

By _____ [*signature*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises General Overview Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Agreements Business & Corporate Law Distributorships & Franchises Terminations General Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51 FRANCHISE AGREEMENTS

PART IV. FORMS

B. AGREEMENTS

21-51 California Legal Forms--Transaction Guide §§ 51.212-51.219

[Reserved]

§§ 51.212[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51 FRANCHISE AGREEMENTS

PART IV. FORMS

C. Location Clauses

21-51 California Legal Forms--Transaction Guide § 51.220

§ 51.220 General Area Designated-Exact Location to Be Specified When Determined

[1] Comment--Use of Form

The franchise location provision set forth below is designed for use when the exact location of the prospective franchisee's premises is not known at the time the parties enter into the franchise agreement. It specifies the general area where the franchisee's business is to be located and provides that the exact location will be entered in the agreement when it is determined by the parties. This provision may be used when the agreement contemplates that the franchisee will lease premises in the general area after the agreement is executed by the parties [*see § 51.230 for provisions governing a future lease*].

[2] FORM

General Area Designated-Exact Location to Be Specified When Determined

General Area Designated-Exact Location to Be Specified

_____. Franchisee has the right to conduct the franchise granted under this Agreement in the general area of _____ [*name of neighborhood or city or description of area or postal code number or numbers*]. The exact location of Franchisee's premises will be set forth at the end of this section on final determination by the parties as to the franchise location: _____ [*insert exact address after the site is leased or purchased*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Agreements



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51 FRANCHISE AGREEMENTS

PART IV. FORMS

C. Location Clauses

*21-51 California Legal Forms--Transaction Guide § 51.221***§ 51.221 Exclusive Area or Territory Provision****[1] Comment--Use of Form**

This form contains two alternative types of exclusive area provisions that are designed for use when the parties have agreed that the franchise granted to the franchisee is to be exercised within a given area or territory to the exclusion of any other franchisee. The first alternative contains a promise that the franchisor will neither operate nor enfranchise any other business bearing the franchise name within a specified radius of the franchisee's location, describing the method by which the radius is to be determined. The second alternative does not contain a positive promise by the franchisor but, rather, grants to the franchisee a specifically described territory. The location or area or territory may be described in terms of a given portion of a state, a city or county, a neighborhood, a ZIP code zone, or other geographic designation.

[2] FORM**Exclusive Area or Territory Provision**

Exclusive Area

_____. Franchisor will not operate or enfranchise any other _____ [name of franchise business] shop within a radius of _____ [number] miles of _____ [the location of Franchisee's shop or address referred to in location clause]. The _____ [number] -mile radius will be measured by the most direct road route.

[OR]

Exclusive Territory

_____. Franchisor grants to Franchisee the following specific territory in which Franchisee may operate Franchisee's _____[*name of franchise business*] franchise: _____[*describe territory*] [*optional*]; a map of which is attached to this Agreement as Exhibit _____].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesFranchise RelationshipsFranchise Agreements



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PART IV. FORMS

C. Location Clauses

21-51 California Legal Forms--Transaction Guide § 51.222

§ 51.222 Nonexclusive Franchise

[1] Comment--Use of Form

The nonexclusive franchise provision set forth below is designed for use when the franchisor desires to reserve to itself all rights either to establish and operate, or to grant to other parties the right to establish and operate, a business bearing the franchise name at any location whatsoever. This provision is likely to be used by franchisors whose product and/or service is so successful that little if any economic harm would result to the existing franchisee from the establishment of another franchisee nearby. It should be used in conjunction with provisions granting the franchisee the first option to establish an additional franchise [*see § 51.210[2], Section 2.04*].

[2] FORM

Nonexclusive Franchise

Nonexclusivity

_____. The right, franchise, and license granted under this Agreement is nonexclusive. Franchisor has at all times have the right either to establish and operate, or to license any other party or parties to establish and operate, a _____ [*name of franchise business*] shop or shops at any other location or locations whatsoever.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsFranchise Agreements



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C. Location Clauses

21-51 California Legal Forms--Transaction Guide §§ 51.223-51.229

[Reserved]

§§ 51.223[Reserved]



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D. Premises Clauses

*21-51 California Legal Forms--Transaction Guide § 51.230***§ 51.230 Lease of Premises by Franchisee From Third Party After Execution of Franchise Agreement****[1] Comment--Use of Form**

This form contains lease of premises provisions that may be inserted in a franchise agreement when, at the time the franchise agreement is executed, the franchisee does not have premises from which the franchise business will be conducted and the parties contemplate that the franchisee will lease, rather than construct, those premises. This form provides for execution of a lease within a specified time after execution of the franchise agreement, and for the assistance of the franchisor in selecting the premises and the negotiation of the lease. The form also requires that the property owner must approve of the franchisor as a prospective assignee under the lease. It also provides for a further period following execution of the lease, during which the franchisee is required to complete the preparation of the premises in accordance with the franchisor's plans and specifications. The form also provides for time extensions, as well as the results of the franchisee's failure to make timely performance.

For provisions requiring construction of the franchisee's premises to the franchisor's specifications, see § 51.211[2], Sections 4.01, 4.07, and § 51.231[2].

[2] FORM**Lease of Premises by Franchisee From Third Party After Execution of Franchise Agreement**

Lease of Premises by Franchisee From Third Party After Execution of Franchise Agreement

Lease of Premises

_____. Within _____[*number*] days after the execution of this Agreement, Franchisee will execute a lease for or otherwise secure suitable premises as a site for Franchisee's _____[*name of franchise business*] shop, subject to Franchisor's approval, which shall not be unreasonably withheld, in the general area set forth in Section _____[*number of general area of*

location clause] of this Agreement. If requested, Franchisor will assist Franchisee in selecting a site and in the negotiation of a lease. Franchisor requires that the owner approve of Franchisor as a prospective assignee under the lease.

Preparation of Premises

_____. Within _____[*number*] days after the execution of a lease for the premises, Franchisee will complete the interior and exterior preparations in accordance with Franchisor's plans and specifications, subject to Franchisor's approval, which will not be unreasonably withheld.

Time Extension

_____. At its option, Franchisor may extend these time requirements if requested to do so, in writing, by Franchisee. Franchisor will extend these time limits to allow for any delay caused by Franchisor.

Failure of Timely Performance

_____. If Franchisee fails to make timely performance of any of the obligations under Sections _____ of this Agreement, or within any time extension granted by Franchisor, the franchise granted pursuant to this Agreement will terminate and Franchisee will have no further rights under this Agreement. In that event, Franchisor may bill Franchisee for its actual reasonable costs incurred in assisting Franchisee in leasing and for _____[*specify other matters*] contributed toward the opening and operation of the franchised business. Franchisor will refund the balance of any franchise fees paid by Franchisee.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Agreements Real Property Law Landlord & Tenant Lease Agreements Commercial Leases General Overview



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D. Premises Clauses

21-51 California Legal Forms--Transaction Guide § 51.231

§ 51.231 Construction of Premises by Franchisee

[1] Comment--Use of Form

The provisions set forth in this form may be used when the parties contemplate that the franchisee will construct the franchise premises in accordance with the plans and specifications agreed on by the parties and incorporated into the agreement by reference. This form includes provisions denying any liability on the part of the franchisor as a result of its approval of the plans and specifications. It also requires the franchisor's approval of the franchisee's construction contract, obligates the franchisee to furnish to the franchisor a completion bond, and requires commencement of operations by a specified date following completion of the premises and notice to the franchisor.

[2] FORM

Construction of Premises by Franchisee

Construction of Premises by Franchisee

_____. Franchisee will, within _____[*number*] days from the date of delivery to Franchisee of a fully executed copy of this Agreement, begin the construction of and will fully complete within a reasonable time thereafter, the franchise premises, as well as any land improvements, in conformity with the plans and specifications agreed upon in writing between the parties. These plans and specifications are incorporated by reference as fully as though attached to this Agreement.

Liability for Approval of Plans

_____. There is no liability on the part of Franchisor to Franchisee, or to any subsequent Franchisee approved by Franchisor, or any present or future owner of the premises, or to any other person for any loss or damages that might arise because Franchisor approves the plans and specifications.

Construction Contract

_____. The contract for construction of the premises and improvements will be submitted to Franchisor before execution by Franchisee and will not be executed without the written approval of Franchisor.

Completion Bond

_____. Before the commencement of construction, Franchisee will furnish Franchisor with a completion bond naming Franchisor as an additional obligee.

Commencement of Operations

_____. Franchisee will commence operation of a _____ [*name of franchise business*] no later than _____ [*number*] days following completion of the above-mentioned premises and improvements, but not before the same are fully completed unless Franchisor gives written consent. Franchisee will give Franchisor _____ [*number*] days written notice before commencing operations.

Violation or Delay

_____. In the event of a violation of any of the provisions of this section not due to war, governmental restrictions, strikes, lockouts, or acts of God, and after giving Franchisee _____ [*number*] days written notice within which to cure this violation, or in the event Franchisee commences construction according to plans and specifications not fully approved by Franchisor, Franchisor may elect to forthwith cancel and terminate this Agreement. On termination, Franchisor may retain the initial franchise fee paid by Franchisee, as liquidated and agreed damages.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Agreements



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D. Premises Clauses

21-51 California Legal Forms--Transaction Guide §§ 51.232-51.239

[Reserved]

§§ 51.232[Reserved]



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CHAPTER 51 FRANCHISE AGREEMENTS

PART IV. FORMS

E. Royalty or Service Fee Clauses

*21-51 California Legal Forms--Transaction Guide § 51.240***§ 51.240 Percentage Service Fee in Consideration of Franchisor's Services to Franchisee****[1] Comment--Use of Form**

The franchise service fee or royalty provision set forth below may be used when the parties desire to specify that the payments made by the franchisee to the franchisor during the term of their franchise agreement are attributable to or in consideration for the franchisor's ongoing services to the franchisee rather than merely for the right to continue the operation of the franchise. This provision specifies periodic payments computed as a percentage of some figure, for example, gross receipts or net revenue. For a provision defining "net revenue," see § 51.210[2], Section 6.02.

This form also provides for the payment of the service fee at a time following the receipt of the revenue that forms the basis for computation of the fee. For a provision requiring payment of a royalty in advance of a royalty period, see § 51.241[2]. This form also requires the franchisee to submit a revenue report to the franchisor together with the fee; for other forms of reporting requirements, see § 51.210[2], Sections 6.03, 6.04.

[2] FORM**Percentage Service Fee in Consideration of Franchisor's Services to Franchisee**

Percentage Service Fee in Consideration of Franchisor's Services to Franchisee

_____. During the term of this Agreement, Franchisee will make _____[e.g., monthly or bimonthly] payments of a service fee in consideration of all services to be rendered by Franchisor to Franchisee, computed on the basis of _____ percent of the _____[e.g., gross receipts or net revenue] that Franchisee receives from the operation of _____[the franchised business or the franchisee's _____ (name of franchise business) establishment]. On or before the _____[specify dates, e.g., 15th and 30th] days of each calendar month, Franchisee will render to Franchisor a full and complete statement, in a form prescribed by Franchisor, of all receipts from the operation of this franchise establishment for the preceding _____[specify period, e.g., two weeks] and will pay to Franchisor this service fee for this period.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Agreements Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Fees



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E. Royalty or Service Fee Clauses

*21-51 California Legal Forms--Transaction Guide § 51.241***§ 51.241 Fixed Amount Payable in Advance****[1] Comment--Use of Form**

This form contains a fixed franchise royalty or service fee for use in a franchise agreement when the fee is to be paid periodically in advance and is to be attributed to specified services to be performed by the franchisor. This provision also includes an undertaking on the part of the franchisor that the fee is to be divided among the services mentioned in accordance with a formula set forth in the agreement.

[2] FORM**Fixed Amount Payable in Advance**Fixed _____ [Royalty **or** Service Fee] Payable in Advance

_____. In addition to the Initial Franchise Fee set forth in _____ [Section _____, *above*], Franchisee will pay to Franchisor a _____ [royalty *or* service fee] of \$_____ per _____ [specify period]. This _____ [royalty *or* service fee] is paid in consideration of _____ [describe services to be provided by franchisor, e.g., engineering, technical, promotional, and advertising programs administered by Franchisor]. This _____ [royalty *or* service fee] will be divided among these services to be provided by Franchisor _____ [describe basis for division, e.g., equally *or* other basis]. This _____ [royalty *or* service fee] will be paid by Franchisee to Franchisor _____ [set forth time for payment, e.g., before the first day of each month], in advance.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Agreements Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Fees



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E. Royalty or Service Fee Clauses

*21-51 California Legal Forms--Transaction Guide § 51.242***§ 51.242 Royalty Expressed as Greater of Percentage or Fixed Amount****[1] Comment--Use of Form**

The franchise royalty provision illustrated below is for use by the parties to a franchise agreement when the franchisor desires to specify a minimum royalty. This objective is accomplished by specifying that commencing on the date that the franchisee's establishment begins operation, and periodically thereafter, the franchisee will pay the greater of a fixed percentage of gross or net sales generated.

[2] FORM**Royalty Expressed as Greater of Percentage or Fixed Amount**

Royalty Expressed as Greater of Percentage or Fixed Amount

_____. Commencing on the date Franchisee's establishment begins operation, Franchisee will pay to Franchisor a _____ [set forth period, e.g., weekly or monthly] royalty fee of _____ percent of _____ [royalty basis, e.g., gross sales or net sales] generated _____ [e.g., weekly or monthly] by Franchisee at the establishment, or the sum of \$_____ per _____ [e.g., week or month], whichever sum is the greater.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Agreements Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Fees



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E. Royalty or Service Fee Clauses

21-51 California Legal Forms--Transaction Guide §§ 51.243-51.249

[Reserved]

§§ 51.243[Reserved]



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F. Miscellaneous Provisions

21-51 California Legal Forms--Transaction Guide § 51.250

§ 51.250 Arbitration Clause

[1] Comment

[a] Use of Form

This form contains a comprehensive arbitration agreement for use in a franchise agreement. The form provides for the selection of an arbitrator, the sharing of costs, provisions of notice, a request that discovery be as limited as possible to the dispute that is the subject of the arbitration, and limitations on the arbitrator's authority.

Providing for arbitration as a means of dispute resolution is particularly important in the context of franchise arrangements. First, as distinct from most conventional commercial relationships, the nature of franchising means that the franchisor's association with the franchisee will significantly increase the latter's potential for success. Second, as a quid pro quo for the first, the franchisee, although nominally independent, must rely to a large extent on public recognition of the franchisor's goods and services and must adhere to prescribed methods of operating the franchised business. Third, the franchisee's capital investment provides the franchisor with low-cost capital for use in the rapid development of a distribution network. As a result, the financial future of both parties is significantly tied together and litigation may cause more damage to the franchise relationship than just its expense.

Franchise agreements can also attempt to avoid litigation through alternative means such as providing for mediation, discussing problems with franchise associations, and grievance procedures. Venue and governing law provisions can also be used to limit the prospect of litigation, as can limitations on the filing of claims and provisions for attorneys' fees.

To the extent that a franchise agreement is a contract of adhesion, it may be subject to the California Supreme Court's holding in *Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100, which held that, in some cases in California, class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class-action litigation or the right to class-wide arbitration. Therefore, in an appropriate case, a ban on class-wide arbitration under a franchise agreement may be unenforceable [*Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court* (2005) 133 Cal. App. 4th 396, 410-411, 34 Cal. Rptr. 3d 659] .

For additional discussion of contractual arbitration provisions, see *Ch. 75, Formation of Contracts and Standard Contractual Provisions*, § 75.100. For detailed coverage of arbitration procedures and proceedings, see *California Forms of Pleading and Practice*, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*, Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding*, and Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[b] Deadlock Provision

This form also contains a less formal deadlock provision under which the franchisor may select a mutually acceptable unrelated and independent individual to resolve the deadlocked matter. If the franchisor and franchisee cannot agree on the selection of such an individual, either may request that an official of the local office of the American Arbitration Association ("AAA") appoint such an individual. The form includes qualification requirements for the selection of such an individual.

[2] FORM

Arbitration Clause

Deadlock

_____. If the Franchisor and Franchisee are deadlocked on any matter or any decision, the Franchisor must promptly select a mutually acceptable unrelated and independent individual who, after good faith discussions with the Franchisor and Franchisee, will resolve the deadlocked matter (including, if necessary, by causing his or her vote in favor of a proposed resolution).

If the Franchisor and Franchisee cannot agree on the selection of such an individual, the Franchisor or Franchisee may request that an official of the local office of the American Arbitration Association ("AAA") appoint such an individual. The Franchisor or Franchisee will promptly give written notice to the other that such a request has been made. The AAA official will be instructed to use his or her best efforts to appoint an individual who (1) is of good reputation and possesses _____ [specify requisite experience, e.g., a minimum of five years experience as a senior executive of a retail company], and (2) has no prior relationship with either the Franchisor, the Franchisee, or other franchisees of the Franchisor. The appointed individual, after good faith discussions with the Franchisor and Franchisee, will resolve the deadlocked matter (including, if necessary, by causing his or her vote in favor of a proposed resolution in the event that no consensus can be reached on the conclusion of these discussions).

Arbitration

_____. The parties further agree to submit any claim arising out of, relating to, or regarding the validity of, this Agreement in excess of the then current limitation for a small claims matter in California, to binding arbitration administered by the American Arbitration Association ("AAA") pursuant to the Commercial Rules of the AAA and California law in the County of _____, with all expenses being shared equally by the Franchisor and Franchisee. This arbitration clause, however, does not deprive the parties of any right they may otherwise have to seek provisional injunctive relief from a court of competent jurisdiction.

Notice of demand for arbitration must be filed in writing with the AAA and the other party to this Agreement. The notice must set forth the demanding party's position as to the matter or matters in dispute, the amount of damages being sought, and any other relief sought.

The arbitration will commence at a time noticed by the AAA, even if a party fails or refuses to participate. The

arbitration will be conducted by a single arbitrator who will be _____ [*specify requisite experience, e.g., an attorney with a minimum of seven years experience in business law and no prior relationships with either the Franchisor or the Franchisee*]. The arbitrator will be chosen by mutual agreement of the parties, but if the parties fail to agree within _____ [*specify, e.g., 10*] days of service of the demand for arbitration, the arbitrator will be chosen by _____ [*e.g., the AAA*].

The parties will ask the arbitrator to limit discovery to the greatest extent possible consistent with basic fairness. The parties will demand that the arbitrator conclude the hearing and render an award within _____ [*specify, e.g., 90*] days of its commencement. The arbitrator will have no power to assess punitive or special damages, legal costs, attorneys' fees, or the fees of expert witnesses, unless the arbitrator finds a party to have acted in bad faith. The arbitrator will not make any award that extends, modifies, or suspends any lawful term of this Agreement. The arbitrator must provide a written arbitration award setting forth the arbitrator's findings of fact and conclusions of law. Judgment on any AAA award may be entered in any court having competent jurisdiction. Any costs incurred in the enforcement of the arbitration award will be paid by the party against whom enforcement is sought.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Alternative Dispute Resolution Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Agreements



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F. Miscellaneous Provisions

21-51 California Legal Forms--Transaction Guide § 51.251

§ 51.251 Insurance Clause

[1] Comment--Use of Form

Most franchise agreements require the franchisee to carry commercial liability insurance with adequate limits to cover personal injury, property damage, and product liability. This form requires the franchisee to secure these insurances, in specified amounts with insurance companies satisfactory to the franchisor, naming the franchisor as an additional insured. Similarly, most agreements require the franchisee to maintain workers' compensation insurance.

The insurance provision is usually accompanied by an indemnification provision requiring the franchisee to hold the Franchisor harmless from all third parties claims.

For discussion of liability insurance in general, see California Insurance Law and Practice, Ch. 41, *Liability Insurance In General*, and Ch. 49, *Business General Liability Policies* (Matthew Bender).

[2] FORM

Insurance Clause

Insurance

_____. Franchisee must obtain insurance, with franchisor as named insured, and hold franchisor harmless from all contractual and damage claims. Franchisee agrees to secure and pay the insurance premium, at Franchisee's sole expense, for the term of this Franchise Agreement, as follows:

(a) A Comprehensive General Liability Policy, including products liability, in _____[specify, e.g., the amount of \$500,000/\$500,000 bodily injury liability, and \$100,000 property damage liability or such other amounts as Franchisor may reasonably request] for the operation on the premises. Franchisee agrees to name Franchisor in this policy as additional named insured, and the policy must stipulate that Franchisor will receive 30 days written notice of cancellation. Franchisee will promptly furnish original or duplicate copies of all insurance policies to Franchisor,

together with proof of payment. All policies must be renewed and evidence of renewal mailed to Franchisor before their expiration date.

(b) A workers' compensation insurance policy as required by state law.

(c) Franchisee is responsible for all loss or damage and contractual liabilities to third persons originating in or in connection with the operation of the Franchise and for all claims or demands for damages to property or for injury, illness, or death of persons directly or indirectly resulting from franchise operations.

(d) Franchisee agrees to defend, indemnify, and hold Franchisor harmless of, from, and with respect to any claims, loss, liability, or expense of any kind whatsoever, from fire (with extended coverage indorsement), personal injury, death, property damage, and other such occurrences, arising out of, or in connection with, the condition, operation, use, or occupancy of the Franchise or the surrounding premises.

(e) Franchisee's obligations to secure and maintain insurance, and to list Franchisor as an additional insured, may not be interpreted to mean that Franchisee is in any way the agent of Franchisor.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Agreements Insurance
Law Business Insurance General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 51A FRANCHISE REGISTRATION

21-51A California Legal Forms--Transaction Guide 51A.syn

§ 51A.syn Synopsis to Chapter 51A: FRANCHISE REGISTRATION

§ 51A.01 California Sources

[1] Statutes

[2] Regulations

[3] Commissioner of Corporations Releases

§ 51A.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 51A.03-51A.04 [Reserved]

§ 51A.05 Law Reviews and Periodicals

§ 51A.06 Annotations

§ 51A.07 Text References

[1] Matthew Bender Sources

§§ 51A.08-51A.09 [Reserved]

§ 51A.10 Franchise Investment Law

[1] Registration Requirement

[2] Purpose

[3] "Franchise" Defined

[a] Basic Characteristics

[b] Petroleum Companies, Distributors, and Dealers

[c] Exclusion for Nonprofit Organizations

[4] Exemptions from Registration

[5] Registration Procedure

[6] Escrow or Impound of Franchise Fees

[7] Liability for Violations

[a] Civil Liability

[b] Civil Actions by Commissioner

[c] Criminal Liability

§ 51A.11 The FTC Rule

[1] Disclosure Requirements

[2] Preemption of State Law

[a] State Laws Preempted to Extent Inconsistent With FTC Rule

[b] Scope of Federal Rule

§§ 51A.12-51A.99 [Reserved]

§ 51A.100 Facts

Scope

§ 51A.101 Documents

Scope

§§ 51A.102-51A.109 [Reserved]

Scope

§ 51A.110 Existence of Franchise

Scope

§ 51A.111 Existence of Offer or Sale in California

Scope

§ 51A.112 Exemptions From Registration

Scope

§ 51A.113 Obtaining Interpretive Opinion

Scope

§ 51A.114 Existence of Franchise for Purposes of Federal Disclosure Requirements

Scope

§ 51A.115 Exemptions From Federal Disclosure Requirements

Scope

§§ 51A.116-51A.129 [Reserved]

§ 51A.130 Preparing and Filing Application for Registration Under Franchise Investment Law

Scope

§ 51A.131 Amending Application for Registration

Scope

§§ 51A.132-51A.139 [Reserved]

§ 51A.140 Advertising Franchises

Scope

§ 51A.141 Selling Under Impound Condition

Scope

§ 51A.142 Registering Material Modification of Existing Franchises

Scope

§ 51A.143 Renewing Registration

Scope

§§ 51A.144-51A.199 [Reserved]

§ 51A.200 Uniform Franchise Registration Application--Facing Page and Supplemental Information Page [10 Cal. Code Reg. § 310.111]

[1] Comment

[a] Use of Form

[b] Contents of Application

[c] Signing Application

[d] Subfranchisors

[e] Impound and Bond

[f] Amendment to Registration Application

[i] Amendment Required for Material Changes in Submitted Information

[ii] Pre-Effective Amendments

[iii] Post-Effective Amendments

[g] Period of Registration

[h] Renewal

[2] FORM

Uniform Franchise Registration Application--Facing Page and Supplemental Information Page [10 Cal. Code Reg. § 310.111]

§ 51A.201 Uniform Franchise Registration Application--Sales Agent Disclosure Form [10 Cal. Code Reg. §§ 310.111, 310.21]

[1] Comment--Use of Form

[2] FORM

Uniform Franchise Registration Application--Sales Agent Disclosure Form [10 Cal. Code Reg. §§ 310.111, 310.21]

§ 51A.202 Uniform Franchise Registration Application--Uniform Consent to Service of Process [Corp. Code § 31155; 10 Cal. Code Reg. § 310.155]

[1] Comment--Use of Form

[2] FORM

Uniform Franchise Registration Application--Uniform Consent to Service of Process [Corp. Code § 31155; 10 Cal. Code Reg. § 310.155]

§ 51A.203 Uniform Franchise Registration Application--Certification Page [Corp. Code § 31112; 10 Cal. Code Reg. §§ 310.111, 310.112]

[1] Comment

[a] Use of Form

[b] Who Must Sign

[2] FORM

Uniform Franchise Registration Application--Certification Page [Corp. Code § 31112; 10 Cal. Code Reg. §§ 310.111, 310.112]

§ 51A.204 Uniform Franchise Registration Application--Customer Authorization of Disclosure of Financial Records [Corp. Code § 31111(b)]

[1] Comment

[a] Use of Form

[b] Effect of Authorization

[2] FORM

Uniform Franchise Registration Application--Customer Authorization of Disclosure of Financial Records [Corp. Code § 31111(b)]

§ 51A.205 Uniform Franchise Registration Application--Guarantee of Performance [Corp. Code § 31113]

[1] Comment

[a] Use of Form

[b] Grounds for Impound

[c] Bond in Lieu of Impound

[2] FORM

Uniform Franchise Registration Application--Guarantee of Performance [Corp. Code § 31113]

§ 51A.206 Uniform Franchise Registration Application--Auditor's Consent [10 Cal. Code Reg. § 310.111]

[1] Comment

[a] Use of Form

[b] Audited Financial Statements

[c] Waiver of Audited Statements

[2] FORM

Uniform Franchise Registration Application--Auditor's Consent [10 Cal. Code Reg. § 310.111]

§§ 51A.207 [Reserved]

§ 51A.208 Cover Page for Franchise Disclosure Document Subject to Federal Law [16 C.F.R. § 436.3]

[1] Comment--Use of Form

[2] Form

Cover Page for Franchise Disclosure Document Subject to Federal Law [16 C.F.R. § 436.3]

§ 51A.209 Uniform Franchise Registration Application--Requirements for Body of Uniform Franchise Disclosure Document [10 Cal. Code Reg. § 310.114.1]

[1] Comment

[a] Use of Form

[b] California Instructions for Completing Uniform Franchise Disclosure Document

[2] FORM

Uniform Franchise Registration Application--Requirements for Body of Uniform Franchise Offering Circular [10 Cal. Code Reg. § 310.114.1]

§ 51A.210 Uniform Franchise Registration Application-Resolution Authorizing Person to Sign Application [10 Cal. Code Reg. § 310.112]

[1] Comment--Use of Form

[2] FORM

Uniform Franchise Registration Application-Resolution Authorizing Person to Sign Application [10 Cal. Code Reg. § 310.112]

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[1] Comment

[a] Use of Form

[b] Confidential Treatment of Application

[2] FORM

Transmittal Letter to Accompany Application to Register Franchise

§ 51A.212 Application for Registration of Material Modification of Existing Franchises [10 Cal. Code Reg. §

310.125]

[1] Comment

[a] Use of Form

[b] What Constitutes a Material Modification

[c] Required Disclosure of Modification to Franchisee

[d] Signing and Filing

[2] FORM

Application for Registration of Material Modification of Existing Franchises [10 Cal. Code Reg. § 310.125]

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[1] Comment

[a] Use of Form

[b] Registration of Negotiated Sale of Franchise--Qualifying for Exemption

[2] FORM

Disclosure Clause for Negotiated Sale of Franchise

§ 51A.214 Registration Renewal Statement

[1] Comment

[a] Use of Form

[b] Renewal of Registration

[2] FORM

Registration Renewal Statement

§§ 51A.215-51A.229 [Reserved]

§ 51A.230 Purchase Receipt [10 Cal. Code Reg. § 310.113.2]

[1] Comment

[a] Use of Form

[b] Contents and Form of Purchase Receipt

[c] Operation of Impound Condition

[d] Release of Impound

[e] Surety Bond in Lieu of Impound

[2] FORM

Purchase Receipt [10 Cal. Code Reg. § 310.113.2]

§ 51A.231 Consent of Depositary to Act [10 Cal. Code Reg. § 310.113.3]

[1] Comment--Use of Form

[2] FORM

Consent of Depositary to Act [10 Cal. Code Reg. § 310.113.3]

§ 51A.232 Request for Order Authorizing Release of Impound Funds to Franchisor [10 Cal. Code Reg. § 310.113.4]

[1] Comment

[a] Use of Form

[b] Contents of Request for Order

[2] FORM

Request for Order Authorizing Release of Impound Funds to Franchisor [10 Cal. Code Reg. § 310.113.4]

§§ 51A.233-51A.239 [Reserved]

§ 51A.240 Notice of Exemption Under Corp. Code §§ 31101, 31104, or 31108

[1] Comment--Use of Form

[2] FORM

Notice of Exemption Under Corp. Code §§ 31101, 31104, or 31108

§ 51A.241 Notice of Exemption Under Corp. Code § 31106

[1] Comment--Use of Form

[2] FORM

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§§ 51A.242-51A.249 [Reserved]

§ 51A.250 Legend That Must Appear on Certain Franchise Advertisements [10 Cal. Code Reg. §§ 310.156.1,

310.156.2]

[1] Comment

[a] Use of Form

[b] Standards for Advertisements

[c] Federal Requirements for Earnings Claims

[2] FORM

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§ 51A.251 Request for Interpretive Opinion [Corp. Code §§ 31510, 31511; 10 Cal. Code Reg. § 250.12]

[1] Comment

[a] Use of Form

[b] Contents of Request

[c] Indexing and Availability of Opinions

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[2] FORM

Request for Interpretive Opinion [Corp. Code §§ 31510, 31511; 10 Cal. Code Reg. § 250.12]

§ 51A.252 Notice of Franchisor's Registration Violation of Franchise Investment Law [Corp. Code § 31303; 10 Cal. Code Reg. § 310.303]

[1] Comment

[a] Use of Form

[b] Form and Contents of Notice

[2] FORM

Notice of Franchisor's Registration Violation of Franchise Investment Law [Corp. Code § 31303; 10 Cal. Code Reg. § 310.303]

§ 51A.253 Notice of Franchisor's Misrepresentation Violation of Franchise Investment Law [Corp. Code § 31304; 10 Cal. Code Reg. § 310.304]

[1] Comment

[a] Use of Form

[b] Form and Contents of Notice

[2] FORM

Notice of Franchisor's Misrepresentation Violation of Franchise Investment Law [Corp. Code § 31304; 10 Cal. Code Reg. § 310.304]

§ 51A.254 Notice of Negotiated Sale of Franchise

[1] Comment--Use of Form

[2] FORM

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21-51A California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers the registration of franchise offerings under California's Franchise Investment Law [*see Corp. Code § 31000 et seq.*]. The chapter focuses on franchise registration under California law. Discussion of the federal registration requirements [16 C.F.R. pt. 436] is generally confined to provisions that augment or preempt California law.

For detailed coverage of franchise agreements under the California Franchise Investment Law, see Ch. 51, *Franchise Agreements*. For discussion of copyrights, see Ch. 103A, *Copyrights*. For detailed coverage of trademarks, see Gilson on Trademarks (Matthew Bender). Other relevant chapters include Ch. 1A, *Role of Counsel in Starting a New Business*; Ch. 1B, *Selecting Form of Business Entity*; Ch. 1C, *Regulation of Employers*; Ch. 1E, *Taxation of Businesses*; Ch. 1F, *Insurance Considerations in Business Formation*; Ch. 75, *Formation of Contracts and Standard Contractual provisions*; and Ch. 76, *Assignment of Rights and Obligations*. For an overview of issues under the California securities laws, see Ch. 6, *Securities Regulation Issues*.



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§ 51A.01 California Sources

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Cartwright Act. *Bus. & Prof. Code § 16720 et seq.*

Franchise Relations Act. *Bus. & Prof. Code § 20000 et seq.*

Fair Dealership Law prohibiting discrimination in connection with granting, sale, bequest, transfer, termination, and renewal of dealerships. *Civ. Code § 80 et seq.*

Seller assisted marketing plans. *Civ. Code § 1812.200 et seq.*

Exemption of franchise from definition of security. *Corp. Code § 25019.*

Franchise Investment Law. *Corp. Code § 31000 et seq.*

Definitions. *Corp. Code § 31000 et seq.*

Regulation of sales of franchises. *Corp. Code § 31100 et seq.*

Statutory exemptions from registration. *Corp. Code §§ 31101-31104.*

Fraudulent and prohibited practices. *Corp. Code § 31200 et seq.*

Enforcement. *Corp. Code § 31300 et seq.*

Civil and criminal liability. *Corp. Code §§ 31300-31306, 31410-31412.*

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Requests for interpretive opinions. *Corp. Code §§ 31510-31511.*

[2] Regulations

Franchise Investment Law rules. *10 Cal. Code Reg. § 310.002 et seq.*

Exemptions from registration. *10 Cal. Code Reg. §§ 310.011, 310.011.1, 310.100.*

Application for registration. *10 Cal. Code Reg. § 310.111.*

Financial statements. *10 Cal. Code Reg. § 310.111.2.*

Impound conditions. *10 Cal. Code Reg. §§ 310.113-310.113.5.*

Disclosure document. *10 Cal. Code Reg. § 310.114.1.*

Application for registration of a material modification. *10 Cal. Code Reg. § 310.125.*

Regulation of advertisements. *10 Cal. Code Reg. §§ 310.156-310.156.3.*

Notice of violations. *10 Cal. Code Reg. §§ 310.303, 310.304.*

[3] Commissioner of Corporations Releases

Registration under the Franchise Investment Law. Dep't of Corp. Release No. 1-F (revised 1971).

When agreement constitutes a "franchise." Dep't of Corp. Release No. 3-F (revised 1994).

Publication of the Commissioner's opinions. Dep't of Corp. Release No. 4-F (1973).

Franchise as including contractual agreements between petroleum corporation or distributor and gasoline dealer. Dep't of Corp. Release No. 5-F (1974).

Required use of Uniform Franchise Registration Application and UFOC in California. Dep't of Corp. Release No. 6-F (1979).

Interpretive opinions. Dep't of Corp. Release No. 7-F (revised 1980).

Notice of exemption filings under Section 31101 or 31104. Dep't of Corp. Release No. 11-F (1983).

Presentation of information and plain language requirements. Dep't of Corp. Release No. 12-F (1994).

Notice of exemption filings under Section 31106. Dep't of Corp. Release No. 13-F (revised 1997).

Notice of exemption filings under Section 31108. Dep't of Corp. Release No. 14-F (revised 2000).

Offices for filing with Department of Corporations. Dep't of Corp. Release No. 13-G (revised 2001).



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Limitation of effect of Sherman Act on international commerce. *15 U.S.C. § 7.1.*

Clayton Act. *15 U.S.C. § 12 et seq.*

Robinson-Patman Act. *15 U.S.C. § 13.*

Federal Trade Commission Act. *15 U.S.C. § 41 et seq.*

Automobile Dealers Franchise Act. *15 U.S.C. § 1221 et seq.*

Petroleum Marketing Practices Act. *15 U.S.C. § 2801 et seq.*

[2] Regulations

Disclosure requirements (FTC Rule 436). *16 C.F.R. pt. 436*

Obligation to furnish documents. *16 C.F.R. § 436.2.*

Contents of disclosure documents. *16 C.F.R. §§ 436.3-436.5.*

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Other laws and rules. *16 C.F.R. § 436.10.*



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21-51A California Legal Forms--Transaction Guide § 51A.05

§ 51A.05 Law Reviews and Periodicals

Root, *The Meaning of "Franchise" Under the California Franchise Investment Law: A Definition in Search of a Concept*, 30 McGeorge L. Rev. 1163 (1999).

Note, *Vylene Enterprises v. Naugles: Remedies for Franchisor Encroachment*, 27 Sw. U. L. Rev. 353 (1997).

Laufer, *The Safe Way to Terminate a Franchise* (Part 2), 41(3) Prac. Law. 63 (1995).

Laufer, *The Safe Way to Terminate a Franchise* (Part 1), 41(2) Prac. Law. 69 (1995).

McErlean & Cannon, *Disclosure for Franchisors*, 40(6) Prac. Law. 23 (1994).

Classen, *Judicial Intervention in Contractual Relationships Under the Uniform Commercial Code and Common Law*, 23 U.C.C. L.J. 260 (1991).

Joseph, *Do Franchisors Owe a Duty of Competence?* 46 Bus. Law. 471 (1991).

Tannenbaum, *The Twelve Most Important Questions to Ask in a Franchisor-Franchisee Relationship*, 36 Prac. Law. 15 (Sept. 1990).

Pitegoff, *Franchise Relationship Laws: A Minefield for Franchisors*, 45 Bus. Law. 289 (1989).

Cantor, *The Federal and State regulation of Franchises* (Part 1), 27(6) Prac. Law. 55 (1981).

Fern, *The Overbroad Scope of Franchise Regulation: A Definitional Dilemma*, 34 Bus. Law. 1387 (1979).



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Annot., Validity, Construction, and Application of State Statutes Regulating Dealings Between Automobile Manufacturers, Dealers, and Franchisees, 82 A.L.R.4th 624 (1990) .



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§ 51A.07 Text References

[1] Matthew Bender Sources

Marsh & Volk, Practice Under the California Corporate Securities Laws, Ch. 40, *Registration of Franchises Under the California Franchise Investment Law* (Matthew Bender).

California Forms of Pleading and Practice, Ch. 515, *Securities and Franchise Regulation* (Matthew Bender).

California Forms of Jury Instructions, Ch. 24, *Franchise Agreements* (Matthew Bender).

Cavitch, Business Organizations with Tax Planning (Matthew Bender).

Ch. 161, *Review of Factors to be Considered in Selecting Form of Acquisition* .

Ch. 232, *Introduction to Trade Secrets*.

Glickman, Franchising (Matthew Bender).

Ch. 3, *Choice of Franchise Method of Expansion*.

Ch. 4, *Legal Pitfalls of Franchise Operations*.

Ch. 8, *Selling Franchise Opportunities: Disclosure and Registration Requirements*.

Ch. 9, *Considerations in Developing the Agreement*.

Ch. 14, *Advising the Prospective Franchisee*.

Ch. 15, *Financing the Franchise Purchase*.

Appendix D, *Uniform Franchise Registration Application Guidelines for Preparation of the UFOC*.

Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 3A, *Business Franchises* (Matthew Bender).

Von Kalinowski, Antitrust Laws and Trade Regulation (Matthew Bender).

Ch. 22, *Tying Arrangements*.

Ch. 23, *Exclusive Dealing/Requirements Contracts and Reciprocal Dealing Arrangements*.

Ch. 105, *California*.

California Small Business Guide, Ch. 8, *Financing Methods for Small Businesses* (Matthew Bender).



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§ 51A.10 Franchise Investment Law

[1] Registration Requirement

The Franchise Investment Law, which is administered under rules promulgated by the Corporations Commissioner [*see Corp. Code § 31502; see also 10 Cal. Code Reg. § 310.002 et seq.*], requires the registration of all offers of franchises that are offered or sold in California, unless the offer has been exempted by statute or by rule of the Commissioner [*Corp. Code § 31110*].

[2] Purpose

The Franchise Investment Law is a registration and disclosure law. It is intended to provide each prospective franchisee with the information necessary to make an intelligent decision regarding franchises being offered. Furthermore, by conferring certain powers on the Commissioner of Corporations, the Franchise Investment Law empowers the Commissioner to prohibit the sale of franchises if the sale would lead to fraud, or a likelihood that the franchisor's promises would not be fulfilled. The Franchise Investment Law also protects franchisors and franchisees by providing a better understanding of their business relationship to franchisees [*Corp. Code § 31001; see Wimsatt v. Beverly Hills Weight Etc. Int'l Inc. (1995) 32 Cal. App. 4th 1511, 1513, 38 Cal. Rptr. 2d 612* (construing legislative intent to protect California franchisees from substantial losses due to lack of information regarding investment)]. In contrast, the Franchise Relations Act [*Bus. & Prof. Code § 20000 et seq.*] primarily regulates the substantive terms of franchise agreements, specifically with respect to the termination and nonrenewal of franchises, offers to repurchase inventories, and the use of binding arbitration. However, the regulations, releases, guidelines and interpretive opinions of the Commissioner under the Franchise Investment Law regarding whether or not an agreement constitutes a "franchise" within the meaning of that law constitute prima facie evidence of the scope and extent of coverage of the definition of "franchise" under the Franchise Relations Act [*Bus. & Prof. Code § 20009*]. Franchise agreements are discussed in Ch. 51, *Franchise Agreements*.

[3] "Franchise" Defined

[a] Basic Characteristics

The Franchise Investment Law defines "franchise" as a contract or agreement, either expressed or implied and either written or oral, between two or more persons that contains the following three elements [*Corp. Code* § 31005(a)]:

- The franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor [*see Gentis v. Safeguard Bus. Sys. (1998) 60 Cal. App. 4th 1294, 1303-1305, 71 Cal. Rptr. 2d 122 (Corp. Code § 31005(a)(1) construed liberally; parties who could not enter into binding contracts or pass title to goods nonetheless held to be franchisees)*];
- The operation of the franchisee's business pursuant to the franchisor's plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate [*see Kim v. Servosnax, Inc. (1992) 10 Cal. App. 4th 1346, 1356-1358, 13 Cal. Rptr. 2d 422 ("substantially associated" even though customers never see corporation's mark, name, or symbol used in association with operation of business)*]; and
- The franchisee is required to pay, directly or indirectly, a franchise fee.

Neither the Franchise Investment Law nor any decision of the Commissioner of Corporations defines or interprets the phrase "offering, selling, or distributing goods or services" in the first element of the definition [*see Corp. Code* § 31005(a)(1)]. One court has construed this phrase liberally, finding that it evidences an intention to designate alternative or separate categories. The court held that parties who could not enter into binding contracts or pass title to goods nonetheless were franchisees. By operating independent businesses through which they solicited orders, demonstrated products, solved customer problems, installed the franchisor's systems, maintained contact with existing customers, generated new business, and provided ongoing service to customers, they were more than simply sales representatives [*Gentis v. Safeguard Business Systems (1998) 60 Cal. App. 4th 1294, 1304-1305, 71 Cal. Rptr. 2d 122*].

The franchise law defines a franchise fee as a fee paid for the right to do business. A person is not a franchisee if the person does not invest anything in return for the right to enter into business with or for a so-called franchisor, makes no required contribution of capital, makes no unrecoverable investment in the so-called franchisor, is not required to purchase any inventory, is not required to purchase services from the so-called franchisor in order to become a dealer, and places none of his or her own funds, even the de minimis amounts required under the franchise law, at risk in exchange for a dealership. Ordinary business expenses paid during the course of business cannot be counted as a franchise fee [*Thueson v. U-Haul Int'l, Inc. (2006) 144 Cal. App. 4th 664, 676, 50 Cal. Rptr. 3d 669*].

Although fairly unambiguous, the three characteristics of a franchise that are listed above have been the subject of a number of opinions of the Commissioner of Corporations. In any situations other than those in which it is clear-cut that a franchise is the contemplated business arrangement, each element of the definition should be examined in the light of the Commissioner's interpretations [*see Marsh & Volk, Practice Under the California Securities Laws, Appendix C-1 (Matthew Bender)*]. The Transaction Guide sets forth some pertinent questions that will help to determine whether a franchise is being offered [*see* § 51A.110].

[b] Petroleum Companies, Distributors, and Dealers

Apart from the basic elements listed in [a], *above*, a franchise is any contractual agreement between a petroleum corporation or distributor and a gasoline dealer, or between a petroleum corporation and distributor, under which the petroleum distributor or the gasoline dealer is granted the right to use a trademark, trade name, service mark, or other identifying symbol or name owned by the other party to the agreement. The term "franchise" also includes any agreement between a petroleum corporation or distributor and a gasoline dealer, or between a petroleum corporation and a distributor, that involves the right to occupy premises owned, leased, or controlled by the other party to the agreement for the purpose of engaging in retail sales of petroleum and other products of the other contracting party [*see Corp.*

Code § 31005(b)(1); see also § 51A.110, P 1].

The term "franchise" also includes any contract between a refiner and a petroleum distributor, between a refiner and a petroleum retailer, between two petroleum distributors, or between a petroleum distributor and a petroleum retailer, under which a refiner or petroleum distributor authorizes or permits the use of a trademark. The trademark must be owned or controlled by the authorizing refiner or by a refiner that supplies fuel to the petroleum distributor authorizing the use. The use of the trademark must be by a petroleum retailer or distributor and must be in connection with the sale, consignment, or distribution of gasoline, diesel, gasohol, or aviation fuel [*Corp. Code § 31005(b)(2); see also § 51A.110, P 2].*

[c] Exclusion for Nonprofit Organizations

Any nonprofit organization operated on a cooperative basis by and for independent retailers that wholesales goods and services primarily to its member retailers is excluded from the definition of "franchise" under the Franchise Investment Law, if it meets all of the following conditions [*Corp. Code § 31005(c)*]:

- Control and ownership of each member is substantially equal;
- Membership is limited to those who will avail themselves of the services furnished by the organization;
- Transfer of ownership is limited or prohibited;
- Capital investment receives no return;
- Substantially equal benefits pass to the members on the basis of patronage of the organization;
- Members are not personally liable for obligations of the organization in the absence of a direct undertaking or authorization by them;
- Services of the organization are furnished primarily for the use of the members;
- Each member and prospective member is provided with a disclosure document that complies with the specifications of *Corp. Code § 31111*; and
- No part of the receipts, income, or profit of the organization is paid to any profit making entity, except for arms-length payments for necessary goods and services, and members are not required to purchase goods or services from the designated profit making entity.

For further discussion of nonprofit organizations, see Ch. 13, *Nonprofit Corporations* . For further discussion of cooperative organizations, see Ch. 14, *Consumer Cooperative Corporations* and Ch. 14A, *Agricultural Nonprofit Cooperative Associations* .

[4] Exemptions from Registration

Although a franchise is being offered in California, it may be exempted from registration under the Franchise Investment Law, either by statute or by the Commissioner's rule. Generally, the following franchise-related transactions are exempt from the registration requirement of the Franchise Investment Law [*Corp. Code § 31100 et seq.; see Corp. Code § 31110*]:

- The offer or sale of a franchise by a franchisee or the offer or sale of the entire area franchise owned by a subfranchisor for his or her own account if the sale is not effected by or through a franchisor [*Corp. Code § 31102; see § 51A.112, P 1a*];
- Transactions related to a bank credit card plan [*see Corp. Code § 31103; see also § 51A.112, P 1b*];
- Offers or sales of franchises by franchisors qualifying as "exempt large franchisors" [*see Corp. Code § 31101; see also § 51A.112, P 1c*];
- Offers or sales of franchises dealing in petroleum products [*see Corp. Code § 31104; see also § 51A.112, P 1d*];
- Offers, sales, or other transfers of franchises to nonresidents, under specified conditions [*see Corp. Code § 31105; see also § 51A.112, P 1e*];
- Offers, sales, or other transfers of franchises to certain experienced franchisees [*see Corp. Code § 31106; see also § 51A.112, P 1f*];
- Offers, but not sales, of franchises by a franchisor while an application for renewal is pending, under certain specified conditions [*see Corp. Code § 31107; see also § 51A.112, P 1g*];
- Offers or sales of franchises, if the franchise involves the adding of a new product or service line to the existing business of a prospective franchisee [*see Corp. Code § 31108; see also § 51A.112, P 2*];
- Offers or sales of franchises to specified purchasers, if certain conditions are met [*see Corp. Code § 31109; see also § 51A.112, P 3*];
- Offers or sales of franchises registered under *Corp. Code § 31111, 31121, or 31123*, on terms different from the terms of the registered offer, if specified conditions are met [*see Corp. Code § 31109.1; see also § 51A.112, P 4*]; and
- Franchise-related transactions exempted from registration under rulings of the Commissioner of Corporations [*see Corp. Code § 31100; see also § 51A.112, P 5*].

However, the California exemptions have no bearing on the franchisor's obligation under Federal Trade Commission (FTC) Rule 436 [16 C.F.R. pt. 436] to provide full disclosure to the franchisee, normally in the form prescribed by the Uniform Franchise Disclosure Document [*see [5], below*]. Consequently, the California exemptions, apart from relieving the franchisor of the necessity of registration, do not lessen his or her disclosure burdens under the FTC Rule. On the other hand, to the extent that materials filed with the Corporations Commissioner become public records, a franchisor who is not required to register can avoid unnecessary disclosure of what may be regarded as trade secrets or other business information that the franchisor would otherwise disclose only to potential franchisees.

Offers or sales of a franchise on terms other than those in a registered offer, otherwise known as a negotiated sale, are also exempt from the registration requirement. However, several specified conditions must be met to qualify for this exemption [*see 10 Cal. Code Reg. § 310.100.2(a)*]. For further discussion of the conditions and a form for the additional required disclosures that must be made to qualify for the exemption, see § 51A.213 [*see also § 51A.254 (notice of negotiated sale)*].

[5] Registration Procedure

Franchises are registered in California (and in other states that have adopted the form) by submitting the Uniform Franchise Registration Application [10 Cal. Code Reg. § 310.111; see § 51A.200]. Subfranchisors, who are persons granted the right to sell franchises within a given area [see Corp. Code §§ 31008.5, 31009], must also use the Uniform Franchise Registration Application [10 Cal. Code Reg. § 310.111.1].

The Uniform Franchise Registration Application was adopted to comply with the registration requirements of the Federal Trade Commission's "Franchise Rule" [16 C.F.R. pt. 436]. That rule was amended in 2007 (effective July 1 (2008)) for the first time since 1978, when it was first enacted [16 C.F.R. pt. 436, as amended 72 Fed. Reg. 15444 (2007)]. The California Corporations Commissioner requires that franchises registered in this state follow the federal rule, modified in certain respects to comply with California law [see 10 Cal. Code Reg. § 310.111]. The Uniform Franchise Disclosure Document is reproduced and discussed in § 51A.209, below. Basic disclosure requirements and preemption are covered in § 51A.11[2], below. The scope of the federal rule and its exemptions are discussed in § 51A.115.

[6] Escrow or Impound of Franchise Fees

Whenever the Commissioner determines that it is necessary and appropriate for the protection of prospective franchisees or subfranchisors because the applicant has failed to demonstrate that adequate financial arrangements have been made to fulfill the franchisor's obligations to provide real estate, improvements, equipment, inventory, training, or other items included in the offering, the Commissioner may by rule or order require the escrow or impound of franchisee fees and other funds paid by the franchisee or subfranchisor until those obligations have been satisfied as a condition of registration [Corp. Code § 31113; 10 Cal. Code Reg. § 310.113]. At the option of the franchisor, the franchisor may furnish a surety bond as provided by rule of the commissioner [Corp. Code § 31113].

When an impound condition is imposed in connection with the registration of a franchise offering, one hundred percent of franchisee fees and all other funds paid by the franchisees or subfranchisors for any purpose must be placed with the depository within 48 hours after receipt [10 Cal. Code Reg. § 310.113.1; see 10 Cal. Code Reg. § 310.113.3 ("depository" defined)]. The funds will be held by the depository until the Commissioner takes further action [10 Cal. Code Reg. § 310.113.1; see 10 Cal. Code Reg. § 310.113.4]. When an impound condition is imposed, the franchisor must deliver to each franchisee or subfranchisor, a purchase receipt [10 Cal. Code Reg. § 310.113.2].

For further discussion, see § 51A.141 and §§ 51A.230-51A.232.

[7] Liability for Violations

[a] Civil Liability

Any person who offers or sells a franchise in violation of the exemption for large franchisors [see Corp. Code § 31101], the registration requirements [see Corp. Code § 31110] and disclosure requirements [see Corp. Code §§ 31119, 31200, 31202] of the Franchise Investment Law, or in violation of any provision of the Franchise Investment Law that provides an exemption from the disclosure and registration provisions of Corp. Code § 31110 et seq., is liable to the franchisee (or subfranchisor) for damages suffered from the violation [Corp. Code § 31300]. If the violation is willful, the franchisee may also sue for rescission [Corp. Code § 31300]. However, in the case of a violation of the rules governing applications and exempt offerings by large franchisors [see Corp. Code §§ 31200, 31202], there is no liability if the defendant proves that the plaintiff knew the facts concerning the untruth or omission, or that the defendant exercised reasonable care and did not know, or, if the defendant had exercised reasonable care, would not have known, of the untruth or omission [Corp. Code § 31300].

Any person who violates the rule barring misrepresentations in offers and sales [see Corp. Code § 31201] is liable for damages to any person not knowing or having cause to believe that a statement was false or misleading and who

purchased a franchise in reliance on the statement, unless the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know (or if the defendant had exercised reasonable care would not have known) of the untruth or omission [*Corp. Code* § 31301].

Liability for the registration and disclosure violations extends to persons directly or indirectly controlling the violator, as well as every employee who materially aids in the act or transaction constituting the violation. Thus, for example, every partner in a firm so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions, every employee of a person so liable who materially aids in the act or transaction constituting the violation, are also liable jointly and severally with and to the same extent as that person, unless the other person who is so liable had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist [*Corp. Code* § 31302]. However, these violations do not have the effect of continuing the franchise. Therefore, although the franchisee may be entitled to damages, the franchisor may terminate the franchise or lease of the franchised premises, unless special statutes have been adopted to prevent that terminations, as in the case of service station lease franchises [*Mobil Oil Corp. v. Handley* (1978) 76 Cal. App. 3d 956, 963-964, 143 Cal. Rptr. 321] .

Any person who violates the franchisee's rights of association [see *Corp. Code* § 31220] may be sued for temporary and permanent injunctive relief, any damages, and the costs of suit including reasonable attorneys' fees [*Corp. Code* § 31302.5(a) (suit filed in superior court in county where defendant resides or where franchise affected by violation does business)]. A plaintiff will not be required to allege or prove that actual damages have been suffered in order to obtain injunctive relief [*Corp. Code* § 31302.5(a)]. However, no action may be maintained to enforce any such liability unless brought before the earlier of (1) the expiration of two years after the violation on which the suit is based or (2) the expiration of one year after the plaintiff discovers the facts constituting the violation [*Corp. Code* § 31302.5(b)].

[b] Civil Actions by Commissioner

Whenever it appears to the Commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of the Franchise Investment Law or any rule or order under the Franchise Investment Law, the Commissioner has discretion to bring an action, or request the Attorney General to bring an action in the name of the people of the State of California, in the superior court to enjoin the acts or practices or to enforce compliance with the Franchise Investment Law and any rule or order under the Franchise Investment Law. On a proper showing, a permanent or preliminary injunction, restraining order, or writ of mandate will be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets [*Corp. Code* § 31400(a)]. If the Commissioner determines it is in the public interest, the Commissioner may include in any action authorized by *Corp. Code* § 31400(a) a claim for ancillary relief, including, but not limited to, a claim for restitution or disgorgement or damages on behalf of the persons injured by the act or practice constituting the subject matter of the action. The court has jurisdiction to award that additional relief [*Corp. Code* § 31400(b)].

The Commissioner has broad investigative and judicial powers [see *Corp. Code* § 31401]. The Commissioner has discretion to make public or private investigations within or outside California as necessary to determine whether any person has violated or is about to violate any provision of the Franchise Investment Law, or to aid in the enforcement of the Franchise Investment Law or the prescribing of rules and forms under the Franchise Investment Law. Further, the Commissioner has discretion to publish information concerning the violation of the Franchise Investment Law [*Corp. Code* § 31401(a), (b)].

If the Commissioner believes that the offer of any franchise is subject to registration under the Franchise Investment Law and it is being, or it has been, offered for sale without the offer first being registered, the Commissioner may order the franchisor or offeror of that franchise to desist and refrain from the further offer or sale of that franchise unless and until the offer has been duly registered under the Franchise Investment Law [*Corp. Code* § 31402]. If a request for a hearing is filed in writing within 60 days from the date of service of the order by the person to whom the order was

directed, the Commissioner will hold a hearing [*see Gov. Code § 11500 et seq.*]. Unless that hearing is commenced within 15 business days after the request is made, or the person affected consents to a later date, the Commissioner's order will be deemed rescinded. If the target of the order fails to file a written request for a hearing within 60 days from the date of service of the order, the order will be deemed a final order of the Commissioner and will not be subject to review by any court or agency [*Corp. Code § 31402*].

If the Commissioner believes that the offer of any franchise exempt from registration under the Franchise Investment Law is being or has been offered for sale without complying with the applicable statutes [*see Corp. Code §§ 31101, 31201*], or any other provision of the Franchise Investment Law that provides an exemption from the disclosure and registration provisions of *Corp. Code § 31110 et seq.*, the Commissioner may order the franchisor or offeror of that franchise to desist and refrain from the further offer or sale of the franchise unless and until the offer is made in compliance with the Franchise Investment Law [*Corp. Code § 31403*]. If a request for a hearing is filed in writing within 60 days from the date of service of the order by the person to whom the order was directed, the Commissioner will hold a hearing [*see Gov. Code § 11500 et seq.*]. Unless that hearing is commenced within 15 business days after the request is made, or the person affected consents to a later date, the Commissioner's order will be deemed rescinded. If the target of the order fails to file a written request for a hearing within 60 days from the date of service of the order, the order will be deemed a final order of the Commissioner and will not be subject to review by any court or agency [*Corp. Code § 31403*].

Any person who violates any provision of the Franchise Investment Law, or any rule or order made under the Franchise Investment Law, will be liable for a civil penalty not to exceed \$10,000 for each violation. The penalty will be assessed and recovered in a civil action brought in the name of the people of the State of California by the Commissioner in any court of competent jurisdiction [*Corp. Code § 31405(a)*]. As applied to the penalties for acts in violation of the Franchise Investment Law, the remedies provided by this statute and by other Franchise Investment Law statutes are not exclusive, and may be sought and employed in any combination to enforce the provisions of the Franchise Investment Law [*Corp. Code § 31405(b)*]. However, no action may be maintained to enforce any such liability unless the action is brought before the expiration of four years after the act or transaction constituting the violation [*Corp. Code § 31405(c)*].

Finally, the Commissioner may refer any available evidence concerning any violation of the Franchise Investment Law to the district attorney of the county in which the violation occurred. The district attorney, with or without a reference, may institute appropriate criminal proceedings under this law. On the district attorney's request, the Commissioner and the counsel, deputies, or assistants of the Commissioner may assist the district attorney in presenting the law or facts at the trial [*Corp. Code § 31404; see [c], below*].

[c] Criminal Liability

Criminal penalties of up to \$10,000, or imprisonment, or both, apply to any person who willfully violates any rule or order under, or any provision (except that pertaining to the right of free association) of, the Franchise Investment Law [*Corp. Code § 31410; see Corp. Code § 31220*]. The same criminal penalties apply to willful acts or schemes which are deceitful or fraudulent in connection with the offer, purchase, or sale of any franchise [*Corp. Code § 31411*]. Nothing in the Franchise Investment Law limits the power of the state to punish any person for any conduct that constitutes a crime under any other statute [*Corp. Code § 31412*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Agreements Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Fees Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview Business & Corporate

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PART II. LEGAL BACKGROUND

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§ 51A.11 The FTC Rule

[1] Disclosure Requirements

The disclosure requirements applicable to franchising appear in 16 C.F.R. pt. 436 [16 C.F.R. § 436.1 *et seq.*] and are referred to in this chapter as the "FTC rule." The basic disclosure requirement provides that in connection with the offer or sale of a franchise to be located in the United States of America or its territories, it is an unfair or deceptive act or practice [see 15 U.S.C. § 15 (definition)] for any franchisor to fail to furnish a prospective franchisee with a copy of the franchisor's current disclosure document or to alter unilaterally and materially the terms and conditions of the basic franchise agreement or any related agreements attached to the disclosure document without furnishing the prospective franchisee with a copy of each revised agreement [see 12 C.F.R. § 436.2(a), (b); see also 16 C.F.R. § 436.8 (exemptions)]. The federal "Franchise Disclosure Document" [see 16 C.F.R. § 436.3(a)] is the analogue of the disclosure document required under California law [see *Corp. Code* § 31114].

For further discussion and a form of the federal disclosure document cover sheet, see § 51A.208[2].

[2] Preemption of State Law

[a] State Laws Preempted to Extent Inconsistent With FTC Rule

The FTC rule attempts to create a minimum federal standard of disclosure applicable to all franchise and business opportunity offerings, and, at the same time, permits state and local authorities to provide additional concurrent protection. State laws are preempted only to the extent that they are "inconsistent" with the FTC rule, that is, that they provide less protection than that provided by the rule [16 C.F.R. § 436.10(b)]. In other words, a state law is not inconsistent with the rule if the protection it affords to any prospective franchisee is equal to or greater than that provided by the rule [16 C.F.R. pt. 436, Note 2; see 72 *Fed. Reg.* 15537 (2007) (noting that revised 16 C.F.R. § 436.10 retains the original Rule's preemption statement found at Note 2)]. Thus, state laws or regulations providing for registration, escrow, and bonding requirements, regulation of termination practices, contract provisions or financing arrangements, and requiring more disclosure than that required by the FTC rule are all examples of nonpreempted state regulation of franchises [44 *Fed. Reg.* 49971 (1979)].

The major areas of preemption of state law include [see 16 C.F.R. pt. 436; 44 Fed. Reg. 49971 (1979)] :

- The scope of the FTC rule [see [b], below].
- The timing of disclosures [see 16 C.F.R. § 436.2(a), (b); cf. Corp. Code § 31119].
- The persons covered by the FTC rule [see 16 C.F.R. § 436.1(l), (j), (k)].
- The contracts that must be executed [see 16 C.F.R. § 436.2].
- Prohibited practices [see 16 C.F.R. § 436.9].

[b] Scope of Federal Rule

Disclosure under the FTC rule must be made in all cases governed by it, regardless of the fact that state law would not require disclosure. An obvious example of the discrepancy between state and federal law is the exemptions from registration available under the Franchise Investment Law [see, e.g., Corp. Code § 31101; see also § 51A.10[4]] that are not available under the federal rule. More subtle distinctions are found in the key definitions under the federal rule, most notable among them the definition of "franchise" which, although it contains the same basic elements as the California definition [see § 51A.10[3]], is probably broader [see 16 C.F.R. § 436.1(h)]. Therefore, it is quite possible that an agreement may not be subject to registration as a "franchise" under the Franchise Investment Law, but nonetheless may be subject to federal disclosure requirements. Moreover, the federal rule covers so-called "business opportunity ventures" (which also come under the FTC's definition of "franchise"); most commonly distributorships, rack jobbing, and vending machine routes. Although these business ventures have some elements in common with franchises under California law, the absence of a federal requirement that the business be substantially associated with the franchisor's mark or commercial symbol [see 16 C.F.R. § 436.2(a)(1)(ii), (2)] means that while it might not be a "franchise" within the Franchise Investment Law definition of that term [see § 51A.10[3]], it could only be offered or sold in compliance with FTC disclosure requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law
Federal Trade Commission Act
General Overview
Antitrust & Trade Law
Federal Trade Commission Act
Coverage
Business & Corporate Law
Distributorships & Franchises
Business Opportunities
Business & Corporate Law
Distributorships & Franchises
Registration & Disclosure
General Overview



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§ 51A.100 Facts

NOTE:

Frequently, the attorney who plans the offer and sale of a franchise will have participated in all phases of the transaction, including the drafting of the franchise agreement [*see* Ch. 51, **Franchise Agreements**]. The attorney's familiarity with the essential facts concerning the franchise operation means that most of the basic information needed for registration of a franchise in California and/or compliance with the Federal Trade Commission rule will already be part of the client's file. However, the following list of facts and documents is intended as a recapitulation of the basic data the attorney will need to (1) determine whether the franchise is subject to California and/or federal regulation, and (2) complete the Uniform Franchise Registration Application [*see* §§ 51A.200-51A.210] with respect to matters other than the disclosure document. Although the terms "franchise" and "franchisor" are used in the following list, they are used for the sake of brevity alone; the determination as to whether a "franchise" is being offered can only be made after analysis of the legal definition of "franchise" is applied to the facts of a particular business relationship. Note also that the division into categories of "facts" and "documents" is somewhat misleading since much of the attorney's analysis of registration requirements will be based on facts contained in documents, chiefly the franchise agreement.

1. Name, address, telephone number, and fax number of franchisor.

2. Form of business organization:

- a. Corporation or S corporation.
- b. General or limited partnership.
- c. Limited liability company.

d. Sole proprietorship.

3. Name under which franchisor is doing or intends to do business.
4. Franchisor's principal business address.
5. Name, address, telephone number, and fax number of franchisor's agent in California who is authorized to receive process.
6. Name, address, telephone number, and fax number of any sub-franchisors in California.
7. Name, address, telephone number, and fax number of person to whom communications regarding franchisor's application for registration should be directed.
8. States in which franchise is currently registered, or for which application for registration is on file.
9. States in which franchisor proposes to register franchise.
10. States that have denied registration of franchise and file number and date of order or other document relating to that denial.
11. States in which right to offer franchise has been suspended and name of agency involved, date of order, grounds for suspension, and, if applicable, details as to any reinstatement.
12. States in which franchisor has withdrawn its application for registration, date of withdrawal, and reasons for withdrawal.
13. Total projected financing required by franchisor to fulfill its obligations to prospective franchisees to be established during next fiscal year for real estate, improvements, equipment, inventory, training, and all other items included in offering.
14. Capitalization sources from which all required funds will be derived.
15. Net worth of franchisor and any corporation having 80 percent or more control of franchisor.
16. Number of years that franchisor or corporation controlling franchisor has been conducting franchise business.
17. Number of franchisees that franchisor or corporation controlling franchisor has had and period during which franchises have been in operation.
18. If salespersons who are not licensed in California as either real estate brokers or salespersons or as securities broker-dealers will be engaged in effecting franchise sales, their occupation and litigation histories.

NOTE:

This information can appear either in a Sales Agent Disclosure Form [*see* § 51A.201] or included in the disclosure document under Items 2 and 3 [*10 Cal. Code Reg. § 310.210(a)*].

19. Names, addresses, telephone numbers, and fax numbers of any other advisors or consultants, including franchisor's

accountant or accounting firm.

20. Rights granted under proposed franchise, e.g., to engage in selling foods or services, or to sell franchises to others.

21. Degree to which commodities or services sold under agreement will be identified or substantially associated with franchisor's trademark, service mark, trade name, advertising, or other commercial symbol.

22. Extent to which franchisor will prescribe marketing plan or otherwise exert control over or extend assistance to franchisee in connection with marketing plan or business organization of franchisee.

23. Amount and consideration for any payment required to be made by franchisee pursuant to franchise agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law
Distributorships & Franchises
General Overview
Business & Corporate Law
Distributorships & Franchises
Franchise Relationships
Franchise Agreements



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§ 51A.101 Documents

1. Organizational documents of franchisor:

- a. For corporation, articles of incorporation, amendments, and bylaws.
- b. For partnership, partnership agreement, and certificate of partnership.
- c. For limited liability company, operating agreement, and limited liability company certificate.
- d. Other business documents.

2. Copies of financial statements satisfying requirements of Item 21 of Uniform Franchise Disclosure Document. [see § 51A.209].

3. Copy of each contract or agreement in use or proposed for use by franchisor (and any desired amendments, corrections, or changes), including:

- a. Franchise agreement.
- b. Lease agreements.
- c. Option agreements.
- d. Purchase agreements.

4. Two copies of all advertising to be used in connection with offer and sale of franchises.

NOTE:

Advertisements must be filed with the Commissioner of Corporations [*Corp. Code § 31156*] unless they are published only after the franchise registration is effective and are limited to the matters permitted by the Commissioner's rule [*10 Cal. Code Reg. § 310.156.2*]. Internet advertising in connection with the offer or sale of a franchise is exempt from the requirements of *Corp. Code § 31156* for filing advertisements with the Commissioner, if specified conditions are met [*see 10 Cal. Code Reg. § 310.156.3; § 51A.140*].

5. Copies of all projected or forecasted franchisees' sales, profits, or earnings.

NOTE:

These forecasts are to be evaluated in light of the Commissioner's requirement that they be demonstrably supported by historical earnings of a statistically reliable number of franchisees. These projections may be used as part of the UFOC only when they meet all of the Commissioner's requirements [*see 10 Cal. Code Reg. § 310.114.1(c)* (Special Instruction Sheet for UFOC)].

6. Copies of offering circulars prepared for use in any other states.

NOTE:

These offering circulars should be obtained for comparison purposes. Even if they are in the UFOC format, they will have to be modified for use in California. However, substantial original drafting can be avoided when the information in existing offering circulars is unchanged or needs no state-specific modification.

7. Any written opinions, decisions, or orders by any governmental authority affecting franchise, including determinations as to any of the following:

- a. Whether previously issued franchises are considered independent businesses or subsidiaries.
- b. Whether Small Loan Administration loans are available.
- c. Whether any monopoly or other restraint of trade problems exist [*see Ch. 51, Franchise Agreements, § 51.11*].

8. All business licenses held and evidence of patents, trademarks, or copyrights involved in franchise business.

9. Any miscellaneous documents involved with franchise business, including insurance policies, leases, documents of title, supply contracts, and all other agreements.

10. Any reports received from other consultants or advisors regarding feasibility of franchise.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law
 Distributorships & Franchises
 General Overview
 Business & Corporate Law
 Distributorships & Franchises
 Franchise Relationships
 Franchise Agreements
 Business & Corporate Law
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DIVISION III: COMMERCIAL TRANSACTIONS

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B. Preliminary Determinations

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NOTE:

The question of whether the business arrangement proposed by the client is in fact a statutory "franchise" and therefore, absent an exemption, subject to registration under the Franchise Investment Law, may prove more problematic than the simplicity of the statutory definition would suggest. This issue, along with whether the offer or sale is made in California [*see* § 51A.111] and whether an exemption is available [*see* § 51A.112], may not be resolvable without recourse to an official opinion on the matter on which the attorney can legally rely. The Franchise Investment Law provides for obtaining opinions from the Corporations Commissioner [*see Corp. Code* § 31510]. Therefore, if it is not clear from the following outline of preliminary determinations whether the contemplated business transaction is subject to registration in California, the procedure for requesting a Commissioner's opinion should be followed [*see* § 51A.113; *see also* Dep't of Corp. Release 3-F (rev.'d 1994); Marsh & Volk, Practice Under the California Securities Laws, Appendix C-1 (Matthew Bender) (annotated opinions of Commissioner of Corporations)].



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B. Preliminary Determinations

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§ 51A.110 Existence of Franchise

NOTE:

For the Corporations Commissioner's guidelines for determining whether an agreement constitutes a "franchise," see Dep't of Corp. Release 3-F, ***When Does an Agreement Constitute a "Franchise"*** (rev.'d 1994).

1. Determine whether all of following statutory components of "franchise" are present in agreement [*Corp. Code § 31005*; see Dep't of Corp. Release 3-F (rev.'d 1994)]:

a. Oral or written agreement granting right to engage in business of offering, selling, or distributing goods or services.

NOTE:

Neither the Franchise Investment Law nor any decision of the Commissioner of Corporations defines or interprets the phrase "offering, selling, or distributing goods or services" [*see Corp. Code § 31005(a)(1)*]. One court has construed this phrase liberally, finding that it evidences an intention to designate alternative or separate categories. Thus, the court found that parties who could not enter into binding contracts or pass title to goods nonetheless were franchisees. By operating independent businesses through which they solicited orders, demonstrated products, solved customer problems, installed the franchisor's systems, maintained contact with existing customers, generated new business, and provided ongoing service to customers, they were more than simply sales representatives [*Gentis v. Safeguard Business Systems* (1998) 60 Cal. App. 4th 1294, 1304-1305, 71 Cal. Rptr. 2d 122] .

(1) Fact that franchisee is already engaged in particular line of business does not negate

existence of "franchise."

(2) Right to engage in business includes right to engage in business of soliciting others to engage in franchised business.

b. Right is granted to engage in business under marketing plan or system prescribed in substantial part by franchisor, including:

NOTE:

The key term here is "substantial." Whether a plan is prescribed in a "substantial part" can only be ascertained from examining the entire agreement. Therefore, the following examples are not intended to be inclusive, nor is the presence of any one of them in the agreement conclusive of the issue of whether a franchise exists.

(1) Control over terms of payment by customers, credit practices, warranties, and representations to customers.

(2) Furnishing or prescribing sales literature or sales aids.

(3) Required adherence to sales policies and business ethics.

(4) Training of sales personnel.

(5) Conducting seminars or periodic meetings to enhance sales.

(6) Right of franchisor to inspect premises and/or take corrective actions for deviations from suggested "norms."

(7) Franchisor's approval of locations or fixtures and equipment.

(8) Requirements contracts and/or agreements not to sell competing products.

(9) Assignments of exclusive territories.

(10) Giving detailed directions and advice concerning operating techniques.

(11) Presenting all businesses to public as unified marketing concept.

c. Operations of franchisee's business is substantially associated with advertising or other commercial symbol designating franchisor or affiliate of franchisor, such as trademark, service mark, trade name, or logotype.

NOTE:

An agreement is not a franchise, even though it prescribes a detailed marketing plan or system for the operation of the business, if that business is not substantially associated with a commercial symbol of the franchisor or its affiliate. In general, a franchisee's business is "substantially associated" with the franchisor's commercial symbol if the franchisee is granted the right to use the symbol, regardless of whether he or she is required to use it. Fundamentally, "substantially associated" means communicated to the customers of the franchisee.

The objective of the Franchise Investment Law is to deal with a multiplicity of business arrangements presented to the public as a unit or marketing concept operated pursuant to a uniform marketing plan and under a common symbol. Therefore, if the franchisee is granted the right to use the franchisor's symbol, that part of the franchise definition is satisfied even if the franchisee is not obligated to display the symbol. Moreover, in line with the Franchise Investment Law's objective, for the operation of the franchisee's business to be substantially associated with the symbol, it must be communicated to the customers of the franchisee. A commercial symbol that a supplier of goods or services only uses on invoices or in its advertising to distributors, but that the supplier does not permit the distributors to show in dealing with their customers, is not in the eyes of the public substantially associated with the operation of the supplier. However, when the trademark is communicated to the customers of the supplier, the appearance of a unified operation is established and it is immaterial whether the advertising containing the trademark is originated, distributed, or paid for by the supplier or by the distributor. In determining whether there is substantial association between the licensee's business and the licensor's commercial symbol, it is necessary to consider whether that commercial symbol is brought to the attention of the licensee's customers to such an extent that the customers regard the licensee's establishment as one in a chain identified with the licensor. For example, in one case, the shape devised by a franchisor for the franchisees' restaurants amounted to a commercial symbol. In another case, the various manufacturing plants with which the franchisor entered into service contracts with, and that were later assigned to the franchisees, were considered "customers" of the franchisees. Since the franchisor communicated its name to these customers as a result of negotiating the service contracts and by being a named party to the service contracts, it was concluded that the franchisees' businesses were substantially associated with the commercial symbol of the franchisor [Dep't of Corp. Release 3-F, When ***Does an Agreement Constitute a "Franchise"*** (rev.'d 1994)].

d. Franchisee agrees or is required to pay, directly or indirectly, "franchise fee," i.e., any fee or charge for right to enter into business under franchise agreement, including, but not limited to, any payment for goods or services [see *Corp. Code § 31011*] and:

NOTE:

The following examples are found in Department of Corporations Release No. 3-F (rev.'d 1994) and are taken from various Commissioner's Opinions on the question of what constitutes a "franchise fee." In fact, this issue is very frequently the subject of interpretive opinion requests directed to the Commissioner. However, the Commissioner will not respond to questions concerning whether the payment or fee is simply payment on the account of the purchase of goods in an amount not exceeding the bona fide wholesale price, which payments are expressly excluded from the definition of "franchise fee" [see *Corp. Code § 31011*]. Whether a payment amounts to the "bona fide wholesale price" is a factual question and the Commissioner may only provide interpretive opinions on questions of law. For further discussion of this exclusion and related exemptions from registration, see § 51A.112.

A franchise fee may be payable in a lump sum or in installments. The amount of the installment payments may be made to depend on gross receipts or net profits in the form of a royalty, or it may be charged on units of merchandise ordered or sold by the franchisee. Thus, the franchise fee may be contained in the price charged by the franchisor or an affiliate of the franchisor for goods or services supplied to the franchisee or in the rental fee payable by the franchisee for business premises or equipment rented from the franchisor or an affiliate of the franchisor. Whether or not a fee or charge is "required" and whether it is made "for the right to enter into a business," is a mixed question of fact and law [Dep't of Corp. Release 3-F, When ***Does an Agreement Constitute a "Franchise"*** (rev.'d 1994)].

(1) Performance guaranties or deposits.

- (2) Initial set-up fees.
- (3) Fees for advertising.
- (4) Bookkeeping charges.
- (5) Payment for training school.
- (6) Royalty or percentage of gross receipts.
- (7) Charges for sales kits, brochures, and programs.
- (8) Rental fees or payments for services.

2. Determine whether, independently of requisite four elements [*see* P 1(a)-(d), *above*], agreement constitutes "franchise" because agreement [*Corp. Code* § 31005(b)]:

a. Constitutes contractual agreement between petroleum corporation or distributor and gasoline dealer, or between petroleum corporation and distributor, that grants distributor or gasoline dealer right to:

NOTE:

"Petroleum distributor" means any person or affiliate who purchases fuel for sale, consignment, or distribution to another, or who receives fuel on consignment for consignment or distribution to his or her own fuel accounts or to accounts of his or her supplier. However, the term does not include common carriers or their employees providing transportation services [*Corp. Code* § 31005.5(d)]. "Petroleum corporation" means any corporation or person owning, managing, or controlling the exploration, production, processing, transportation, or sale of crude or refined petroleum or any petroleum product [*Corp. Code* § 31005.5(l)].

(1) Use trademark, trade name, service mark, or other identifying symbol or name owned by other contracting party; or

(2) Occupy premises owned, leased, or controlled by other contracting party for purpose of engaging in retail sale of petroleum and other products of other contracting party.

b. Constitutes contract between refiner and petroleum distributor, between refiner and petroleum retailer, between petroleum distributors, or between petroleum distributor and petroleum retailer, under which refiner or petroleum distributor authorizes or permits petroleum retailer or petroleum distributor to use, in connection with sale, consignment, or distribution of gasoline, diesel, gasohol, or aviation fuel, trademark that:

NOTE:

"Refiner" means any person engaged in the refining of crude oil produce fuel, including any affiliates of that person [*Corp. Code* § 31005.5(c)]. "Petroleum retailer" means any person who purchases fuel for sale to the general public for ultimate consumption [*Corp. Code* § 31005.5(e)].

(1) Is owned or controlled by refiner; or

(2) Is owned or controlled by refiner that supplies fuel to petroleum distributor that authorizes or permits that use.

c. Constitutes contract under which petroleum retailer or petroleum distributor is authorized or permitted to occupy leased marketing premises in connection with sale, consignment, or distribution of fuel under trademark owned or controlled as described in P b, *above*.

d. Constitutes contract pertaining to supply of fuel that is to be sold, consigned, or distributed:

(1) Under trademark owned or controlled by refiner; or

(2) Under contract that has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, fuel was sold, consigned, or distributed under trademark owned and controlled by refiner on that date.

e. Any unexpired portion of any franchise included in PP a-d, *above*, that is transferred as permitted by provisions of franchise agreement or by state law [see Ch. 51, *Franchise Agreements*].

3. Determine whether agreement creates "subfranchise" [see *Corp. Code* § 31008.5].

NOTE:

"Subfranchise" is defined as any contract or agreement between a franchisor and a subfranchisor that grants the subfranchisor the right, in return for consideration given in whole or in part for that right, to sell or negotiate franchises in the name or on behalf of the franchisor. However, a franchise does not become a subfranchise merely because the agreement gives a person the right to receive compensation for referrals to the franchisor or subfranchisor or for acting as a salesperson on the franchisor or subfranchisor's behalf [*Corp. Code* § 31008.5].

Subfranchises are generally subject to the provisions governing other franchises [see *Corp. Code* § 31010]. Nonetheless, *Corp. Code* § 31115(b), regarding the issuance of stop orders denying the effectiveness of a franchise registration when a major inducement to prospective franchisees is fees or other compensation for participation in the sale of additional franchises, does not apply to subfranchises [*Corp. Code* § 31115(b)].

4. Determine whether agreement creates "area franchise" [see *Corp. Code* § 31008].

NOTE:

An "area franchise" is any franchise between a franchisor and a franchisee granting the franchisee the right to operate more than one franchise unit within a specified geographical area [*Corp. Code* § 31008]. Area franchises are generally subject to the provisions governing other franchises [see *Corp. Code* § 31010]. An entire area franchise sold by a subfranchisor for his or her own account is exempted from registration requirements if the sale is not effected by or through a franchisor [*Corp. Code* § 31102; see *Corp. Code* § 31009 ("subfranchisor" defined); see also § 51A.112 P 1a, *below*].

5. Determine whether business arrangement meets all of following criteria, and is thereby exempt from definition of "franchise" [see *Corp. Code* § 31005(c)]:

- a. Business is nonprofit cooperative organization operated by and for independent retailers;

NOTE:

The nonprofit organization is subject to an action for rescission or damages [*see Civ. Code § 3343.7*] if the organization fraudulently induce the plaintiff to join the organization [*Corp. Code § 31005(d)*].

- b. Organization wholesales goods and services primarily to its member retailers;
- c. Control and ownership of each member is substantially equal;
- d. Membership is limited to those who will avail themselves of services furnished by organization;
- e. Transfer of ownership is limited or prohibited;
- f. Capital investment receives no return;
- g. Substantially equal benefits pass to members on basis of patronage of organization;
- h. Members are not personally liable for obligations of organization in absence of direct undertaking or authorization by them;
- i. Services of organization are furnished primarily for use of members;
- j. Each member and prospective member is provided with a disclosure document that complies with specifications of *Corp. Code § 31111*; and
- k. No part of receipts, income, or profit of organization is paid to any profit making entity, except for arms-length payments for goods and services, and members are not required to purchase goods or services from designated profit making entity.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Franchise Relationships General Overview Business & Corporate Law Distributorships & Franchises Franchise Relationships Elements Business & Corporate Law Distributorships & Franchises Franchise Relationships Franchise Fees Energy & Utilities Law Oil Industry Franchising & Marketing



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51A FRANCHISE REGISTRATION

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

21-51A California Legal Forms--Transaction Guide § 51A.111

§ 51A.111 Existence of Offer or Sale in California

1. Determine whether following transactions (constituting, respectively, offer and sale) will take place:

a. Attempts to offer to dispose of, or solicitations of offers to buy, franchise or interest in franchise for value [*Corp. Code § 31018(b)*].

b. Contracts or agreements of sale, contracts to sell, or any disposition of franchise or any interest in franchise for value [*Corp. Code § 31018(a)*].

NOTE:

"Offer" and "sale" do not include the renewal or extension of an existing franchise if there is no interruption in the operation of the franchised business by the franchisee.

However, a material modification of an existing franchise, whether on renewal or otherwise, constitutes a "sale" [*Corp. Code § 31018(c)*; *see* § 51A.132].

2. Determine, under following rules, whether offer or sale will be made in California [*Corp. Code § 31013*].

a. Offer to sell is made in California, occurring when offer either originates from California or is directed by offeror to California and is received at place to which it is directed [*Corp. Code § 31013(a), (b)*; *see Dollar Sys. v. Avcar Leasing Sys. (9th Cir. 1989) 890 F.2d 165, 171-172 (sale of franchise to nonresident franchisee to operate entirely outside California was sold in California because negotiations took place, agreement was executed, and payments were made in California)*].

b. Offer to buy is accepted in California, when acceptance is communicated to offeror in California, i.e., when offeree directs acceptance to offeror reasonably believing offeror to be in California and it is received at place to which it is directed [*Corp. Code § 31013(a), (b)*].

c. Franchisee is domiciled in California and franchised business is or will be operated in California [Corp. Code § 31013(a)].

3. Determine whether particular mode of advertising is excluded from offers and sales made in California merely because either of following is true [Corp. Code § 31013(c)]:

a. It appears in bona fide newspaper or other publication of general, regular, and paid circulation with more than two thirds of its circulation outside of California during past 12 months; or

NOTE:

For purposes of the two-thirds requirement, if the newspaper or other publication has a separate edition for California that carries different advertising from the publication's other editions, the California edition is considered a separate publication [10 Cal. Code Reg. § 310.013].

b. It is heard or seen on radio or television program originating outside of California but received in California.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises General Overview Business & Corporate Law Distributorships & Franchises Franchise Relationships General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51A FRANCHISE REGISTRATION

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

21-51A California Legal Forms--Transaction Guide § 51A.112

§ 51A.112 Exemptions From Registration

1. Determine whether one of following statutory exemptions from registration is available:

a. Offer or sale of franchise by franchisee for franchisee's own account, or offer or sale of entire area franchise owned by subfranchisor for subfranchisor's own account, if sale is not effected by or through franchisor [*Corp. Code § 31102*].

NOTE:

A sale is not effected by or through a franchisor merely because the franchisor has a right to approve or disapprove of the sale [*see Corp. Code § 31102*]. When the franchisor's participation in the franchisee's sale of the franchise is limited to furnishing information, referring prospective purchasers, or approving purchasers, that participation does not meet the "by or through" test and does not defeat the exemption under *Corp. Code § 31102* [*see Fox v. Ehrmantraut (1980) 28 Cal. 3d 127, 141-142, 167 Cal. Rptr. 595, 615 P.2d 1383*].

b. Any transaction relating to a bank credit card plan [*Corp. Code § 31103; see Civ. Code § 1747.02(a)*].

c. Offers or sales of franchises by franchisor, commonly referred to as "exempt large franchisors," meeting following requirements [*Corp. Code § 31101*]:

NOTE:

The exemption for "large franchisors" is available only if the franchisor files a notice of exemption and the appropriate fee with the Commissioner of Corporations before an offer or a sale of a franchise in California during any calendar year in which one or more franchises are sold, excluding any material modification [*Corp. Code § 31101(d); see Corp. Code § 31500(f)* (filing fee); *see also § 51A.240*].

(1) Franchisor has minimum net worth of at least [*Corp. Code § 31101(a)*]:

NOTE:

Net worth must be determined according to the franchisor's audited financial statement, and, when necessary, the audited financial statement of the corporation owning at least 80 percent of the franchisor. The financial statements must be for the fiscal year just ended. However, when necessary, the franchisor and its parent corporation may rely upon the immediately preceding fiscal year's audited financial statement for 15 months from that fiscal year end date [*Corp. Code § 31101(a)*]. For these purposes, a "parent" corporation is one owning at least 80 percent of the franchisor [*see Corp. Code § 31101(a)*].

(a) Five million dollars on consolidated basis according to its audited financial statement;

(b) One million dollars and its parent has net worth of at least five million dollars according to its audited financial statements of franchisor and parent respectively; or

(c) One million dollars according to its unaudited financial statement and its parent has net worth on consolidated basis of at least five million dollars according to its audited financial statement.

NOTE:

Under this alternative qualification, the parent corporation must absolutely and unconditionally guarantee to assume the duties and obligations of the franchisor under the franchise agreement if the franchisor becomes unable to perform them [*Corp. Code § 31101(a)(3)*].

(2) Franchisor has franchising experience as follows [*Corp. Code § 31101(b)*]:

NOTE:

The franchisor or its parent corporation (owning at least 80 percent of franchisor) must comply with one of the listed conditions throughout the five-year period immediately preceding the offer and sale of the franchise. Alternatively, this requirement may be met through compliance with one of the following listed conditions during part of the period and one or more of the following conditions during the balance of the period [*Corp. Code § 31101(b)*].

(a) Has had at least 25 franchisees conducting business that is subject of franchise;

(b) Franchisor itself has conducted business that is subject of franchise;

(c) Parent corporation has had at least 25 franchisees conducting business that is subject of franchise;
or

(d) Parent corporation has conducted business that is subject of franchise.

(3) Franchisor furnishes abbreviated disclosure statement to each prospective franchisee at least 10 business days before either execution of any agreement or receipt of any consideration [*Corp. Code § 31101(c)*].

NOTE:

The disclosures that must be made are listed in the statute [*see Corp. Code § 31101(c)(1)*]. They are not repeated here because neither the abbreviated disclosure statement nor the time specified for its delivery complies with the standards established by the Federal Trade Commission [*see 16 C.F.R. § 436.2*]. In other words, the large franchisor exemption, while relieving the franchisor of the burdens of California

registration, does not excuse the franchisor from complying with the FTC's rule and, in particular, the legal requirement that a disclosure document be prepared and delivered to prospective franchisees in the same manner as would be required if the California exemption did not exist.

d. Offers or sales of franchise by franchisor who [*Corp. Code* § 31104(a)]:

(1) Is petroleum corporation or distributor who is wholesale distributor or marketer of petroleum products not engaged in production or refining of petroleum.

(2) Has been doing business continuously for past five years.

(3) Does not require advance of funds in nature of fee or lease for franchise agreement.

NOTE:

An "advance of funds" means a fee or lease for the agreement, but does not mean rent for the possession or use, or both, of the premises or property, the purchase of inventory for resale or supplies, utility deposits, and other consideration or expenditures for the formation or operation, or both, of a wholesale distributor or marketer entity [*Corp. Code* § 31104(c)(2)].

(4) Makes disclosures required of franchisors for whom large franchisor exemption is available [*see* P 1(c)(3), *above*].

NOTE:

As discussed above with respect to the large franchisor exemption, the relaxed disclosure requirements are meaningless if the business arrangement is a "franchise" within the meaning of FTC rule 436 [16 C.F.R. pt. 436]. In the case of marketers or wholesale distributors for whom the exemption from California registration is available, federal disclosure requirements will probably apply, because even if no right to use a trademark or trade name is granted along with the right to occupy premises or property, the arrangement could still be a "franchise" in the nature of a business opportunity venture [*see* 16 C.F.R. § 436.1(h)(1)]. The FTC rule includes in the definition of "franchise" the requirement that a franchise fee be paid [*see* 16 C.F.R. § 436.1(h)(3)], but, unlike the California exemption, the FTC's interpretation of "required payment" includes virtually every source of revenue received by the franchisor pursuant to the agreement, including rents [*see* "Final Guides to the Franchising and Business Opportunity Ventures Trade Regulation Rule," 44 *Fed. Reg.* 166, p. 49967 (1979)].

e. Offers, sales, or other transfers of franchise (or any interest in franchise) to resident of another state, territory, or foreign country if all locations from which sales, leases, or other transactions between franchise and its customers are made, or goods and services distributed, are physically located outside California [*Corp. Code* § 31105].

f. Offers, sales, or other transfers of franchise (or any interest in franchise), provided that transaction meets requirements in (1) and (2), *below* [*Corp. Code* § 31106]:

(1) Any of following conditions apply:

(a) One or more of owners of prospective franchisee owning at least 50 percent interest in prospective franchisee meet both of following:

(i) Owner or owners have had, within seven years before date of sale or other transaction, at least 24 months' experience being responsible for financial and operational aspects of business offering products and services substantially similar to those offered by franchise.

(ii) Owner or owners are not controlled by franchisor.

(b) One or more owners of prospective franchisee owning at least 50 percent interest in franchisee meet both of following:

(i) Owner or owners are, or have been within 60 days before sale or other transaction, an officer, director, managing agent, or owner of at least 25 percent interest in franchisor for at least 24 months.

(ii) Owner or owners are not controlled by franchisor.

(c) Offer, sale, or other transfer is of additional franchise either to existing franchisee of franchisor, or to entity, one or more of officers, directors, managing agents or owners of at least 25 percent interest of which is existing franchisee of franchisor; provided that in either case, for 24 months or more, franchisee or qualifying person has engaged in business offering products or services substantially similar to those to be offered by franchise being sold or otherwise transferred.

(2) Franchisor files notice of exemption with Commissioner of Corporations [*see Corp. Code § 31106(b); 10 Cal. Code Reg. § 310.101; see also § 51A.241*] and pays fee prescribed by *Corp. Code § 31500(f)* not later than 15 calendar days after sale of franchise in California.

g. Offers, but not sales, by franchisor of franchise while application for renewal or amendment is pending, if prospective franchisee receives all of following [*Corp. Code § 31107*]:

(1) Disclosure document and its exhibits [*see Corp. Code § 31114*], as filed with Commissioner of Corporations with application for renewal or amendment [*Corp. Code § 31107(a)*].

(2) Written statement from franchisor that [*Corp. Code § 31107(b)*]:

(a) Filing has been made, but is not effective;

(b) Information in disclosure document and its exhibits [*see Corp. Code § 31114*] has not been reviewed by Commissioner of Corporations; and

(c) Franchisor will deliver to prospective franchisee disclosure document and exhibits showing all material changes from disclosure document and exhibits received by prospective franchisee under *Corp. Code § 31107(a)* [*see P (1), above*], at least 10 business days before earlier of:

(i) Prospective franchisee's execution of binding agreement, or

(ii) Payment of any consideration to franchisor or any person affiliated with franchisor.

(3) Disclosure document and exhibits in accordance with *Corp. Code § 31107(b)(3)* [*see P (2)(c), above*].

2. Determine whether transaction is exempt from registration because franchise involves addition of new product or

service line to existing business of prospective franchisee and all of following is true [*see Corp. Code § 31108; see also Dep't of Corp. Release No. 3-F (rev.'d 1994)*]:

- a. For at least last 24 months before date of sale of franchise, prospective franchisee, or, if prospective franchisee is not natural person, existing officer, director, or managing agent of prospective franchisee who has held that position with prospective franchisee for at least last 24 months, has been engaged in business offering products or services substantially similar or related to those to be offered by franchised business;
- b. New product or service is substantially similar or related to product or service being offered by prospective franchisee's existing business;
- c. Franchised business will be operated from same business location as prospective franchisee's existing business;
- d. Parties anticipated, in good faith, when agreement establishing franchise relationship was reached, that sales resulting from franchised business will not represent more than 20 percent of total sales in dollar volume of franchisee on annual basis;
- e. Prospective franchisee is not controlled by franchisor; and
- f. Franchisor files notice of exemption with Commissioner and pays required fee [*see Corp. Code § 31500(f)*] before offer or sale of franchise in California during any calendar year in which one or more of those franchises are sold.

3. Determine whether transaction is exempted from registration because each purchaser is one of following persons or entities and meets following specified requirements [*Corp. Code § 31109*]:

NOTE:

No franchisor or any of its officers, directors, employees, or agents may form, organize, engage, or assist any person to purchase a franchise for resale or distribution to avoid the registration requirements of *Corp. Code § 31110 et seq.* [*Corp. Code § 31109(f)*].

a. Each purchaser is either:

- (1) Partner, executive officer, or director of franchisor, or executive officer of its corporate general partner if franchisor is partnership, or manager if franchisor is limited liability company [*Corp. Code § 31109(a)(1)*].
- (2) Natural person whose net worth, or joint net worth with that person's spouse, exceeds \$1,000,000 at time of purchase of franchise, excluding aggregate value of that person's personal residence and all retirement or pension plan accounts or benefits, home furnishings, and automobiles [*Corp. Code § 31109(a)(3)*].
- (3) Natural person whose gross income exceeded \$300,000 per year in each of the two most recent years, or whose joint gross income with that person's spouse exceeded \$500,000 per year in each of those years, and who reasonably expects to reach same income level in current year [*Corp. Code § 31109(a)(4)*].

(4) Entity with total assets exceeding \$5,000,000, according to its most recent financial statements, which was not specifically formed for purpose of acquiring franchise that is offered [*Corp. Code § 31109(a)(2)*; *see Corp. Code § 31109(a)(2)(A), (B)* (requirements for financial statements)].

NOTE:

In this context, an "entity" is either an organization described in *I.R.C. § 501(c)(3)*, a corporation, a Massachusetts or similar business trust, a limited liability company, or a partnership [*Corp. Code § 31109(a)(2)*].

(5) Entity in which each equity owner is person or entity described in preceding four paragraphs [*Corp. Code § 31109(a)(5)*].

b. Each purchaser has knowledge and experience in financial and business matters, such that franchisor reasonably believes, based on reasonable inquiry before sale, that each purchaser can evaluate merits and risks of, and protect own interests in, franchise investment [*Corp. Code § 31109(b)*].

NOTE:

The source of a purchaser's knowledge and experience in financial matters may be professional advisors if they are not affiliated with, and not directly or indirectly compensated by, the franchisor or an affiliate or selling agent of the franchisor [*Corp. Code § 31109(b)*].

c. Each purchaser purchases franchise for purchaser's own account, or trust account if purchaser is trustee, for purpose of conducting business as franchise and not for sale in connection with any resale or distribution of franchise or any franchise interest [*Corp. Code § 31109(c)*].

d. Immediate cash payment required from purchaser who is natural person, on purchase of franchise, does not exceed 10 percent of that person's net worth or joint net worth with that person's spouse, exclusive of that person's personal residence, any retirement or pension accounts or benefits, home furnishings, and automobiles [*Corp. Code § 31109(d)*].

e. Franchisor files notice of exemption with Commissioner and pays prescribed fee before any offer or sale [*see Corp. Code § 31109(e)*; *see also Corp. Code § 31500(f) (fee)*].

4. Determine whether transaction is exempted from registration because it involves offer or sale of franchise on terms different from terms of offer registered under *Corp. Code §§ 31111, 31121, or 31123*, if following requirements are met:

a. Initial offer is offer registered under *Corp. Code § 31111, 31121, or 31123* [*Corp. Code § 31109.1(a)(1)*].

b. Prospective franchisee receives all of following in separate written appendix to disclosure document [*Corp. Code § 31109.1(a)(2)*]:

NOTE:

The franchisor must provide a copy of the negotiated terms described in *Corp. Code § 31109.1(a)* [*see PP (1)-(3), below*] to the prospective franchisee within five business days following a request by the franchisee [*Corp. Code § 31109.1(b)*]. The franchisor must maintain copies of all material negotiated terms for which this exemption is claimed for a period of five years from the effective date of the first agreement containing the relevant negotiated term [*see Corp. Code § 31109.1(c)*; *see also Corp. Code § 31109.1(d)*].

("material" means that reasonable franchisee would view terms as important in negotiating franchise)].

(1) Summary description of each material negotiated term that was negotiated by franchisor for California franchise during 12-month period ending in calendar month immediately preceding month in which negotiated offer or sale is made under *Corp. Code* § 31109.1.

(2) Statement indicating that copies of negotiated terms are available on written request.

(3) Name, telephone number, and address of franchisor's representative to whom request for copy of negotiated terms may be made.

c. Franchisor certifies or declares in appendix to its application for renewal that all requirements of *Corp. Code* § 31109.1 have been met [*Corp. Code* § 31109.1(a)(3)].

d. Negotiated terms confer additional benefits on franchisee [*Corp. Code* § 31109.1(a)(4)].

5. Determine whether transaction is exempted from registration by rules of Corporations Commissioner as not being within purposes of law and registration of which would be unnecessary or appropriate in public interest or for protection of investors [*see Corp. Code* § 31100], such as following:

a. Offers or sales of franchise that would be subject to registration solely because franchisee is required to pay, directly or indirectly, franchise fee that, on annual basis, does not exceed sum of \$500 [*10 Cal. Code Reg.* § 310.011].

NOTE:

This exemption for "nominal franchise fees" is much narrower than its federal counterpart [*see 16 C.F.R.* § 436.2(a)(3)(iii); *see also* § 51A.115, P 3]. Consequently, franchisors may be exempt from satisfying any federal disclosure requirements, including the timing of prospectus delivery, but remain obliged to meet all California requirements.

b. Offers or sales of franchise that would be subject to registration solely because franchisee by agreement must pay franchisor, in addition to any annual franchise fee not exceeding \$500, sum not exceeding \$1,000 annually on account of purchase price or rental of fixtures, equipment, or other tangible property utilized in and necessary for operation of franchised business when price or rental so charged does not exceed cost franchisee would incur in acquiring items from other persons or on open market [*10 Cal. Code Reg.* § 310.011.1; *see 10 Cal. Code Reg.* § 310.011].

NOTE:

This expansion of the "nominal franchise fee" exemption would not excuse the franchisor from compliance with federal disclosure requirements unless the franchisee's payments are less than \$500 for the period from six months before until six months after the franchise has commenced operation [*see 16 C.F.R.* § 436.2(a)(3)(iii)]. Payments made after six months have elapsed from commencement of operations are not counted towards the \$500 minimum.

c. Any offer or sale of a franchise on terms different from the terms of the offer registered under *Corp. Code* § 31111, 31121 or 31123, if all following conditions are met [*10 Cal. Code Reg.* § 310.100.2]:

(1) Initial offer is offer registered under *Corp. Code* §§ 31111, 31121 or 31123.

(2) When prospective franchisee receives disclosure document, he or she also receives copies of all Notices of Negotiated Sale of Franchise filed with Commissioner within last 12 months, if any [see § 51A.254].

(3) Before selling another franchise, franchisor amends its registered offer to disclose the following:

"The terms of Item(s) _____ of this Disclosure Document have been negotiated with other franchisees. A copy of all Negotiated Sales Notices filed in California in the last twelve months is attached as Exhibit _____."

NOTE:

The above disclosure should be made in the UFDD Item that was negotiated or in an appendix to the UFDD. This disclosure must be made if the negotiated sale occurred within 12 months of the offering being made. An amendment making only this disclosure is effective when filed [10 Cal. Code Reg. § 310.100.2(a)(3)].

(4) A Notice of Negotiated Sale of Franchise is filed with Commissioner within 15 business days after negotiated sale is consummated [see 10 Cal. Code Reg. § 310.100.2(b); see also § 51A.254].

(5) Franchisor certifies or declares in appendix to its application for renewal that all required notices have been filed with Commissioner [see 10 Cal. Code Reg. §§ 310.100.2(a)(4), 310.122].

d. Any offer to sell franchise ("Internet Offer") communicated through Internet, World Wide Web, or any other similar proprietary or common carrier electronic delivery system, provided as follows [10 Cal. Code Reg. § 310.100.3(a)]:

NOTE:

Reliance on an exemption from registration under this rule does not preclude a franchisor from relying on any other exemption provided under the Franchise Investment Law or the rules promulgated that law [10 Cal. Code Reg. § 310.100.3(b)].

(1) Internet Offer indicates, directly or indirectly, that franchise is not being offered to residents of California;

(2) Internet Offer is not otherwise directed to any person in California by or on behalf of franchisor or anyone acting with franchisor's knowledge; and

(3) No franchises are sold in California by or on behalf of franchisor until offering has been registered under Franchise Investment Law and declared effective, and Uniform Franchise Disclosure Document (UFDD) has been delivered to offeree before sale and in compliance with Franchise Investment Law.

6. If transaction is exempt from registration under *Corp. Code* § 31101, 31104, 31106, 31108, complete and file Notice of Exemption [see 10 Cal. Code Reg. § 310.101; see also §§ 51A.240, 51A.241].

NOTE:

Notice of Exemption forms for use when the transaction is exempt from registration under *Corp. Code* §§ 31109 or 31109.1 had not been printed as of December 2004. Questions should be directed to the

department attorney on call to handle questions related to California franchise law, at 1-866-275-2677 or 1-213-576-7500.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law
Distributorships & Franchises
Registration & Disclosure
General Overview
Energy & Utilities
Law
Oil Industry
Franchising & Marketing



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21-51A California Legal Forms--Transaction Guide § 51A.113

§ 51A.113 Obtaining Interpretive Opinion

NOTE:

If there is uncertainty concerning the Corporations Commissioner's jurisdiction over a transaction pursuant to the provisions of the Franchise Investment Law, counsel should request an interpretive opinion from the Commissioner [*see 10 Cal. Code Reg. § 250.12(a); Corp. Code § 31510*]. If an interpretive opinion is issued, acts done or omitted in good faith in reliance on the opinion cannot result in liability under the Franchise Investment Law [*Corp. Code § 31511; Dep't of Corp. Release No. 61-C (revised 1999), reproduced in Marsh & Volk, Practice Under the California Securities Laws, App. A-4 (Matthew Bender); see also Dep't of Corp. Release No. 7-F (June 25, 1980), reproduced in Marsh & Volk, Practice Under the California Securities Laws, App. C-4 (Matthew Bender)*].

1. Prepare written request for interpretive opinion from Commissioner stating [*10 Cal. Code Reg. § 250.12(a); Dep't of Corp. Release No. 61-C (revised 1999), reproduced in Marsh & Volk, Practice Under the California Securities Laws, App. A-4 (Matthew Bender); see also Dep't of Corp. Release No. 7F (June 25, 1980), reproduced in Marsh & Volk, Practice Under the California Securities Laws, App. C-4 (Matthew Bender); see § 51A.251*]:

- a. That interpretive opinion is requested.
- b. Names of principal parties to proposed transaction, including identification of those who may rely on opinion (e.g., "possible franchisor").
- c. Questions presented and facts and circumstances of transaction in full, with significant documents attached.

NOTE:

Whether the price that the franchisee is required to pay under the agreement for goods

exceeds their bona fide wholesale price (or exceeds it by an amount in excess of that allowed by Cal. Code Reg. §§ 310.011 or 310.011.1 is a question of fact. Similarly, whether the quantity of goods the franchisee is required to purchase or pay for exceeds what a reasonable business person normally would purchase as a starting inventory or supply, or to maintain a going inventory or supply is also a question of fact. The Commissioner will not resolve these questions in an interpretive opinion since these opinions are limited to the interpretation and determination of legal questions arising under the Franchise Investment Law [Dep't of Corp. Release No. 3-F (revised 1994); *see* Dep't of Corp. Release No. 61-C (revised 1999)].

d. Attorney's views with respect to questions presented.

NOTE:

Although attorneys are not required to state their views, the Department "strongly urges" attorneys to set forth their views with respect to the questions presented in a request for an interpretive opinion. The Department advises attorneys, in so doing, to review applicable law and regulations, previous opinions issued by the Commissioner of Corporations, and significant state and federal court decisions reflecting similar factual situations. A request containing a discussion of the applicable law, with appropriate citations, will often result in a more expeditious response [Dep't of Corp. Release No. 61-C (revised 1999), reproduced in Marsh & Volk, Practice Under the California Securities Laws, App. A-4 (Matthew Bender); *see also* Dep't of Corp. Release No. 7F (June 25, 1980), reproduced in Marsh & Volk, Practice Under the California Securities Laws, App. C-4 (Matthew Bender)].

e. If confidential treatment of request is desired, facts supporting that treatment [*see 10 Cal. Code Reg. § 250.10*].

NOTE:

An interpretive opinion and the request for the opinion are ordinarily available for public inspection [*10 Cal. Code Reg. § 250.9.1(e)*]. However, confidential treatment is available on request [*see 10 Cal. Code Reg. §§ 250.10, 250.10.5*]. Confidential information held by the Commissioner is not disclosed unless state or federal agencies lawfully request the information, an investigation requires its disclosure, or the Commissioner determines confidential treatment is no longer justified [*10 Cal. Code Reg. § 250.10.5(a)(3)*]. Requests for confidential treatment are also available for public inspection [*10 Cal. Code Reg. § 250.10(b)(7)*].

2. Mail request for interpretive opinion to:

Commissioner of Corporations
c/o Office of Policy
Department of Corporations
1515 K Street, Suite 200
Sacramento, California 95814-4052

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Causes of Action General Overview Business & Corporate Law Distributorships & Franchises Franchise Relationships General Overview



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§ 51A.114 Existence of Franchise for Purposes of Federal Disclosure Requirements

1. Determine whether contemplated agreement has following characteristics that will make it a franchise [see 16 C.F.R. § 436.1(h)]:

NOTE:

The federal rule covers business format and product franchises. The name given to the business arrangement is irrelevant in determining whether it is covered. A business arrangement described as a "franchise" will not be covered unless it meets the three definitional elements in 16 C.F.R. § 436.1(h). Similarly, a self-described "distributorship" will be covered only if the three definitional elements are satisfied [http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

a. Franchisor will promise to provide a trademark or other commercial symbol.

NOTE:

The term "trademark" is intended to be read broadly to cover not only trademarks, but any service mark, trade name, or other advertising or commercial symbol [http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

b. Franchisor will promise to exercise significant control or provide significant assistance in the operation of the business.

NOTE:

"Significant control" or "assistance" includes site approval; requirements covering design

or appearance, hours, production techniques, accounting, personnel policies and practices, promotional campaigns; and customer, location, and territorial restrictions. Controls deemed insignificant include health and safety requirements prescribed by law and financing assistance. [<http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

- c. Franchisor will require a minimum payment of at least \$500 during first six months of operations.

NOTE:

All sources of revenue flowing from franchisee to the franchisor are "required payments," even if they are not denominated as a "franchise fee." Thus, rents, charges for advertising assistance, training costs, and payments for required equipment and supplies are included. However, "required payment" do not include any payments made by a person at a bona fide wholesale price for reasonable amounts of merchandise for resale. "Reasonable amounts" means those not in excess of the amounts which a reasonable businessman normally would purchase as a starting inventory or supply or to maintain a going inventory or supply [<http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

2. Determine whether relationship to be created is represented, either orally or in writing, to be franchise, as defined above [*16 C.F.R. § 436.1(h)*; see § 1, *above*].

NOTE:

The definition of "franchise" covers relationships that are represented either orally or in writing as having the characteristics specified in *16 C.F.R. § 436.1(h)*, regardless of whether the representations are, in fact, true or can be fulfilled. Accordingly, if a seller of a business arrangement represents that it licenses its trademark, promises to provide significant assistance in the buyer's business operations, and charges a minimum payment of at least \$500, the arrangement will be covered by the Rule even if, for example, the seller, in fact, has no trademark or has no means to provide any assistance to buyers [<http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

3. Determine whether business relationship is one that is not covered by federal franchise law, for example [<http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))]:

- a. Business opportunity ventures [*see 16 C.F.R. pt. 437*].
- b. Franchises that will be located outside of the United States and its territories.

NOTE:

As a matter of policy, the franchise rule reaches only the offer or sale of franchises to be located in the United States and its territories. Accordingly, the rule does not apply, for example, to the sale of a franchise to an American citizen living in Paris (or in Chicago), or to a French citizen in Paris, when the outlet will be located in Europe [<http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesBusiness OpportunitiesBusiness & Corporate
LawDistributorships & FranchisesFranchise RelationshipsGeneral OverviewBusiness & Corporate LawDistributorships
& FranchisesFranchise RelationshipsFranchise FeesBusiness & Corporate LawDistributorships &
FranchisesRegistration & DisclosureGeneral OverviewBusiness & Corporate LawDistributorships &
FranchisesTrademark Licensing



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21-51A California Legal Forms--Transaction Guide § 51A.115

§ 51A.115 Exemptions From Federal Disclosure Requirements

1. Determine whether contemplated franchise is exempt as "fractional franchise" because [*see 16 C.F.R. 436.8(a)(2)*; <http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))]:

NOTE:

The "fractional franchise" exemption does not exist under California's Franchise Investment Law; however, one of the other California exemptions may be available.

a. It is franchise [*see pt. § 51A.114*] in which franchisee or any of its current directors or executive officers has been in type of business represented by franchise relationship for more than two years; and

b. Parties to relationship anticipated, or should have anticipated, at time agreement establishing franchise was reached, that sales arising from relationship would represent no more than 20 percent of sales in dollar volume of franchisee.

2. Determine whether arrangement is exempt as concession or leased department in lessor's premises [*see 16 C.F.R. 436.8(a)(3)*; <http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

NOTE:

A "leased department" is an arrangement in which an independent retailer sells its own goods and services from premises leased from a larger retailer in the larger retailer's store. This exemption is available only if the independent retailer is not required directly or indirectly to purchase its goods or services from either the larger retailer or from suppliers

required or approved by the larger retailer. These arrangements usually occur in the merchandising of footwear, optometry, tobacco, cosmetics, and jewelry [<http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

3. Determine whether contemplated franchise is exempt because total franchise payments (amount franchisee will be required to pay as condition of obtaining or commencing franchise) to be made before or within six months after commencement of operations by franchisee will be less than \$500 [*see 16 C.F.R. 436.8(a)(1)*; <http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

NOTE:

A franchise commences operation when it first makes goods or services available for sale. A commitment entered into during the first six months that requires a payment later than six months after commencing operation (such as a promissory note or that portion of lease payments made after six months) is not counted towards the \$500 minimum [<http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

4. Determine whether contemplated franchise is exempt because no material term or aspect of relationship or arrangement will be evidenced by writing [*see 16 C.F.R. 436.8(a)(7)*; <http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

NOTE:

California's Franchise Investment Law includes both oral and written agreements in its definition of "franchise" [*Corp. Code § 31005(a)*]. However, even under the federal rule, it is doubtful that oral franchises would constitute more than an infinitesimal amount of the franchise relationships entered. This is especially true when one considers that the FTC takes the view that the exemption is unavailable if any writing, even if unsigned, exists as to a material term, such as a purchase order for goods [*see* <http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

5. Determine whether contemplated franchise is exempt because it is petroleum marketer and reseller covered by Petroleum Marketing Practices Act (15 U.S.C. § 2801) [*see 16 C.F.R. 436.8(a)(4)*; <http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

NOTE:

The most common types of franchises falling under this exemption are gasoline station franchises <http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

6. Determine whether contemplated franchise is exempt because initial investment is at least \$1 million, excluding the cost of unimproved land and any franchisor (or affiliate) financing [*see 16 C.F.R. 436.8(a)(5)*; <http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

7. Determine whether contemplated franchise is exempt because it is offered to officers, directors,

general partners, managers (collectively "officers"), and owners of franchisor [*see 16 C.F.R. 436.8(a)(6)*; <http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

NOTE:

To take advantage of the exemption, an officer must seek to purchase at least a 50% ownership interest in the franchise being offered for sale. In addition, the officer must have at least two years of experience with the franchisor as an officer, director, general partner, or manager. Further, the prior experience must be recent: the officer must currently be associated with the franchisor or have been associated with the franchisor within 60 days of the proposed franchise sale [*see 16 C.F.R. 436.8(a)(6)*; <http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf> (Federal Trade Commission Franchise Rule Compliance Guide (2008))].

8. Determine whether business may petition for exemption from any FTC rule defining unfair or deceptive practice or act on ground that application of rule to business or to class of which it is member is unnecessary to prevent unfair or deceptive practice or act [*15 U.S.C. § 57a(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Franchise Relationships General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview



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[Reserved]

§§ 51A.116[Reserved]



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21-51A California Legal Forms--Transaction Guide § 51A.130

§ 51A.130 Preparing and Filing Application for Registration Under Franchise Investment Law

NOTE:

Large franchisors who are exempt from registration must file a notice of exemption with the Commissioner of Corporations and pay the required fee [*see Corp. Code § 31500(f)*] before the offer or sale of a franchise in California [*Corp. Code § 31101(d)*; *see also* P 8, *below*]. Franchisors seeking exemption under *Corp. Code* §§ 31104, 31106, or 31108 similarly must file a notice of exemption and pay the required fee [*see Corp. Code § 31500(f)*] before the offer or sale of a franchise in California [*see Corp. Code* §§ 31104(b), 31106(b), 31108(f); *see also* P 8, *below*].

1. Obtain, from Department of Corporations, that agency's "Guidelines for Franchise Registration" (Department of Corporations Packet 310.111), which consists of following forms:

NOTE:

The Franchise Investment Law application rules [*see 10 Cal. Code Reg. §§ 310.000 et seq.*] prescribe use of the Uniform Franchise Disclosure Document (UFDD) as adopted by the North American Securities Administrators Association, Inc., as the form of Uniform Franchise Registration Application [*10 Cal. Code Reg. §§ 310.111, 310.114.1*]. Packet 310.111 contains the required forms, instructions for their completion, modification required for use in California, and filing instructions. The latest edition of this packet is available on the Internet at <http://www.corp.ca.gov/forms/pdf/ufoc.pdf>.

- a. Facing page and supplemental information page of UFDD [*see § 51A.200*].
- b. Sales agent disclosure form [*see § 51A.201*].
- c. Uniform Consent to Service of Process [*see § 51A.202*].

- d. Certification page [see § 51A.203].
- e. Customer authorization of disclosure of financial records [see § 51A.204].
- f. Guarantee of performance [see § 51A.205].
- g. Body of UFDD, consisting of cover page, table of contents, and body of form [see § 51A.209].
- h. If applicable, include preface or appendix to UFDD containing disclosures regarding negotiated sale of franchise [see 10 Cal. Code Reg. § 310.100.2; see also § 51A.213].

NOTE:

For discussion of the additional disclosures required for a negotiated sale of a franchise, see § 51A.213. For a form for the required notice of the negotiated sale of a franchise, see § 51A.254.

- i. If applicable, include power of attorney or corporate resolution authorizing person other than officer or general partner to sign application [see § 51A.210].
 - j. Two copies of any advertising to be used [see § 51A.140].
2. Together with client and accountants, assemble information needed to complete registration application and UFDD.

NOTE:

The "Requirements for Preparation of a Uniform Franchise Disclosure Document" [see Guidelines for Franchise Registration" (Department of Corporations Packet 310.111)] is an itemized list of topics that must be covered in the completed UFDD [see § 51A.209 (requirements)]. This list may be used as a check sheet as the necessary information is compiled.

3. Have application signed by officer or general partner of applicant [10 Cal. Code Reg. § 310.112; see § 51A.203].

NOTE:

The application may be signed by a person holding a power of attorney from the applicant, in which case a copy of the power of attorney or corporate resolution authorizing the person to sign must be attached as an exhibit [10 Cal. Code Reg. § 310.112; see § 51A.210 (form for corporate resolution)].

4. Obtain manually signed consent of auditor for use of audited financial statements appearing in UFDD [see § 51A.206].

5. Obtain check payable to "California Commissioner of Corporations" in amount necessary to cover filing fee [see Corp. Code § 31500(b)].

NOTE:

Although the regulations state that checks should be made payable to the "Department of Corporations" [see 10 Cal. Code Reg. § 250.15], the franchise registration guidelines state that checks should be made payable to the "California Commissioner of Corporations" [Guidelines for Franchise Registration, Department of Corporations Packet 310.111].

6. Prepare transmittal letter [see § 51A.211].

7. File Uniform Franchise Registration Application and related documents with Department of Corporations at one of following addresses [see Guidelines for Franchise Registration, Department of Corporations Packet 310.111 at <http://www.corp.ca.gov/forms/pdf/ufoc.pdf>]:

a. CALIFORNIA DEPARTMENT OF CORPORATIONS 320 WEST 4th STREET, SUITE 750 LOS ANGELES, CA 90013-2344

b. CALIFORNIA DEPARTMENT OF CORPORATIONS 71 STEVENSON STREET, SUITE 2100 SAN FRANCISCO, CA 94105-2908

c. CALIFORNIA DEPARTMENT OF CORPORATIONS 1515 K STREET, SUITE 200 SACRAMENTO, CA 95814-4052

8. If client is franchisor who is exempt from registration, in lieu of application for registration, advise client to file following with Commissioner of Corporations:

NOTE:

If the exemption is based on *Corp. Code* §§ 31101, 31104, or 31108, the notice and fee must be filed before the offer or sale of franchise in California during any calendar year in which one or more franchises are sold, excluding any material modification [*Corp. Code* §§ 31101(d), 31104(b), 31108(f); **see** § 51A.10[4]; **see also** § 51A.112, P 1c]. If the exemption is based on *Corp. Code* § 31106, the notice and fee must be filed no later than 15 calendar days after the sale of a franchise in California [*Corp. Code* §31106(b)].

a. Notice of exemption.

b. Applicable filing fee [see *Corp. Code* § 31500(f)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesRegistration & DisclosureGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureRequirements



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21-51A California Legal Forms--Transaction Guide § 51A.131

§ 51A.131 Amending Application for Registration

1. Determine whether there has been any material change in information contained in registration application as originally submitted, amended, or renewed [*Corp. Code § 31123*].

NOTE:

The Commissioner of Corporations may define by rule what constitutes a "material change" and the circumstances under which a revised disclosure document must accompany the application for an amended registration [*Corp. Code § 31123*]. However, no such rule has been adopted, so common sense should govern when the issue of materiality is concerned. The safest and recommended course is to file an amendment to the application whenever the information shown on it is changed. Although the information on the application proper (the facing page, supplemental information, sales agent's disclosure form, and consent to service) is not repeated to a significant extent in the disclosure document, the document is part of the application and should be amended without fail each time the information in it becomes obsolete.

2. If so, completely fill in facing page of Uniform Franchise Registration Application [*see § 51A.200*], indicating at heading whether amendment is pre-effective or post-effective [*10 Cal. Code Reg. § 310.123*].

NOTE:

A post-effective amendment must be carefully distinguished from a "material modification of an existing franchise" [*see Corp. Code § 31125; see also § 51A.142*]. A post-effective amendment is appropriate when either (1) registration of the franchise has become effective, but no franchises have been sold; or (2) registration is effective and franchises have been sold, but the amendment to the registration does not affect the terms of the franchise agreement; for example, if an additional salesperson is employed by the

franchisor [**see** Guidelines for Franchise Registration, Department of Corporations Packet 310.111].

3. Complete only items of registration application or exhibits to application that are being amended and indicate changes from original text by underscoring or other appropriate method [*10 Cal. Code Reg. §§ 310.122.1, 310.123*].

4. Obtain check payable to "California Commissioner of Corporations" in amount necessary to cover filing fee [*Corp. Code § 31500(d)*].

NOTE:

Although the regulations state that checks should be made payable to the "Department of Corporations" [**see** *10 Cal. Code Reg. § 250.15*], the franchise registration guidelines state that checks should be made payable to the "California Commissioner of Corporations" [Guidelines for Franchise Registration, Department of Corporations Packet 310.111]. The filing fee is required only for a post-effective amendment; there is no fee for a pre-effective amendment [*Corp. Code § 31500(d)*; Guidelines for Franchise Registration, Department of Corporations Packet 310.111].

5. Prepare transmittal letter that includes either of following:

a. If pre-effective amendment, request for accelerated effective date of registration, if desired.

NOTE:

Unless the Commissioner specifies an earlier time, a registration will not become effective until 12:00 noon of the 15th business day after the filing of the last amendment to the application, provided no stop order is in effect [*Corp. Code § 31116(a)*; **see** *Corp. Code § 31115* (stop orders)].

b. If post-effective amendment affects method, disclosures, or terms of offering, statement of facts supporting effectiveness of amendment by particular date.

NOTE:

The Commissioner is empowered, having due regard for the public interest and the protection of franchisees, to fix the effective date of a post-effective amendment [*Corp. Code § 31124*]. When time is of the essence in a franchise offering, it may be a good idea to supply the Commissioner with all information regarding changes affecting the offering in order to hasten the review process.

6. File amendment in office of Commissioner in which original registration application is on file [*see § 51A.130, P 7* (addresses)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesRegistration & DisclosureGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureRequirements



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C. Procedural Guide

21-51A California Legal Forms--Transaction Guide §§ 51A.132-51A.139

[Reserved]

§§ 51A.132[Reserved]



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D. Related and Subsequent Procedures

21-51A California Legal Forms--Transaction Guide § 51A.140

§ 51A.140 Advertising Franchises

NOTE:

An "advertisement" is any written or printed communication or any communication by means of recorded telephone messages or spoken on radio, television, or similar communications media, published in connection with an offer or sale of a franchise [*Corp. Code § 31003*]. To "publish" means publicly to issue or circulate by newspaper, mail, radio, or television, or otherwise to disseminate to the public [*Corp. Code § 31016*].

1. Determine whether advertisement to be disseminated would be excluded from requirement that it be filed with Commissioner at least three business days before its first publication [*Corp. Code § 31156*] because:

a. Advertisement has already been filed along with application for registration of franchise [*see § 51A.209*].

b. Matter to be published is excluded from definition of "advertisement" by Commissioner's rule because it is published after registration is effective and its contents are in nature of "tombstone advertisement" confined to statement of name and address of person or persons from whom disclosure document may be obtained, legend concerning registration under Franchise Investment Law [*see § 51A.250*], and any one or more of following items of information [*10 Cal. Code Reg. § 310.156.2(a)*]:

(1) Name of franchisor.

(2) Brief description of type of franchise being offered.

(3) Brief description of type of business to be conducted by franchisee.

(4) Total dollar investment (including all obligations) required to be made on franchise purchase, or if amount of investment varies, method of its determination or probable price range.

(5) City and/or state in which franchises are offered.

(6) Name and address of sender of communication.

c. "Advertisement" is disclosure document, which may be used immediately on effective date of registration of franchise regardless of how long it has been on file in its final form [10 Cal. Code Reg. § 310.156].

d. Advertisement is Internet advertising in connection with offer or sale of franchise that complies with all of following [10 Cal. Code Reg. § 310.156.3(a)]:

NOTE:

An "internet advertisement" is any communication made in connection with an offer or sale of a franchise posted on a website on the Internet [10 Cal. Code Reg. § 310.156.3(a)].

(1) Franchisor files written notice with Commissioner that includes:

NOTE:

The notice is effective from the date it is filed with the Commissioner until the end of the franchisor's then-currently effective registration period [see 10 Cal. Code Reg. § 310.120]. The exemption may be renewed for additional periods of one year by submitting to the Commissioner no later than the end of the franchisor's then-currently effective registration period, an additional written notice that complies with the statutory requirements [10 Cal. Code Reg. § 310.156.3(b)].

(a) URL address or similar address identifying location of any Internet advertisement.

(b) Statement that franchisor, or anyone acting with the franchisor's knowledge, agrees to comply with California Franchise Investment Law and its rules, when posting any Internet advertisement on website.

(c) Franchisor's name, address, telephone number, and contact person.

NOTE:

The notice must be executed by an officer or general partner of the franchisor having direct responsibility for the conduct of the franchisor's activities, and verified in accordance with Code Civ. Proc. § 2015.5 [10 Cal. Code Reg. § 310.156.3(a)(1)]. The following heading (in large bold type) may be inserted at the top of the filed notice, to assist staff in identifying the claim of exemption:

**"NOTICE OF EXEMPTION FOR INTERNET ADVERTISEMENT
SECTION 310.156.3 OF
TITLE 10, CALIFORNIA CODE OF REGULATIONS"**

(2) Internet advertisement is not directed to any person in California by or on behalf of the franchisor or anyone acting with the franchisor's knowledge.

NOTE:

For the purposes of this requirement, "directed to any person in the State of California," means directed to a specifically named person, or group of persons, and not to the public generally, and includes, but is not limited to, non-passive forms of communication such as e-mail, instant messages, or other similar modes of communication [10 Cal. Code Reg. § 310.156.3(a)(2)].

(3) Preface, exhibit or appendix of franchisor's disclosure document includes:

(a) URL address of the franchisor's website.

(b) Statement, prescribed by statute, in clear readable type, of not less than 12-point size.

NOTE:

The required statement is [10 Cal. Code Reg. § 310.156.3(a)(3)]:

"OUR WEBSITE HAS NOT BEEN REVIEWED OR APPROVED BY THE CALIFORNIA DEPARTMENT OF CORPORATIONS. ANY COMPLAINTS CONCERNING THE CONTENT OF THIS WEBSITE MAY BE DIRECTED TO THE CALIFORNIA DEPARTMENT OF CORPORATIONS at www.corp.ca.gov."

2. If advertisement is one not previously filed with Commissioner and is not exempt from filing requirements, determine whether proposed advertisement conforms to Commissioner's standards.

NOTE:

The Commissioner is empowered to issue a stop order without prior hearing on determining that an advertisement contains any statement that is false or misleading or omits statements that would be necessary to make the advertisement not misleading [Corp. Code § 31157]. These standards for advertisements are amplified in the regulations [10 Cal. Code Reg. § 310.156.1]. See § 51A.250[1] for discussion of these standards.

3. Determine whether advertisement will contain projection of future earnings and must therefore conform to federal standards in addition to California standards [see 16 C.F.R. § 436.1(e); see also § 51A.250[1]].

NOTE:

The Federal Trade Commission's rules regarding the content of earnings claims will not apply as long as earnings claims are made in conformity with Item 19 of the Uniform Franchise Disclosure Document; that is, they appear in the disclosure document only [FTC Rule and Guides, p. 14; see 58 Fed. Reg. 69233 (1993) ; see also § 51A.209[2]]. However, with respect to the printed text of advertisements generally disseminated, an earnings claims disclosure in accordance with FTC Rule 436.1(e) [16 C.F.R. § 436.1(e)] will have to be prepared. However, the federal format will have to be augmented if any representation is made concerning California registration of the franchise [see 10 Cal. Code Reg. § 310.156.1; see also § 51A.250[1]].

4. If advertisement is subject to filing requirement, prepare transmittal letter and, if desired, include request for order accelerating time when advertisement may be used.

NOTE:

A true copy of the advertisement must be on file in the office of the Commissioner at least three business days before its first publication, or within any shorter period as the Commissioner orders. The Commissioner will shorten the time during which the advertisement must be on file on an appropriate

showing of need [*10 Cal. Code Reg. § 310.156*].

5. File true copy of advertisement with office of Department of Corporations where registration application is on file [see § 51A.130, P 7 (addresses)].

6. Do not publish advertisement until three business days have elapsed from date on which advertisement was filed.

NOTE:

"Business days" are all days other than Saturdays, Sundays, and days specified as holidays in the Government Code [*Corp. Code § 31003.5*]. The Commissioner will not issue a "no-action" letter if the advertisement is not disapproved [*10 Cal. Code Reg. § 310.156*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises General Overview Business & Corporate Law Distributorships & Franchises Franchise Relationships General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51A FRANCHISE REGISTRATION

PART III. TRANSACTION GUIDE

D. Related and Subsequent Procedures

21-51A California Legal Forms--Transaction Guide § 51A.141

§ 51A.141 Selling Under Impound Condition

NOTE:

Regardless of any impound of franchise fees ordered by the Commissioner of Corporations, it is a separate violation of federal law to fail to return any funds to a franchisee when such a refund is promised in the disclosure document [16 C.F.R. § 436.1(h); FTC Rule and Guides, p. 16].

1. On imposition of impound condition under *Corp. Code § 31113* by Commissioner of Corporations, obtain copy of order imposing impound condition to determine exact nature of restriction.

NOTE:

When an applicant has failed to show that adequate financial arrangements have been made to fulfill obligations to provide real estate, improvements, equipment, inventory, training, or other items included in the offering, the Commissioner may impose an impoundment of the franchise fees and other funds paid by a franchisee or subfranchisor, as a condition of registration, to be held until those obligations have been satisfied [*Corp. Code § 31113*; 10 Cal. Code Reg. § 310.113].

2. Determine whether, in lieu of impound condition, it would be desirable for franchisor to post surety bond in amount set by Commissioner, conditioned on completion by franchisor of its obligations under franchise contract to provide real estate, improvements, equipment, inventory, training, or other items included in offering [*Corp. Code § 31113*; 10 Cal. Code Reg. § 310.113.5; see § 51A.205 (guarantee of performance)].

NOTE:

The bond must be issued by a corporate surety admitted to transact business in the State of California. When more than one franchise is sold at the same time but left unopened, the amount of the bond must equal the aggregate liability to all franchises in California [

Corp. Code § 31113; 10 Cal. Code Reg. § 310.113.5].

3. If surety bond is not posted, select depository that will agree to hold funds to be received from franchisees and subfranchisors in separate trust account [*10 Cal. Code Reg. § 310.113.3*].

NOTE:

The depository must be a national bank located in California or a California bank or trust company [*10 Cal. Code Reg. § 310.113.3*].

4. Obtain written consent of depository to act in that capacity [*see § 51A.231*].

5. File written consent of depository with Commissioner of Corporations at office where application is on file [*10 Cal. Code Reg. § 310.113.3*].

6. Prepare purchase receipts to be given to franchisees [*see § 51A.230*] and obtain approval of Commissioner for their use [*see 10 Cal. Code Reg. § 310.113.2*].

NOTE:

When an impound condition is imposed, the franchiser must deliver a purchase receipt to each franchisee or subfranchisor. Purchase receipt forms must be consecutively numbered and prepared in triplicate. The original copy is to be given to the purchaser. The duplicate copy is to be retained by the franchisor. The triplicate copy is to be provided to the depository along with the payment involved *10 Cal. Code Reg. § 310.113.2*].

7. Ensure that full amount of franchise fees and all other funds paid by franchisees or subfranchisors together with statement showing full name and address of each franchisee or subfranchisor and amount deposited by him or her are delivered to depository for deposit in trust account within 48 hours after receipt [*see 10 Cal. Code Reg. § 310.113.1*].

8. Issue consecutively numbered purchase receipts in triplicate and distribute as follows [*10 Cal. Code Reg. § 310.113.2*]:

- a. Original to franchisee or subfranchisor.
- b. Duplicate retained by franchisor.
- c. Triplicate to depository with payment.

9. Ensure that all checks from franchisees are made payable to depository [*see 10 Cal. Code Reg. § 310.113.1*].

10. When franchisor has fulfilled its obligations to franchisee under franchise agreement, obtain signed statement to that effect from franchisee and statement from depository as to amount of funds in trust account in name of franchisee [*see 10 Cal. Code Reg. § 310.113.4*].

NOTE:

The impound may also be lifted when, for other reasons, the impound is no longer required to protect franchisees [*10 Cal. Code Reg. § 310.113.4*].

11. Prepare and submit to Commissioner of Corporations verified request for order authorizing release of

impound funds of this franchisee to franchisor [*10 Cal. Code Reg. § 310.113.4; see § 51A.232*].

NOTE:

Any request for an order of the Commissioner authorizing the release of impounds to the franchiser must contain, among other things, a statement signed by the franchisee or subfranchisor that the information in the statement is correct [*10 Cal. Code Reg. § 310.113.4*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law
Distributorships & Franchises
Franchise Relationships
Franchise Fees
Business & Corporate Law
Distributorships & Franchises
Registration & Disclosure
Enforcement



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DIVISION III: COMMERCIAL TRANSACTIONS

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21-51A California Legal Forms--Transaction Guide § 51A.142

§ 51A.142 Registering Material Modification of Existing Franchises

NOTE:

A material modification of existing franchises differs from a post-effective amendment to an application for registration [*see* Corp. Code § 31123; *see also* § 51A.131] in that a material modification affects the contractual obligations of the franchisor and/or the franchisee after the franchise has been sold [*see* Corp. Code § 31125].

1. Determine whether proposed modification is "material."

NOTE:

Neither the Franchise Investment Law nor the rules of the Commissioner of Corporations indicate what sort of modification is considered "material." However, a material modification of an existing franchise is a "sale" of the franchise [*Corp. Code* § 31018]; therefore, it would be prudent, in order to avoid liability for the failure to register a sale, to regard any modification of the terms of the franchise agreement as "material."

2. Obtain from any office of Department of Corporations [*see* § 51A.130, P 7] Facing Page for Uniform Franchise Registration Application, and instructions for completing remainder of application for registration of material modification [*see 10 Cal. Code Reg.* § 310.125; *see also* § 51A.212].

3. Following instructions for registering material modification, assemble necessary information and documents, including [*10 Cal. Code Reg.* § 310.125]:

- a. Copy of item(s) of Uniform Franchise Disclosure Document (UFDD), complying with *10 Cal. Code Reg.* § 310.114.1, if information is changed [*see* § 51A.212[2], Exhibit 1].

- b. Statement of existing arrangement and new arrangement regarding proposed items to

be modified [*see* § 51A.212[2], Exhibit 1].

c. Statement on cover of UFDD of following [*see* § 51A.212[2], Exhibit 1]: "The changes set forth herein are voluntary. If a franchisee does not receive the attached disclosure at least five business days prior to the execution of a binding agreement, the franchisee may, by written notice, mailed or delivered to the franchisor or (specify agent of franchisor), within five business days following the execution of the agreement rescind the agreement to the modifications."

d. Description of proposed modifications, including [*see* § 51A.212[2], Exhibit 1]:

(1) Identification of section of franchise contract or document being modified;

(2) Nature of modification;

(3) Whether additional cost will accrue to franchisee, and if so, estimate of additional cost; and

(4) Effect on franchisee who accepts change and on franchisee who does not accept change.

e. Copy of franchise contract or document that embodies modification(s) [*see* § 51A.212[2], Exhibit 2].

f. Statement of following [*see* § 51A.212[2], Exhibit 3]:

(1) Number of franchises presently operating;

(2) Number of these franchises presently operating in California;

(3) Number of franchises proposed to be modified; and

(4) Number of franchises proposed to be modified in California.

g. Consent to service of process when required, if not previously filed [*see Corp. Code* § 31155; *see* § 51A.212[2], Exhibit 4].

4. If application for registration of material modification is being filed in conjunction with renewal of current registration [*see* § 51A.143], indicate on facing page that application is both for registration of offer or sale and for registration renewal; and

a. Incorporate by reference any documents already on file with Department of Corporations if not more than four years old and currently accurate [*Corp. Code* § 31152].

b. Attempt to integrate requirements of two applications to extent possible.

NOTE:

A renewal application is made on the same form as an original application to register a franchise [10 *Cal. Code Reg.* § 310.122(a)]. It appears that simultaneous registration of a renewal and a material modification can be expeditiously accomplished by concentrating on the requirements of the Uniform Franchise Registration Application, being careful to indicate the proposed modification of the franchise in both a cover letter and the relevant

documents attached to the renewal application. The problems faced when attempting to integrate two applications reinforces the argument that the applicant need only prepare a "written disclosure," not a full disclosure document, with respect to the franchises being modified, and, for the renewal application, a separate disclosure document in the UFDD format embodying the modifications but without the explanation of their effect, an explanation that would be superfluous as far as prospective franchisees are concerned.

5. Have application signed and verified by officer or general partner of applicant [*10 Cal. Code Reg. § 310.112; see § 51A.203*].

NOTE:

The application may be signed by a person holding a power of attorney from the applicant, in which case a copy of the power or of the corporate resolution authorizing the person to sign must be attached as an exhibit [*10 Cal. Code Reg. § 310.112; see § 51A.210* (form for corporate resolution)].

6. Obtain check payable to "California Commissioner of Corporations" in amount necessary to cover filing fee [*see Corp. Code § 31500(e)*].

NOTE:

Although the regulations state that checks should be made payable to the "Department of Corporations" [*see 10 Cal. Code Reg. § 250.15*], the franchise registration guidelines state that checks should be made payable to the "California Commissioner of Corporations" [Guidelines for Franchise Registration, Department of Corporations Packet 310.111].

7. File application with office of Department of Corporations where original or most recent renewal registration is on file [*see § 51A.130, P 7* (addresses)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Franchise Relationships General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure Requirements



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21-51A California Legal Forms--Transaction Guide § 51A.143

§ 51A.143 Renewing Registration

NOTE:

A franchise offering is deemed registered for a period of one year from the effective date of registration, unless the Commissioner by order or rule specifies a different period [*Corp. Code § 31120*].

1. Obtain from any office of Department of Corporations copy of Uniform Franchise Registration Application [*10 Cal. Code Reg. § 310.122*].
2. Complete application in same manner as for original registration application [*see § 51A.130*], except that:
 - a. Any documents filed with Department of Corporations within past four years and that are currently accurate may be incorporated by reference in application for renewal [*Corp. Code § 31152*].

NOTE:

The facing page and the supplemental information page [*see § 51A.200*] should not be incorporated by reference, and, although it is legally permissible to do so, the copy of the Uniform Franchise Disclosure Document currently in use by the franchisor should not be incorporated by reference even though it has been unchanged. The Department recommends this procedure to expedite review of the renewal application [*see Guidelines for Franchise Registration, Department of Corporations Packet 310.111*].

- b. If renewal application alters text of disclosure document, or if any item, exhibit, or other document previously filed, changes in text must be indicated by means of underscoring or in some other appropriate manner [*10 Cal. Code Reg. § 310.122.1*].

c. Appropriate space on facing page must be checked to indicate that application is for renewal of registration.

3. If franchisor has effected any negotiated sales exempt from registration [*see 10 Cal. Code Reg. § 310.100.2*], attach appendix containing required statement [*10 Cal. Code Reg. § 310.122; see § 51A.214*].

NOTE:

For discussion of negotiated sales, see § 51A.213[1].

4. Have application signed by officer or general partner of applicant [*10 Cal. Code Reg. § 310.112; see § 51A.203*].

NOTE:

The application may be signed by a person holding a power of attorney from the applicant, in which case a copy of the power of attorney or corporate resolution authorizing the person to sign must be attached as an exhibit [*10 Cal. Code Reg. § 310.112; see § 51A.210* (form for corporate resolution)].

5. Obtain manually signed consent of auditor for use of audited financial statements appearing in disclosure document [*see § 51A.206*].

6. Obtain check payable to "California Commissioner of Corporations" in amount necessary to cover filing fee [*see Corp. Code § 31500(c)*].

NOTE:

Although the regulations state that checks should be made payable to the "Department of Corporations" [*see 10 Cal. Code Reg. § 250.15*], the franchise registration guidelines state that checks should be made payable to the "California Commissioner of Corporations" [Guidelines for Franchise Registration, Department of Corporations Packet 310.111].

7. Prepare transmittal letter [*see § 51A.211*].

8. File application with office of Department where original registration is on file [*see § 51A.130*, P 7 (addresses)] no later than 15 business days before expiration of current registration unless that period is waived by order of Commissioner [*Corp. Code § 31121*].

NOTE:

The renewed registration becomes effective, assuming no stop order is in effect, at 12:00 noon on the date on which the current registration is to expire. On renewal, the registration is effective for one year unless the Commissioner specifies a different period by rule or order [*Corp. Code § 31121*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure Requirements



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[Reserved]

§§ 51A.144[Reserved]



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PART IV. FORMS

A. Franchise Registration

21-51A California Legal Forms--Transaction Guide § 51A.200

§ 51A.200 Uniform Franchise Registration Application--Facing Page and Supplemental Information Page [10 Cal. Code Reg. § 310.111]

[1] Comment

[a] Use of Form

This form is the application-facing page and supplemental information page of the Uniform Franchise Disclosure Document (UFDD). It contains information required from the applicant in accordance with the Uniform Franchise Disclosure Document Guidelines, as adopted by the North American Securities Administrators Association, Inc. [10 Cal. Code Reg. § 310.111(b)]. The UFDD, prescribed by the California Commissioner of Corporations, is the sole means of applying for registration of a franchise in California [Corp. Code § 31111(a); 10 Cal. Code Reg. §§ 310.111(a), 310.114.1]. When an application is filed using the UFDD, the applicant must include the required information set forth in 10 Cal. Code Reg. § 310.114.1 in appropriate corresponding sections of the UFDD [10 Cal. Code Reg. § 310.111(c)]. For purposes of 10 Cal. Code Reg. § 310.114.1, when filing the UFDD, the term "offering circular" means "disclosure document" and "UFOC" means "UFDD" [10 Cal. Code Reg. § 310.111(c)].

The facing page and supplemental information page are also used to register a material modification of an existing franchise, in conjunction with special instructions [10 Cal. Code Reg. § 310.125; see §§ 51A.142, 51A.212]. In addition, the entire registration form is used to renew the registration of a franchise [10 Cal. Code Reg. § 310.122; see §§ 51A.143, 51A.214].

The Uniform Franchise Registration Application consists of numerous parts [see [b], below]. If an impound condition is imposed, a guarantee of performance [see § 51A.205] must also be included [see [e], below].

All forms comprising the registration package may be obtained from any office of the Department of Corporations. For a list of those offices, see § 51A.130. Forms are also available on the Internet at the website of the Department of Corporations, at <http://www.corp.ca.gov/forms/securities.asp#fl>. For a list of steps to be taken to complete and file the application, see § 51A.130.

[b] Contents of Application

An application for registration of the offer and sale of a franchise must include the following, all of which must be verified by means of the prescribed signature page [see Guidelines for Franchise Registration, Department of Corporations Packet 310.111]:

- A cover page [see § 51A.208].
- A facing page (this form).
- A supplemental information page (this form).
- A sales agent disclosure form for each person offering and selling the franchise in California, unless the person is named in Item 2 of the disclosure document [see § 51A.201].
- One copy of the disclosure document, including a table of contents, in the Uniform Franchise Disclosure Document (UFDD) format as presented in Department of Corporations Packet 310.111. The information in the disclosure document must be presented in a clear, concise fashion that is readily understandable by a person unfamiliar with the franchise business. Specified pronouns must be used to refer to the franchisor and the franchisee [10 Cal. Code Reg. § 310.114.1(b); see § 51A.209].
- A certification page [see § 51A.203] and, if applicable, an accompanying power of attorney or corporate resolution [see § 51A.210].
- A consent to service of process form (not required for California corporations, California limited partnerships, or California limited liability companies) [10 Cal. Code Reg. § 310.155; Corp. Code § 31155; see § 51A.202].
- A customer authorization of disclosure of financial records [see § 51A.204].

In addition, the applicant must include the required fee [see Corp. Code § 31500] and all of the following [see Guidelines for Franchise Registration, Department of Corporations Packet 310.111]:

- The franchisor's audited financial statement. Compilation report financial statements and review report balance sheets are accepted in lieu of an audit in some situations [see 10 Cal. Code Reg. § 310.111.2; see also § 51A.206[1][b]].
- A manually signed consent of the independent public accountant for the use of the financial statements in the disclosure document [see § 51A.206].
- A cover letter, giving the date of the end of the franchisor's fiscal year, and an acknowledgment that the initial registration will end 110 days after the date of its next fiscal year [see 10 Cal. Code Reg. § 310.120; see also § 51A.211].
- Two copies of any advertising to be used to offer the franchise in California [see Corp. Code § 31156; 10 Cal. Code Reg. §§ 310.156-310.156.2; see also 10 Cal. Code Reg. § 310.156.3 (exception for Internet advertising in connection with offer or sale of franchise)].

[c] Signing Application

The application must be signed by an officer or general partner of the applicant or by a person holding a power of attorney from the applicant for that purpose [see § 51A.203]. If signed under a power of attorney, the application must include a copy of the power of attorney or corporate resolution authorizing the person signing to act on behalf of the applicant [10 Cal. Code Reg. § 310.112; see Corp. Code § 31112; see also § 51A.210].

[d] Subfranchisors

When the person filing the application for registration is a subfranchisor [see Corp. Code § 31009 ("subfranchisor" defined)], the application must also include the same information concerning the subfranchisor as is required from the franchisor [10 Cal. Code Reg. § 310.111.1].

[e] Impound and Bond

If the registration applicant has failed to demonstrate that adequate financial arrangements have been made to fulfill the franchisor's obligations to provide real estate, improvements, equipment, inventory, training, or other items in the offering, the Commissioner may require the escrow or impound of franchise fees until those obligation have been satisfied. At the option of the franchisor, he or she may furnish a surety bond in lieu of impoundment [Corp. Code § 31113; see 10 Cal. Code Reg. §§ 310.113-310.113.5]. For further discussion, see § 51A.141 and § 51A.230 et seq. For a form for a guarantee of performance, see § 51A.205.

[f] Amendment to Registration Application

[i] Amendment Required for Material Changes in Submitted Information

A franchisor must promptly notify the Commissioner in writing, by an application to amend the registration, of any material change in the information contained in an application as originally submitted, amended, or renewed [Corp. Code § 31123; see § 51A.212]. An application can be amended before the effective date of registration ("pre-effective amendment") or after the effective date of registration ("post-effective amendment").

[ii] Pre-Effective Amendments

A pre-effective amendment is used to amend a pending application when there has been a material change. The application must include a facing page (this form) and a certification page [see § 51A.203]. Changes from previous documents must be shown by underscoring or by some other appropriate manner [10 Cal. Code Reg. § 310.122.1]. The guidelines for registration state that changes from previous filings should be underlined in red and that only one redlined copy (and no unmarked copies) should be submitted. There is no filing fee for a pre-effective amendment [see Guidelines for Franchise Registration, Department of Corporations Packet 310.111].

[iii] Post-Effective Amendments

A post-effective amendment is submitted after a registration is effective, and must be made when there is a material change in the information last registered or when a sales agent is being added [see Guidelines for Franchise Registration, Department of Corporations Packet 310.111]. The Guidelines provide that a post-effective amendment application includes a completed cover page and a certification page [see Guidelines for Franchise Registration, Department of Corporations Packet 310.111]. By statute, a post-effective amendment must be made on the form used for the original application with the appropriate heading checked on the facing page [see 10 Cal. Code Reg. § 310.111]. The facing page must be completely filled in, and only those other items of the applicable form being amended must be included [10 Cal. Code Reg. § 310.123].

Changes from previous documents must be shown by underscoring or by some other appropriate manner [10 Cal. Code Reg. § 310.122.1]. The guidelines for registration state that changes from previous filings should be underlined in red.

Only the marked copy indicating the changes, and no unmarked copies, should be submitted [see Guidelines for Franchise Registration, Department of Corporations Packet 310.111].

[g] Period of Registration

A franchise offering is deemed registered for a period of one year from the effective date of the registration, unless the Commissioner specifies a different period [*Corp. Code* § 31120].

[h] Renewal

Registration may be renewed for an additional one-year period (unless the Commissioner specifies a different period) by submitting a renewal application no later than 15 business days before the expiration of the current registration unless that period is waived by order of the Commissioner [*Corp. Code* § 31121]. The renewal application must be submitted in the same format as the original application [see *Corp. Code* § 31122; *10 Cal. Code Reg. § 310.122(a)*]; the franchisor's financial statement must be certified as an audit [see Guidelines for Franchise Registration, Department of Corporations Packet 310.111]. The application must show any changes from the previous filing by underscoring or by some other appropriate manner [*10 Cal. Code Reg. § 310.122.1*]. The registration guidelines state that changes should be underlined in red [see Guidelines for Franchise Registration, Department of Corporations Packet 310.111]. For a form for the registration renewal statement, see § 51A.214.

[2] FORM

Uniform Franchise Registration Application--Facing Page and Supplemental Information Page [10 Cal. Code Reg. § 310.111]

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Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure Requirements



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A. Franchise Registration

21-51A California Legal Forms--Transaction Guide § 51A.201

§ 51A.201 Uniform Franchise Registration Application--Sales Agent Disclosure Form [10 Cal. Code Reg. §§ 310.111, 310.21]

[1] Comment--Use of Form

This form is a reproduction of Form E--Sales Agent Disclosure Form. The form may be used to comply with the Franchise Investment Law's requirement that, unless a person effecting sales of franchises is either licensed as a real estate broker or salesperson by the Real Estate Commissioner, or licensed as a securities broker-dealer by the Commissioner of Corporations, he or she must be identified in the franchise registration application or in an amendment to the application [*Corp. Code § 31210*]. In the alternative, the identification requirement may be satisfied by including sales agents in the disclosures made under Item 2 (Identity and Business Experience of Persons Affiliated With the Franchisor) and Item 3 (Litigation) of the Uniform Franchise Disclosure Document [*10 Cal. Code Reg. § 310.210(a)*; see § 51A.209].

Although this form is essentially the one drafted by the North American Securities Administrators Association, Inc., Item 2A has been modified by rule of the Commissioner so that it will not violate the California prohibition against public agencies asking applicants to reveal a record of arrest that did not result in a conviction or a nolo contendere plea [*10 Cal. Code Reg. §§ 310.114.1(c)(2); 310.210(a)(2); Bus. & Prof. Code § 461*].

[2] FORM

Uniform Franchise Registration Application--Sales Agent Disclosure Form [10 Cal. Code Reg. §§ 310.111, 310.21]

SALES AGENT DISCLOSURE FORM

1. List the persons who will offer or sell franchises in this state. For each person state:

A. Name;

B. Business address and telephone number;

C. Home address and telephone number;

D. Present employer;

E. Present title;

F. Social Security number;

G. Birth date; and

H. Employment during the past five years. For each employment, state the name of the employer, position held, and beginning and ending dates.

2. State whether any person identified in P 1 above:

A. Has any administrative, civil or criminal action pending alleging a violation of any franchise or securities law, fraud, embezzlement, fraudulent conversion, restraint of trade, unfair or deceptive practices, misappropriation of property or any comparable allegations, other than a pending proceeding involving an arrest that did not result in conviction or plea of nolo contendere?

YES

_____ NO

B. Had during the ten-year period immediately before the offering circular date:

(1) been convicted of a felony or pleaded nolo contendere to a felony charge or been held liable in a civil action by final judgment if the felony or civil action involved a violation of franchise or securities law, fraud, embezzlement, fraudulent conversion, restraint of trade, unfair or deceptive practices, misappropriation of property or any comparable violations of law?

YES

_____ NO

(2) entered into or been named in any consent judgment, decree, order or assurance under federal or state franchise, securities, anti-trust, monopoly, trade practice or trade-regulation law?

YES

_____ NO

(3) been subject to an order of any national securities association or national securities

exchange as defined in the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a et seq.,
suspending or expelling the person from membership in the association or exchange?

YES

_____ NO

C. For each above question answered "YES" state:

- (1) the name of the person or entity involved;
- (2) the court, agency, association or exchange involved;
- (3) a summary of the allegations;
- (4) if applicable, the date of the conviction, judgment, decree, order or assurance; and
- (5) the penalty imposed, damages assessed, and terms and conditions of the judgment, decree, order, or assurance.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure Requirements



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A. Franchise Registration

21-51A California Legal Forms--Transaction Guide § 51A.202

§ 51A.202 Uniform Franchise Registration Application--Uniform Consent to Service of Process [Corp. Code § 31155; 10 Cal. Code Reg. § 310.155]

[1] Comment--Use of Form

This form is the Form D--Uniform Consent to Service of Process, which is used to comply with the Franchise Investment Law requirement that all franchise registration applicants who are not California corporations, California limited partnerships, or California limited liability companies, appoint the Commissioner of Corporations as the franchisor's agent for the purpose of receiving service of process in any noncriminal action arising under the Franchise Investment Law [see Corp. Code § 31155; 10 Cal. Code Reg. § 310.155]. However, regardless of whether a consent is filed, any person who engages in conduct prohibited or made actionable by the Franchise Investment Law is deemed by that conduct to have appointed the Commissioner as his or her attorney to receive service if personal jurisdiction cannot otherwise be obtained in California [Corp. Code § 31420].

[2] FORM

Uniform Franchise Registration Application--Uniform Consent to Service of Process [Corp. Code § 31155; 10 Cal. Code Reg. § 310.155]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesRegistration & DisclosureGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureRequirementsCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon Agents



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A. Franchise Registration

21-51A California Legal Forms--Transaction Guide § 51A.203

§ 51A.203 Uniform Franchise Registration Application--Certification Page [Corp. Code § 31112; 10 Cal. Code Reg. §§ 310.111, 310.112]

[1] Comment

[a] Use of Form

This form is Form C--Certification, which is part of the Uniform Franchise Disclosure Document (UFDD), prescribed as the Uniform Franchise Registration Application in California. This form is provided in the franchise registration packet available from the Department of Corporations. It is also available on the Internet at the website of the Department of Corporations, at <http://www.corp.ca.gov/forms/securities.asp#fl>. This form provides several alternate acknowledgment clauses for use in different situations. The first acknowledgment clause is for use by a corporation; the second is for use by an individual or partnership; the last acknowledgment is the statutory acknowledgment provided by *Civ. Code § 1189(a)*.

Although the acknowledgment contained in the UFDD may be used in California because it has been prescribed by the Commissioner [*10 Cal. Code Reg. § 310.111*], it does not exactly comply with either *Code Civ. Proc. § 2015.5*, governing the form of declarations under penalty of perjury, or provisions of the Civil Code governing acknowledgments [*see Civ. Code §§ 1188-1190*]. As to the acknowledgment, any inconsistency with California law is irrelevant because there is no point in obtaining acknowledgment of a declaration under penalty of perjury, which is itself a substitute for a sworn statement. The statute [*Corp. Code § 31112*] specifically requires verification in the same manner as pleadings, leaving no doubt that a declaration under penalty of perjury is all that is required. However, as an extra measure of protection, a statutory acknowledgment is provided as the last clause of this form [*see Civ. Code § 1189(a)*].

The form of certification illustrated in this form should be used. It is the form found on all applications prepared by the Department of Corporations [*see, e.g., 10 Cal. Code Reg. § 310.125* (application for registration of a material modification of an existing franchise)] and contains the information required from the applicant in accordance with the UFDD Guidelines, as adopted by the North American Securities Administrators Association, Inc. [*10 Cal. Code Reg. § 310.111(b)*]. This form has been adopted by the Commissioner of Corporations as the official form of franchise

registration application. The instructions for completing the UFDD contain no indication that the certification should be altered to conform with California law [see Guidelines for Franchise Registration, Department of Corporations Packet 310.111].

[b] Who Must Sign

The application for registration ordinarily must be signed and verified by an officer or general partner of the applicant. It may also be signed by a person holding a power of attorney for that purpose from the applicant. If the application is signed on behalf of the applicant pursuant to a power of attorney, the application must include a copy of the power of attorney or a copy of the corporate resolution authorizing the person signing to act on behalf of the applicant [*10 Cal. Code Reg. § 310.112*; see § 51A.210 (form for corporate resolution)].

[2] FORM

Uniform Franchise Registration Application--Certification Page [Corp. Code § 31112; 10 Cal. Code Reg. §§ 310.111, 310.112]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure Requirements



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A. Franchise Registration

21-51A California Legal Forms--Transaction Guide § 51A.204

§ 51A.204 Uniform Franchise Registration Application--Customer Authorization of Disclosure of Financial Records [Corp. Code § 31111(b)]

[1] Comment

[a] Use of Form

This form is a customer authorization allowing the disclosure to the Department of Corporations of financial records of the franchise registrant concerning the sale of the franchise. The franchise applicant must submit the authorization with the completed registration application [*Corp. Code § 31111(b)*]. The Department of Corporations uses the authorization to inspect financial records relating to the sale of the franchise. The form is included in the franchise registration packet available from the Department of Corporations [*see Guidelines for Franchise Registration, Department of Corporations Packet 310.111*]. The form is also available on the Internet at the website of the Department of Corporations, at <http://www.corp.ca.gov/forms/securities.asp#fl>. The official instructions are reproduced here along with the actual form.

[b] Effect of Authorization

This authorization allows the Department of Corporations to obtain financial records of the franchise applicant pertaining to the sale of the franchise from any financial institution [*Corp. Code § 31111(b)*]. A government agency or department may not request or receive copies of, or the information contained in, financial records of customers of financial institutions unless the records are described with particularity, the records are consistent with the scope and requirements of the investigation giving rise to the request, and the customer has authorized disclosure to the agency [*Gov. Code § 7470(a)*]. A customer may authorize disclosure if those seeking disclosure furnish to the financial institution a signed and dated statement by which the customer (1) authorizes the disclosure for a period set forth in the authorization statement; (2) specifies the name of the agency or department to which disclosure is authorized, and, if applicable, the statutory purpose for which the information is to be obtained; and (3) identifies the financial records that are authorized to be disclosed [*Gov. Code § 7473(a)*].

The records may pertain to current accounts, closed accounts, or accounts to be opened in the future. The authorization is effective from the date of execution, and remains in effect until five years after the expiration or revocation of the

franchise registration, including renewals. The authorization may not be revoked [see Guidelines for Franchise Registration, Department of Corporations Packet 310.111].

[2] FORM

**Uniform Franchise Registration Application--Customer Authorization of Disclosure of Financial Records
[Corp. Code § 31111(b)]**

[Click here to view image.](#)

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Legal Topics:

For related research and practice materials, see the following legal topics:

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21-51A California Legal Forms--Transaction Guide § 51A.205

§ 51A.205 Uniform Franchise Registration Application--Guarantee of Performance [Corp. Code § 31113]

[1] Comment

[a] Use of Form

This form is Form F--Guarantee of Performance, to be used to avoid an impound of franchise fees when the franchisor has failed to demonstrate that adequate financial arrangements have been made to fulfill its obligations. Whenever an impound or escrow condition is imposed by the Commissioner, the franchisor has the option to furnish a surety bond [Corp. Code § 31113].

This form should be completed by the security company providing the franchisor with a surety bond, and it should be returned with the completed application. The form is part of the franchise registration packet available from the Department of Corporations [see Guidelines for Franchise Registration, Department of Corporations Packet 310.111]. The form is also available on the Internet at the website of the Department of Corporations, at <http://www.corp.ca.gov/forms/securities.asp#fl>. For coverage of requirements for surety bonds in general, see Ch. 79, *Suretyship, Guaranty, and Indemnity* .

[b] Grounds for Impound

If the applicant has failed to demonstrate that adequate financial arrangements have been made to fulfill the franchisor's obligations to provide real estate, improvements, equipment, inventory, training, or other items in the offering, the Commissioner may require the escrow or impound of franchise fees and other funds paid by the franchisee or subfranchisor until the obligation has been satisfied [Corp. Code § 31113]. The impounded funds are placed in a separate trust account with an approved depository [10 Cal. Code Reg. §§ 310.113.1, 310.113.3]. For forms and discussion relating to impoundment, see §§ 51A.230-51A.232.

[c] Bond in Lieu of Impound

In lieu of the imposition of an impound condition, the franchisor may post a surety bond in an amount required by the

Commissioner. The bond must be issued by a corporate surety admitted to transact business in California, conditioned on the completion by the franchisor of its obligations under the franchise contract to provide real estate, improvements, equipment, inventory, training, or other items in the offering. When more than one franchise is sold at the same time but one or more is left unopened, the amount of the bond must equal the aggregate liability to all those franchises in California [*10 Cal. Code Reg. § 310.113.5; see Corp. Code § 31113*].

Under the 1982 Bond and Undertaking Law [*see Code Civ. Proc. § 995.010 et seq.*], an undertaking may be given in place of a bond required by statute [*Code Civ. Proc. § 995.210(a)*].

[2] FORM

Uniform Franchise Registration Application--Guarantee of Performance [Corp. Code § 31113]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law
Distributorships & Franchises
Registration & Disclosure
General Overview
Business & Corporate Law
Distributorships & Franchises
Registration & Disclosure
Requirements



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A. Franchise Registration

21-51A California Legal Forms--Transaction Guide § 51A.206

§ 51A.206 Uniform Franchise Registration Application--Auditor's Consent [10 Cal. Code Reg. § 310.111]

[1] Comment

[a] Use of Form

This is a form for consent to the use of audited financial statements appearing in the franchise disclosure document. It must accompany applications for registration of a franchise and must be manually signed by the public accountant(s) who prepared the audited statements. A photocopy is acceptable [see Instructions for Filing a Uniform Franchise Registration Application, reproduced in § 51A.209[2]].

[b] Audited Financial Statements

A franchisor must file a balance sheet as of a date within 90 days before the date of the application. This balance sheet need not be audited. However, if this balance sheet is not audited, the franchisor must file an audited balance sheet as of the end of the franchisor's last fiscal year unless that fiscal year ended within 90 days of the date of the application. In that case, the franchisor must file an audited balance sheet as of the end of the franchisor's next preceding fiscal year [10 Cal. Code Reg. § 310.111.2(b)]. The use of unaudited financial statements does not relieve the applicant or any person from any liability for false and misleading statements contained in the financial statements [10 Cal. Code Reg. § 310.111.2(e)].

The franchisor must file a profit and loss statement for each of the three fiscal years preceding the date of the balance sheet; if there is any period between the close of the last fiscal year and the date of the balance sheet, the franchisor must also file a profit and loss statement for that period. Profit and loss statements must be audited up to the date of the last audited balance sheet filed, if any [10 Cal. Code Reg. § 310.111.2(b)].

Financial statements required to be filed must be prepared according to generally accepted accounting principles. If required to be audited, they should be audited by either an independent certified public accountant or independent public accountant [10 Cal. Code Reg. § 310.111.2(a)].

If a franchisor owns directly or indirectly more than 50 percent of the outstanding voting securities of any other corporation, the financial statements required to be filed normally should reflect, on a consolidated basis, the financial condition of the franchisor and each of its subsidiaries [10 Cal. Code Reg. § 310.111.2(c)].

[c] Waiver of Audited Statements

In extraordinary cases, the Commissioner may waive the requirement for audited statements if (1) the statements have been prepared by an independent certified public accountant or independent public accountant and (2) the Commissioner is otherwise satisfied as to the reliability of the statements and as to the ability of the franchisor to perform future commitments. A waiver ordinarily will be granted only on a showing that [10 Cal. Code Reg. § 310.111.2(d)]:

- The franchisor has not had prior audited statements;
- The close of the most recent or current fiscal year is so near the time of filing of the application that it would be unreasonably costly or impractical to provide audited statements with the application; and
- Audited statements will be furnished within a reasonable time after the end of the most recent or current fiscal year.

In such a situation, the Commissioner may impose an impound condition and any other conditions and restrictions as in the Commissioner's discretion may be appropriate [10 Cal. Code Reg. § 310.111.2(d)].

[2] FORM

Uniform Franchise Registration Application--Auditor's Consent [10 Cal. Code Reg. § 310.111]

AUDITOR'S CONSENT

As independent certified public accountants, we hereby consent to the use of our reports dated _____ and _____ to be included in and made a part of the franchise application and offering circular of _____ [name of franchisor] filed with the California Department of Corporations [and in all other states requiring registration of the offer of franchises].

_____ [signature]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure Requirements



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21-51A California Legal Forms--Transaction Guide §§ 51A.207

[Reserved]

§§ 51A.207[Reserved]



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A. Franchise Registration

21-51A California Legal Forms--Transaction Guide § 51A.208

§ 51A.208 Cover Page for Franchise Disclosure Document Subject to Federal Law [16 C.F.R. § 436.3]

[1] Comment--Use of Form

This form is the cover sheet that must be carried by all franchise offering circulars distributed by franchisors subject to the Federal Trade Commission's "Disclosure Requirements and Prohibitions Concerning Franchising" [see 16 C.F.R. § 436.3]. For a discussion of which franchises are subject to the FTC rule and which are exempt from the rule, see §§ 51A.114 and 51A.115.

In connection with the offer or sale of a franchise to be located in the United States of America or its territories, it is an unfair or deceptive act or practice in violation of the Federal Trade Commission Act, 15 U.S.C. § 45, for the franchisor to [16 C.F.R. § 436.2(a), (b); see 16 C.F.R. § 436.8 (exemptions)]:

- To fail to furnish a prospective franchisee with a copy of the franchisor's current disclosure document [see 16 C.F.R. §§ 436.3-436.7], at least 14 calendar-days before the prospective franchisee signs a binding agreement with, or makes any payment to, the franchisor or an affiliate in connection with the proposed franchise sale.
- To alter unilaterally and materially the terms and conditions of the basic franchise agreement or any related agreements attached to the disclosure document without furnishing the prospective franchisee with a copy of each revised agreement at least seven calendar-days before the prospective franchisee signs the revised agreement. Changes to an agreement that arise out of negotiations initiated by the prospective franchisee do not trigger this seven calendar-day period.

For these purposes, the franchisor has furnished the documents by the required date if [16 C.F.R. § 436.2(c)]:

- A copy of the document was hand-delivered, faxed, emailed, or otherwise delivered to the prospective franchisee by the required date;

• Directions for accessing the document on the Internet were provided to the prospective franchisee by the required date; or

• A paper or tangible electronic copy (for example, computer disk or CD-ROM) was sent to the address specified by the prospective franchisee by first-class United States mail at least three calendar-days before the required date.

In addition to the disclosures contained in [2], *below*, franchisors may include additional disclosures on the cover page, on a separate cover page, or on an addendum to comply with state pre-sale disclosure laws [16 C.F.R. § 436.3(g)].

[2] Form

Cover Page for Franchise Disclosure Document Subject to Federal Law [16 C.F.R. § 436.3]

[Begin disclosure document with this cover page, in order and form as follows:]

FRANCHISE DISCLOSURE DOCUMENT

_____ [franchisor's name]

_____ [type of business organization]

_____ [principal business address]

_____ [telephone number]

_____ [email address and primary home page address, if applicable]

_____ [sample of primary business trademark franchisee will use in its business]

_____ [brief description of franchised business]

The total investment necessary to begin operation of a [franchise system name] franchise is: _____
[total amount of Item 7 in 16 C.F.R. § 436.5(g)]. This includes _____ [total amount in Item 5 in 16
C.F.R. § 436.5(e)] that must be paid to the franchisor or affiliate.

This disclosure document summarizes certain provisions of your franchise agreement and other information in plain English. Read this disclosure document and all accompanying agreements carefully. You must receive this disclosure document at least 14 calendar-days before you sign a binding agreement with, or make any payment to, the franchisor or an affiliate in connection with the proposed franchise sale. **Note, however, that no governmental agency has verified the information contained in this document.**

[ADD following optional statement, if desired:]

You may wish to receive your disclosure document in another format that is more convenient for you. To discuss the availability of disclosures in different formats, contact _____ [name or office] at
_____ [address] and _____ [telephone number].

[CONTINUE:]

The terms of your contract will govern your franchise relationship. Don't rely on the disclosure document alone to understand your contract. Read all of your contract carefully. Show your contract and this disclosure document to an advisor, like a lawyer or an accountant.

Buying a franchise is a complex investment. The information in this disclosure document can help you make up your mind. More information on franchising, such as "A Consumer's Guide to Buying a Franchise," which can help you understand how to use this disclosure document, is available from the Federal Trade Commission. You can contact the FTC at 1-877 -FTC-HELP or by writing to the FTC at 600 Pennsylvania Avenue, NW, Washington, D.C. 20580. You can also visit the FTC's home page at www.ftc.gov for additional information. Call your state agency or visit your public library for other sources of information on franchising.

There may also be laws on franchising in your state. Ask your state agencies about them.

_____ [issuance date].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law
Distributorships & Franchises
Business Opportunities
Business & Corporate Law
Distributorships & Franchises
Registration & Disclosure
General Overview
Business & Corporate Law
Distributorships & Franchises
Registration & Disclosure
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A. Franchise Registration

21-51A California Legal Forms--Transaction Guide § 51A.209

§ 51A.209 Uniform Franchise Registration Application--Requirements for Body of Uniform Franchise Disclosure Document [10 Cal. Code Reg. § 310.114.1]

[1] Comment

[a] Use of Form

This form is a guide to the requirements for preparing a Uniform Franchise Disclosure Document (UFDD). It contains information required from the applicant in accordance with the Uniform Franchise Disclosure Document Guidelines, as adopted by the North American Securities Administrators Association, Inc. [10 Cal. Code Reg. § 310.111(b)]. This form, prescribed by the California Commissioner of Corporations, is the sole means of applying for registration of a franchise in California [Corp. Code § 31111(a); 10 Cal. Code Reg. §§ 310.111(a), 310.114.1]. When an application is filed using the UFDD, the applicant must include the required information set forth in 10 Cal. Code Reg. § 310.114.1 in appropriate corresponding sections of the UFDD [10 Cal. Code Reg. § 310.111(c)]. For purposes of 10 Cal. Code Reg. § 310.114.1, when filing the UFDD, the term "offering circular" means "disclosure document" and "UFOC" means "UFDD" [10 Cal. Code Reg. § 310.111(c)].

This form contains, in the body of the form, a description of the items of information needed [see 16 C.R.R. § 436.5 (disclosure items)]. Appendices A-F provide sample answers to specific items of information. The form is provided by the Department of Corporations, as 310.111 UFDD PACKET, Guidelines for Franchise Registration. For a list of the components that make up a complete application, see § 51A.200[1][b].

To be used in California, the UFDD must be modified to meet the requirements of the California Commissioner of Corporations [10 Cal. Code Reg. § 310.114.1(a)]. The required modifications are listed in [b], *below*. These modifications have not been included in the text of the form because this form is an illustration of the provided official form. When completing an offering circular, the franchisor must include all of the required California modifications [see 10 Cal. Code Reg. § 310.114.1(c)].

The information in the offering circular must be presented in a clear, concise fashion that is readily understandable by a person unfamiliar with the franchise business. Specified pronouns must be used to refer to the franchisor and the

franchisee [see 10 Cal. Code Reg. § 310.114.1(b)]. One copy of the disclosure document must accompany the application for registration [see Guidelines for Franchise Registration, Department of Corporations 310.111 UFDD PACKET].

[b] California Instructions for Completing Uniform Franchise Disclosure Document

The Commissioner of Corporations requires the following modifications to the UFOC [see 10 Cal. Code Reg. § 310.114.1(c)]. Because this form is an illustration of the official model form, which does not contain the California modifications, these modifications are not included in the text of the following form. The required modifications are as follows [10 Cal. Code Reg. § 310.114.1(c)]:

- A preface, exhibit, or appendix to the UFDD, stating: "THE CALIFORNIA FRANCHISE INVESTMENT LAW REQUIRES THAT A COPY OF ALL PROPOSED AGREEMENTS RELATING TO THE SALE OF THE FRANCHISE BE DELIVERED TOGETHER WITH THE OFFERING CIRCULAR."
- Withholding of information from Item 3A (and the sales agent disclosure form (see § 51A.201)) relating to pending action involving arrest that did not result in conviction or plea of no contest.
- In addition to the information required by Item 3C, addition of a statement whether the franchisor, any person, or franchise broker listed in Item 2 is subject to any currently effective order of any national securities association or national securities exchange suspending or expelling the person from membership in that association or exchange. This information may be included in Item 3 or in a preface, exhibit, or appendix, which is part of the offering circular. If the information is in a preface, exhibit, or appendix, a reference to the preface, exhibit, or appendix must be prominently set forth in Item 3.
- If the initial franchise fee can vary, inclusion of a mathematical formula in Item 5 that allows the franchisee to calculate franchise fee.
- Inclusion of an additional paragraph in Item 17 or in a preface, exhibit, or appendix concerning statutory rights relating to termination or nonrenewal of a franchise [see Bus. & Prof. Code §§ 20000 et seq.]. If the additional paragraph is in a preface, exhibit, or appendix, then a reference to the preface, exhibit, or appendix must be prominently set out in Item 17.
- If applicable, inclusion of additional paragraphs in Item 17 or in a preface, exhibit, or appendix warning prospective franchisees of provisions in the franchise agreement concerning termination on bankruptcy, noncompetition covenants, liquidated damages, binding arbitration, and application of another jurisdiction's laws. If the additional paragraphs are in a preface, exhibit, or appendix, then a reference to the preface, exhibit, or appendix must be prominently set out in Item 17.
- If any earnings claim is made, and the earnings claim figures do not include either costs of sales or operating expenses, then, in addition to the information required by Item 19, inclusion of the following statement: "The earnings claims figure(s) does (do) not reflect the costs of sales, operating expenses, or other costs or expenses that must be deducted from the gross revenue or gross sales figures to obtain your net income or profit. You should conduct an independent investigation of the costs and expenses you will incur in operating your (franchised business). Franchisees or former franchisees, listed in the offering circular, may be one source of this information."

The modifications to Items 17 and 19 may be included in the items themselves or may be included in a preface, exhibit, or appendix. If presented in a preface, exhibit, or appendix, a reference to the preface, exhibit, or appendix must be

prominently set forth in Item 17 or Item 19.

The "State of California Special Instructions" is included in [2], *below*, following the application.

[2] FORM

Uniform Franchise Registration Application--Requirements for Body of Uniform Franchise Offering Circular [10 Cal. Code Reg. § 310.114.1]

[Click here to view image.](#)

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Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesRegistration & DisclosureGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureRequirements



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A. Franchise Registration

*21-51A California Legal Forms--Transaction Guide § 51A.210***§ 51A.210 Uniform Franchise Registration Application-Resolution Authorizing Person to Sign Application [10 Cal. Code Reg. § 310.112]****[1] Comment--Use of Form**

This form is a resolution by a corporation or partnership authorizing a person other than the corporation's officer or partnership's general partner to sign a franchise registration application. This type of resolution is required by the Uniform Franchise Disclosure Document (UFDD), drafted by the North American Securities Administrators Association, Inc., and adopted by the Commissioner of Corporations as the mandatory method of applying for registration [see 10 Cal. Code Reg. § 310.111]. This resolution should be formally adopted by the corporation or partnership before applying to register the franchise [see Guidelines for Franchise Registration, Department of Corporations Packet 310.111]. For further discussion of resolutions, see Ch. 5, *Directors' Meetings, Actions, and Resolutions*.

Ordinarily, an officer or general partner should sign the franchise registration application [see § 51A.203]. However, the application may be signed by a person holding a power of attorney for that purpose. If signed under a power of attorney, the franchise registration application should include a copy of the power of attorney or corporate resolution authorizing the person signing to act on behalf of the applicant [10 Cal. Code Reg. § 310.112].

[2] FORM**Uniform Franchise Registration Application-Resolution Authorizing Person to Sign Application [10 Cal. Code Reg. § 310.112]**

WHEREAS, _____[*name of company*] wishes to allow _____[*name*], who is not [an officer or a general partner] of the company, to sign a Uniform Franchise Registration Application on its behalf, it is:

RESOLVED, that _____[*name*] is authorized to sign the Uniform Franchise Registration Application of _____[*date*] pertaining to _____[*describe franchise*] on behalf of _____[*name of company*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law
Distributorships & Franchises
Registration & Disclosure
General Overview
Business & Corporate Law
Distributorships & Franchises
Registration & Disclosure
Requirements



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51A FRANCHISE REGISTRATION

PART IV. FORMS

A. Franchise Registration

21-51A California Legal Forms--Transaction Guide § 51A.211

§ 51A.211 Transmittal Letter to Accompany Application to Register Franchise

[1] Comment

[a] Use of Form

This form is a transmittal letter used to accompany an initial application for registration of a franchise. It may be modified for use in renewal of a franchise registration [*see Corp. Code §§ 31121, 31122; see also §§ 51A.143, 51A.214*], a material modification of an existing franchise [*see Corp. Code § 31125; see also §§ 51A.142, 51A.212*], or an amendment to a registration application [*see Corp. Code §§ 31123, 31124; see also § 51A.131*]. The letter should give the date of the end of the franchisor's fiscal year, and an acknowledgment that the initial registration will end 110 days after the date on which its next fiscal year ends [Guidelines for Franchise Registration, Department of Corporations 310.111 UFDD PACKET; *see 10 Cal. Code Reg. § 310.120*]. The letter should list the application documents required to be submitted [*see Guidelines for Franchise Registration, Department of Corporations, 310.111 UFDD PACKET*].

The letter should be addressed to the Commissioner of Corporations at the office where the registration package will be filed. Filing is permitted at any office of the Department of Corporations; these offices are listed in § 51A.130, P 7. The check for the filing fee should be made payable to the "California Commissioner of Corporations" [Guidelines for Franchise Registration, Department of Corporations 310.111 UFDD PACKET].

[b] Confidential Treatment of Application

If confidentiality is desired, a request for confidential treatment of the application and any or all related documents filed with the Commissioner should be submitted along with the application. All applications, and the files of which they are a part, ordinarily are open to public inspection during business hours of the Department of Corporations [*Corp. Code § 31504; 10 Cal. Code Reg. §§ 250.9, 250.9.1*]. However, the Commissioner will withhold material from public inspection, on request, provided that inspection is not determined to be necessary to the public interest, or for the purpose of the law under which the material is filed, and is reasonably shown to meet any of the following requirements [*10 Cal. Code Reg. § 250.10*]:

- The information is of a proprietary business nature and is in fact confidential including, but not limited to, trade secrets;
- The information is of a confidential business nature and is in fact confidential, and the release of the information would be damaging or prejudicial to the business;
- The information relates to the name of any potential investor in connection with certain specified securities filings [see Ch. 6, *Securities Regulation Issues*]; or
- A public interest is served by withholding the information.

A request for confidential treatment of any information received in connection with any application or report should accompany the submission of that information. The information that is subject to the request for confidentiality must be separated from other parts of the filing and marked "Confidential Treatment Requested" [10 Cal. Code Reg. § 250.10(b)].

If the request for confidentiality is denied, the material for which confidential treatment was requested will not be considered, and may be withdrawn unless the Commissioner has already taken official action on the information before receiving the request, or unless the Commissioner determines that withdrawal is otherwise contrary to the public interest [10 Cal. Code Reg. § 250.10(c)]. Under some circumstances the Commissioner has discretion to release, on request or on the Commissioner's own motion, information that has previously been granted confidential treatment [see 10 Cal. Code Reg. § 250.10.5].

[2] FORM

Transmittal Letter to Accompany Application to Register Franchise

_____ [date]

California Department of Corporations
 _____ [e.g., 1390 Market Street, Suite 810]
 San Francisco, California 94102-5303]

Re: _____ [name of franchisor] California Franchise Investment Law Application for Registration

Dear Commissioner:

Enclosed you will find an application for registration by _____ [name of franchisor] of the offer and sale of franchises in California for _____ [name of franchise].

The date of the end of the fiscal year of _____ [name of franchisor] is _____ [date].
 _____ [Name of franchisor] acknowledges that the initial registration will end 110 days after the date on which its next fiscal year ends.

[ADD, if franchisor offered or sold securities in California under the California Corporate Securities Law of 1968:]

_____ [describe transactions and whether securities were qualified or exempt and/or make any required filings].

[CONTINUE:]

The application appears in the following order:

1. A check in the amount of \$

_____ [specify amount included for fees (see Corp. Code § 31500)] to cover requisite filing fees.

A. Uniform Franchise Application Page;

B. Supplemental Information page(s);

C. Certification page;

D. Uniform Consent to Service of Process;

E. Sales Agent Disclosure Form;

[ADD, if applicant is corporation or partnership or limited liability company, and application is verified by person other than applicant's officer or general partner:]

#. Authorizing resolution;

[CONTINUE, adjusting lettering, as required:]

F. Uniform Franchise Disclosure Document;

G. Application Fee;

H. Auditor's [consent or photocopy of consent) to the use of the latest audited financial statements in the offering circular;

[ADD, if advertising or promotional materials are used in connection with offer or sale of franchise:]

#. Advertising/promotional materials.

[ADD: if documents or exhibits will be submitted at later time:]

The following documents [or exhibits] will be submitted at a later time: _____ [specify those

documents or exhibits.]

If you have questions, please contact me at _____ [*telephone number*] or at [*e-mail address*].

Sincerely,

_____ [*signature*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51A FRANCHISE REGISTRATION

PART IV. FORMS

A. Franchise Registration

21-51A California Legal Forms--Transaction Guide § 51A.212

§ 51A.212 Application for Registration of Material Modification of Existing Franchises [10 Cal. Code Reg. § 310.125]

[1] Comment

[a] Use of Form

This form is the body of the application for registration of a material modification of existing franchises. It must be used in conjunction with the facing page of the Uniform Franchise Registration Application [10 Cal. Code Reg. § 310.125; see § 51A.200] whenever there is a material modification of existing franchises (that is, franchise agreements already in force) [Corp. Code § 31125(a)]. According to the statute [see Corp. Code § 31125], an application for a material modification may be included with an original application (although how there could be an existing franchise, absent a violation of the law, before registration of the offer is not clear) or with an application for renewal of a franchise registration [see Corp. Code §§ 31121, 31122]. Coordinating renewal with modification is covered in § 51A.142, P 4.

[b] What Constitutes a Material Modification

Neither the statute nor the regulations define the term "material modification." However, Corp. Code § 31018(c) defines the sale of a franchise to include a material modification of an existing franchise, and Exhibit 1 of this form suggests that modifications that will increase costs to the franchisee, may constitute a material modification.

[c] Required Disclosure of Modification to Franchisee

As this form indicates in Exhibit 1, the application must have attached to it "a copy of the item(s) of the Uniform Franchise Offering Circular, complying with 10 Cal. Code Reg. § 310.114.1, if the information is changed" [10 Cal. Code Reg. § 310.125]. The items of the franchise agreement that are the subject of the proposed modification therefore must be listed in a separate document in the same fashion as the disclosures contained in the Uniform Franchise Disclosure Document [see 10 Cal. Code Reg. § 310.125; see also 10 Cal. Code Reg. § 310.114.1]. The existing arrangement must be stated along with the proposed new arrangement and must contain the specified descriptive elements of the proposed modification [10 Cal. Code Reg. § 310.125].

Because the material modification of an existing franchise agreement is a "sale" [*Corp. Code § 31018(c)*], it follows that no sale can be made until the modification is registered with the Department of Corporations. Furthermore, with specified exceptions, the proposed disclosure, identifying the proposed modification, must be delivered to the franchisee either five business days before execution of any binding agreement by the franchisee to the modification, or must contain a statement that the franchisee may, by written notice mailed or delivered to the franchisor or a specified agent of the franchisor within five business days after execution of the agreement, rescind the modification agreement [*Corp. Code § 31125(b)*].

Any modification of a franchise agreement with an existing franchisee is exempt from the provisions of *Corp. Code § 31110 et seq.*, if all of the following are met

- The franchisee receives the complete written modification at least five business days before the execution of a binding agreement, or the franchisee may, by written notice to the franchisor or its agent within not less than five business days following the execution of the agreement, rescind the agreement to the material modification, provided (in either case) that (1) the agreement is not executed within 12 months after the date of the franchise agreement, and (2) the modification does not waive any right the franchise has under the California Franchise Relations Act [*see Bus. & Prof. Code § 20000 et seq.*]. However, the modification may include a general release of all known and unknown claims by a party to the modification [*Corp. Code § 31125(c)(1)*].
- The modification meets one of the following requirements [*Corp. Code § 31125(c)(2)*]:
 - It is in connection with the resolution of a bona fide dispute between the franchisor and the franchisee or the resolution of a claimed or actual default by either party, and the modification is not applied on a franchise- systemwide basis at or about the time the modification is executed [*see Corp. Code 31125(c)(2)(A)* (when modification is not deemed to be systemwide)].
 - It is offered on a voluntary basis to fewer than 25 percent of the franchisor's California franchises within any 12-month period, provided each franchisee is given a right to rescind the modification agreement if the modification is not made in compliance with *Corp. Code § 31125(c)(1)*, discussed above [*see Corp. Code § 31125(e)* ("California franchise" defined); *see also Corp. Code § 31125(f)* (forbidding modifications in consecutive years to evade 25- percent requirement)].

Any modification of a franchise agreement with an existing franchisee is also exempt from the provisions of *Corp. Code § 31110 et seq.* if the modification is offered on a voluntary basis and does not substantially or adversely impact the franchisee's rights, benefits, or responsibilities under the agreement [*Corp. Code § 31125(d)*].

For a further description of an application for registration of a material modification, see § 51A.142.

[d] Signing and Filing

The application should be signed and verified by an officer or general partner of the applicant [*10 Cal. Code Reg. § 310.112*], and filed with the office of the Department where the current registration is on file. The signed application must be accompanied by the applicable filing fee [*see Corp. Code § 31500(e)*]. For a form for this certification, see § 51A.203.

[2] FORM

Application for Registration of Material Modification of Existing Franchises [10 Cal. Code Reg. § 310.125]

APPLICATION FOR REGISTRATION OF MATERIAL MODIFICATION OF EXISTING FRANCHISES

[Add the following to the facing page of the UFRA application; see § 51A.200:]

EXHIBIT 1

Attach a copy of the item(s) of the Uniform Franchise Disclosure Document, complying with Section 310.114.1 of these rules, if the information is changed. State the existing arrangement and the new arrangement with respect to the item(s). The cover of the Disclosure Document shall state: "The changes set forth herein are voluntary. If a franchisee does not receive the attached disclosure at least five business days prior to the execution of a binding agreement, the franchisee may, by written notice, mailed or delivered to the franchisor or (specify agent of franchisor), within five business days following the execution of the agreement, rescind the agreement to the modifications."

Describe the proposed modifications, including:

- (a) An identification of the section of the franchise contract or document being modified.
- (b) The nature of the modification.
- (c) Whether additional cost will accrue to the franchisee and, if so, an estimate of the additional cost.
- (d) State the effect on a franchisee who accepts the change and on a franchisee who does not accept the change.

EXHIBIT 2

Attach a copy of the franchise contract or document that embodies the modification(s).

EXHIBIT 3

State the number of franchises presently operating, the number of such franchises presently operating in California, the number of franchises proposed to be modified, and the number of franchises proposed to be modified in California.

EXHIBIT 4

Attach the Consent to Service of Process if required by *Section 31155 of the California Corporations Code*, if one has not been previously filed.

EXHIBIT 5

The applicant has caused this application to be signed on its behalf by the undersigned who is duly authorized to sign on the applicant's behalf.

_____ [name of applicant]
By: _____ [signature]
[typed name and title]

I certify or declare under penalty of perjury that I have read this application and the exhibits thereto and know the contents thereof, and that the statements therein are true and correct.

Executed at _____ [city], California, on the date of _____.

_____ [signature of declarant]
[typed name]

If executed at any place within or without this state: I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at _____ [city, state], on the date of _____.

_____ [signature of declarant]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure Requirements



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A. Franchise Registration

21-51A California Legal Forms--Transaction Guide § 51A.213

§ 51A.213 Disclosure Clause for Negotiated Sale of Franchise

[1] Comment

[a] Use of Form

This form is a statutory clause disclosing the nature of items of a Uniform Franchise Disclosure Document (UFDD) that have been, or that may be, negotiated. This form is intended to give notice to subsequent franchisees that items in a UFDD have been negotiated with previous franchisees. If this form is used and specified requirements are met, an offer or sale is exempted from registration requirements [see [b], *below*; see also *Corp. Code* § 31100]. This form may be incorporated into a negotiated item in a UFDD or may be added in an appendix to that document [10 *Cal. Code Reg.* § 310.100.2(a)(3)]. This disclosure must be made if the negotiated sale occurred within 12 months of the offering being made. An amendment making only this disclosure is effective when filed [10 *Cal. Code Reg.* § 310.100.2(a)(3)].

In the event of the negotiated sale of a franchise, a notice of the sale must be sent to the Commissioner of Corporations within 15 days after the date of the sale [10 *Cal. Code Reg.* § 310.100.2(a)(4); see § 51A.254]. Additionally, if applicable, the franchisor must certify or declare in an appendix to an application for renewal of the existing franchise registration that all required notices of a negotiated sale of a franchise have been filed with the Commissioner [10 *Cal. Code Reg.* § 310.100.2(a)(5); see 10 *Cal. Code Reg.* § 310.100.2(a)(4) (notice requirement); 10 *Cal. Code Reg.* § 310.122 (notice form); see also § 51A.143].

[b] Registration of Negotiated Sale of Franchise--Qualifying for Exemption

An offer or sale of a franchise on terms other than those in a registered offer [see *Corp. Code* §§ 31111, 31121, 31123] is exempt from the franchise registration requirement [see *Corp. Code* § 31100] if all of the following conditions are met [10 *Cal. Code Reg.* § 310.100.2(a); see §§ 51A.200-51A.211]:

- The initial offer is the offer registered under *Corp. Code* § 31111, 31121, or 31123.
- When the prospective franchisee receives the disclosure document, he or she also receives copies of

all Notices of Negotiated Sales [see § 51A.254] filed with the Commissioner of Corporations within the last 12 months.

- Before selling another franchise, the franchisor amends its registered offer to include the statement required by *10 Cal. Code Reg. § 310.100.2(a)(3)* (this form). This disclosure should be made in the UFDD item that was negotiated or in an appendix to the UFDD. This disclosure must be made if the negotiated sale occurred within 12 months of the offering being made. An amendment making only this disclosure is effective when filed.

- The Notice of Negotiated Sale of Franchise [see § 51A.254] is filed with the Commissioner of Corporations within 15 business days after the negotiated sale is consummated.

- The franchisor certifies or declares in an appendix to its application for renewal that all notices have been filed with the Commissioner of Corporations as required by *10 Cal. Code Reg. § 310.100.2(a)(4)*.

[2] FORM

Disclosure Clause for Negotiated Sale of Franchise

Disclosure Clause for Negotiated Sale of Franchise

[Attach to UFDD as appendix or incorporate into negotiated item in body of UFDD]:

Negotiated Items

The terms of Item(s) [*specify item(s)*] of this Disclosure Document have been negotiated with other franchisees. A copy of Negotiated Sales Notices filed in California in the last twelve months is attached as Exhibit [*specify*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure Requirements



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51A FRANCHISE REGISTRATION

PART IV. FORMS

A. Franchise Registration

21-51A California Legal Forms--Transaction Guide § 51A.214

§ 51A.214 Registration Renewal Statement

[1] Comment

[a] Use of Form

This form is a registration renewal statement that must be attached as an appendix to the Uniform Franchise Registration Application to renew a franchise offering registration if the franchisor has effected any negotiated sales exempt from registration under *10 Cal. Code Reg. 310.100.2* [*10 Cal. Code Reg. § 310.122(b)*]. For discussion of negotiated sales and a disclosure clause for negotiated sales, see § 51A.213. For a notice of negotiated sale, see § 51A.254.

Applications for renewal of a franchise registration must be made on the same format as the original application, the Uniform Franchise Registration Application [*Corp. Code § 31122*; *10 Cal. Code Reg. § 310.122(a)*; see *10 Cal. Code Reg. § 310.111(b)*; see also § 51A.209]. The Commissioner of Corporations has adopted the Uniform Franchise Uniform Franchise Disclosure Document (UFDD), drafted by the North American Securities Administrators Association, Inc., as the mandatory method of renewing a franchise registration [see *10 Cal. Code Reg. § 310.111*]. The renewal application must include one complete updated copy of the UFDD and exhibits, and all documents required for an initial registration. If a document is revised, one copy of the changed pages, with the changes marked, must be submitted. Changes from the previous filing must be marked, but not highlighted in color. Extra copies should not be sent [Guidelines for Franchise Registration, Department of Corporations 310.111 UFDD PACKET].

For an application for registration of a material modification of a franchise registration, see § 51A.212. For coverage of coordinating renewal and modification, see § 51A.142, P 4.

[b] Renewal of Registration

A franchise offering ordinarily is deemed registered for one year from the effective date of registration [*Corp. Code § 31120*]. The registration may be renewed for additional periods of one year by submitting the prescribed registration renewal statement and the required fee [see *10 Cal. Code Reg. § 310.111*; *Corp. Code § 31500(c)*] If no stop order or

other order is in effect, registration of the offer of franchises automatically becomes renewed effective at 12:00 noon, California time, on the date on which the prior registration is due to expire, or at any earlier time determined by the Commissioner [*Corp. Code* §§ 31121, 31222; *see 10 Cal. Code Reg. § 310.122*].

By statute, the registration renewal statement must be submitted for filing no later than 15 business days before the expiration of the registration unless that period is waived by order of the Commissioner [*Corp. Code* § 31121]. A renewal application is filed at least 15 business days before the expiration of the registration automatically becomes renewed effective 12:00 p.m., California time, of the date on which the prior registration is due to expire [*Corp. Code* § 31121]. If the renewal application is filed less than 15 business days before expiration of the registration, this automatic effectiveness provision does not apply, but the application is still treated as a RENEWAL. If filed after the expiration of a previous registration, the applicant should check "REGISTRATION OF AN OFFER AND SALE OF FRANCHISES" on the application-facing page and pay the filing fee for a franchise application, rather than for a renewal application [*see Guidelines for Franchise Registration, Department of Corporations 310.111 UFDD PACKET*].

The franchisor may not offer or sell franchises in California in the interim period between expiration and renewal except that a franchisor may make an offer (but not a sale) of a franchise under *Corp. Code* § 31107 [*Guidelines for Franchise Registration, Department of Corporations 310.111 UFDD PACKET; see § 51A.112*].

[2] FORM

Registration Renewal Statement

[Attach as appendix to renewal UFDD:]

REGISTRATION RENEWAL STATEMENT

I certify (or declare) that all Notices of Negotiated Sale of Franchise have been filed with the Commissioner as required by paragraph (a)(4) of Section 30.100.2 of these rules. Executed at _____[city], California, on the date of _____[date].

_____[name of franchisor]
 By: _____[signature of franchisor]
 _____[title]
 [typed name]

If executed at any place within or without this state I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at _____[city], California, on the date of _____[date].

_____[name of franchisor]
 By: _____[signature of franchisor]
 _____[title]
 [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure Requirements



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A. Franchise Registration

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[Reserved]

§§ 51A.215[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51A FRANCHISE REGISTRATION

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B. Selling Under Impound Condition

21-51A California Legal Forms--Transaction Guide § 51A.230

§ 51A.230 Purchase Receipt [10 Cal. Code Reg. § 310.113.2]

[1] Comment

[a] Use of Form

This form is a purchase receipt which is used in connection with an impound condition [see [c], *below*]. When an impound condition has been imposed by the Commissioner of Corporations in connection with the registration of a franchise offering, the franchisor is required to furnish each franchisee or subfranchisor from whom money is received with a purchase receipt, which must be in a form prescribed by the Commissioner [see *10 Cal. Code Reg. § 310.113.2*]. This form is in the required format [see [b], *below*].

[b] Contents and Form of Purchase Receipt

The purchase receipt form must provide space for at least all of the following [*10 Cal. Code Reg. § 310.113.2*]:

- The complete names and addresses of the purchaser.
- The complete name of the individual receiving the payment.
- The general location of the franchise involved and the total purchase price.
- The amount of the payment received.
- The complete name and address of the depository with whom the payment will be placed.
- The date of the payment.

Purchase receipts must be consecutively numbered and prepared in triplicate. The original is to be given to the purchaser, the duplicate is to be retained by the franchisor, and the triplicate is to be provided to the depository together

with the payment received [10 Cal. Code Reg. § 310.113.2].

[c] Operation of Impound Condition

An impound condition is imposed when the Commissioner of Corporations determines that the applicant for franchise registration has not demonstrated that adequate financial arrangements have been made to fulfill obligations to franchisees to provide real estate, improvements, equipment, inventory, training, or other items included in the offering [Corp. Code § 31113]. When an impound condition has been imposed, the franchisor must deposit all franchise fees and other funds obtained from franchisees and subfranchisors within 48 hours after their receipt in a separate trust account with a depository [Corp. Code § 31113; 10 Cal. Code Reg. §§ 310.113.1, 310.113.3]. The depository must be a national bank located in California or a California bank or trust company. The depository's written consent to act in that capacity must be filed with the Commissioner [10 Cal. Code Reg. § 310.113.3; see § 51A.231].

For a guide to selling under an impound condition, see § 51A.141.

A franchisor may avoid an impound if an increase in the franchisor's capital shows the financial ability to meet proposed obligations. An impound may also be avoided by an adequate guarantee of performance, together with the guarantor's audited financial statements [see [e], below; see also § 51A.205 (form for guarantee of performance)].

[d] Release of Impound

Funds applicable to a particular franchisee or subfranchisor held in impound may be released on a showing that the franchisor has fulfilled its obligations to that franchisee or subfranchisor under the franchise agreement [10 Cal. Code Reg. § 310.113.4]. A franchisor with funds held under an impound condition may obtain a release of the funds by filing with the Commissioner of Corporations a request for an order authorizing the release of the impound funds [10 Cal. Code Reg. § 310.113.4]. For a release request and coverage of the contents of the request, see § 51A.232.

[e] Surety Bond in Lieu of Impound

In lieu of the imposition of an impound condition, a franchisor may post a surety bond in an amount set by the Commissioner and conditioned on the completion by the franchisor of its obligations under the franchise contract to provide real estate, improvements, equipment, inventory, training, or other items included in the offering. The bond must be issued by a corporate surety admitted to transact business in the State of California [10 Cal. Code Reg. § 310.113.5; see Corp. Code § 31113]. For a form for a guarantee of performance for use in avoiding an impound condition, see § 51A.205.

Under the 1982 Bond and Undertaking Law [see Code Civ. Proc. §§ 995.010 et seq.], an undertaking may be given in place of a bond required by statute [Code Civ. Proc. § 995.210(a)].

[2] FORM

Purchase Receipt [10 Cal. Code Reg. § 310.113.2]

THIS FORM MUST BE EXECUTED IN TRIPLICATE.

PURCHASE RECEIPT

Number _____

Received on _____ [date] from _____ [name of franchisee], of

_____[*address of franchisee*], the sum of \$_____, evidenced by cash [], personal check [], cashier's check [], or [*specify other form of payment*] as a deposit on account of the total purchase price of \$_____ for a [*specify type*] franchise, to be located at [*location*] pursuant to the purchase agreement dated _____ [*date*], between _____ [*name of franchisee*] as Franchisee and _____ [*name of franchisor*] as Franchisor. This sum will be deposited within 48 hours of its receipt in a special escrow account at _____ [*name of depositary*], located at _____ [*address*], pursuant to the Franchise Investment Law of the State of California until released on approval of the Commissioner of Corporations.

Executed at _____, California, on _____ [*date*].

_____ [*name of franchisor*]

By: _____ [*signature*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure Requirements



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B. Selling Under Impound Condition

21-51A California Legal Forms--Transaction Guide § 51A.231

§ 51A.231 Consent of Depositary to Act [10 Cal. Code Reg. § 310.113.3]

[1] Comment--Use of Form

This form is a consent by a depositary to act in the capacity of a depositary. This type of written consent is a prerequisite to approval of the depositary by the Commissioner of Corporations when an impound condition has been imposed on a franchisor. The depositary must be a national bank located in California or a California bank or trust company [10 Cal. Code Reg. § 310.113.3].

For a discussion of the operation of the impound condition, see §§ 51A.10[5] and 51A.230[1]. For a guide to selling under the impound condition, see § 51A.241.

[2] FORM

Consent of Depositary to Act [10 Cal. Code Reg. § 310.113.3]

[letterhead of depositary]

_____*[date]*

TO: Commissioner of Corporations

_____*[address of office where application is on file]*

RE: File No. _____

_____*[name of applicant (franchisor)]*

Sir or Madam:

This letter is to inform you that _____ [*name of depositary*], a [national bank located in California or California bank or California trust company], consents to act as depositary for funds to be deposited in a separate trust account by _____ [*name of franchisor*] for the account of franchisees and subfranchisors under the impound condition imposed under the Franchise Investment Law.

Sincerely,

_____ [*name*]

By: _____ [*signature*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Franchise Relationships General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview



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B. Selling Under Impound Condition

21-51A California Legal Forms--Transaction Guide § 51A.232

§ 51A.232 Request for Order Authorizing Release of Impound Funds to Franchisor [10 Cal. Code Reg. § 310.113.4]

[1] Comment

[a] Use of Form

This form is a request for an order to release funds held by a depositary under an impound condition imposed by the Commissioner of Corporations. If an impound condition has been imposed, funds are ordinarily held in impound until the franchisor can demonstrate that it has completely performed its obligations to provide real estate, improvements, equipment, inventory, training, or other items to a particular franchisee or subfranchisor, or until, for other reasons, the impound is no longer required to protect franchisees [10 Cal. Code Reg. § 310.113.4; see Corp. Code § 31113].

Funds are released from impound by filing a request with the Commissioner of Corporations for an order authorizing the release of funds applicable to a particular franchisee or subfranchisor on a showing that all obligations have been performed, or that, for other reasons, the impound is no longer required [10 Cal. Code Reg. § 310.113.4]. For coverage of the contents of the request for an order, see [b], *below*.

For a more detailed discussion of the impound condition, see § 51A.230[1].

[b] Contents of Request for Order

A request for an order of the Commissioner authorizing the release of impound funds to the franchisor must contain all of the following [10 Cal. Code Reg. § 310.113.4]:

- The franchisor's statement that all required proceeds from the sales of franchises have been placed with the depositary in accordance with the impound condition.
- The depositary's statement signed by an appropriate officer of the depositary setting forth the aggregate amount of impound funds placed with the depositary.

■ The name of each franchisee or subfranchisor and the amount held in impound for the account of each franchisee or subfranchisor.

■ A showing that the franchisor, with respect to each franchise for which funds are sought to be released, has completely performed all obligations to provide real estate, improvements, equipment, inventory, training, or other items.

■ Other information that the Commissioner may require in a particular case.

■ A statement signed by the franchisee or subfranchisor that the information is correct.

[2] FORM

Request for Order Authorizing Release of Impound Funds to Franchisor [10 Cal. Code Reg. § 310.113.4]

REQUEST FOR ORDER AUTHORIZING THE RELEASE OF IMPOUNDED FUNDS

Pursuant to *Title 10, Section 310.113.4 of the California Code of Regulations*, _____ [name of franchisor] requests an order authorizing the release to applicant of all impound funds representing payment by _____ [name of franchisee or subfranchisor].

1. _____ [Name of franchisor], as franchisor, has placed all required proceeds from the sale of franchises with the depository, _____ [name of depository], in accordance with the terms and conditions of the impound condition issued on _____ [date].

2. The statement of the depository signed by an appropriate officer of the depository setting forth the aggregate amount of impounds placed with the depository and the amount representing payments by _____ [name of franchisee or subfranchisor] for the purchase of a franchise is attached as Exhibit A and made a part of this request.

3. The names of each franchisee [or subfranchisor] and the amount held in the impound for the account of each is as follows:

Name of Franchisee	Amount
_____ [name]	\$ _____
_____ [name]	\$ _____

4. _____ [Name of franchisor], as franchisor, has performed all of the following obligations required under the franchise agreement: [list obligations]. The statement of the franchisee, _____ [name of franchisee whose funds are sought to be released], that _____ [name of franchisor] has performed all obligations to be performed by it before the opening of the franchisee's business is attached as Exhibit B and made a part of this request.

_____ [name of franchisor]

By: _____ [signature]

[typed name and title]

[Include verification; this form may be used if the franchisor is a California corporation:]

I, _____ [name of corporate officer], declare:

I am [title, e.g., President], of _____ [name of franchisor] (a California corporation), the above-named applicant, and am duly authorized to make this verification on behalf of the corporation.

I have read the above application and know its contents and declare the same to be true of my own knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at _____, California, on _____ [date].

_____ [signature of officer]
[typed name]

EXHIBIT A

[letterhead of depositary]

_____ [date]

Commissioner of Corporations

_____ [address of office where application is on file]

Re: File No. _____

_____ [name of applicant (franchisor)]

Sir or Madam:

As of the above date, a total of \$[aggregate amount of impound funds] has been deposited with _____ [name of depositary] on behalf of franchisees of _____ [name of franchisor], \$_____ of which represent payments made by _____ [name of franchisee whose funds are sought to be released].

Sincerely,

_____ [name of depositary]

By: _____ [signature]

[typed name and title of officer]

EXHIBIT B

_____ [date]

Sir or Madam:

This letter is to state that _____ [name of franchisor] has completely performed its obligations under

the franchise agreement before the granting of my franchise in that [*state details of performance, e.g., construction of the building and stocking with inventory have been completed and I have received the agreed training*], and the franchise business is scheduled to be opened on _____ [*date*].

Sincerely,

_____ [*signature of franchisee*]

[*typed name*]

_____ [*street address*]

_____ [*city, state, zip*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Franchise Relationships General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview



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B. Selling Under Impound Condition

21-51A California Legal Forms--Transaction Guide §§ 51A.233-51A.239

[Reserved]

§§ 51A.233[Reserved]



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C. Exemption Notices

21-51A California Legal Forms--Transaction Guide § 51A.240

§ 51A.240 Notice of Exemption Under Corp. Code §§ 31101, 31104, or 31108

[1] Comment--Use of Form

This form is a notice of exemption that must be filed by persons claiming an exemption from registration under *Corp. Code* §§ 31101, 31104, or 31108. The requirements for these exemptions are *set forth in § 51A.112*, PP 1(c), 1(d), and 2, respectively. The form may be filed at any time after July 1 of the year preceding the calendar year for which the notice is required to be filed. For example, a notice for calendar year 2002 may be filed at any time after July 1, 2001. A separate notice must be filed for each calendar year, together with the applicable fee [*see Corp. Code § 31500(f)*], before any offer or sale of a franchise in California (other than a material modification for the exemption) under *Corp. Code* § 31101 or 31104 [*see [2], below* (instructions); *see also Corp. Code § 31018(c)*]. No documents are required to be filed with this notice of exemption [*see [2], below* (instructions)].

This form is available from the Department of Corporations. It is also available on the Department's website at www.corp.ca.gov/forms/. However, if the notice form cannot be obtained, it may be typed on a single sheet of 8 1/2 inch by 11 inch white bond paper, using one side only. If the space in the form is insufficient for one or more items, a single continuation sheet should be attached, designating the continued information by item number [*see [2], below* (instructions)].

If this notice is filed by a subfranchisor, the notice is only applicable to offers and sales by the subfranchisor who filed the notice [*see [2], below* (instructions)].

A notice of exemption may be filed in any office of the Department [Dep't of Corp. Release No. 13-G (revised 2001)], including the Sacramento office at the following address:

**Department of Corporations
1515 K Street, Suite 200
Sacramento, CA 95814-4017**

For other addresses, see § 51A.130, P 7.

[2] FORM

Notice of Exemption Under Corp. Code §§ 31101, 31104, or 31108

[Click here to view image.](#)

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Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesRegistration & DisclosureGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureRequirements



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C. Exemption Notices

21-51A California Legal Forms--Transaction Guide § 51A.241

§ 51A.241 Notice of Exemption Under Corp. Code § 31106

[1] Comment--Use of Form

This form is a notice of exemption that must be filed by persons claiming an exemption from registration under *Corp. Code § 31106*. This form must be filed, together with the applicable fee [*see Corp. Code § 31500(f)*], within 15 calendar days after the sale of the franchise. No documents are required to be filed with this notice of exemption [*see [2], below (instructions)*].

The filing of this notice means that the filer is claiming an exemption regarding any offer, sale, or other transfer of a franchise (or an interest in a franchise) and that the offer, sale, or other transfer meets the prescribed requirements [*see [2], below (instructions)*]. The requirements for this exemption are *set forth in § 51A.112*, P 1f. A separate notice must be filed for each transaction for which this exemption is claimed, together with the applicable fee [*see [2], below (instructions)*].

This form is available from the Department of Corporations. It is also available on the Department's website at www.corp.ca.gov/forms/. However, if the notice form cannot be obtained, it may be typed on a single sheet of 8 1/2 inch by 11 inch white bond paper, using one side only. If the space in the form is insufficient for one or more items, a single continuation sheet should be attached, designating the continued information by item number [*see [2], below (instructions)*].

If this notice is filed by a subfranchisor, the notice is only applicable to offers and sales by the subfranchisor who filed the notice [*see [2], below (instructions)*].

A notice of exemption may be filed in any office of the Department [Dep't of Corp. Release No. 13-G (revised 2001)], including the Sacramento office at the following address:

**Department of Corporations
1515 K Street, Suite 200**

Sacramento, CA 95814-4017

For other addresses, see § 51A.130, P 7.

[2] FORM

Notice of Exemption Under Corp. Code § 31106

[Click here to view image.](#)

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Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesRegistration & DisclosureGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureRequirements



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C. Exemption Notices

21-51A California Legal Forms--Transaction Guide §§ 51A.242-51A.249

[Reserved]

§§ 51A.242[Reserved]



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21-51A California Legal Forms--Transaction Guide § 51A.250

§ 51A.250 Legend That Must Appear on Certain Franchise Advertisements [10 Cal. Code Reg. §§ 310.156.1, 310.156.2]

[1] Comment

[a] Use of Form

This form is a required legend that must appear in any advertisement that refers to the registration of franchises under the Franchise Investment Law. The legend, in capital letters of not less than 10-point type, must appear in two types of advertisements. The first type, which must be filed with the Commissioner before their use, must carry this legend if the advertisement refers to registration of the franchise under the Franchise Investment Law [10 Cal. Code Reg. § 310.156.1(c)]. The second type, referred to as a "communication" because it is expressly excluded from the statutory definition of advertisement [see Corp. Code §§ 31003, 31156], must bear the legend in all cases [10 Cal. Code Reg. § 310.156.2]. For the distinction between these two types of franchise advertisements, see § 51A.140, P 1.

Internet advertising in connection with the offer or sale of a franchise is exempt from the requirements of Corp. Code § 31156 for filing advertisements with the Commissioner, if the franchisor files the required notice with the Commissioner and the Internet advertisement meets certain specifications [see 10 Cal. Code Reg. § 310.156.3]. For a complete discussion of these requirements, see § 51A.140 P 1(d).

[b] Standards for Advertisements

Any advertisement of a franchise should disclose fairly and accurately the relevant facts concerning the franchise, its terms and conditions, and the material rights and liabilities created under the franchise in such a manner that the advertisement will not be misleading. Specifically, there should be no statement or inference that the franchise is a safe investment, that failure is unlikely or impossible, or that earnings or profits are assured [10 Cal. Code Reg. § 310.156.1(a)]. Earnings claims must conform to Item 19 of the offering circular prescribed by the Uniform Franchise Registration Application [10 Cal. Code Reg. § 310.156.1(b); see 10 Cal. Code Reg. § 310.111(b); see also § 51A.209[2]].

In addition, if the advertisement contains any endorsement or recommendation of the franchises by any public figure, whether express or implied, full disclosure must be made of any compensation or other benefit given or promised by the franchisor or any person associated with the franchisor to that person, directly or indirectly. These disclosures must be made in the same document, or as part of the same radio or television program without any intermission or other intervening material, in which the advertisement appears [10 Cal. Code Reg. § 310.156.1(e)]. Any advertisement ordinarily should contain the name and address of the person placing the advertisement [10 Cal. Code Reg. § 310.156.1(d)]. If the advertisement refers to a tax exemption or tax reduction, the statement should be based on an opinion of counsel and that person's name should be stated in the advertisement [10 Cal. Code Reg. § 310.156.1(f)].

[c] Federal Requirements for Earnings Claims

The FTC's Franchise Rule [26 C.F.R. pt. 436] permits a franchisor to provide information about the actual or potential financial performance of its franchised and/or franchisor-owned outlets, if there is a reasonable basis for the information, and if the information is included in the disclosure document [16 C.F.R. § 436.5(s)]. Financial performance information that differs from that included in Item 19 of the Uniform Franchise Disclosure Document (UFDD) [16 C.F.R. § 436.5(s); see § 51A.209[2]] may be given only if a franchisor [16 C.F.R. § 436.5(s)(1)]:

- Provides the actual records of an existing outlet you are considering buying; or
- Supplements the information provided in Item 19, for example, by providing information about possible performance at a particular location or under particular circumstances.

If a franchisor does not provide any financial performance representation, as required in Item 19, the franchisor must also state [16 C.F.R. § 436.5(s)(2)]:

We do not make any representations about a franchisee's future financial performance or the past financial performance of company-owned or franchised outlets. We also do not authorize our employees or representatives to make any such representations either orally or in writing. If you are purchasing an existing outlet, however, we may provide you with the actual records of that outlet. If you receive any other financial performance information or projections of your future income, you should report it to the franchisor's management by contacting [name, address, and telephone number], the Federal Trade Commission, and the appropriate state regulatory agencies.

If the franchisor makes any financial performance representation to prospective franchisees, the franchisor must have a reasonable basis and written substantiation for the representation at the time the representation is made and must state the representation in the Item 19 disclosure [16 C.F.R. § 436.5(s)(3)]. The franchisor must also disclose additional specified information [see 16 C.F.R. § 436.5(s)(3); see 16 C.F.R. § 436.5(s)(4) (exception)].

In addition to the financial performance information provided in UFDD, the franchisor may deliver to a prospective franchisee a supplemental financial performance representation about a particular location or variation, apart from the disclosure document [16 C.F.R. § 436.5(s)(5)]. The supplemental representation must [16 C.F.R. § 436.5(s)(5)(i)-(iii)]:

- Be in writing.
- Explain the departure from the financial performance representation in the disclosure document.
- Be prepared, as specified [see 16 C.F.R. § 436.5(s)(3)(i)-(iv)].

Additionally, it is an unfair or deceptive act or practice [see 15 U.S.C. § 45 (definition)], to disseminate any financial performance representations to prospective franchisees unless the franchisor has a reasonable basis and written

substantiation for the representation at the time the representation is made, and the representation is included in Item 19 of the franchisor's disclosure document [16 C.F.R. § 436.9(c)]. In conjunction with a financial performance representation, the franchise seller must also disclose additional specified information [see 16 C.F.R. § 436.5(s)(3)(ii)(B), (E)], if the representation relates to the past performance of the franchisor's outlets, and include a clear and conspicuous admonition that a new franchisee's individual financial results may differ from the result stated in the financial performance representation [16 C.F.R. § 436.9(c)].

Finally, it is an unfair or deceptive act or practice [see 15 U.S.C. § 45 (definition)], to fail to make available to prospective franchisees, and to the Federal Trade Commission on reasonable request, written substantiation for any financial performance representations made in UFDD, Item 19 [16 C.F.R. § 436.9(d)].

[2] FORM

Legend That Must Appear on Certain Franchise Advertisements [10 Cal. Code Reg. §§ 310.156.1, 310.156.2]

THESE FRANCHISES HAVE BEEN REGISTERED UNDER THE FRANCHISE INVESTMENT LAW OF THE STATE OF CALIFORNIA. SUCH REGISTRATION DOES NOT CONSTITUTE APPROVAL, RECOMMENDATION, OR ENDORSEMENT BY THE COMMISSIONER OF CORPORATIONS, NOR A FINDING BY THE COMMISSIONER THAT THE INFORMATION PROVIDED HEREIN IS TRUE, COMPLETE, AND NOT MISLEADING.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law
Federal Trade Commission Act
General Overview
Business & Corporate Law
Distributorships & Franchises
Registration & Disclosure
General Overview
Business & Corporate Law
Distributorships & Franchises
Registration & Disclosure
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21-51A California Legal Forms--Transaction Guide § 51A.251

§ 51A.251 Request for Interpretive Opinion [Corp. Code §§ 31510, 31511; 10 Cal. Code Reg. § 250.12]

[1] Comment

[a] Use of Form

This form is a request for issuance of an interpretive opinion from the Commissioner of Corporations, that may be granted in the Commissioner's discretion [*Corp. Code § 31510*]. Interpretive opinions are issued through the Office of Policy to provide a procedure by which members of the public can protect themselves against liability for acts done or omitted in good faith in reliance on the determination of the Commissioner with respect to an interpretation of the Franchise Investment Law or the rules adopted under the Law. Interpretive opinions are applicable only to the specific transaction identified and may not be relied on in connection with any other transaction [*10 Cal. Code Reg. § 250.12(a)*]. These opinions are issued only when the Commissioner does not assert jurisdiction over a particular transaction. When the Commissioner does assert jurisdiction with respect to a particular instance or determines that a legal requirement is applicable to a specific set of circumstances, the letter containing that advice is not an interpretive opinion, and cannot be relied on by the requesting party [Dep't of Corp. Release No. 61-C (revised Sept. 30, 1999), reproduced in Marsh & Volk, Practice Under the California Securities Laws, App. A-4 (Matthew Bender); *see also* Dep't of Corp. Release No. 7-F (June 25, 1980), reproduced in Marsh & Volk, Practice Under the California Securities Laws, App. C-4 (Matthew Bender)].

[b] Contents of Request

The request must be addressed in writing to the Commissioner of Corporations at the Department of Corporations and should state that an interpretive opinion is requested. A request must contain all the relevant information needed for issuance of an opinion and should present the views of the attorney making the request with respect to the legal questions presented [*see 10 Cal. Code Reg. § 250.12*; Dept. of Corp. Release No. 61-C (revised Sept. 30, 1999), reproduced in Marsh & Volk, Practice Under the California Securities Laws, App. A-4 (Matthew Bender); *see also* Dept. of Corp. Release No. 7-F (June 25, 1980), reproduced in Marsh & Volk, Practice Under the California Securities Laws, App. C-4 (Matthew Bender)].

[c] Indexing and Availability of Opinions

The names of the persons concerning whom an interpretive opinion is requested are indexed in the Central Index of the Department of Corporations located in the Los Angeles office [10 Cal. Code Reg. § 250.12(b)]. Interpretive opinions, unless held confidential [see [d], below], are among the records that are subject to public inspection and copying during the Department's regular business hours [10 Cal. Code Reg. §§ 250.9, 250.9.1(e)]. Copies of published interpretive opinions relating to franchise investment law are reproduced in Marsh & Volk, Practice Under the California Securities Laws, Appendix C-4, (Matthew Bender).

Annotations of the Commissioner's opinions may be found in Marsh & Volk, Practice Under the California Securities Laws (Matthew Bender).

[d] Confidential Treatment of Requests and Replies

An interpretive opinion and the request for the opinion are normally available for public inspection [10 Cal. Code Reg. §§ 250.9, 250.9.1(e)]. However, the Commissioner may afford confidential treatment to certain information on request if, in the Commissioner's opinion, the public inspection of the information is not necessary, and if the requesting party can reasonably show that the information meets specified requirements [10 Cal. Code Reg. §§ 250.10(a), 250.12(c); see § 51A.211[1][b]]. Confidential information held by the Commissioner will not be disclosed unless a state or federal agency lawfully requests the information, an investigation requires its disclosure, or the Commissioner determines confidential treatment is no longer justified [10 Cal. Code Reg. § 250.10.5(a)].

[2] FORM**Request for Interpretive Opinion [Corp. Code §§ 31510, 31511; 10 Cal. Code Reg. § 250.12]**

TO: Commissioner of Corporations
c/o Office of Policy
Department of Corporations
1515 K Street, Suite 200
Sacramento, CA 95814-4017

REQUEST FOR AN INTERPRETIVE OPINION

PURSUANT TO CORP. CODE § 31510 [AND FOR THE CONFIDENTIAL TREATMENT OF THIS REQUEST AND THE REPLY]

1. Names of Interested Persons

The persons concerning whom an interpretive opinion is requested are as follows: _____ [include names of all natural persons and entities involved in the proposed transaction, along with identification of those who may rely on the interpretation, e.g., possible franchisor].

2. Facts and Circumstances

_____ [State fully, e.g., Gasohol Corporation, a California Corporation, has developed an automobile service system that provides for "while-you-wait" warranted automotive tuneup and emissions control services emphasizing convenience to the customer. This system is contained in a series of copyrighted shop manuals and is designated "Super Tune," a name protected by registration with the United States Patent Office.

Gasohol Corporation proposes to franchise its service station dealers, affording them an opportunity to specialize in the performance of services under the "Super Tune" system. As now structured, the service concept is intended to be separate from the relationship of petroleum supplier/retailer dealer presently existing between Gasohol Corporation and its service station dealers.

Gasohol Corporation is currently exempted by the provisions of *Corp. Code § 31101* from having to register its petroleum agreements with service station franchisees. Gasohol will continue to provide prospective franchisees with the disclosures required by *Corp. Code § 31101(c)*, including disclosures concerning "Super Tune." According to its most recent audited financial statement, Gasohol Corporation has a net worth in excess of \$5 billion. Gasohol has had at least 25 franchisees conducting business during the past five years.]

3. Legal Question

[*E.g.*, Is the offer and sale of the "Super Tune" system described above by Gasohol Corporation a franchise exempt from registration under the Franchise Investment Law because the transaction satisfies all the conditions of *Corp. Code § 31101*, in particular the experience requirement of subdivision (b) of that Section?]

4. Opinion of Counsel

_____[*E.g.*, It is my opinion that the proposed offer and sale of the "Super Tune" franchise system by Gasohol Corporation is exempt from registration because the franchisor satisfies all conditions of *Corp. Code § 31101*. In particular, subdivision (b) of that Section, which sets forth the scope of operations test, permits that test to be satisfied by the franchisor *either* having had at least 25 franchisees conducting business at all times during the five-year period immediately preceding the offer or sale or having conducted the business that is the subject of the franchise continuously for not less than five years preceding the offer or sale. Since the Legislature omitted any requirement in the first alternative that the franchisees must have conducted the business which is the subject of the proposed franchise, it must be assumed that the Legislature intended that five years of franchising experience was sufficient to meet the scope of operations test.]

[*Optional*]

5. Request for Confidential Treatment

[*State facts that would justify confidential treatment (see § 51A.211[1][b]).*]

[*Continue with the following:*]

_____[*signature of attorney making request*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Franchise Relationships General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview



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21-51A California Legal Forms--Transaction Guide § 51A.252

§ 51A.252 Notice of Franchisor's Registration Violation of Franchise Investment Law [Corp. Code § 31303; 10 Cal. Code Reg. § 310.303]

[1] Comment

[a] Use of Form

This form is a notice of violation of the Franchise Investment Law to be given to a franchisee by a franchisor to shorten the time within which the franchisee may bring an action, when the franchisor has violated *Corp. Code § 31110* or *31200* [10 Cal. Code Reg. § 310.303; see *Corp. Code § 31303*]. The form also contains a mandatory introductory letter to the Commissioner of Corporations, seeking approval of the notice of violation.

Corp. Code § 31110 makes it unlawful for any person to offer or sell a franchise in California unless the offer of the franchise has been registered under the Franchise Investment Law or is exempt from registration [*Corp. Code § 31110*]. *Corp. Code § 31200* makes it unlawful for any person to willfully make an untrue statement of a material fact in an application, notice, or report filed with the Commissioner of Corporations under the Franchise Investment Law or to willfully omit to state a material fact in any application, notice, or report [*Corp. Code § 31200*]. A franchisor who sells a franchise in violation of either statute is liable to the franchisee for the damages caused by the violation. If the violation is willful, the franchisee may also sue for rescission [*Corp. Code § 31300*].

The purpose of this notice is to shorten to 90 days the time period within which the franchisee may bring an action to enforce remedies for the violation. In the absence of the giving of a proper notice of the violation to the franchisee, the franchisee may bring action within four years after the act or transaction constituting the violation or within one year after discovery of the fact constituting the violation, whichever is shorter [*Corp. Code § 31303*; see *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (2002) 95 Cal. App. 4th 709, 723-725, 116 Cal. Rptr. 2d 497 (claims for violations of *Corp. Code § 31300* were barred by four-year statute; *Corp. Code § 31306* constitutes express statement of unequivocal legislative intent that statute of limitations provisions in *Corp. Code § 31303* are to be sole controlling limits on time for filing suit under Franchise Investment Law, and therefore delayed discovery or tolling rules did not apply to franchisees' causes of action)].

[b] Form and Contents of Notice

To obtain approval of a notice of violation, a franchisor must file an application for approval with the Commissioner of Corporations in letter form. The franchisor must attach to the application as an exhibit a form of the written notice for which the Commissioner's approval is requested [10 Cal. Code Reg. § 310.303]. This form contains the introductory letter to the Commissioner as well as the required notice of violation.

The notice of violation must contain all of the following [10 Cal. Code Reg. § 310.303]:

- A prescribed legend, in capital letters of not less than 10-point type and printed in a contrasting color or type, that the notice of violation has been approved by the Commissioner only as to form [see 10 Cal. Code Reg. § 310.303(a)].
- The name and address of each party to whom the notice is to be directed. An attached list of names may be used.
- A statement regarding how the violation of *Corp. Code § 31303* occurred, including identification of the transaction involved and the relevant parties, identification of the specific Corporations Code section violated, and an explanation of the liability of the franchisor and/or subfranchisor to the franchisee under that section.
- Information regarding the franchisor that is material and pertinent to the franchisee [see 10 Cal. Code Reg. § 310.303(d)].
- A statement indicating the franchisee's right of action, if any, under *Corp. Code § 31300*, together with the statement that no action may be brought later than 90 days after delivery of the notice.
- A complete statement setting forth the text of *Corp. Code § 31303*.
- The notice must not be subject to any condition not authorized by *Corp. Code § 31303*.

The franchisor sending this notice should provide for a means of delivery that will allow for ascertaining the time of delivery to the franchisee. When the notice is submitted to the Commissioner for approval, the applicant should indicate the method of delivery that will be used [10 Cal. Code Reg. § 310.303].

[2] FORM

Notice of Franchisor's Registration Violation of Franchise Investment Law [Corp. Code § 31303; 10 Cal. Code Reg. § 310.303]

NOTICE OF VIOLATION OF FRANCHISE INVESTMENT LAW

To: Commissioner of Corporations
 _____[street address]
 _____[city, state, zip]

Sir or Madam:

This letter is to seek approval for the enclosed notice of violation of *Corp. Code § 31303*, attached as Exhibit A. This notice of violation, when approved, will be sent to _____[name(s) of franchisee(s)], as a result of a

violation of Corporations Code Section *[list specific section violated]* on _____ *[date]*. This notice of violation will be sent by _____ *[describe method of delivery, e.g., United States mail, first class, postage prepaid, with return receipt requested]*.

Please contact me at *[telephone number]* if you require further information.

Sincerely,

 _____ *[name]*
 _____ *[signature]*
 _____ *[typed name and title]*

EXHIBIT A

To: _____ *[name of franchisee]*
 _____ *[street address]*
 _____ *[city, state, zip]*

[If addressees are numerous, attach names and addresses as list.]

[The following notice should appear in at least 10-point boldface type:]

THIS NOTICE DISCLOSING VIOLATION OF THE FRANCHISE INVESTMENT LAW HAS BEEN APPROVED BY THE COMMISSIONER OF CORPORATIONS ONLY AS TO ITS FORM. SUCH APPROVAL DOES NOT IMPLY A FINDING BY THE COMMISSIONER THAT ANY STATEMENTS MADE HEREIN OR IN ANY ACCOMPANYING DOCUMENTS ARE TRUE OR COMPLETE AND THE COMMISSIONER MAKES NO RECOMMENDATIONS AS TO WHETHER OR NOT RESORT SHOULD BE HAD TO THE CIVIL REMEDIES PROVIDED IN THE FRANCHISE INVESTMENT LAW.

This notice, pursuant to *Corp. Code § 31303*, is to inform you that the undersigned _____ *[franchisor or subfranchisor]* violated *Corp. Code §* _____ *[31110 or 31200]* in connection with the sale of a franchise to you.

1. The transaction involved in the violation was the sale to you

_____ *[by or through]*
 _____ *[name of franchisor or subfranchisor]* as
 _____ *[franchisor or subfranchisor]* of
 _____ *[identify particular franchise]* of
 _____ *[date]* for a consideration, received by the seller of the franchise, in the amount of \$

_____ and consisting of
 _____ [state nature of consideration].

2. The violation involved in the described transaction was a violation of Corp. Code §
 _____ [31110 or 31200], which makes it unlawful for any person to

_____ [if Corp. Code § 31110 was violated, use: offer or sell a franchise in California unless the offer of the franchise has been registered under the Franchise Investment Law of California or is exempt from registration under Chapter 1 of the Law or, if Corp. Code § 31200 was violated, use: willfully make an untrue statement of a material fact in any application, notice, or report filed with the Commissioner of Corporations, or to willfully omit to state a material fact required to be stated in any application, notice, or report filed with the Commissioner of Corporations, or to fail to notify the Commissioner of Corporations of any material change as required by Corp. Code § 31123].

3. The undersigned

_____ [franchisor or subfranchisor] is liable to you as franchisee for any damages caused by the violation described in this notice and you may also sue, if the violation was willful, for rescission of the transaction involved in the violation.

Information regarding the undersigned _____ [franchisor or subfranchisor] that issued the franchise described in this notice that is material and pertinent to you as franchisee is:

1. The franchisor's management consists of

_____ [describe franchisor's management].

2. The franchisor's operations and plan of business are

_____ [describe franchisor's operations and plan of business].

3. The franchisor's financial condition is

_____ [describe financial condition, e.g., good and solvent], as shown by financial statement prepared for the franchisor as of the close of business on

_____ [date], and filed with the application for approval of this notice with the Commissioner of Corporations.

4. The franchisor is

_____ [describe terms of organization, e.g., a corporation duly incorporated on

_____ (date), under the laws of the State of

_____ (specify)].

5. A disclosure statement is contained in a separate document attached to this notice and marked Exhibit

B disclosing the information required by Corp. Code § _____ [31101(c) or 31114].

6. [Add if violation is of Corp. Code § 31200: The specific

_____ (misrepresentation or omission) made to you concerning the franchise was

_____ (specify). The information necessary to correct this

_____ (misrepresentation or omission) is

_____ (specify).]

You, as franchisee, have a right of action under Corp. Code § 31300 to sue the undersigned _____ [franchisor or subfranchisor] or any person who offers or sells a franchise in violation of Corp. Code § _____ [31110 or 31200] for all damages caused by the violation. If the violation was willful you also have the right to sue for rescission of the transaction involved in the violation [add if violation is of Corp. Code § 31200: unless the defendant proves either that you knew the facts concerning the untruth or omission or if the defendant exercised reasonable care and did not know, or if he or she had exercised reasonable care, would not have known, of the untruth or omission]. No action may be brought to enforce your right of action arising because of the violation described in this notice unless the action is brought not later than 90 days after the delivery to you of this notice.

The complete text of Corporations Code Section 31303, pursuant to which this notice is given, is as follows:

"No action shall be maintained to enforce any liability created under Section 31300 unless brought before the expiration of four years after the act or transaction constituting the violation, the expiration of one year after the discovery by the plaintiff of the fact constituting the violation, or 90 days after delivery to the franchisee of a written notice disclosing any violation of Section 31110 or 31200, which notice shall be approved as to form by the commissioner, whichever shall first expire."

Dated: _____.

_____ [name of franchisor]

By: _____ [signature]

[typed name and title]

EXHIBIT B

[If applicable, include disclosure required by Corp. Code § 31101(c) or 31114.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure Enforcement Business & Corporate Law Distributorships & Franchises Registration & Disclosure Requirements



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 51A FRANCHISE REGISTRATION
PART IV. FORMS
D. Miscellaneous Forms

21-51A California Legal Forms--Transaction Guide § 51A.253

§ 51A.253 Notice of Franchisor's Misrepresentation Violation of Franchise Investment Law [Corp. Code § 31304; 10 Cal. Code Reg. § 310.304]

[1] Comment

[a] Use of Form

This form is a notice of violation of the Franchise Investment Law to be given to a franchisee by a franchisor to shorten the time within which the franchisee may bring an action, when the franchisor has violated *Corp. Code* §§ 31201 or 31202 [10 Cal. Code Reg. § 310.304; see *Corp. Code* § 31304]. The form also contains a mandatory introductory letter to the Commissioner of Corporations, seeking approval of the notice of violation.

Corp. Code § 31201 makes it unlawful for any person to offer or sell a franchise in California by means of a written or oral communication not listed in *Corp. Code* § 31200 that includes an untrue statement of a material fact or omits to state a material fact necessary to make the statements not misleading [*Corp. Code* § 31201]. *Corp. Code* § 31202 makes it unlawful for any person willfully to make an untrue statement of a material fact in a statement required to be disclosed in writing under *Corp. Code* § 31101, or willfully to omit to state in any such statement any material fact that is required to be stated [*Corp. Code* § 31201]. A franchisor who sells a franchise in violation of *Corp. Code* § 31202 is liable to the franchisee for the damages caused by the violation and, if the violation is willful, the franchisee may also sue for rescission [*Corp. Code* § 31300]. A franchisor who violates *Corp. Code* § 31201 is liable for damages to any person who, while relying on the untruth or omission, purchased a franchise, unless the franchisor proves that the injured party knew the facts concerning the untruth or omission or that the franchisor exercised reasonable care and did not know of the untruth or omission [*Corp. Code* § 31301].

The purpose of this notice is to shorten to 90 days the time within which the franchisee may bring an action to enforce remedies for the violation. In the absence of the giving of a proper notice of the violation to the franchisee, the franchisee may bring action within two years after the act or transaction constituting the violation or within one year after discovery of the fact constituting the violation, whichever is shorter [*Corp. Code* § 31304; see *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (2002) 95 Cal. App. 4th 709, 723-725, 116 Cal. Rptr. 2d 497 (claims for *Corp. Code* § 31201 violations were barred by two-year statute; *Corp. Code* § 31306 constitutes

express statement of unequivocal legislative intent that statute of limitations provisions in *Corp. Code § 31304* are to be sole controlling limits on time for filing suit under Franchise Investment Law, and therefore delayed discovery or tolling rules did not apply to franchisees' causes of action)].

[b] Form and Contents of Notice

To obtain approval of a notice of violation, a franchisor must file an application for approval with the Commissioner of Corporations in letter form. The franchisor must attach to the application as an exhibit a form of the written notice for which the Commissioner's approval is requested [*10 Cal. Code Reg. § 310.304*]. This form contains the introductory letter to the Commissioner as well as the required notice of violation.

The notice of violation must contain all of the following [*10 Cal. Code Reg. § 310.304*]:

- A prescribed legend, in capital letters of not less than 10-point type and printed in a contrasting color or type, that the notice of violation has been approved by the Commissioner only as to form [*see 10 Cal. Code Reg. § 310.304(a)*].
- The name and address of each party to whom the notice is to be directed. An attached list of names may be used.
- A statement regarding how the violation of *Corp. Code § 31304* occurred, including identification of the transaction involved and the relevant parties, identification of the specific Corporations Code section violated, and an explanation of the liability of the franchisor and/or subfranchisor to the franchisee under that section.
- Information regarding the franchisor that is material and pertinent to the franchisee [*see 10 Cal. Code Reg. § 310.304(d)*].
- A statement indicating the franchisee's right of action, if any, under *Corp. Code § 31301*, together with the statement that no action may be brought later than 90 days after delivery of the notice.
- A complete statement setting forth the text of *Corp. Code § 31304*.

The notice must not be subject to any condition not authorized by *Corp. Code § 31304* [*10 Cal. Code Reg. § 310.304(g)*].

The franchisor sending this notice should provide for a means of delivery that will allow for ascertaining the time of delivery to the franchisee. When the notice is submitted to the Commissioner for approval, the applicant should indicate the method of delivery that will be used [*10 Cal. Code Reg. § 310.304*].

[2] FORM

Notice of Franchisor's Misrepresentation Violation of Franchise Investment Law [Corp. Code § 31304; 10 Cal. Code Reg. § 310.304]

NOTICE OF VIOLATION OF FRANCHISE INVESTMENT LAW

To: Commissioner of Corporations

_____ [street address]

_____ [city, state, zip]

Sir or Madam:

This letter is to seek approval for the enclosed notice of violation of *Corporations Code Section 31304*, attached as Exhibit A. This notice of violation, when approved, will be sent to _____ [name(s) of franchisee(s)], as a result of a violation of Corporations Code Section [list specific section violated] on _____ [date]. This notice of violation will be sent by _____ [describe method of delivery, e.g., United States mail, first class, postage prepaid, with return receipt requested].

Please contact me at [telephone number] if you require further information.

Sincerely,

_____ [name]
 _____ [signature]
 [typed name and title]

EXHIBIT A

To: _____ [name of franchisee]
 _____ [street address]
 _____ [city, state, zip]

[If addressees are numerous, attach names and addresses as list.]

[The following notice should appear in at least 10-point boldface type:]

THIS NOTICE DISCLOSING VIOLATION OF THE FRANCHISE INVESTMENT LAW HAS BEEN APPROVED BY THE COMMISSIONER OF CORPORATIONS ONLY AS TO ITS FORM. SUCH APPROVAL DOES NOT IMPLY A FINDING BY THE COMMISSIONER THAT ANY STATEMENTS MADE HEREIN OR IN ANY ACCOMPANYING DOCUMENTS ARE TRUE OR COMPLETE AND THE COMMISSIONER MAKES NO RECOMMENDATIONS AS TO WHETHER OR NOT RESORT SHOULD BE HAD TO THE CIVIL REMEDIES PROVIDED IN THE FRANCHISE INVESTMENT LAW.

This notice, pursuant to *Corporations Code Section 31304*, is to inform you that the undersigned franchisor [or subfranchisor] violated Corporations Code Section _____ [31201 or 31202] in connection with the sale of a franchise to you.

1. The transaction involved in the violation was the sale to you

_____ [by or through]
 _____ [name of franchisor or subfranchisor] as
 _____ [franchisor or subfranchisor] of

_____ [*identify particular franchise*] of
 _____ [*date*] for a consideration, received by the seller of the franchise, in the amount
 of \$
 _____ and consisting of
 _____ [*state nature of consideration*].

2. The violation involved in the described transaction was a violation of Corp. Code §
 _____ [31201 or 31202], which makes it unlawful for any person to

_____ [*if Corp. Code § 31201 was violated, use: offer or sell a franchise in California by means of a written or oral communication not enumerated in Corporations Code Section 31200 that includes an untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading or, if Corp. Code § 31202 was violated, use: willfully make an untrue statement of a material fact in any statement required to be disclosed in writing pursuant to Corporations Code Section 31101, or willfully to omit to state in any such statement any material fact that is required to be included in the statement*].

3. The undersigned

_____ [*franchisor or subfranchisor*] is liable to you as franchisee for any damages caused by the violation described in this notice and you may also sue, if the violation was willful, for rescission of the transaction involved in the violation.

Information regarding the undersigned _____ [*franchisor or subfranchisor*] that issued the franchise described in this notice that is material and pertinent to you as franchisee is:

1. The franchisor's management consists of

_____ [*describe franchisor's management*].

2. The franchisor's operations and plan of business are

_____ [*describe franchisor's operations and plan of business*].

3. The franchisor's financial condition is

_____ [*describe financial condition, e.g., good and solvent*], as shown by financial statement prepared for the franchisor as of the close of business on

_____ [*date*], and filed with the application for approval of this notice with the Commissioner of Corporations.

4. The franchisor is

_____ [*describe terms of organization, e.g., a corporation duly incorporated on*

_____ (*date*), under the laws of the State of

_____ (*specify*).

5. A disclosure statement is contained in a separate document attached to this notice and marked Exhibit B disclosing the information required by Corp. Code § _____ [31101(c) or 31114].

6. The specific

_____ [misrepresentation or omission] made to you concerning the franchise was

_____ [*specify*]. The information necessary to correct this

_____ [misrepresentation or omission] is

_____ [*specify*].

You, as franchisee, have a right of action under *Corp. Code § 31301* to sue the undersigned _____ [franchisor or subfranchisor] or any person who offers or sells a franchise in violation of *Corp. Code § 31201* for all damages caused by the violation. However, the defendant is not liable to you if the he or she proves either that you knew the facts concerning the untruth or omission or if the defendant exercised reasonable care and did not know, or if he or she had exercised reasonable care, would not have known, of the untruth or omission. No action may be brought to enforce your right of action arising because of the violation described in this notice unless the action is brought not later than 90 days after the delivery to you of this notice.

The complete text of *Corporations Code Section 31304*, pursuant to which this notice is given, is as follows:

"No action shall be maintained to enforce any liability created under Section 31301 unless brought before the expiration of two years after the violation upon which it is based, expiration of one year after the discovery by the plaintiff of the facts constituting such violation, or 90 days after delivery to the franchisee of a written notice disclosing any violation of Section 31201 or 31202 which notice shall be approved as to form by the commissioner, whichever shall first expire."

Dated: _____.

_____ [*name of franchisor*]

By: _____ [*signature*]

[*typed name and title*]

EXHIBIT B

[*If applicable, include disclosure required by Corp. Code § 31101(c) or 31114 .*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Distributorships & Franchises Registration & Disclosure General Overview Business & Corporate Law Distributorships & Franchises Registration & Disclosure Enforcement Business & Corporate Law Distributorships & Franchises Registration & Disclosure Requirements



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 51A FRANCHISE REGISTRATION

PART IV. FORMS

D. Miscellaneous Forms

21-51A California Legal Forms--Transaction Guide § 51A.254

§ 51A.254 Notice of Negotiated Sale of Franchise

[1] Comment--Use of Form

This form is a notice of the negotiated sale of a franchise required under *10 Cal. Code Reg. § 310.100.2* [see *10 Cal. Code Reg. § 310.100.2(b)*]. If a negotiated sale of a franchise is consummated, this completed form must be filed with the Commissioner of Corporations within 15 days after the sale [*10 Cal. Code Reg. § 310.100.2(a)(4)*].

For further discussion of the sale of a negotiated franchise, including the required additional disclosure that must be filed with the UFOC, see § 51A.213.

[2] FORM

Notice of Negotiated Sale of Franchise

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesRegistration & DisclosureGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureRequirements



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 52 SALES OF GOODS UNDER THE UNIFORM COMMERCIAL CODE

21-52 California Legal Forms--Transaction Guide 52.syn

§ 52.syn Synopsis to Chapter 52: SALES OF GOODS UNDER THE UNIFORM COMMERCIAL CODE

§ 52.01 California Statutes

[1] In General

[2] Uniform Commercial Code-Sales

§ 52.02 Federal Sources

[1] Federal Statutes

[2] Federal Regulations

§§ 52.03-52.04 [Reserved]

§ 52.05 Law Reviews

§ 52.06 Annotations

§ 52.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 52.08-52.09 [Reserved]

§ 52.10 Nature of the Uniform Commercial Code

§ 52.11 Purpose and Construction of the Uniform Commercial Code

§ 52.12 Applicable Law in California

§ 52.13 Definitions

- [1] Importance of Definitions
- [2] "Sale," "Goods," and "Contract for Sale"
- [3] "Buyer" and "Seller"
- [4] "Merchants"

§ 52.14 Formation of Contracts

- [1] In General
- [2] Parol Evidence
- [3] Statute of Frauds
- [4] Offers
- [5] Acceptances

§ 52.15 Obligations of Parties and Interpretation of Contract

- [1] In General
- [2] Course of Performance, Course of Dealing, Usage of Trade
- [3] Allocation of Risk
- [4] Price
- [5] Delivery
- [6] Shipping Terminology
- [7] Time Provisions
- [8] Specifying Particulars of Performance

§ 52.16 Modification, Rescission, and Waiver

§ 52.17 Title, Creditors, and Good Faith Purchasers

- [1] Passing of Title
- [2] Rights of Seller's Creditors
- [3] Power to Transfer

§ 52.18 Remedies

[1] In General

[2] Seller's Remedies

[3] Buyer's Remedies

§ 52.19 Discrimination in Sale of Goods

§§ 52.20-52.99 [Reserved]

§ 52.100 Facts

Scope

§ 52.101 Documents

Scope

§§ 52.102-52.109 [Reserved]

§ 52.110 Practical Considerations

Scope

§ 52.111 Status of Parties

Scope

§ 52.112 Basic Legal Determinations

Scope

§§ 52.113-52.119 [Reserved]

§ 52.120 Offer and Acceptance

Scope

§ 52.121 Parties and Basic Contract Terms

Scope

§ 52.122 Goods

Scope

§ 52.123 Price or Payment

Scope

§ 52.124 Shipment

Scope

§ 52.125 Risk of Loss

Scope

§ 52.126 Times for Performance or Duration of Relationship

Scope

§ 52.127 Unresolved Details of Performance

Scope

§ 52.128 Express Warranties

Scope

§ 52.129 Implied Warranties-Merchantability and Fitness for Particular Use

Scope

§ 52.130 Warranty of Title or Against Infringement

Scope

§ 52.131 Buyer's Right of Inspection

Scope

§ 52.132 Breach, Repudiation, and Excuse

Scope

§ 52.133 Remedies

Scope

§§ 52.134-52.139 [Reserved]

§ 52.140 Follow-up Letter

Scope

§ 52.141 Confirmation of Contract

Scope

§ 52.142 Offeree's Alternatives in Accepting Offer or Order

Scope

§ 52.143 Offeror's Review of Acceptance

Scope

§ 52.144 Rescission or Modification of Contract

Scope

§ 52.145 Delegation of Performance; Assignment of Rights

Scope

§ 52.146 Specifications and Assurances

Scope

§ 52.147 Anticipatory Repudiation

Scope

§ 52.148 Seller's Performance of Obligation to Deliver

Scope

§ 52.149 Acceptance or Rejection of Goods

Scope

§ 52.150 Actions and Remedies

Scope

§ 52.151 Telephone, Mail Order, Catalog, or Internet Sales

Scope

§ 52.152 Unsolicited Sales

Scope

§§ 52.153-52.199 [Reserved]

§ 52.200 Simple Contract for Sale of Goods

[1] Comment

[a] Use of Form

[b] Basic Terms of Contract

[2] FORM

Simple Contract for Sale of Goods

§ 52.201 Memorandum of Sale or Purchase

[1] Comment--Use of Form

[2] FORM

Memorandum of Sale or Purchase-General

§ 52.202 Contract for Sale of Goods With Detailed Provisions

[1] Comment

[a] Use of Form

[b] "Agreement" and "Contract" Defined

[c] Formation and Definiteness

[d] Warranties, Samples, and Models

[e] Reducing Time for Bringing Action

[2] FORM

Contract for Sale of Goods With Detailed Provisions

§ 52.203 Bill of Sale

[1] Comment--Use of Form

[2] FORM

Bill of Sale

§ 52.204 Output Contracts

[1] Comment

[a] Use of Form

[b] Nature of Output Contracts

[c] Noncompetition Clauses

[d] Hold Harmless Clause

[e] Warranties

[2] FORM

Output Contracts

§ 52.205 Requirements Contracts

[1] Comment

[a] Use of Form

[b] Quantity Term

[c] Allocation of Production

[2] FORM

Requirements Contracts

§ 52.206 Contract for Sale on Consignment With Factor

[1] Comment

[a] Use of Form

[b] Factors

[c] Consignment Sales and Creditors' Rights

[2] FORM

Contract for Sale on Consignment With Factor

§ 52.207 Offer to Sell Goods

[1] Comment--Use of Form

[2] FORM

Offer

§§ 52.208-52.219 [Reserved]

§ 52.220 Firm Offers, Revocable Offers, and Options

[1] Comment

[a] Use of Form

[b] Firm Offers

[c] Firm Offers by Contractors

[d] Revocable Offers

[e] Options

[2] FORM

Firm Offers, Revocable Offers, and Options

§ 52.221 Clauses Conditioning the Acceptance of Offers

[1] Comment--Use of Form

[2] FORM

Clauses Conditioning the Acceptance of Offers

§ 52.222 Clauses Controlling the Effect of Additional Terms in Acceptances

[1] Comment

[a] Use of Form

[b] Construction and Effect of Additional Terms

[c] Cautionary Note

[2] FORM

Clauses Controlling the Effect of Additional Terms in Acceptances

§ 52.223 Provisions Leaving Particulars of Performance to Be Specified by One Party

[1] Comment--Use of Form

[2] FORM

Provisions Leaving Particulars of Performance to Be Specified by One Party

§ 52.224 Clauses Allowing Subsequent Specification by One Party of Assortment of Goods

[1] Comment--Use of Form

[2] FORM

Clauses Allowing Subsequent Specification by One Party of Assortment of Goods

§§ 52.225-52.229 [Reserved]

§ 52.230 Provisions Setting the Contract Price

[1] Comment

[a] Use of Form

[b] Open Price Term--Intent to Be Bound

[c] Good Faith; Failure to Fix Price Through Fault of Party

[d] Intent Not to Be Bound Unless Price Is Fixed

[e] Method for Determining Price or Adjusting Stated Price

[2] FORM

Provisions Setting the Contract Price

§ 52.231 Clauses Providing Credit Arrangements for Payment

[1] Comment

[a] Use of Form

[b] Application of Usury Law

[2] FORM

Clauses Providing Credit Arrangements for Payment

§ 52.232 Clauses Providing for Manner of Tender of Payment

[1] Comment--Use of Form

[2] FORM

Clauses Providing for Manner of Tender of Payment

§ 52.233 Provisions Requiring Payment for Goods by Letter of Credit

[1] Comment--Use of Form

[2] FORM

Provisions Requiring Payment for Goods by Letter of Credit

§ 52.234 Clauses Providing for Delivery and Payment in Single or Several Installments

[1] Comment--Use of Form

[2] FORM

Clauses Providing for Delivery and Payment in Single or Several Installments

§ 52.235 Clauses Prohibiting or Restricting Substitute Manner of Payment

[1] Comment--Use of Form

[2] FORM

Clauses Prohibiting or Restricting Substitute Manner of Payment

§§ 52.236-52.249 [Reserved]

§ 52.250 Clauses Specifying Time for Delivery

[1] Comment

[a] Use of Form

[b] Time of Delivery

[2] FORM

Clauses Specifying Time for Delivery

§ 52.251 Clauses Specifying Place of Delivery of Goods

[1] Comment

[a] Use of Form

[b] Documents of Title and Warehouse Receipts

[2] FORM

Clauses Specifying Place of Delivery of Goods

§ 52.252 Clauses to Vary Statutory Duties of Seller Who Is Authorized or Required to Ship Goods

[1] Comment--Use of Form

[2] FORM

Clauses to Vary Statutory Duties of Seller Who Is Authorized or Required to Ship Goods

§ 52.253 "F.O.B." and "F.A.S." Terms

[1] Comment

[a] Use of Form

[b] Definitions

[c] Requirements Applicable to Sales of Goods "F.O.B."

[d] Requirements Applicable to Sales of Goods "F.A.S."

[e] Instructions

[f] Tender of Documents

[2] FORM

"F.O.B." and "F.A.S." Terms

§ 52.254 "C.I.F.," "C. & F.," and "C.F." Terms

[1] Comment

[a] Use of Form

[b] Definitions

[c] Requirements of C.I.F. and C. & F. Agreements

[d] Application to Mail Order and Internet Sales

[2] FORM

"C.I.F.," "C. & F.," and "C.F." Terms

§ 52.255 "Net Landed Weights" Terms

[1] Comment

[a] Use of Form

[b] Payment of Estimated Price

[2] FORM

"Net Landed Weights" Terms

§ 52.256 Risk of Deterioration

[1] Comment--Use of Form

[2] FORM

Risk of Deterioration

§ 52.257 "Ex-Ship" Terms

[1] Comment

[a] Use of Form

[b] Definition and Delivery From a Particular Vessel

[c] Documents of Title

[2] FORM

"Ex-Ship" Terms

§ 52.258 Overseas Shipment Bill of Lading Requirements

[1] Comment--Use of Form

[2] FORM

Overseas Shipment Bill of Lading Requirements

§ 52.259 "No Arrival, No Sale" Terms

[1] Comment--Use of Form

[2] FORM

"No Arrival, No Sale" Terms

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[1] Comment--Use of Form

[2] FORM

Provision Prohibiting Seller's Reservation of Security Interest

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[1] Comment

[a] Use of Form

[b] Definitions

[2] FORM

Provisions Requiring Delivery of Documents of Title Against Which Drafts Have Been Drawn

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[1] Comment--Use of Form

[2] FORM

Provisions for Tender of Delivery

§ 52.263 Provisions for Tender of Delivery When Bailee Holds Goods

[1] Comment--Use of Form

[2] FORM

Provisions for Tender of Delivery When Bailee Holds Goods

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[1] Comment--Use of Form

[2] FORM

Provisions for Subsequent Specification of Shipping Arrangements by One Party

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[1] Comment--Use of Form

[2] FORM

Provisions Specifying Whether Seller May Ship Under Reservation

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[1] Comment

[a] Use of Form

[b] General Rules Governing Risk of Loss Absent Breach

[c] Risk of Loss When Contract Requires or Authorizes Seller to Ship Goods by Carrier

[d] Goods Held by Bailee

[e] Exceptions

[2] FORM

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[1] Comment--Use of Form

[2] FORM

Clauses Specifying Risk of Loss in Event of Breach

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[1] Comment

[a] Use of Form

[b] Right to Return and Risk of Loss; Sale on Approval

[c] Sale or Return

[d] "Seasonable" Notice or Exercise Defined; "Due" Notice Distinguished

[e] Creditors' Rights in Goods Sold on Approval or Return

[f] No Application to Ordinary Retail Sales

[2] FORM

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[1] Comment--Use of Form

[2] FORM

Clauses Prohibiting or Restricting Substitute Tender of Delivery

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[1] Comment--Use of Form

[2] FORM

Clauses to Determine When Identification of Goods Occurs

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[1] Comment

[a] Use of Form

[b] Creation of Warranty

[c] Basis of the Bargain

[d] Definition; The Reliance Requirement

[e] Violation of Law

[f] Effect of Assignment

[g] Getting the Right Warranty

[h] Disclaimers

[i] Cumulation or Conflict of Express or Implied Warranties

[j] Consumer Product Warranty Statutes

[k] Federal Consumer Warranty Statute

[i] Warranty Requirement; Minimum Standards

[ii] Written Warranties

[iii] Implied Warranties

[iv] Non-Warranties

[v] Disclosure of Terms and Conditions of Warranty

[vi] "Full" or "Limited" Warranties

[vii] Disclaimer or Modification of Implied Warranties

[viii] Service Contracts; Representatives of Warrantors

[ix] Resolving Disputes

[x] Preemption of State Law

[l] California Consumer Warranty Statute

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[2] FORM

Express Warranties and Disclaimers

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[1] Comment--Use of Form

[2] FORM

Express Warranties With Disclaimers

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[1] Comment

[a] Use of Form

[b] Inconsistent Disclaimers

[c] Implied Warranties

[2] FORM

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[1] Comment

[a] Use of Form

[b] Consumer Warranty Statutes

[c] "Conspicuous" Defined

[2] FORM

Clauses Providing for the Dominance of an Express Warranty in a Sale of Nonconsumer Goods

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[1] Comment

[a] Use of Form

[b] Implied Warranties In General

[c] Merchantability

[d] Course of Dealing or Usage of Trade

[e] Fitness for Purpose

[2] FORM

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[1] Comment

[a] Use of Form

[b] Written Disclaimers

[c] Disclaimer by Conduct, Including Course of Dealing, Course of Performance, or Usage of Trade

[d] Unconscionability

[2] FORM

Disclaimer of Implied Warranties

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[1] Comment

[a] Use of Form

[b] Disclaimers in Compliance With Consumer Warranty Statutes

[c] Conspicuous Written Disclaimers

[2] FORM

Provisions for Sales "As Is" or "With All Faults"

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[1] Comment

[a] Use of Form

[b] Warranties of Title

[c] Warranties Against Infringement

[d] Meaning of "Infringement or the Like"

[2] FORM

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[1] Comment

[a] Use of Form

[b] Acceptance; Buyer's Rights and Remedies

[c] Legal Effect of Contract

[2] FORM

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[1] Comment

[a] Use of Form

[b] Buyer's Right of Inspection

[c] Circumstances Under Which Buyer Does Not Have Right of Inspection

[d] Expenses of Inspection

[e] Exclusive Place or Method of Inspection; Avoidance of Contract

[2] FORM

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[c] Unforeseen Contingencies

[d] Allocations; Notice

[2] FORM

Clauses Specifying Situations in Which Parties Excused

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[1] Comment--Use of Form

[2] FORM

Provisions Specifying Rights and Duties When There Is a Casualty to Identified Goods

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[1] Comment--Use of Form

[2] FORM

Clauses Restricting Buyer's Right to Accept Partial Shipment

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[1] Comment

[a] Use of Form

[b] Time, Manner, and Effect of Rejection

[c] Rightful Rejection

[2] FORM

Clauses Limiting Time Within Which to Give Notice of Rejection

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[1] Comment--Use of Form

[2] FORM

Clauses Specifying Duties of Merchant Buyer With Respect to Rejected Goods

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[1] Comment--Use of Form

[2] FORM

Clauses Relieving Buyer From Waiver Due to Failure to Particularize Basis for Rejection of Goods

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[1] Comment--Use of Form

[2] FORM

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[1] Comment--Use of Form

[2] FORM

Prohibiting Cure of Improper Tender by Seller

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[1] Comment--Use of Form

[2] FORM

Clauses Specifying Manner of Acceptance of Goods

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[1] Comment--Use of Form

[2] FORM

Clauses Restricting Buyer's Right to Revoke Acceptance

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[1] Comment--Use of Form

[2] FORM

Clauses Setting Conditions Under Which Demand for Assurance of Performance Is Proper

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[1] Comment

[a] Use of Form

[b] "Insolvency" Defined

[c] Seller's Remedies on Discovery of Buyer's Insolvency

[2] FORM

Representations by Buyer With Respect to Solvency

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[1] Comment

[a] Use of Form

[b] Notice Requirement

[c] Unconscionability

[2] FORM

Termination and Accompanying Notice

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[1] Comment

[a] Use of Form

[b] Breach Resulting From Delivery of Nonconforming Installment

[2] FORM

Clauses Specifying When a Nonconforming Installment Delivery Is Breach of Entire Agreement

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[1] Comment

[a] Use of Form

[b] Course of Performance

[2] FORM

Clause Reserving Rights on Failure to Object

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[a] Use of Form

[b] Seller's Right to Identify Goods to Contract after Buyer's Breach

[c] Unfinished Goods

[2] FORM

Clauses Limiting Right of Seller to Identify Goods to Contract After Buyer's Breach

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[1] Comment

[a] Use of Form

[b] Right of Resale After Breach

[c] Auction Sales

[2] FORM

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[1] Comment

[a] Use of Form

[b] Cover

[2] FORM

Clauses Specifying Whether Buyer May or Must "Cover"

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[1] Comment

[a] Use of Form

[b] Contractual Modification or Limitation of Remedy

[c] Consequential Damages

[d] Failure of Essential Purpose

[2] FORM

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[1] Comment--Use of Form

[2] FORM

Merger or Integration Clause; Parol or Extrinsic Evidence

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[1] Comment--Use of Form

[2] FORM

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[1] Comment

[a] Use of Form

[b] Effect of Right to Demand Assurance

[c] Alternative Provisions in Form

[d] Effect of Assignment

[2] FORM

Provisions Covering Assignment of Rights and Delegation of Performance

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[a] Use of Form

[b] Amount of Liquidated Damages for Breach

[c] Buyer's Right to Restitution

[2] FORM

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[2] FORM

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[1] Comment--Use of Form

[2] FORM

Follow-up Letter to Client

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[1] Comment--Use of Form

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[1] Comment--Use of Form

[2] FORM

Notice of Acceptance After Commencement of Performance

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[1] Comment--Use of Form

[2] FORM

Acceptance Conditioned on Consent to Additional Terms

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[1] Comment--Use of Form

[2] FORM

Notice by Seller That Nonconforming Goods Are Offered as Accommodation

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[1] Comment--Use of Form

[2] FORM

Notice of Objection to Additional Terms of an Acceptance

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[1] Comment--Use of Form

[2] FORM

Notice of Revocation of Acceptance

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[1] Comment--Use of Form

[2] FORM

Notice of Breach Discovered After Acceptance

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[1] Comment--Use of Form

[2] FORM

Notice of Rejection of Offer of Nonconforming Goods

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[1] Comment--Use of Form

[2] FORM

Rescission of Contract With or Without Reservation of Rights

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[1] Comment--Use of Form

[2] FORM

Notice From Buyer That Contract Is Terminated

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[1] Comment--Use of Form

[2] FORM

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[1] Comment--Use of Form

[2] FORM

Notice of Rejection Based on Failure to Notify Buyer of Shipment

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[1] Comment--Use of Form

[2] FORM

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[1] Comment--Use of Form

[2] FORM

Modification of Contract of Sale

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[1] Comment--Use of Form

[2] FORM

Notice From Buyer of Consent to Modification

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[1] Comment--Use of Form

[2] FORM

Retraction of Waiver of Executory Performance

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[1] Comment--Use of Form

[2] FORM

Notice of Assignment of Rights and Delegation of Performance

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[1] Comment--Use of Form

[2] FORM

Notice Requesting Specification or Cooperation

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[1] Comment--Use of Form

[2] FORM

Demand for Assurances

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[1] Comment--Use of Form

[2] FORM

Notice by Aggrieved Party That Anticipatory Repudiation Deemed Final

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[1] Comment--Use of Form

[2] FORM

Notice of Retraction of Anticipatory Repudiation

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[1] Comment--Use of Form

[2] FORM

Notice to Buyer of Delivery

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[1] Comment--Use of Form

[2] FORM

Seller's Notice of Intent to Cure Improper Tender

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[1] Comment--Use of Form

[2] FORM

Notice to Rejecting Buyer of Shipping Instructions

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[1] Comment

[a] Use of Form

[b] Assumption of Control by Seller

[2] FORM

Notice to Seller of Infringement Suit Against Buyer

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[1] Comment--Use of Form

[2] FORM

Notice to Seller That Suit for Breach of Warranty Has Been Commenced Against Buyer

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[1] Comment--Use of Form

[2] FORM

Demand by Seller That Buyer Turn Over Control of Action for Infringement

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[1] Comment--Use of Form

[2] FORM

Notice of Objection to Performance

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[1] Comment--Use of Form

[2] FORM

Notice of Termination of Contract

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[1] Comment--Use of Form

[2] FORM

Demand to Inspect Goods for Purpose of Preserving Evidence

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[1] Comment--Use of Form

[2] FORM

Agreement to Submit Controversy to Third Party for Binding Inspection

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[1] Comment--Use of Form

[2] FORM

Seller's Demand for Return of Goods on Buyer's Insolvency

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[1] Comment--Use of Form

[2] FORM

Notice by Seller That Goods Are Withheld Because of Buyer's Breach

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[1] Comment

[a] Use of Form

[b] Necessity for Notice of Cancellation

[c] "Termination" and "Cancellation" Distinguished

[2] FORM

Seller's Notice of Cancellation by Reason of Buyer's Breach

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[1] Comment

[a] Use of Form

[b] Surrender of Documents of Title

[c] Effect of Reshipment

[2] FORM

Notice to Carrier by Aggrieved Seller to Stop Goods in Transit

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[1] Comment--Use of Form

[2] FORM

Notice of Intention to Deduct Damages From Purchase Price

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[1] Comment--Use of Form

[2] FORM

Notice of Resale



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 52 SALES OF GOODS UNDER THE UNIFORM COMMERCIAL CODE

21-52 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers the sale of goods under Article 2 of the Uniform Commercial Code ("UCC") as enacted in California [*see Com. Code § 2101 et seq.*]. The scope of Article 2 of the UCC is limited to transactions in goods. It does not apply to transactions intended to operate as security transactions [*Com. Code § 2102; see Ch. 42, Secured Transactions*].

The Legal Background of this chapter is intended to provide a broad overview of the statutory framework governing sales. More specific discussions of the provisions governing particular transactions appear in the comments to the forms covering those transactions. In this chapter the term "Uniform Commercial Code" ("UCC") refers to the model legislation, while the term "Commercial Code" refers to the California version of that model legislation.

This chapter does not discuss the specific disclosures that must be made with respect to consumer credit sales, or the statutes that govern those sales. The federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] and the Unruh Act [*Civ. Code § 1801 et seq.*] are covered in Ch. 45, *Consumer Installment Loans and Credit Sales*. Disclosures required in motor vehicle sales, including those required under the Rees-Levering Act [*see Civ. Code §§ 2981-2984.4*], are discussed in Ch. 47, *Automotive Financing and Vehicle Leasing*.



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§ 52.01 California Statutes

[1] In General

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Construction, subject matter, general definitions, principles of interpretation, and territorial applicability of Commercial Code. *Com. Code §§ 1101, 1310.*

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Subject matter and general construction of Uniform Commercial Code-Sales. *Com. Code §§ 2101-2107.*

Form, formation, and readjustment of contracts for sale of goods. *Com. Code §§ 2201-2210.*

General obligations of parties and construction of contracts. *Com. Code §§ 2301-2327.*

Sale by auction. *Com. Code § 2328.*

Title, creditors, and good faith purchasers. *Com. Code §§ 2401-2403.*

Performance of contracts for sale of goods. *Com. Code §§ 2501-2515.*

Breach, repudiation, and excuse in contracts for sale of goods. *Com. Code §§ 2601-2616.* Remedies. *Com. Code §§ 2701-2725.*

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[1] Federal Statutes

Magnuson-Moss Consumer Warranty Act. *15 U.S.C. §§ 2301-2312.*

[2] Federal Regulations

Magnuson-Moss Consumer Warranty Act Rules. *16 C.F.R. §§ 700.1-703.8.*



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§ 52.05 Law Reviews

Goldberg, *Discretion in Long-Term Open Quantity Contracts: Reining in Good Faith*, 35 Davis L. Rev. 319 (2002).

Gordon, *Best Efforts*, 2002 J. Bus. L. 143 (2002).

Martin-Davidson, *Buyer Beware(!) The Lost Volume Seller*, 34 UCC L.J. 269 (2002).

Bjerre, Meadows, & Sepinuck, *The Uniform Commercial Code Survey*, 56 Bus. Law. 1743 (2001).

Garvin, Kotler, Meadows, & Wladis, *Sales*, 56 Bus. Law. 1747 (2001).

Hedley, *Quality of Goods, Information, and the Death of Contract*, 2001 J. Bus. L. 1141 (2001).

Scott, *Is Article 2 the Best We Can Do?* 52 Hastings L.J. 677 (2001).

Speidel, *Revising U.C.C. Article 2: A View from the Trenches*, 52 Hastings L.J. 607 (2001).

Ausness, *"Waive" Goodbye to Tort Liability: A Proposal to Remove Paternalism from Product Sales Transactions*, 37 San Diego L. Rev. 293 (2000).

Garvin, Meadows, Miles, Roszkowski, & Wladis, *Sales*, 55 Bus. Law. 1951 (2000).

Seto, *Bailor, Consignor, and Trustee Rights Under California Commercial Code § 2326*, 25 Cal. Bankr. J. 353 (2000).

Greenfield and Rusch, *Limits on Standard Form Contracting in Revised Article 2*, 32 UCC L.J. 114 (1999).

Muroff, *From Ink to Inkjet: Electronic Commerce Prompts Dramatic Revisions to U.C.C. Article 2*, 30 UCC L.J. 399

(1998).

Roszkowski, *Revised Article 2 of the Uniform Commercial Code--Section by Section Comparison With the 1990 Official Text*, 30 UCC L.J. 199 (1998).

Weiskopf, *The Last Hurdle in the Ongoing Revision of Section 2-207 of the U.C.C.: Defining What Constitutes Assent to Varying Terms*, 30 UCC L.J. 423 (1998).

Effross, *The Legal architecture of Virtual Stores: World Wide Web Sites and the Uniform Commercial Code*, 34 San Diego L. Rev. 1263 (1997).

Flores, *Risk of Loss in Sales: A Missing Chapter in the History of the U.C.C.: Through Llewellyn to Williston and a Bit Beyond*, 27 Pac. L.J. 161 (1996).

Dillsaver, *Notice in Article 2 of the Uniform Commercial Code*, 22 UCC L.J. 66 (1989).

Lawrence, *Cure in Contracts for the Sale of Goods: Looking Beyond Section 2-508*, 21 UCC L.J. 333 (1989).

Lawrence, *Cure Under Article 2 of the Uniform Commercial Code: Practices and Prescriptions*, 21 UCC L.J. 138 (1988).

Anderson, *An Overview of Buyers' Damage Remedies*, 21 UCC L.J. 28 (1988).

Note, *The Buyer's Specifications Exception to the Implied Warranty of Fitness for a Particular Purpose: Design or Performance?* 61 S. Cal. L. Rev. 237 (1987).

Coffey, *Creating Express Warranties Under the UCC: Basis of the Bargain-Don't Rely on It*, 20 UCC L.J. 115 (1987).

Towers and Gardon, *Circumvention of Article 2: Tort Remedies for Breach of Contract*, 19 UCC L.J. 291 (1987).

Schneider, *UCC § 2-713: A Defense of Buyers' Expectancy Damages*, 22 Cal. W. L. Rev. 233 (1986).

Note, *RRX Industries, Inc. v. Lab-Con, Inc.: Is the Ninth Circuit's Inconsequential Treatment of Consequential Damages Limitations under U.C.C. § 2-719 Unconscionable?* 20 Loy. L.A. L. Rev. 181 (1986).

Frisch, Leary, & Wladis, *Uniform Commercial Code Annual Survey: General Provisions, Sales, Bulk Transfers, and Documents of Title*, 41 Bus. Law. 1363 (1986).

Murray, *Breach of Warranty of Title: A Comparative Analysis*, 18 UCC L.J. 311 (1986).

Note, *Notification of Breach under Uniform Commercial Code Section 2-607(3)(a): A Conflict, A Resolution*, 70 Cornell L. Rev. 525 (1985).

Kanovitz, *The Seller Fiddles and the Clock Ticks: Seller's Cure and the U.C.C. Statute of Limitations*, 60 Notre Dame L. Rev. 318 (1985).

Note, *Lost-Profits Damage Awards under Uniform Commercial Code Section 2-708(2)*, 37 Stan. L. Rev. 1109 (1985).

Mair, *Unconscionability and the Enforcement of Standardized Contracts*, 16 Pac. L.J. 247 (1984).

Thatcher, *Battle of the Forms: Solution by Revision of Section 2-207*, 16 UCC L.J. 237 (1984).

Duesenberg, *Sales, Bulk Transfers, and Documents of Title*, 38 Bus. Law. 1109 (1983).

Utz, *More on the Battle of the Forms: The Treatment of "Different" Terms under the Uniform Commercial Code*, 16 UCC L.J. 103 (1983).

Duesenberg, *Sales and Bulk Transfers*, 37 Bus. Law. 949 (1982).

Greenberg, *Specific Performance under Section 2-716 of the Uniform Commercial Code: "A More Liberal Attitude" in the "Grand Style,"* 87 Com. L.J. 583 (1982).

Schmitt, *Seller's Right to Cure Non-Conforming Tender--If at First You Don't Succeed, Try to Try Again*, 87 Com. L. J. 283 (1982).

Finch, *Output and Requirements Contracts: The Scope of the Duty to Remain in Business*, 14 UCC L.J. 347 (1982).

Wallach, *Buyer's Right to Monetary Damages*, 14 UCC L.J. 236 (1982).

Benfield, *General Provisions, Sales, Bulk Sales*, 36 Bus. Law. 1267 (1981).

Huffmire, *Section 2-615 and Corporate Accountability*, 13 UCC L.J. 256 (1981).

Lutz, *Section 2-608 Revocations of Acceptance of Nonconforming Goods: the Seller's Defenses*, 13 UCC L.J. 348 (1981).

Skilton, *General Provisions, Sales, Bulk Transfers, and Documents of Title*, 35 Bus. Law. 1103 (1980).

Loomis, *Crestwood Lumber Company v. Citizens Savings & Loan Association* (148 Cal. Rptr. 129): *the Usury Law and Liquidated Damages in Sale of Goods Transactions*, 10 Golden Gate U. L. Rev. 553 (1980).

Beane, *Partial Payment Exception to the UCC Sale of Goods Statute of Frauds*, 13 UCC L.J. 135 (1980).

Duesenberg, *Exiting from Bad Bargains Via U.C.C. Section 2-615: an Impractical Dream*, 13 UCC L.J. 32 (1980).

Duesenberg, *Contract Creation: The Continuing Struggle With Additional and "Different" Terms Under Uni-form Commercial Code Section 2-207*, 34 Bus. Law. 1477 (1979).

Squillante, *General Provisions, Sales, Bulk Transfers, and Documents of Title*, 34 Bus. Law. 1491 (1979).

Schiro, *Prospecting for Lost Profits in the Uniform Commercial Code: The Buyer's Dilemmas*, 52 S. Cal. L. Rev. 1727 (1979).

Squillante, *General Provisions, Sales, Bulk Transfers, and Documents of Title*, 33 Bus. Law. 1875 (1978).

Schroeder, *Private Actions Under the Magnuson-Moss Warranty Act*, 66 Cal. L. Rev. 1 (1978).

Taylor, *Uniformity of Commercial Law and State-by-State Enactment: A Confluence of Contradictions*, 30 Hast. L.J. 337 (1978).

Comment, *Frustration as an Agricultural Buyer's Excuse under U.C.C. Section 2-615*, 11 U.C. Davis L. Rev. 351 (1978).

Comment, *Unconscionability in Standard Forms*, 64 Cal. L. Rev. 1151 (1976).



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21-52 California Legal Forms--Transaction Guide § 52.06

§ 52.06 Annotations

Annot., Establishment and Construction of Requirements Contracts Under § 2-306(1) of the Uniform Commercial Code, 94 A.L.R.5th 247 (2001).

Annot., Sufficiency and Timeliness of Buyer's Notice Under UCC § 2-607(3)(a) of Seller's Breach of Warranty, 89 A.L.R.5th 319 (2001).

Annot., What Constitutes Warranty explicitly extending to "Future Performance" for Purposes of UCC § 2-725(2), 81 A.L.R.5th 483 (2000).

Annot., Construction and Application of Statute-of-Frauds Provisions Under UCC § 1-206 Governing Personal Property Not Otherwise Covered, 62 A.L.R.5th 137 (1998).

Annot., Sales: Construction and Application of UCC § 2-612(2), Dealing with Rejection of Goods Under Installment Contracts, 61 A.L.R.5th 611 (1998).

Annot., Impracticability of Performing Sales Contracts Under UCC § 2-615, 55 A.L.R.5th 1 (1998).

Annot., Liability on Implied Warranties in sale of Used Motor Vehicles, 47 A.L.R.5th 677 (1997).

Annot., What Constitutes "Substantial Impairment" Entitling Buyer to Revoke His Acceptance of Goods Under UCC § 2-608(1), 38 A.L.R.5th (1996).



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21-52 California Legal Forms--Transaction Guide § 52.07

§ 52.07 Text References

[1] Matthew Bender Sources

California Legal Forms (Matthew Bender).

Ch. 17, *Buying and Selling a Business or Professional Practice*.

Ch. 18, *Buying and Selling a Retail Alcoholic Beverage License and Business*.

Ch. 42, *Secured Transactions*.

Ch. 43, *Commercial Loans*.

Ch. 44, *Accounts Receivable Financing and Factoring*.

Ch. 45, *Consumer Installment Loans and Credit Sales*.

Ch. 47, *Automotive Financing and Vehicle Leasing*.

Ch. 48, *Agricultural Financing*.

Ch. 49, *Agricultural Contracts*.

Ch. 54, *Shipment of Property*.

Ch. 54A, *Storage of Goods*.

Ch. 55, *Negotiable Instruments*.

Ch. 56, *Letters of Credit and Electronic Fund Transfers*.

Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

Ch. 77, *Discharge of Obligations*.

California Forms of Jury Instructions, Ch. 20, *Commercial Code Sales Contracts* (Matthew Bender).

California Forms of Pleading and Practice (Matthew Bender).

Ch. 127, *Consumer Contracts and Loans*.

Ch. 500, *Sales: Sales under the Commercial Code*.

Ch. 501, *Sales: Retail Installment Sales*.

Ch. 502, *Sales: Warranties*.

California Points and Authorities, Ch. 206, *Sales* (Matthew Bender).

Duesenberg & King, Sales and Bulk Transfers Under the U.C.C. (Matthew Bender).

Hart & Willier, Forms and Procedures Under the UCC, Article 2, *Sales* (Matthew Bender).

Knapp, Commercial Damages: A Guide to Remedies in Business Litigation (Matthew Bender).

Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 4, *Sale of Goods* (Matthew Bender).

Warren's Forms of Agreements, Ch. 12A, *Sales of Personal Property* (Matthew Bender).

[2] Additional Text References

California UCC Sales and Leases (Cal. CEB 2002).

Witkin, Summary of California Law, vol. 4, *Sales* (10th ed. 2005).



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[Reserved]

§§ 52.08[Reserved]



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§ 52.10 Nature of the Uniform Commercial Code

The Uniform Commercial Code (UCC) has been adopted in all states except Louisiana. It regulates most commercial transactions under a comprehensive scheme that is basically consistent throughout the United States, although most states have amended the uniform law slightly [Taylor, *Uniformity of Commercial Law and State-by-State Enactment: A Confluence of Contradictions*, 30 *Hastings L.J.* 337, 341 (1978); see, e.g., *Com. Code* § 2326 (which adds a P (4) regarding consumer goods which is not part of *UCC* § 2326)].

The UCC is a "code" in the strict sense. That is, it is intended to be preemptive, comprehensive, and systematic. It is assumed to carry within it the answers to all questions concerning the types of commercial transactions governed by its provisions [see Hart & Willier, *Forms and Procedures Under the UCC*, Article 1, *General Provisions*, Part 2, *Effect of Article I Upon Commercial Transactions*, PP 12.01, 12.02 (Matthew Bender); Duesenberg & King, *Sales and Bulk Transfers Under the U.C.C.*, Ch. 1, *Introduction*, § 1.01 (Matthew Bender); Gilmore, *Legal Realism: Its Cause and Cure* 70 *Yale L.J.* 1037, 1043 (1961)]. The Commercial Code is a *general act intended as a unified coverage of its subject matter*. [*Com. Code* § 1104] As a true code, the Commercial Code contains general safety-valve provisions [see, e.g., *Com. Code* § 1304 (obligation of good faith in performance or enforcement of contracts and duties under Code)] as well as more specific provisions. The different Articles (called Divisions in the California Commercial Code) are integrated, and reference back and forth between Articles may be necessary to fully understand some situations. For example, the Article 9 [see *Com. Code* § 9101 *et seq.*; see also Ch. 42, *Secured Transactions*] security interest claims of creditors against goods in the hands of an insolvent buyer must be weighed against the Article 2 reliance-based claims of the seller [see *Com. Code* § 2702; for further discussion, see Duesenberg & King, *Sales and Bulk Transfers Under the U.C.C.*, Ch. 1, *Introduction*, § 1.01; Ch. 13, *Remedies of the Seller*, § 13.03[4] (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General OverviewCommercial Law (UCC)General Provisions (Article 1)Policies & PurposesGeneral Overview



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§ 52.11 Purpose and Construction of the Uniform Commercial Code

The UCC is to be liberally construed and applied to promote its underlying purposes and policies [*Com. Code § 1103(a)*]. Those purposes and policies are as follows [*Com. Code § 1103(a)(1)-(3)*]:

- To simplify, clarify, and modernize the law governing commercial transactions.
- To allow the continued expansion of commercial practices through custom, usage, and agreement of the parties.
- To standardize the law among the different jurisdictions.

Parties to transactions governed by the Commercial Code may agree to vary the effects of the Code unless there is a specific provision to the contrary [*Com. Code § 1302(a)*]. While the obligations of good faith, diligence, reasonableness, and care may not be disclaimed by agreement, the parties may, by agreement, determine the standards by which the performance of those obligations will be measured, provided those standards are not manifestly unreasonable [*Com. Code § 1302(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)Application & ConstructionGeneral OverviewCommercial Law (UCC)General Provisions (Article 1)Policies & PurposesGeneral OverviewCommercial Law (UCC)General Provisions (Article 1)Policies & PurposesLiberal Construction



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§ 52.12 Applicable Law in California

Article 2 of the UCC has been enacted in California as Division 2 of the Commercial Code [*see Com. Code §§ 2101-2801*]. The full title of that division is "Uniform Commercial Code-Sales" [*Com. Code § 2101*].

Division 2 of the Commercial Code [*see Com. Code §§ 2101-2801*] applies to "transactions in goods" [*Com. Code § 2102*]. It does not apply to any transaction intended to operate as a security transaction [*see Ch. 42, Secured Transactions*], even if that transaction is in the form of a present sale or an unconditional contract to sell. It does not limit any statute regulating sales to consumers, farmers, or other specified classes of buyers [*Com. Code § 2102*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)General Overview



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§ 52.13 Definitions

[1] Importance of Definitions

Because the Commercial Code is a comprehensive statutory scheme for dealing with the sale of goods, it must be consulted for all aspects of sales, including definitions of the terms appearing in its provisions. Effective use of the Code and of this chapter is impossible without close attention to these definitions. For example, to fully understand the definition of "goods" discussed in [2], *below*, it is necessary to look up several defined terms, among them "identification," defined in *Com. Code § 2501* [see § 52.284[1]].

[2] "Sale," "Goods," and "Contract for Sale"

For purposes of the Commercial Code, a "sale" exists when the title to goods passes from the seller to the buyer for a price [*Com. Code § 2106(1)*]. In Division 2 of the Commercial Code, the definitions of "contract" and "agreement" are limited to contracts or agreements for the sale of goods. A "contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "present sale" is a sale that is accomplished by the making of the contract (as opposed to a contract that does not presently accomplish a sale but merely agrees that there will be a sale in the future) [*Com. Code § 2106(1)*].

The term "goods" means all things (including specially manufactured goods) that are movable at the time of identification [see *Com. Code § 2501*; see also § 52.284[1]] to the contract for sale other than the money in which the price is to be paid, investment securities, and things in action [*Com. Code § 2105(1)*]. "Goods" also includes the unborn young of animals, growing crops, and other identified things attached to realty as described in *Com. Code § 2107* [*Com. Code § 2105(1)*], such as minerals, structures and materials, timber, and other items that may be severed from realty without material harm to it [*Com. Code § 2107*].

Goods must be both existing and identified before any interest in them can pass [*Com. Code § 2105(2)*]. Goods that are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest in them operates as a contract to sell (as opposed to a present sale) [*Com. Code § 2105(2)*].

[3] "Buyer" and "Seller"

A "buyer" is a person who buys or contracts to buy goods [*Com. Code § 2103(1)(a)*], and a "seller" is a person who sells or contracts to sell goods [*Com. Code § 2103(1)(d)*]. A "person in the position of a seller" is anyone who holds a security interest or other right in goods similar to that of a seller. With respect to a principal, this includes an agent who has paid or become responsible for the price of goods on behalf of his or her principal [*Com. Code § 2707(1)*].

[4] "Merchants"

The special rules governing sales involving merchants illustrate the importance of correctly understanding Commercial Code terminology before beginning to apply its provisions. Many times, which rule applies to a particular transaction depends on whether the parties are merchants. For example, whether a sale is "between merchants" [*Com. Code § 2104(1)*] determines whether additional terms in an acceptance to an offer require an answer of objection in order to be effectively rejected [*Com. Code § 2207*].

A "merchant" is a person who deals in goods of the kind or who otherwise by occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction, or to whom that knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by occupation holds himself or herself out as having that knowledge or skill [*Com. Code § 2104(1)*]. A transaction is "between merchants" if both parties are chargeable with the knowledge or skill of merchants [*Com. Code § 2104(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)General OverviewCommercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral Overview



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§ 52.14 Formation of Contracts

[1] In General

The Commercial Code takes a practical and informal approach toward the question of when a binding contract is formed, and the statutory scheme reflects business practice. A contract for the sale of goods may be made in any manner sufficient to show agreement (subject to the statute of frauds) [see *Com. Code § 2201*; see also [3], *below*], including conduct by both parties that recognizes the existence of a contract [*Com. Code § 2204(1)*]. An agreement sufficient to constitute a contract for sale may be found to exist although the precise time at which it was made is undetermined [*Com. Code § 2204(2)*]. Thus, for example, if the parties' correspondence does not disclose exactly when their deal was closed, but their actions show that a binding obligation has been undertaken, a contract exists [*Com. Code § 2204*, comment 2].

Even though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy [*Com. Code § 2204(3)*]. A contract that meets this requirement is not made invalid because it leaves particulars of performance to be specified by one of the parties [*Com. Code § 2311(1)*; see § 52.15[8]; see also §§ 52.223, 52.224, and 52.264].

[2] Parol Evidence

If the confirmatory memoranda of the parties agree on certain terms, or if those terms are set forth in a writing intended by the parties as a final expression of their agreement on the included terms, then those terms may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. However, these terms may be explained or supplemented by:

- Course of dealing, course of performance, or usage of trade [*Com. Code § 2202(a)*; see *Com. Code § 1303* (definitions and application); e.g., *Mohave Valley Irrigation & Drainage v. Norton* (9th Cir. 2001) 244 F.3d 1164, 151 L. Ed. 2d 539 (minutes of board of directors meeting was not evidence of course of mutual conduct, trade usage, or performance, and thus could not be considered to interpret contract)].
- Consistent additional terms, unless the court finds the writing was intended as a complete and

exclusive statement of terms of the agreement [*Com. Code* § 2202(b)].

To ensure a finding that the writing was intended as a complete and exclusive statement of the terms of the agreement, it is advisable to include a merger (or integration) clause. An integrated agreement is one adopted by the parties as a final, complete, and exclusive statement of the terms of their agreement [*Restatement (Second) of Contracts* §§ 209(1), 210(1)]. An express statement of integration is called a "merger clause" or an "integration clause." A merger clause agreed to by both parties is generally conclusive on the issue of integration [*Restatement (Second) of Contracts* § 216 comment e]. For further discussion and a representative merger or integration clause that excludes parol evidence, see § 52.354 (form).

[3] Statute of Frauds

If applicable to a transaction governed by the Commercial Code, the statute of frauds operates informally and in conformity with business practice. Generally, a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought, or by his or her authorized agent or broker [*Com. Code* § 2201(1); see *Com. Code* § 1201(b)(37) "signed" defined; *Donovan v. RRL Corp.* (2001) 26 Cal. 4th 261, 277-278, 109 Cal. Rptr. 2d 807, 27 P.3d 702 (car dealership's printed name appearing in newspaper advertisement constituted signature satisfying statute of frauds); see also *Com. Code* § 2201(4) (exception for qualified financial contract); *Civ. Code* § 1624(b)(2) ("qualified financial contract" defined)]. However, the writing need only contain the term of the agreement mentioning the quantity of goods [*Com. Code* § 2201(1)]. All other terms may be omitted from the writing [*Com. Code* § 2201, comment 1].

Special rules apply between merchants [see *Com. Code* § 2201 (definition); see also § 52.13[4]]. Even without a writing signed by the party to be charged, the statute of frauds is satisfied if, within a reasonable time from the date on which an agreement was reached, a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, unless the receiving party gives written notice of objection to the contents of the confirmation within 10 days after it is received [*Com. Code* § 2201(2)].

A contract that is not in writing but is otherwise valid is enforceable in the following situations:

- The goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has either made substantial commitments toward procuring those goods or has substantially commenced their manufacture [*Com. Code* § 2201(3)(a)].
- Payment for the goods has been made and accepted or the goods have been received and accepted [*Com. Code* § 2201(3)(c)].

[4] Offers

The Commercial Code also brings legal concepts into conformity with business practices with respect to offers. At common law, offers could be revoked unless supported by consideration [Duesenberg & King, *Sales and Bulk Transfers Under the U.C.C.*, Ch. 3, *Offer and Acceptance: Conflicting Terms in Responsive Document*, § 3.01 (Matthew Bender); Keyes, *Cause and Consideration in California--A Re-Appraisal*, 47 Cal. L. Rev. 74, 83-84 (1959)]. This principle was out of step with the business world, in which a merchant must rely on another's promise that an offer will remain open. Accordingly, *Com. Code* § 2205(a) provides that a merchant's offer to buy or sell goods is not revocable for lack of consideration if the offer is in a signed writing and if the offer by its terms gives assurance that it will be held open. An offer so made is not revocable for lack of consideration during the time stated, or if no time is stated, for a reasonable

time. In no event may the period of irrevocability exceed three months [see discussion in § 52.220[1][b]-[d]].

An oral or written offer by a merchant to supply goods to a licensed contractor is irrevocable if the merchant has actual or imputed knowledge that the contractor is licensed and that the contractor will rely on the offer in submitting a bid for a construction contract. No consideration is necessary. The offer will be held open for 10 days after the contract is awarded to the prime contractor, but not for more than 90 days after the merchant made the offer. An oral offer for a price of \$2500 or more must be confirmed in writing by the contractor or the contractor's agent within 48 hours. The statutory duration requirements for offers to licensed contractors do not bar a merchant from providing that an offer will be held open for less than the time required by statute [*Com. Code* § 2205(b)].

[5] Acceptances

Com. Code § 2206 provides that, unless otherwise restricted, offers may be accepted in any reasonable manner and by any reasonable medium (by either a return promise or by performance) [see § 52.221 (form)]. The problems created by acceptances that contain additional or differing terms from the offers are governed by *Com. Code* § 2207. As a general rule, definite and seasonable acceptance or a written confirmation sent within a reasonable time operates as an acceptance even if it states terms additional to or different from those offered or agreed on, unless acceptance is expressly conditioned on assent to the additional or different terms [*Com. Code* § 2207(1); see, e.g., *PMC Inc. v. Porthole Yachts Ltd.* (1998) 65 Cal. App. 4th 882, 888-889, 76 Cal. Rptr. 2d 832 (no acceptance found under *Com. Code* § 2207(1) because of timing of addendum to agreement sent on last day to accept, contents of addendum containing new term, and cover letter emphasizing conditional nature of acceptance); *Textile Unlimited, Inc. v. A..BMH and Co. Inc.* (9th Cir. 2001) 240 F.3d 781, 787-788 (contract containing new terms, including arbitration clause, not formed under *Com. Code* § 2207(1) when no specific and unequivocal assent was given to supplemental conditions)]. The additional terms are to be construed as proposals for additions to the contract. Whether particular terms become part of the contract depends on whether the transaction is between merchants [*Com. Code* § 2207(2); see § 52.222[1][b], [c]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & AcceptanceCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral Overview



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§ 52.15 Obligations of Parties and Interpretation of Contract

[1] In General

In a sale of goods governed by the Commercial Code, the parties are charged with specific statutory obligations. The seller is obligated to transfer title to the goods and to deliver them in accordance with the terms of the contract. The buyer is obligated to accept those goods and pay for them in accordance with the terms of the contract [*Com. Code § 2301*]. To determine what is "in accordance with the contract," course of performance, course of dealing, usage of trade, and the general background of circumstances must be given due consideration in conjunction with the lay meaning of the words used to define the scope of the conditions and duties [*Com. Code § 2301*, comment].

The parties' obligations under specific types of Commercial Code transactions are discussed in the comments to the forms relating to those transactions. For example, output and requirement contracts, including those for exclusive dealing, are discussed in §§ 52.204[1] and 52.205[1]; warranties are discussed in §§ 52.290[1]-52.297[1]; and the Code provisions concerning sales on approval and sales or returns [*see Com. Code §§ 2326, 2327*] are discussed in § 52.282[1].

[2] Course of Performance, Course of Dealing, Usage of Trade

Terms contained in the parties' final agreement or in the parties' confirmatory memoranda may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement [*Com. Code § 2202(a)*; *see § 54.14[2]*]. However the final agreement or confirmatory memoranda may be explained or supplemented by course of performance, course of dealing, or usage of trade [*Com. Code § 2202(a)*; *see Com. Code § 1303(a)-(c)* (definitions)].

A course of performance or course of dealing between the parties, or usage of trade in the vocation or trade in which the parties are engaged (or of which they are or should be aware), is relevant in ascertaining the meaning of the parties' agreement [*Com. Code § 1303(d)*; *see, e.g., Insurance Co. of No. Am. v. NNR Aircargo Service (USA), Inc. (9th Cir. 2000) 201 F.3d 1111, 1113-1115* (under former *Com. Code § 1205(1)*, now *Com. Code § 1303(a)*, receipt of 47 identical invoices for 47 separate transactions was sufficient to constitute course of dealing, modifying shipping agreement)]. A course of performance, course of dealing, or usage of trade may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement [*Com. Code § 1303(d)*; *see Com.*

Code § 2202(a)]. Localized usage of trade may give particular meaning to a part of performance under the agreement that occurs in that place [*Com. Code § 1303(d)*].

With limited exceptions [*see Com. Code § 1303(f)*], the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other [*Com. Code § 1303(e)*]. If that construction is unreasonable, the following rules apply [*Com. Code § 1303(e)(1)-(3)*]:

- Express terms prevail over course of performance, course of dealing, and usage of trade.
- Course of performance prevails over course of dealing and usage of trade.
- Course of dealing prevails over usage of trade.

Subject to *Com. Code § 2209* governing modification or rescission, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance [*Com. Code § 1303(f)*]. For further discussion of modification and waiver, see § 52.16.

Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party [*Com. Code § 1303(g)*].

[3] Allocation of Risk

When the Commercial Code allocates a risk or burden between the parties "unless otherwise agreed" [*see, e.g., Com. Code § 2509* (risk of loss in the absence of breach of contract)], the agreement may not only shift the allocation, but may also divide the risk or burden [*Com. Code § 2303*]. However, the right of the parties to shift, divide, or allocate the risk is subject to the provisions of the Civil Code on unconscionability of contracts [*Com. Code § 2303*, comment 1; *see Civ. Code § 1670.5* (court may deny or limit enforcement of contract found to be unconscionable as a matter of law)].

[4] Price

The contract price of goods may be made payable in money or otherwise, including goods or realty. If the price is payable in whole or part in goods, then each party is deemed to be a "seller" of the goods he or she is to transfer [*Com. Code § 2304(1)*; *see § 52.13[3]*]. If all or part of the price is payable by an interest in realty, the transfer of the goods and the seller's obligations concerning the goods are governed by Division 2 of the Commercial Code [*see Commercial Code §§ 2101-2801*], but the transfer of the realty is not covered, nor are the transferor's obligations in connection with that transfer [*Com. Code § 2304(2)*]. The parties may conclude a contract for sale even when the price is not settled [*Com. Code § 2305(1)*]. For discussion of setting the contract price, see § 52.230[1]. For discussion of the time for payment under the contract, see [7], *below*.

[5] Delivery

Com. Code §§ 2307-2310 define the delivery obligations of parties by specifying delivery provisions when the parties do not otherwise agree. In general, these sections make the following provisions for delivery:

- All goods called for by a contract for sale must be tendered in a single delivery, and payment is due only on that tender [*Com. Code § 2307*].
- The place for delivery is the seller's place of business, or if he or she has none, his or her residence [*Com. Code § 2308(a)*].

- The time for shipment or delivery will be a reasonable time [*Com. Code* § 2309(1)].

The parties are free, of course, to vary these provisions by contracting otherwise. One way to specify delivery requirements is with standard shipping terms and abbreviations, such as "F.O.B.," discussed in [6], *below*.

Under *Civ. Code* § 1722, if a contract for the sale of merchandise to a consumer by a retailer with 25 or more employees requires the presence of the consumer at the time of delivery, the delivery must be made within a designated four-hour period [*Civ. Code* § 1722(a)(1)]. Failure to deliver within the specified time gives rise to an action for the buyer's damages in small claims court [*see Civ. Code* § 1722(a)(2)]. For further discussion of time of delivery in general and contract clauses addressing the effect of *Civ. Code* § 1722, see § 52.250[1].

For discussion of delivery and payment in single or several installments, see § 52.234[1]. For discussion of the place for delivery of goods, see § 52.251[1]. For discussion of shipments under reservation of a security interest [*see Com. Code* § 2310(b)], see § 52.265[1].

[6] Shipping Terminology

Contracts covering commercial sales transactions often use certain standard shipping terms and abbreviations to specify delivery arrangements. *Com. Code* §§ 2319-2324 define shipping terms such as F.A.S. [*see Com. Code* § 2319 (delivery free alongside)] and C.I.F. [*see Com. Code* § 2320 (lump sum price includes cost of goods, insurance, and freight to named destination)], and explain the requirements attaching to the use of these terms. For discussion of these definitions and requirements, see § 52.124 PP 3, 4, and §§ 52.253[1]-52.259[1].

[7] Time Provisions

The Commercial Code sections governing time provisions [*see, e.g., Com. Code* §§ 2309, 2310], like the sections on delivery obligations [*see* [5], *above*], provide certain rules that apply unless the parties agree otherwise. For example, the time for shipment or delivery or any other action under a contract will be a reasonable time unless otherwise agreed or otherwise provided in Division 2 of the Commercial Code [*Com. Code* § 2309(1); *see* § 52.250]. A contract of indefinite duration that provides for successive performances will remain in effect for a reasonable time but may be terminated at any time by either party [*Com. Code* § 2309(2)]. However, termination of a contract by one party requires reasonable notice, except when the termination is on the happening of an agreed event [*Com. Code* § 2309(3); *see* § 52.232[1]; *see also* § 52.474[1]].

Similar rules apply to time of payment. For example, unless otherwise agreed, payment is due at the time and place at which the buyer is to receive the goods, even though the place of shipment is the place of delivery [*Com. Code* § 2310(a)]. However, if delivery is authorized and made by way of documents of title, then payment is due, regardless of where the goods are to be received, either (1) at the time and place at which the buyer is to receive delivery of the tangible documents or (2) at the time the buyer is to receive delivery of the electronic documents and at the seller's place of business or, if none, the seller's residence, unless the parties otherwise agree [*Com. Code* § 2310(c)]. For coverage of the special rule that applies to the tender of documents of title when goods are shipped under reservation [*Com. Code* § 2310(b); *see Com. Code* § 2505 (shipment by seller with reservation of security interest in goods)], *see* § 52.265[1].

[8] Specifying Particulars of Performance

A contract that is otherwise sufficiently definite [*see Com. Code* § 2204(3); § 52.14[1]] to be a contract is not made invalid because it leaves particulars of performance to be specified by one of the parties. However, the specification of the particulars of performance must be made in good faith and within limits set by commercial reasonableness [*Com. Code* § 2311(1); *see* § 52.223[1]]. Unless otherwise agreed, specifications relating to assortment of the goods are to be determined by the buyer and, except for certain shipments F.A.S. or F.O.B. [*see Com. Code* § 2319; *see also* § 52.124

PP 3, 4; § 52.253], specifications or arrangements relating to shipment are to be determined by the seller [*Com. Code* § 2311(2)]. For a discussion of remedies available for the failure to seasonably specify or the failure to seasonably provide necessary cooperation [*Com. Code* § 2311(3)], see § 52.440[1].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.16

§ 52.16 Modification, Rescission, and Waiver

An agreement modifying a contract that is governed by Division 2 of the Commercial Code [*see Com. Code §§ 2101-2801*] needs no consideration to be binding [*Com. Code § 2209(1)*]. A signed agreement that excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded; but, except when the transaction is one between merchants [*see Com. Code § 2104; see also § 52.13[4]*], the writing evidencing the rescission or modification must be separately signed by the other party [*Com. Code § 2209(2)*]. In addition, a contract modification must satisfy the statute of frauds [*see Com. Code § 2201; § 52.14[3]*] if the contract as modified is within its provisions [*Com. Code § 2209(3)*].

If an attempted modification does not meet these requirements, it may still operate as a waiver of the contract terms sought to be modified [*Com. Code § 2209(4)*]. Moreover, a course of performance may be relevant to show a waiver or modification of any term inconsistent with that course of performance [*Com. Code § 1303(f)*]. A party who has waived an executory portion of the contract may retract the waiver by reasonable notification, received by the other party, that strict performance of the waived terms will be required [*see § 52.430 (form)*]. However, a waiver may not be retracted if the retraction would be unjust due to a material change of position in reliance on the waiver [*Com. Code § 2209(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & Waiver



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21-52 California Legal Forms--Transaction Guide § 52.17

§ 52.17 Title, Creditors, and Good Faith Purchasers

[1] Passing of Title

The provisions of Division 2 of the Commercial Code [*Com. Code §§ 2101-2801*] that govern the rights, obligations, and remedies of buyers, sellers, and third parties apply irrespective of title to the goods, unless the provision at issue refers to the title [*Com. Code § 2401*]. That is, the Commercial Code deals with the issues between buyer and seller in terms of step-by-step performance or nonperformance under the contract of sale and not in terms of whether title to the goods has passed. This means that the title rules provided in *Com. Code § 2401* in no way alter the rights declared elsewhere in the Code [*Com. Code § 2401*, comment 1].

Insofar as situations are not covered by the other provisions of Division 2 of the Commercial Code [*Com. Code § 2101 et seq.*] and matters concerning title become material, the following rules apply [*Com. Code § 2401*]:

- Title to goods cannot pass under a contract prior to their identification to the contract [*see Com. Code § 2501(1)*], and, unless otherwise explicitly agreed, the buyer acquires by their identification a special property as limited by the Commercial Code.
- Any retention or reservation by the seller of the title in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest.
- Subject to the two preceding rules, and to the provisions of Division 9-Secured Transactions [*see Com. Code § 9101 et seq.*; *see also* Ch. 42, *Secured Transactions*], title to goods passes from the seller to the buyer in any manner and on any condition explicitly agreed on by the parties.
- Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes performance of the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place.
- In particular and despite any reservation of a security interest by the bill of lading, if the contract

requires or authorizes the seller to send the goods to the buyer, but does not require the seller to deliver them at destination, title passes to the buyer at the time and place of shipment, but if the contract requires delivery at destination, title passes on tender there.

- Unless otherwise explicitly agreed, when delivery is to be made without moving the goods, if the seller is to deliver a tangible document of title, title passes at the time and place the document of title is delivered, or if the seller is to deliver an electronic document of title, title passes when the seller delivers the document. However, if the goods are already identified at the time of contracting and no documents are to be delivered, title passes at the time and place of contracting.

- A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance, reverts title to the goods in the seller. This reversion occurs by operation of law and is not a "sale."

[2] Rights of Seller's Creditors

Except as noted below, the rights of unsecured creditors of the seller with respect to goods that have been identified to a contract for sale [see *Com. Code* § 2501 (definition); see also § 52.284[1]] are subject to the buyer's rights to recover the goods [*Com. Code* § 2402(1); see *Com. Code* §§ 2502, 2716 (buyer's right of recovery)]. A creditor may treat a sale or identification [see *Com. Code* § 2501 (time and manner of identification of goods to contract); see also § 52.284[1]] of goods to a contract for sale as void if, as against that creditor, a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated. Retention of possession in good faith and current course of trade by a merchant-seller [see § 52.13[4]] for a commercially reasonable time after a sale or identification is not fraudulent [*Com. Code* § 2402(2)].

Nothing in Division 2 of the Commercial Code [*Com. Code* § 2101 *et seq.*] will be deemed to impair the rights of the creditor of the seller under the provisions of Division 9 on secured transactions [*Com. Code* § 2402(3)(a); see *Com. Code* § 9101 *et seq.*; see also Ch. 42, *Secured Transactions*]. The rights of the seller's creditors enjoy the same protection when identification to the contract or delivery is made not in the current course of trade, but in satisfaction of or as security for a pre-existing claim for money, security, or the like and is made under circumstances that under the law of the state where the goods are situated would, apart from Division 2 of the Commercial Code [*Com. Code* § 2101 *et seq.*], make the transaction a fraudulent transfer or voidable preference [*Com. Code* § 2402(3)(b)].

[3] Power to Transfer

A purchaser of goods acquires all title that the transferor had or had power to transfer, except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered as part of a purchase [see *Com. Code* § 1201(b)(29) ("purchase" includes any voluntary transaction creating an interest in property)], the purchaser has the same power even in the following situations [*Com. Code* § 2403(1)]:

- The transferor was deceived as to the identity of the purchaser.
- The delivery was in exchange for a check that is later dishonored.
- It was agreed that the transaction was to be a "cash sale".
- The delivery was procured through fraud punishable as larcenous under the criminal law [see, e.g., *Penal Code* § 484 (theft defined)].

Any "entrusting" of possession of goods to a merchant [*see Com. Code § 2104* (definition); *see also § 52.13[4]* ("merchants" defined)] who deals in goods of that kind gives the merchant power to transfer all rights of the entruster to a buyer in the ordinary course of business [*Com. Code § 2403(2)*; *see Gordon v. Hamm (1998) 63 Cal. App. 4th 1324, 1330-1332, 74 Cal. Rptr. 2d 631* (owners' entrustment of used motor home to dealer did not constitute "disposition" for purposes of former *Com. Code § 9306(2)*; *now see Com. Code § 9315(a)(1)* which governs creditor's lien; buyers took motor home subject to original owners' lenders' perfected security interest) (decided under prior law)]. "Entrusting" includes any delivery and any acquiescence in retention of possession for the purpose of sale, obtaining offers to purchase, locating a buyer, or the like. This is true regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods has been larcenous under the criminal law [*Com. Code § 2403(3)*; *see Pen. Code § 484 et seq.*]. The rights of other purchasers of goods and of lien creditors are governed by Commercial Code Division 9 covering secured transactions [*see Com. Code § 9101 et seq.*; *see also Ch. 42, Secured Transactions*], Division 6 covering bulk transfers [*see Com. Code § 6101 et seq.*; *see also Ch. 17, Buying and Selling a Business or Professional Practice*], and Division 7 covering documents of title [*Com. Code § 2403(4)*; *see Com. Code § 7101 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Title, Creditors & Good Faith PurchasersGeneral OverviewCommercial Law (UCC)Sales (Article 2)Title, Creditors & Good Faith PurchasersPassing of Title



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21-52 California Legal Forms--Transaction Guide § 52.18

§ 52.18 Remedies

[1] In General

Remedies for the breach of a contract for the sale of goods under the Commercial Code are covered by *Com. Code* §§ 2701-2725. The provisions of Division 2 of the Commercial Code [*Com. Code* § 2101 *et seq.*] do not impair the remedies for the breach of any obligation or promise collateral or ancillary to a contract for the sale of goods [*Com. Code* § 2701].

Specific remedies are discussed with the relevant forms in the comments to forms at §§ 52.350[1]-52.358[1] and §§ 52.470[1]-52.482[1]. For further discussion, see §§ 52.133 and 52.150.

[2] Seller's Remedies

When the buyer wrongfully rejects or revokes acceptance of goods, or fails to make a payment due on or before delivery, or repudiates a part or the whole contract, then with respect to any goods directly affected and, if the breach is of the whole contract [*see Com. Code* § 2612 (breach of part of installment contract is breach of whole contract if breach substantially impairs value of whole contract); *see also* § 52.333[1]], then with respect to the whole undelivered balance the aggrieved seller may do any of the following [*Com. Code* § 2703]:

- Withhold delivery of the goods [*see* § 52.478 for a notice of withholding goods].
- Stop delivery by any bailee as provided in *Com. Code* § 2705 [*see* § 52.480].
- Identify goods to the contract or resell them under *Com. Code* § 2704 [*see* § 52.350].
- Resell the goods and recover the difference between the resale price and the contract price as provided in *Com. Code* § 2706 [*see* §§ 52.351 and 52.482].
- Recover damages for nonacceptance [*see Com. Code* § 2708], or, in a proper case, the price of the goods [*see Com. Code* § 2709].

- Cancel the contract [see § 52.479 for a notice of cancellation].

[3] Buyer's Remedies

When the seller fails to make delivery or repudiates, or the buyer rightfully rejects or justifiably revokes acceptance, then with respect to any goods involved, and with respect to the whole contract if the breach goes to the whole contract [see *Com. Code* § 2612 (breach of part of installment contract is breach of whole contract if breach substantially impairs value of whole contract); see also § 52.333[1]], the buyer may cancel the contract [*Com. Code* § 2711(1)]. Whether or not the buyer cancels, in addition to recovering as much of the price as has been paid, the buyer also may do either of the following:

- Cover [see *Com. Code* § 2712(1) ("cover" means to make a good faith, reasonable purchase or contract to purchase substitute goods)] and seek the damages allowed after cover [see *Com. Code* § 2712(2) (damages available to covering buyer after seller's breach include the difference between cost of cover and contract price plus any incidental or consequential damages, minus expenses saved by seller's breach)] as to all the goods affected whether or not they have been identified to the contract [*Com. Code* § 2711(1)(a)]; or
- Recover damages for nondelivery as provided in *Com. Code* § 2713 [*Com. Code* § 2711(1)(b)].

When the seller fails to deliver or repudiates the contract, the buyer may also reach the goods themselves by choosing either of two remedies. If the goods have been identified [see *Com. Code* § 2501; see also § 52.284], the buyer may recover them as provided in *Com. Code* § 2502 [*Com. Code* § 2711(2)(a)]. If the goods are unique, or in other proper circumstances, the buyer may get specific performance of the contract [*Com. Code* §§ 2716(1), (2), 2711(2)(b)]. If the buyer cannot effect cover, or if the goods were shipped under reservation of a security interest and satisfaction of that interest has been made or tendered, the buyer has a right of replevin for the goods [*Com. Code* §§ 2716(3), 2711(2)(b)]. In the case of goods brought for personal, family, or household purposes, the buyer's right of replevin vests on the acquisition of a special property, even if the seller had not then repudiated or failed to deliver [*Com. Code* § 2716(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.19

§ 52.19 Discrimination in Sale of Goods

No one in California may be excluded from a business transaction on the basis of a policy expressed in any document or writing and imposed by a third party if that policy requires discrimination against that person on the basis of any characteristic listed in *Civ. Code § 51(b)* or defined in *Civ. Code § 51(e)* [*Bus. & Prof. Code § 16721(a)*; see *Civ. Code § 51(b)*] ("All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation..."). It is an unlawful trust and an unlawful restraint of trade for a person to enter into transactions for the sale of goods when the contract or other documents involved require such discrimination, and it is similarly unlawful to refuse to grant or accept a letter of credit or other document, or to refuse to enter into a contract for the exchange of goods or services on the ground that the letter, contract, or document does not contain a discriminatory provision [*Bus. & Prof. Code § 16721.5(a)(2)*].

California's anti-discrimination statutes [*Bus. & Prof. Code §§ 16721(a), 16721.5*] are interpreted and applied so as not to conflict with federal law with respect to transactions in the interstate or foreign commerce of the United States to the extent, if any, not preempted by the Export Administration Act of 1969 [*50 U.S.C. App. §§ 2401-2413*] and any regulations promulgated under that act [*Bus. & Prof. Code § 16721.6*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)General OverviewCommercial Law (UCC)Sales (Article 2)RemediesGeneral Overview



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21-52 California Legal Forms--Transaction Guide §§ 52.20-52.99

[Reserved]

§§ 52.20[Reserved]



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21-52 California Legal Forms--Transaction Guide § 52.100

§ 52.100 Facts

1. Names of parties.
2. Date and state of incorporation or formation, if applicable.
3. Addresses and telephone numbers of parties.
 - a. Principal place of business.
 - b. Location of manufacturing plants.
 - c. Residence.
4. Whether goods will be shipped to or from any state other than California.
5. Any other agreements between parties.
6. Any prior transactions between parties.
7. Complete description of contract goods.
8. Quantity of goods.
9. Express or implied warranties to be given or disclaimed.
10. Price of goods or method to be used to fix price.

11. Method of payment of contract price.
12. Method of shipment and delivery.
13. Desired remedies for breach of contract, including liquidated damages, if any.
14. Business needs of client.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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21-52 California Legal Forms--Transaction Guide § 52.101

§ 52.101 Documents

1. Prior sales contracts between the parties.
2. Invoices covering goods.
3. Bills of lading.
4. Warehouse receipts.
5. Bills of sale.
6. Itemized lists of goods to be sold.
7. Any trade code or similar document that establishes usage of trade for goods and locality involved in current transaction.
8. Any documents granting warranty in goods, including technical descriptions such as blueprints.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)General Overview



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21-52 California Legal Forms--Transaction Guide §§ 52.102-52.109

[Reserved]

§§ 52.102[Reserved]



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B. Preliminary Determinations

21-52 California Legal Forms--Transaction Guide § 52.110

§ 52.110 Practical Considerations

1. Determine type of document required by client.

a. Simple contract for sale of goods [*see* § 52.200].

NOTE:

A simple contract for the sale of goods, like memoranda of sale or bills of sale, is appropriate for use by parties who wish only to specify the basic terms of their agreement (identity of parties, date of delivery, etc.) in a writing and who are willing to let the applicable provisions of the Commercial Code operate to supply the other terms.

b. Memorandum of sale or purchase [*see* § 52.201].

c. Contract for sale of goods with detailed provisions [*see* § 52.202].

NOTE:

A contract for the sale of goods with detailed provisions should be used if the parties define most aspects of their transaction and do not rely on the gap-filling provisions of the Commercial Code [*see Com. Code* §§ 2305-2311; ***see also*** § 52.200[1]].

d. Bill of sale [*see* § 52.203].

e. Output and requirements contracts [*see* §§ 52.204, 52.205].

NOTE:

Output contracts measure the quantity of goods to be sold by the output of the seller. Requirements contracts measure the quantity of goods to be purchased by the requirements of the buyer. An output

contract is appropriate when it is necessary or important for the seller to be sure that it has a buyer, and a requirements contract is appropriate when the buyer wants to insure a reliable supply of goods.

- f. Contract for sale on consignment with factor [see § 52.206].

NOTE:

A contract for sale on consignment is to be used when the seller wants the actual sale to be handled by an agent.

2. Ascertain client's business needs.

- a. Does potential seller require immediate cash in order to maintain production of goods?

NOTE:

The parties' respective cash requirements may dictate the payments provisions that should be included in the sales contract [see §§ 52.230-52.235].

- b. Does buyer need to make credit arrangements [see §§ 52.231, 52.233]?

- c. Do uncertainties of market require buyer to insure that it will be supplied [see § 52.205] or seller to insure that it will have buyer [see § 52.204]?

- d. Is seller so busy or so inexperienced in the particular market that it wants agent to sell goods [see § 52.206]?

- e. Do choices open to buyer make option more desirable than firm offer [see § 52.220]?

- f. Does pressure to deliver goods to customer require quick reply to offer by specific method?

NOTE:

When the offeror wants to control the manner of indicating acceptance and the medium through which acceptance must be communicated, the offer should so specify. Otherwise, any reasonable manner or medium of acceptance, including performance, may be effective [Com. Code § 2206(1); see § 52.221].

- g. Do uncertainties of market or transaction require some particulars to be left for future specification [see §§ 52.223, 52.224]?

- h. Does structure of buyer's business or location of its premises require particular means or time of delivery [see §§ 52.250-52.265, 52.460-52.462]?

- i. Is client financially unable to bear risk of loss [see §§ 52.280-52.284]?

- j. Does state of the art in client's technical field or financial needs of client require particular warranty to be offered or disclaimed [see §§ 52.290-52.297]?

- k. Do client's business needs suggest special problems for inspection of goods [see §§ 52.310, 52.311]?

(1) Does technical nature of product require tests to see if goods conform to specifications?

(2) Does nature of client's manufacturing process require that inspection include right to install and operate machinery?

(3) Does client's present cash flow require an agreement to allocate expenses of inspection?

NOTE:

Expenses of inspection must be borne by the buyer [*Com. Code* § 2513(2)], but the parties may vary this rule by agreement [*Com. Code* § 2513, comment 4; *see* § 52.311[1]].

l. Does potential financial impact of litigation require provision for arbitration or other limitation or specification of remedies [*see* §§ 52.350-52.358, 52.470-52.482]?

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)General OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGeneral Overview



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B. Preliminary Determinations

21-52 California Legal Forms--Transaction Guide § 52.111

§ 52.111 Status of Parties

1. Determine whether party buying goods is "buyer" [*see Com. Code § 2103(1)(a)*] (definition of "buyer"); *see also § 52.13[3]* (definitions of " 'buyer' and 'seller' ").
2. Determine whether buyer is "consumer" by considering following factors [*see 15 U.S.C. § 2301(3)*; *see also § 52.128 P 7*]:
 - a. Is purchaser a buyer or other qualified transferee of consumer product [*see 15 U.S.C. § 2301(3)*]?
 - b. Is product purchased a "consumer product" [*15 U.S.C. § 2301(1)*]?
 - (1) Is product tangible personal property?
 - (2) Is it distributed in commerce?
 - (3) Is it normally used for personal, family, or household purposes?
3. Determine whether party selling goods is "seller" [*see Com. Code § 2103(1)(d)*] (definition of "seller") discussed at § 52.13[3].
4. Determine whether either party is "merchant" by considering following factors [*see Com. Code § 2104(1)*] (definition of "merchant") discussed at § 52.13[4]:
 - a. Does party deal in goods of the kind or otherwise by occupation hold himself or herself out as having knowledge or skill peculiar to practices or goods involved?

- b. Is party person to whom that knowledge or skill may be attributed by his or her employment of agent or broker or other intermediary who by occupation holds himself or herself out as having that knowledge or skill?
5. Determine status of parties as partnership, joint venture, limited partnership, corporation, public entity, or individual.
6. If either party is other than individual, determine following:
- a. Who has authority to act for party.
 - b. Scope of authority.
 - c. Names, addresses, and telephone numbers of those with authority.
 - d. Procedure for approval of sales transactions.
 - e. Principal place of business.
7. If either party is public entity, determine following:
- a. Name, address, and telephone number of principal office of public entity.
 - b. Name, address, and telephone number of public entity employee in charge of sales or purchases.
 - c. Governing body of public entity.
 - d. Time and place governing body meets to vote on sales transaction.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.112

§ 52.112 Basic Legal Determinations

1. Determine whether articles to be sold are "goods" by considering following factors [*see Com. Code § 2105(1)* (definition of "goods"); *see also § 52.13[2]*]:

NOTE:

Com. Code §§ 2101-2801 apply only to transactions in goods [*Com. Code § 2102*].

a. Be sure articles to be sold are things (including specially manufactured goods) that are movable at time of identification to contract for sale [*see Com. Code § 2501*; *see also § 52.284[1]*].

b. Be sure articles to be sold are not:

- (1) Money in which price is to be paid;
- (2) Investment securities; or
- (3) Things in action.

c. Determine whether articles are among those specifically listed as "goods":

(1) Unborn young of animals.

(2) Growing crops and other identified things attached to realty that may be severed from it without material harm, such as [*Com. Code § 2107*]:

(a) Minerals.

(b) Structures and materials.

(c) Timber.

2. Determine whether statute of frauds applies [*see Com. Code § 2201; see also § 52.14[3]*].

3. Determine likelihood that contract will be subject to interpretation, supplementation, or qualification by any of following [*see Com. Code §§ 1303, 2203; see also § 52.15[2]*]:

NOTE:

The parties may guard against supplementation or qualification of their agreement by including a merger or integration clause [*see § 52.354*].

a. Course of performance.

b. Course of dealing [*see, e.g., Insurance Co. of No. Am. v. NNR Aircargo Service (USA), Inc. (9th Cir. 2000) 201 F.3d 1111, 1113-1115 (under former Com. Code § 1205(1), now Com. Code § 1303(a), receipt of 47 identical invoices for 47 separate transactions was sufficient to constitute course of dealing, modifying shipping agreement)*].

c. Usage of trade.

4. Determine whether express or implied warranties may be disclaimed [*see Com. Code § 2316; see also §§ 52.292, 52.295*].

5. Determine whether it will be advisable to shift allocation of risk or burden of risk [*see Com. Code §§ 2509, 2510; see also §§ 52.15[3], 52.280, 52.281*].

6. Determine whether it is advisable to shift terms of payment [*see Com. Code §§ 2305, 2307, 2511; see also §§ 52.15[4], 52.230, 52.232, 52.234*].

7. Determine advisability of changing place, time, or amount of delivery from those provided by Commercial Code if parties do not agree otherwise [*see Com. Code §§ 2307-2309; see also §§ 52.15[5], 52.250, 52.251*].

8. Determine whether assignment of rights or delegation of duties should be prohibited [*see Com. Code § 2210; §§ 52.356, 52.431*].

NOTE:

A party may want to prohibit assignment or delegation when it is relying on the personal performance of the other party, as in transactions in which the judgment, craftsmanship, reputation, or credit of the other party is an important part of the bargain.

9. Determine nature of goods to be sold.

a. Determine whether goods to be sold are "consumer goods" by considering following factors [*see Civ. Code § 1791(a); see also §§ 52.128 P 6 and 52.129 P 3*]:

(1) Are goods new products or parts of new products used, bought, or leased for use

primarily for personal, family, or household purposes (except for clothing and consumables)?

(2) Are goods new or used assistive devices sold at retail?

NOTE:

An assistive device is a device used or intended to be used to assist the physically disabled. Prescription lenses and ophthalmic goods do not qualify unless sold or dispensed to the blind [*Civ. Code* § 1791(s); **see** *Civ. Code* § 1793.02].

b. Determine whether goods to be sold are "consumer products" by considering following factors [*see 15 U.S.C. § 2301(1)*; *see also* § 52.128 P 7]:

(1) Is product tangible personal property?

(2) Is it distributed in commerce?

(3) Is it normally used for personal, family, or household purposes?

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Subject MatterGeneral OverviewCommercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 52 SALES OF GOODS UNDER THE UNIFORM COMMERCIAL CODE
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B. Preliminary Determinations

21-52 California Legal Forms--Transaction Guide §§ 52.113-52.119

[Reserved]

§§ 52.113[Reserved]



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C. Procedural Guide to Contracts for Sale of Goods

21-52 California Legal Forms--Transaction Guide § 52.120

§ 52.120 Offer and Acceptance

1. Reduce terms of offer to sell or buy to a writing and either:

a. Include terms of offer in sales contract, or

NOTE:

A written sales contract that includes an offer to buy or sell must also include all other provisions that the parties intend to govern their transaction, particularly if they wish the details of that transaction to vary from the gap-filling provisions of the Commercial Code.

b. Submit written offer to other party.

2. Specify time offer is to remain open [*see* § 52.220].

3. Specify whether offer is firm (i.e., irrevocable) or revocable at will [*Com. Code* § 2205; § 52.220].

NOTE:

An offer by a merchant to buy or sell goods in a signed writing that gives assurance that it will be held open is not revocable for lack of consideration during the time stated. If no time is stated, the offer is irrevocable for a reasonable time, but in no event may the period of irrevocability exceed three months [*Com. Code* § 2205(b)]. Any term of assurance on a form supplied by the offeree must be separately signed by the offeror [*Com. Code* § 2205(a)]. Offers by nonmerchants require consideration in order to be binding. Even firm offers by merchants require consideration or renewal if they are to last more than three months. For further discussion, including discussion of the irrevocability of a material supplier's offer to a contractor, see § 52.220[1].

4. Specify manner and medium for acceptance [*Com. Code* § 2206; *see* § 52.221], such as:

NOTE:

Unless specified, the offer will be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances [*Com. Code § 2206(1)(a)*]. In addition, unless specified, an order or other offer to buy goods for prompt or current shipment will be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods [*Com. Code § 2206(1)(b)*].

- a. Return promise.
- b. Performance followed by notice.
- c. Mail.
- d. Telegram.
- e. Email or other electronic communication.

5. If desired, include provision regulating effect of additional or different terms in acceptance [*Com. Code § 2207*; see, e.g., *PMC Inc. v. Porthole Yachts Ltd. (1998) 65 Cal. App. 4th 882, 888-889, 76 Cal. Rptr. 2d 832* (no acceptance found under *Com. Code § 2207* due to timing of addendum to agreement sent on last day to accept, contents of addendum which contained new term, and cover letter emphasizing conditional nature of acceptance); see also § 52.222 (clauses controlling effect of additional terms in acceptance)].

NOTE:

Additional or different terms are construed as proposals for addition to the contract [*Com. Code § 2207(2)*]. Between merchants, those terms become part of the contract unless (1) the offer expressly limits acceptance to the terms of the offer; (2) they materially alter it; or (3) notification of objection to the terms has already been given or is given within a reasonable time after notice of them is received [*Com. Code § 2207(2)(a)-(c)*].

A decision as to which of the following approaches to adopt depends on the importance, in the offeror's business, of acceptance on exact terms, as opposed to businesses which anticipate that the customer will add his or her individual requirements.

- a. Say nothing as to effect of additional or different terms, and stand prepared to object to undesirable terms; or
- b. Say nothing as to effect of additional or different terms except to disclaim in advance anticipated terms that would be entirely unacceptable; otherwise, stand prepared to object to undesirable terms; or
- c. Limit power of acceptance to exact terms of offer.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & AcceptanceCommercial Law (UCC)Sales (Article 2)Subject MatterGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.121

§ 52.121 Parties and Basic Contract Terms

NOTE:

For a complete simple contract for the sale of goods, see § 52.200. For a complete detailed contract, see § 52.202.

1. Specify date of contract.
2. Include following information on parties:
 - a. Names.
 - b. Addresses.
 - c. Status (e.g., partnership, corporation, limited liability company, or joint venture).
 - d. Character (e.g., buyer, seller, or factor).
3. Include recitation of seller's agreement to sell and deliver and buyer's agreement to pay and accept delivery of goods.

NOTE:

Under the Commercial Code, the obligation of the seller is to transfer and deliver, and that of the buyer is to accept and pay in accordance with the contract [*Com. Code § 2301*].

4. Governing law [*see § 52.358* (choice of law clause)].

5. Merger or integration clause [see § 52.354].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.122

§ 52.122 Goods

1. Specify goods subject to contract, including [*see Com. Code § 2311(1), (2); §§ 52.223, 52.224*]:

- a. Description of amount and variety, or
- b. Identity of party who will be entitled to later designate amount and variety.

NOTE:

Unless otherwise agreed, specifications relating to assortment of the goods are at the buyer's option [*Com. Code § 2311(2)*]. However, the parties may leave open the particulars of performance, such as assortment of goods, to be designated later by one of the parties [*Com. Code § 2311(1)*].

2. If any description of goods is not to be part of basis of bargain, make express disclaimer [*see § 52.292*].

3. If desired, specify that amount of goods is to be determined by output of seller or requirements of buyer [*see §§ 52.204, 52.205*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Subject MatterGoodsGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.123

§ 52.123 Price or Payment

1. Set amount of purchase price, or means for later determining purchase price [§ 52.230].

NOTE:

The parties may conclude a contract for sale even though the price is not settled. In that case, the implied price generally is a reasonable price at the time for delivery [*Com. Code § 2305(1)*]. For further discussion, *see* § 52.230[1].

2. Determine when payment is due [§§ 52.231, 52.234].

NOTE:

Unless otherwise agreed, tender of payment is a condition to the seller's duty to tender and complete delivery [*Com. Code § 2511(1)*], and actual payment at the contract rate is due on acceptance [*Com. Code §§ 2301, 2607(1)*] at the time and place where the buyer is to receive the goods even though the place of shipment is the place of delivery [*Com. Code § 2310(a)*]. When the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment, but postdating the invoice or delaying its dispatch will correspondingly delay the start of the credit period [*Com. Code § 2310(d)*].

3. Specify required medium of payment [§ 52.232].

NOTE:

Unless otherwise agreed [*Com. Code § 1302(a)*], tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it [*Com. Code § 2511(2)*]. Payment by check is conditional. Between the parties, a payment by check is defeated if the check is not honored when presented for

payment [*Com. Code* § 2511(3)].

4. If payment is to be by letter of credit, include provision to that effect, along with any other details that may be agreed on, such as [*Com. Code* § 2325; see § 52.233]:

NOTE:

Unless otherwise agreed, the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, when the shipment is overseas, of good international repute [*Com. Code* § 2325(3)]. For discussion of the law governing letters of Credit, see Ch. 56, ***Letters of Credit and Electronic Fund Transfers*** .

a. Bank approved of or required by seller.

b. "Confirmed credit" required.

NOTE:

The term "confirmed credit" means that the credit must also carry the direct obligation of a financing agency of good repute that does business in the seller's financial market [*Com. Code* § 2325(3)]. That is, if the credit is issued by a bank or other agency that does not do direct business in the seller's financial market, it should be confirmed by one that does [*Com. Code* § 2325, comment 3].

c. Time by which credit must be established.

d. Amount that letter of credit must cover.

5. If delivery of payment and purchase price are to be apportioned, specify manner of apportionment, such as [see § 52.234]:

a. Delivery in equal monthly installments.

b. Size and number of deliveries at seller's option, with all goods to be delivered by given date.

c. Delivery of all or any part of goods as buyer may demand from time to time within period of delivery set by contract.

d. Payment with each installment.

e. Payment of only a fixed percentage of price for each installment, with remainder to be paid along with full price of last installment.

f. Payment of a set percentage of total purchase price on first of month until total is paid; e.g., 20 percent for five months.

6. If substituted means or manner of payment would be unsatisfactory, include provision prohibiting substitutions [see § 52.235].

NOTE:

If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment that is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive, or predatory [*Com. Code* § 2614(2)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformancePayment Tender



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21-52 California Legal Forms--Transaction Guide § 52.124

§ 52.124 Shipment

NOTE:

For general discussion of the shipment of goods, see Ch. 54, *Shipment of Property*.

1. Fix time of delivery [see § 52.250]; either:

NOTE:

Unless otherwise agreed, the time for shipment or delivery or any other action under a contract is a reasonable time [Com. Code § 2309(1)].

a. Omit term governing time of delivery, in which case delivery must be within a reasonable time [Com. Code § 2309(1)].

b. Specify delivery date.

c. Provide that date of delivery is to be specified later by buyer.

NOTE:

Parties may leave particulars of performance to be specified later by one of the parties [Com. Code § 2311(1); see § 52.223]. Specifications or arrangements concerning shipment are usually at the seller's option unless the parties agree otherwise [Com. Code § 2311(2); see § 52.264].

2. Fix place and obligations of delivery; either:

- a. Omit contract provisions covering delivery.

NOTE:

If no agreement as to place of delivery is made, the rules provided by *Com. Code § 2308* apply. For discussion of these rules see § 52.251[1]. In most cases it is unwise to leave delivery terms unexpressed [*see § 52.251*].

- b. If carrier will not make delivery, specify details, such as [*see § 52.263*]:

- (1) Delivery to be made by seller.
- (2) Pick-up of goods by buyer.
- (3) Delivery by transfer of documents of title.

- c. Use either of following:

- (1) Shipment contract [*Com. Code § 2504; see §§ 52.250, 52.252*]:

NOTE:

A "shipment contract" is a contract requiring or authorizing the seller to send goods to the buyer but without requiring delivery at a particular destination [*Com. Code § 2504; see §§ 52.250, 52.252*].

- (a) Specify desired details for tender of delivery; or
- (b) Do the following:
 - (i) Put goods in possession of carrier and make reasonable agreement for their transportation;
 - (ii) Get and promptly deliver or tender any necessary documents; and
 - (iii) Promptly notify buyer of shipment.

- (2) Destination contract [*§§ 52.252, 52.262*].

NOTE:

A destination contract is a contract requiring the seller to deliver at a particular destination [*Com. Code § 2503(3)*]. Time, place, and manner for tender of delivery are determined by the contract and by Division 2 of the Commercial Code [*see Com. Code §§ 2101-2801*], especially *Com. Code § 2503*, which requires, for example, tender at a reasonable hour and the furnishing by the buyer of facilities reasonably suited to the receipt of the goods [*Com. Code § 2503(3); see also §§ 52.262[1] and 52.263[1]*]. The primary difference between shipping and destination contracts is that the buyer bears the risk of loss during transit under a shipping contract, and the seller bears the risk of loss during transit under a destination contract [*Com. Code § 2509(1); Com. Code § 2503, comment 5*].

- d. If appropriate, leave some details of shipping arrangement open to be later specified by one of parties, such as the following [*§ 52.264*]:

(1) Designation of carrier.

(2) Designation of local carrier after goods arrive in buyer's area by ship or train.

(3) Time of shipment.

3. Use the following mercantile shipping terms to determine related obligations for shipment contracts [§§ 52.253, 52.254].

NOTE:

Even after the determination that the basic delivery terms will involve a shipment or a destination contract, there are related obligations that must also be set, such as the cost of freight. The parties must therefore articulate these related obligations. This can be done explicitly or by use of mercantile shipping terms.

For additional discussion, see Ch. 54, *Shipment of Property* .

a. If parties want seller to bear expense and risk of putting goods into possession of carrier, then send goods F.O.B. point of shipment (e.g., "F.O.B. San Francisco," when shipment is from San Francisco to Los Angeles) [*Com. Code* § 2319].

NOTE:

"F.O.B." means "free on board" [*Com. Code* § 2319(1); *see* § 52.253].

b. If parties want seller to bear expense and risk of putting goods into possession of carrier and expense and risk of loading goods on board, send goods F.O.B. point of shipment, vessel, car, or other vehicle [*Com. Code* § 2319(1)(c)].

NOTE:

If the shipment is to be F.O.B. vessel, and overseas shipment is contemplated, then the seller must obtain a negotiable bill of lading [*see Com. Code* §§ 2319(1)(c), 2323(1)].

c. If parties want seller to deliver goods alongside vessel at his or her own risk and expense in manner usual in that port or on dock designated and provided by buyer, send goods F.A.S. vessel at a named port [*Com. Code* § 2319(2)].

NOTE:

"F.A.S." means "free alongside." The seller must obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading [*Com. Code* § 2319(2); *see* § 52.253].

d. If parties want price to include in lump sum cost of goods, insurance, and freight to destination, send goods C.I.F. place of destination [*Com. Code* § 2320].

e. If parties want price to include in lump sum cost of goods and freight to destination, send goods C. & F. place of destination [*Com. Code* § 2320].

NOTE:

The terms "C.I.F." and "C. & F." designate "shipment" contracts even though they are

used with the point of destination because the buyer bears the risk of loss during transit [*Com. Code* § 2320, comment 1]. For discussion of the obligations imposed by "C.I.F." and "C. & F." terms, see § 52.254[1].

f. If parties decide on shipment under reservation, have seller either:

(1) Procure a negotiable bill of lading to his or her own order [*Com. Code* § 2505(1)(a)];
or

(2) Procure a nonnegotiable bill of lading to himself or herself or to his or her nominee [*Com. Code* § 2505(1)(b)].

4. Use mercantile shipping terms to determine related obligations for destination contracts [see §§ 52.253, 52.257, 52.259].

NOTE:

Related delivery obligations must be defined even when a shipment or a destination contract is used. These related obligations can be expressly stated or implied by the use of mercantile shipping terms.

a. If parties want seller to bear expense and risk of transporting goods to destination, then send goods F.O.B. destination (e.g., "F.O.B. Los Angeles," if shipment is from San Francisco to Los Angeles) [see *Com. Code* § 2319(1)].

NOTE:

"F.O.B." means "free on board" [*Com. Code* § 2319(1)]. A seller making a delivery F.O.B. destination must tender delivery of the goods at the named destination in the manner provided by *Com. Code* § 2503 [see §§ 52.262, 52.263]. For further discussion of deliveries F.O.B. destination, see § 52.253.

b. If parties want seller to bear expense and risk of transporting goods to destination and expense and risk of loading goods on board, send goods F.O.B. destination, vessel, car, or other vehicle [*Com. Code* § 2319(1)(c)].

NOTE:

If delivery is to be F.O.B. vessel, and overseas shipment is contemplated, then the seller must obtain a negotiable bill of lading [see *Com. Code* §§ 2319(1)(c), 2323(1)].

c. If parties wish seller to deliver from ship that has reached a place at named port of destination where goods of the kind are usually discharged, send goods ex-ship [*Com. Code* § 2322(1); § 52.257].

NOTE:

Delivery of goods "ex-ship" means from the carrying vessel, not restricted to a particular ship [*Com. Code* § 2322(1); *Com. Code* § 2322, comment 2]. The seller must discharge all liens arising out of the carriage and furnish the buyer with a direction that puts the carrier under a duty to deliver the goods [*Com. Code* § 2322(2)(a)].

d. If parties want seller to ship conforming goods, and, if they arrive by any means, to tender them on arrival, but without assuming any obligation that the goods will arrive, send goods "no arrival, no sale" [*Com. Code* § 2324(a); see § 52.259].

NOTE:

The exemption of the seller from liability for non-arrival under a "no arrival, no sale" term does not apply if the seller caused the goods not to arrive [*Com. Code* § 2324(a)]. If, without fault of the seller, the goods are lost in part, or have so deteriorated as no longer to conform to the contract, or arrive after the contract time, the buyer may proceed as if there had been a casualty to identified goods [*Com. Code* § 2324(b); *see* § 52.132 P 2].

5. Resolve remaining shipping details not covered by mercantile terminology, such as the following:

- a. How goods are to be packaged [*see* § 53.202[2] P 6, § 52.256[2]].
- b. What type of carrier is to be used [*see* §§ 52.253, 52.264].
- c. Which specific carrier is to be used [*see* §§ 52.253, 52.257].

6. If seller is not to be allowed to ship under reservation, provide exclusion in contract [§ 52.260].

NOTE:

Unless otherwise agreed, a seller who is authorized to send the goods may ship them under reservation, tendering documents of title, although buyer still may inspect before payment [*Com. Code* § 2310(b)]. This allows the seller under a shipment contract to retain an interest in the goods even after shipment.

7. If substituted methods of delivery would be unsatisfactory, even when permitted by the Commercial Code, include contract provision prohibiting substituted methods of delivery [*see* § 52.234].

NOTE:

When, without fault of either party, the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable, or the agreed manner of delivery otherwise becomes commercially impractical but a commercially reasonable substitute is available, this substitute performance must be tendered and accepted [*Com. Code* § 2614(1)] in the absence of specific agreement to the contrary [*Com. Code* § 2614, comment 1].

8. If parties wish to vary terms on which delays in delivery or nondelivery are excused by the Code, include contract provision specifying grounds, if any, for excuse [*Com. Code* § 2615; *see* § 52.320].

9. Specify when documents against which draft is drawn are to be delivered to drawee [§ 52.261].

NOTE:

Unless otherwise agreed, documents against which a draft is drawn must be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment [*Com. Code* § 2514].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



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21-52 California Legal Forms--Transaction Guide § 52.125

§ 52.125 Risk of Loss

1. Fix time when risk of loss passes from seller to buyer if there is no breach of contract [see § 52.280]; either:

a. Omit coverage of risk of loss in absence of breach, in which case *Com. Code § 2509* governs [see § 52.280[1][b] for discussion].

b. Vary terms of *Com. Code § 2509* by specifying in contract when risk of loss passes if there is no breach of contract [*Com. Code § 2509(4)*].

2. Fix time when risk of loss passes from seller to buyer in event of breach [see § 52.281], either:

a. Omit any coverage of when risk of loss passes in event of breach, in which case *Com. Code § 2510* governs.

b. Vary terms of *Com. Code § 2510* by specifying in contract when risk of loss passes if there is breach of contract.

3. If desired, include provision defining when identification of goods to contract will occur, such as the following:

NOTE:

The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers. Identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, the time of identification is controlled by *Com. Code § 2501(1)* [see § 52.284].

- a. Identification occurs when seller places goods in hands of carrier for delivery [*see* § 52.284[2], first alternative].
- b. Identification occurs when buyer receives notice from seller that goods are ready for shipment [*see* § 52.284[2], second alternative].
- c. Identification occurs when buyer receives goods [*see* § 52.284[2], third alternative].

4. If buyer will have option to return goods, specify type of option [*see* § 52.282].

- a. Sale on approval.

NOTE:

In a sale on approval, the goods are delivered primarily for use [*Com. Code* § 2326(1)(a)]. Unless otherwise agreed, although the goods are identified to the contract, the risk of loss and the title do not pass to the buyer until acceptance. After due notification of election to return, the return is at the seller's risk and expense, but a merchant buyer must follow any reasonable instructions [*Com. Code* § 2327(1)(c)]. Goods held on approval are not subject to the claims of the buyer's creditors until acceptance [*Com. Code* § 2326(2); *see* § 52.282[1][d] for discussion of exception to rule].

- b. Sale or return.

NOTE:

In a sale or return, the goods are delivered primarily for resale [*Com. Code* § 2326(1)(b)]. Unless otherwise agreed, the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably. The return is at the buyer's risk and expense [*Com. Code* § 2327(2)]. In a sale or return the risk of loss is on the buyer [*Com. Code* § 2327, comment 3]. Goods held on sale or return are subject to the claims of the buyer's creditors while in the buyer's possession [*Com. Code* § 2326(2)].

- c. Retail sellers must post refund or return policy.

NOTE:

A retailer selling to the public who has a policy of not giving full cash or credit refunds, of not allowing equal exchanges, or any combination of these, for at least seven days following purchase, must conspicuously post its policy [*Civ. Code* § 1723(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceRisk of Loss



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21-52 California Legal Forms--Transaction Guide § 52.126

§ 52.126 Times for Performance or Duration of Relationship

NOTE:

See § 52.250.

1. Fix time for performance.
 - a. Specify time for performance; or
 - b. Set no time for performance, in which case time for any action under contract is reasonable time [*Com. Code § 2309(1)*].
2. Fix duration of contract.
 - a. Specify duration of contract; or
 - b. Set no limit on duration of contract, and, if contract provides for successive performances, it is valid for reasonable time, but may be terminated at any time by either party [*Com. Code § 2309(2)*; see § 52.474].
3. If parties are consumer and retailer with 25 or more employees, contract relates to sale of merchandise that will be delivered at a later date, and presence of consumer is required at time of delivery, reach agreement with consumer, at time of sale or at later date before delivery, on four-hour time period during which delivery will be made [*Civ. Code § 1722(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



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21-52 California Legal Forms--Transaction Guide § 52.127

§ 52.127 Unresolved Details of Performance

1. If transaction involves types of performance that are difficult or impossible to fix now, but that must later be resolved, specify which party has right to later designate details of performance [*see Com. Code § 2311(1); see also § 52.223*].
2. If desired, set standards or limits on right to specify details of performance, for example:
 - a. If right to specify particulars of performance includes right to change those particulars, require notice to other party before change may be made [*see § 52.223[2]*, second alternative].
 - b. Require specification to be made on or before a given date [*see § 52.223[2]*, third alternative].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.128

§ 52.128 Express Warranties

NOTE:

See §§ 52.290-52.294.

1. If seller intends to make no express warranties as to goods other than "consumer goods" [see P 6, *below*], advise seller to do the following [*Com. Code § 2313(1)(a)*]:

NOTE:

The provisions of the Song-Beverly Consumer Warranty Act [*see Civ. Code §§ 1790-1795.7*] do not affect rights and obligations under the Commercial Code except when the two conflict. In that case, the former prevails [*Civ. Code § 1790.3*]. For discussion of the Song-Beverly Consumer Warranty Act [*see Civ. Code §§ 1790-1795.7*], see P 6, *below*.

a. Avoid making, and advise all agents and salespeople to avoid making, any oral or written affirmations of facts or promises.

NOTE:

Warranties are easily created by simply making a promise or affirming a fact to be true. It is not necessary that formal words such as "warrant" or "guarantee" be used or that there be a specific intention to make a warranty [*Com. Code § 2313(2)*].

b. Disclaim all express warranties, or all express warranties other than those agreed on by parties [see §§ 52.291-52.293].

NOTE:

Disclaiming all express warranties after making certain express warranties will have no effect on warranties actually made [*Com. Code § 2316(1)*].

- c. Include integration or merger clause to prevent later proof of oral warranties [*see § 52.354*].
 - d. Include clause denying authority of agents or salespeople to make any representations not included in written contract [*see § 52.292*].
2. If seller intends to make one or more express warranties, advise seller to use precautions listed in Paragraph 1, *above*, to protect against false assertions that other warranties were made.
 3. If description of goods is not intended by seller to be part of basis of bargain and an express warranty [*see Com. Code § 2313(1)(b)*], provide that description does not create express warranty [*see Com. Code § 1302*].
 4. If seller does not intend model or sample to become part of basis of the bargain and an express warranty [*see Com. Code § 2313(1)(c)*], provide that model or sample does not create express warranty [*see Com. Code § 1302*].
 5. If buyer expects to rely on express warranties by seller, advise buyer to do the following:
 - a. Determine express warranties on which bargain is based.
 - b. If possible, have all express warranties that are to be relied on included in written agreement.
 - c. Make sure express warranties are orally understood as part of basis of bargain, and that sales agreement does not have merger or integration clause [*see Com. Code § 2202; § 52.354*], or clause that denies authority of person dealing with buyer to create warranties.
 - d. Make sure sales agreement does not disclaim any express warranties relied on by the parties in reaching their agreement [*see Com. Code § 2316(1)*].
 6. Comply with requirements of Song-Beverly Consumer Warranty Act [*see Civ. Code §§ 1790-1795.7*] if goods are "consumer goods."

NOTE:

The rights and obligations of parties determined under the Commercial Code are not affected by the Song-Beverly Consumer Warranty Act [*see Civ. Code §§ 1790-1795.7*] except in case of conflict, in which case the Song-Beverly Act prevails over the Commercial Code [*Civ. Code § 1790.3*].

- a. Following are consumer goods [*Civ. Code § 1791(a)*]:
 - (1) Any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables.
 - (2) New and used assistive devices sold at retail.

NOTE:

An assistive device is a device used or intended to be used to assist the physically disabled. Prescription lenses and ophthalmic goods do not qualify unless sold or

dispensed to the blind [*Civ. Code* § 1791(s); **see** *Civ. Code* § 1793.02].

b. Create express warranties by [*Civ. Code* § 1791.2(a)]:

NOTE:

Express warranty provisions must set forth the warranties in readily understood language and must clearly identify the party making the express warranties. The language of the warranties must comply with the federal warranty disclosure standards set forth in the Magnuson-Moss Warranty Act [15 U.S.C. §§ 2301-2312; **see** P (9), **below**] and applicable regulations [*Civ. Code* § 1793.1(a)(1); **see** 16 C.F.R. §§ 700.1-703.8].

(1) Providing written statement arising out of sale to consumer of consumer good under which manufacturer, distributor, or retailer undertakes to preserve or maintain utility or performance of consumer good or provide compensation if there is failure in utility or performance; or

(2) Statement that goods conform to sample or model.

c. If providing warranty or product registration card or form (or electronic online warranty or registration card) to be completed and returned by buyer, ensure that card or form informs buyer that it is for product registration and that failure to return card does not diminish buyer's warranty rights [*see* *Civ. Code* § 1973.1(a)].

d. Do not attempt to limit application of any implied warranty guaranteed by Song-Beverly Consumer Warranty Act [*see* *Civ. Code* § 1790 *et seq.*] to sale of consumer goods if express warranties are made [*see* *Civ. Code* § 1793; *see also* § 52.129 P 3].

7. If warranties are made to "consumer," comply with requirements of Magnuson-Moss Warranty Act [15 U.S.C. § 2301 *et seq.*; *see* § 52.290].

NOTE:

The Magnuson-Moss Warranty Act [15 U.S.C. § 2301 *et seq.*] gives consumers the right to sue suppliers, warrantors, or service contractors for breach of a warranty or service contract or violation of the Act [15 U.S.C. § 2310(d)(1); *see, e.g.,* Milicevic v. Fletcher Jones Imports, Ltd. (2005) 402 F.3d 912, 914 (purchaser of automobile sued auto dealer and manufacturer for breach of written warranty under Act)]. For purposes of the Magnuson-Moss Warranty Act, a "consumer" is a buyer or other qualified transferee of a consumer product [15 U.S.C. § 2301(3)]. A "consumer product" is any tangible personal property distributed in commerce and normally used for personal, family, or household purposes [15 U.S.C. § 2301(1)].

a. Make sure written warranty for consumer product actually costing consumer more than \$15 clearly and conspicuously discloses in single document, in simple and readily understood language, all of following [16 C.F.R. § 701.3; *see* 15 U.S.C. § 2302(a) (disclosures FTC may require to be included in warranties for consumer goods actually costing consumer more than \$5)]:

(1) Identity of parties to whom written warranty is extended, if enforceability of written warranty is limited to original consumer purchaser or is otherwise limited to persons other than every consumer owner during term of warranty.

(2) Clear description and identification of products, parts, characteristics, components, or

properties covered by, and when necessary for clarification, excluded from, warranty.

(3) Statement of what warrantor will do in event of defect, malfunction, or failure to conform with written warranty, including items or services warrantor will pay for or provide, and when necessary for clarification, those that warrantor will not pay for or provide.

(4) Point in time or event on which warranty term commences, if different from purchase date, and time period or other measurement of warranty duration.

(5) Step-by-step explanation of procedure that consumer should follow to obtain performance of any warranty obligation, including persons or class of persons authorized to perform warranty obligations.

NOTE:

This includes name of warrantor, mailing address of warrantor, and/or name or title and address of any employee or department of warrantor responsible for performance of warranty obligations, and/or telephone number that consumers may use without charge to obtain information on warranty performance.

(6) Information concerning availability of any informal dispute settlement mechanism elected by warrantor in compliance with 16 C.F.R. Part 703.

(7) Any limitations on duration of implied warranties, disclosed on face of warranty as provided in 15 U.S.C. § 2308, accompanied by following statement: "Some States do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you."

(8) Any exclusions of or limitations on relief such as incidental or consequential damages, accompanied by following statement, which may be combined with statement required by Paragraph (7), *above*: "Some States do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you."

(9) Statement in following language: "This warranty gives you specific legal rights, and you may also have other rights which vary from State to State."

b. Do not condition written warranty on consumer using any article or service (other than one provided without charge under terms of warranty) that is identified by brand, trade, or corporate name (unless requirement has been waived by Federal Trade Commission) [*see 15 U.S.C. § 2302(c)*].

c. Specify whether written warranty will be "full" or "limited."

NOTE:

A product may be sold with both full and limited warranties provided they are clearly and conspicuously differentiated [*15 U.S.C. § 2305*].

(1) If warranty meets federal minimum standards for written warranty, then it must be designated "full (statement of duration) warranty" [*15 U.S.C. § 2303(a)(1)*; *see Paragraph 7(d), below*; *see also § 52.290[2], first alternative*].

(2) If warranty does not meet federal minimum standards for written warranty, it must be conspicuously designated "limited warranty" [15 U.S.C. § 2303(a)(2)].

d. Make sure warranty complies with following federal minimum standards for written warranty [15 U.S.C. § 2304(a)]:

NOTE:

The warrantor may not impose any duty other than that of giving notice on any consumer as a condition of securing the remedy of any nonconforming consumer product, unless he or she can demonstrate that the duty is reasonable. However, the warrantor can require that the nonconforming product be made available free and clear of liens and encumbrances except as otherwise provided by the Federal Trade Commission [15 U.S.C. § 2304(b)]. The performance of duties under the federal minimum standards for a warranty will not be required of a warrantor if he or she can show that the nonconformance was caused by damage (not resulting from a defect or malfunction) while in the possession of the consumer, or unreasonable use (including the failure to provide reasonable and necessary maintenance) [15 U.S.C. § 2304(c)].

(1) Warrantor must, at minimum, remedy consumer product involved within reasonable time and without charge in event that there is defect, malfunction, or failure to conform with warranty (i.e., when there is nonconforming product).

(2) Warrantor may not impose any limitation on duration of any implied warranty on product.

(3) Warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on product, unless limitation conspicuously appears on face of warranty.

(4) If product (or component part) contains defect or malfunction after reasonable number of attempts by warrantor to remedy it, warrantor must permit consumer to elect either refund or replacement without charge.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection Magnuson-Moss Warranty Act General Overview Commercial Law (UCC) Sales (Article 2) Warranties General Overview Commercial Law (UCC) Sales (Article 2) Warranties Express Warranties



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21-52 California Legal Forms--Transaction Guide § 52.129

§ 52.129 Implied Warranties-Merchantability and Fitness for Particular Use

1. Inform seller of warranties that will be implied by law under Commercial Code.
 - a. If seller is a merchant with respect to goods sold, in order to be deemed "merchantable," goods must [*Com. Code § 2314(1), (2); see § 52.294[2], first alternative*]:
 - (1) Pass without objection in the trade under contract description.
 - (2) If fungible, be of fair, average quality within description.
 - (3) Be fit for ordinary purposes for which the goods are used.
 - (4) Run, within variations permitted by contract, of even kind, quality, and quantity within each unit and among all units involved.
 - (5) Be adequately contained, packaged, and labeled as contract requires.
 - (6) Conform to any promises or affirmations of fact made on container or label.
 - b. Course of dealing or usage of trade may create other implied warranties [*Com. Code § 2314(3)*].
 - c. If seller at time of contracting has reason to know particular purpose for which goods are required and that buyer is relying on seller's skill or judgment to select or furnish suitable goods, there is implied warranty that goods will be fit for that purpose [*Com. Code § 2315; see § 52.294[2], second alternative*].
2. Exclude implied warranties on nonconsumer goods if warranty is not intended by seller.

NOTE:

There is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed if the buyer, before entering into the contract, examines the goods or the sample or model as fully as he or she desires or refuses to examine the goods [*Com. Code § 2316(3)(b)*].

a. To exclude or modify implied warranty of merchantability, mention merchantability and, in written disclaimers, mention merchantability in conspicuous writing [*Com. Code § 2316(2)*; *see § 52.295*].

b. Exclude or modify implied warranty of fitness by conspicuous writing, e.g., "THERE ARE NO WARRANTIES THAT EXTEND BEYOND THE DESCRIPTION ON THE FACE OF THIS CONTRACT" [*Com. Code § 2316(2)*; *see § 52.295*].

c. To exclude any implied warranty, use expressions like "as is," "with all faults," or other language which in common understanding calls buyer's attention to exclusion of warranties and makes plain that there is no implied warranty [*Com. Code § 2316(3)(a)*; *see § 52.296*].

d. Exclude or modify implied warranty by course of dealing, course of performance, or usage of trade [*Com. Code § 2316(3)(c)*].

3. If goods to be sold are consumer goods, comply with requirements of Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*].

NOTE:

The Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*] applies to consumer goods [*see Civ. Code § 1791.2(a)*]. The act [*Civ. Code §§ 1790-1795.7*] does not affect rights and obligations of parties determined under Commercial Code except in case of conflict [*Civ. Code § 1790.3*]. Any buyer of consumer goods injured by a breach of the implied warranty of merchantability or fitness may bring an action for damages under or seek any other remedy provided by *Com. Code §§ 2601-2725*, and in that action reasonable attorneys' fees must be awarded to a prevailing buyer [*Civ. Code § 1791.1(d)*; *see Civ. Code § 1794(d)*].

a. If warranty of merchantability is not desired, expressly disclaim it.

NOTE:

Every retail sale of consumer goods in California is accompanied by the manufacturer's and the seller's implied warranty that the goods are merchantable, unless this warranty is properly disclaimed [*Civ. Code § 1792*]. The retail seller has the right of indemnity against the manufacturer [*Civ. Code § 1792*]. "Implied warranty of merchantability" means that the consumer goods pass without objection in the trade under the contract description; are fit for the ordinary purposes for which such goods are used; are adequately contained, packaged, and labeled; and conform to the promises or affirmations of fact made on the container or label [*Civ. Code § 1791.1(a)*; *see Mocek v. Alfa Leisure, Inc. (2003) 114 Cal. App. 4th 402, 406-408, 7 Cal. Rptr. 3d 546* (giving overview of implied warranty of merchantability and holding that buyer is not required to give seller opportunity to repair before rescinding purchase when implied warranty is breached)].

b. To disclaim implied warranties on consumer goods, do the following:

(1) Sell goods on "as is" or "with all faults" basis [*Civ. Code* §§ 1792.3, 1792.5]; and

(2) Attach conspicuous writing to goods clearly informing buyer prior to sale in simple and concise language of each of following [*Civ. Code* § 1792.4(a); *see* § 52.296[2], third and fourth alternatives];

NOTE:

If the transaction is a retail sale of consumer goods by a manufacturer, retailer, or distributor, warranty of fitness for particular purpose will be implied if seller had reason to know at time of sale that (1) the goods are required for a particular purpose, and (2) the buyer is relying on the manufacturer's, retailer's, or distributor's skill or judgment to select or furnish suitable goods [*Civ. Code* §§ 1792.1, 1792.2(a)].

Every retail sale of assistive device in California is accompanied by seller's implied warranty that device is specifically fit for particular needs of buyer [*Civ. Code* § 1792.2(b)]. An "assistive device" is a device used or intended to be used to assist the physically disabled. Prescription lenses and ophthalmic goods do not qualify unless sold or dispensed to the blind [*Civ. Code* § 1791(s); *see* *Civ. Code* § 1793.02].

A manufacturer, distributor, or retailer in transacting a sale in which express warranties are given may not limit, modify, or disclaim the implied warranties guaranteed by the Act to the sale of consumer goods [*Civ. Code* § 1793].

(a) Goods are being sold on "as is" or "with all faults" basis.

(b) Entire risk as to quality and performance is on buyer.

(c) If goods prove defective after purchase, only buyer assumes entire cost of necessary service or repair.

c. If sale is by mail order catalog, disclaim implied warranties by putting required statements in catalog for each item offered, in lieu of requirement of notice prior to sale [*Civ. Code* § 1792.4(b)].

4. Advise warrantor that Magnuson-Moss Consumer Warranty Act [15 U.S.C. §§ 2301-2312; *see* § 52.128 P 7] affects implied warranties in following manner:

a. Warranty that limits duration of implied warranty or excludes or limits consequential damages without disclosing this on its face is limited warranty [*see* 15 U.S.C. § 2304(a)(2), (3)] and must be designated as "limited warranty" [15 U.S.C. § 2303(a)(2)].

b. No supplier may disclaim or modify any implied warranty to consumer with respect to consumer product if [15 U.S.C. § 2308(a)]:

NOTE:

A "supplier" is any person in the business of making a consumer product available to consumers, whether directly or indirectly [15 U.S.C. § 2301(4)].

(1) He or she makes any written warranty.

(2) At time of sale, or within 90 days thereafter, he or she enters into service contract with consumer that applies to product.

c. Rule against disclaimer or modification of implied warranty does not prohibit limitation of its duration to duration of written warranty of reasonable duration, provided that [*15 U.S.C. § 2308(b)*]:

(1) Limitation must be conscionable.

(2) Limitation must be set forth in clear and unmistakable language and prominently displayed on face of warranty.

5. Advise buyer to consider making all important implied warranties as express warranties in contract of sale.

6. Make sure any implied warranty on which client is relying is not disclaimed [*Com. Code § 2316(2), (3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection Magnuson-Moss Warranty Act General Overview Commercial Law (UCC) Sales (Article 2) Warranties General Overview Commercial Law (UCC) Sales (Article 2) Warranties Exclusion & Modification Commercial Law (UCC) Sales (Article 2) Warranties Merchantability



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21-52 California Legal Forms--Transaction Guide § 52.130

§ 52.130 Warranty of Title or Against Infringement

1. Consider inserting warranty of title provision if desired by buyer and if seller is willing to guarantee the following [*Com. Code § 2312(1), (2); see § 52.297[1]*]:

- a. Title conveyed is good.
- b. Transfer of title is rightful.
- c. Goods will be delivered free from any security interest or other lien or encumbrance not known to buyer at time of contracting.

2. If desired, give or disclaim warranty against infringement [*Com. Code § 2312(3); see § 52.297[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesWarranties of Title



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21-52 California Legal Forms--Transaction Guide § 52.131

§ 52.131 Buyer's Right of Inspection

1. Determine whether buyer has right to inspect goods before or after payment [*see Com. Code § 2513; § 52.310*].
2. Specify details of time, place, and manner of inspection [*§ 52.311*].

NOTE:

If not specified, inspection may take place at any reasonable time and place and in any reasonable manner. Unless the parties agree otherwise, when the seller is required or authorized to send the goods to the buyer, the inspection may be made after their arrival [*Com. Code § 2513(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)PerformanceBuyer's Rights



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21-52 California Legal Forms--Transaction Guide § 52.132

§ 52.132 Breach, Repudiation, and Excuse

1. If parties wish to vary circumstances under which delay in delivery or nonperformance is excused under Commercial Code due to impracticability, insert appropriate provision [*see Com. Code § 2615(a); § 52.320*].

a. Provide for excuse of buyer as well as seller [*see § 52.320[2]*, first, second, fifth, and sixth alternatives].

b. Require notice of claim of excuse for nonperformance [*see § 52.320[2]*, first and second alternatives].

c. List specific events that will excuse performance [*see § 52.320*].

d. Provide buyer with option to terminate or to accept delayed performance [*see § 52.320[2]*, third alternative].

2. If parties wish to vary, by agreement, effect of casualty to identified goods, insert appropriate provision [*see Com. Code § 2613; § 52.321*].

NOTE:

Unless otherwise agreed, the result of a casualty to identified goods without fault of either party before the risk of loss passes to the buyer, or, in a proper case, under a "no arrival, no sale" term [*see Com. Code § 2324*], is to avoid the contract if the loss is total. If the loss is partial or the goods no longer conform to the contract, the buyer has the option to avoid the contract or accept the goods with due allowance from the contract price [*Com. Code § 2613*].

- a. Provide that seller is not excused, and must tender substitute goods [see § 52.321[2], second alternative].
- b. Provide that seller is not excused, but has additional time to effect delivery [see § 52.321[2], first alternative].
- c. Provide that seller is excused even if goods are destroyed due to seller's negligence [see § 52.321[2], third alternative].
- d. Provide that buyer has no right to accept conforming goods [see § 52.321[2], fourth alternative].

3. If seller desires, restrict buyer's right to partial acceptance [see *Com. Code* § 2601; § 52.322].

NOTE:

Unless otherwise agreed, if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may reject the whole, accept the whole, or accept any commercial unit or units and reject the rest [*Com. Code* § 2601].

- a. Require timely return of rejected goods to seller at risk and expense of buyer [see § 52.322[2], first alternative].
- b. Provide that any partial acceptance cancels credit terms of contract [see § 52.322[2], second alternative].
- c. Require partial acceptance to include a minimum specified portion (e.g., 50 percent) of shipment [see § 52.322[2], third alternative].

4. If desired, specify [see § 52.323]:

NOTE:

In the absence of more exact agreement, rejection of goods must be within a reasonable time after their delivery or tender and is ineffective unless the buyer seasonably notifies the seller [*Com. Code* § 2602(1)]. Contract provisions limiting the time for rejection are effective only if the time set gives the buyer a reasonable time for discovery of defects [*Com. Code* § 2602, comment 1].

- a. Exact time limitations on rejection, and
- b. Exact manner of notification of seller.

5. If desired, specify merchant buyer's duties as to rightfully rejected goods, or restrict buyer's right to resell [see *Com. Code* §§ 2603, 2604; §§ 52.324, 52.326].

NOTE:

Com. Code §§ 2603 and 2604 specify the duties of the merchant buyer with respect to rightfully rejected goods [see § 52.324[1] for list].

- a. Provide that buyer is only required to notify seller and hold goods, and that buyer has no duty to resell

rejected goods [see § 52.324[2], second alternative].

b. Provide that buyer is to resell rejected goods immediately without awaiting instructions from seller [see § 52.324[2], third alternative].

c. Provide that buyer must reship rejected goods to seller express collect within 24 hours after rejection [see § 52.324[2], fourth alternative].

d. Forbid buyer to salvage by reselling rejected goods [see § 52.326].

6. If desired, include clause relieving buyer from waiver of objections to goods by virtue of failure to particularize certain defects on rejection.

NOTE:

Com. Code § 2605 enumerates situations under which failure to specify a defect relied on for rejecting goods becomes a waiver of the defect. For discussion, see § 52.325[1].

7. If buyer does not want seller to have right to cure improper tender of nonconforming goods, include clause prohibiting cure of improper tender [see *Com. Code § 2508*; § 52.327].

8. If, by reason of circumstances of transaction, buyer or seller wants to fix a specific means of acceptance in variance of *Com. Code § 2606*, include clause specifying what constitutes acceptance of goods [see § 52.328].

a. If sale is installment sale, provide that retention of goods by buyer for specified period (e.g., 10 days) constitutes acceptance [see § 52.328[2], first alternative].

b. If goods are stored in warehouse, provide that removal of goods from warehouse by buyer constitutes acceptance [see § 52.328[2], second alternative].

c. If goods are perishable, specify that acceptance must be by written notice within specified period (e.g., eight hours) after delivery [see § 52.328[2], third alternative].

9. If seller wants acceptance once made to be final, advise seller to include clause restricting buyer from revoking acceptance [see § 52.329].

NOTE:

In the absence of a clause restricting revocation, the buyer may, under certain circumstances, revoke acceptance of goods whose nonconformity substantially impairs their value [see *Com. Code § 2608(1)*; see also § 52.329[1]].

10. If parties are concerned about assuring performance, include clause dealing with adequate assurance of performance [see *Com. Code § 2609*; see also § 52.330].

a. Specify conditions under which demand for assurance of performance is proper, such as [see § 52.330]:

(1) Delivery is later than a specified period (e.g., three days late).

(2) Quantity of goods delivered is more than a specified percentage (e.g., 25 percent) below contract amount.

- (3) Buyer is delinquent in making any payment for a specified period (e.g., five days).
- (4) Buyer fails to meet its obligations with other suppliers as they occur.
- (5) A judgment is entered against buyer in excess of a specified amount (e.g., \$5,000) in any court of competent jurisdiction.
- (6) There is work stoppage of more than a specified period (e.g., five days) at buyer's factory.
- (7) Any product sold by buyer is subject of action by Food and Drug Administration.

b. Specify what types of assurance will constitute adequate assurance, such as [*see* § 52.330]:

- (1) Posting of performance bond, with sureties.
- (2) Posting liquid collateral to be held in escrow.
- (3) Statement in writing that each shipment complies with all applicable laws, regulations, and ordinances.

11. Advise seller to consider requiring clause containing representations by buyer with respect to solvency [*Com. Code* § 2702; *see* § 52.331]

NOTE:

A written misrepresentation of solvency to the seller within three months before delivery extends the time the seller has to reclaim goods on discovering that the buyer has received goods on credit while insolvent [*Com. Code* § 2702].

12. Specify how contract may be terminated [*Com. Code* § 2309(3); § 52.332]

a. Determine conditions on which one of parties may terminate the agreement, such as:

- (1) Bankruptcy of buyer.
- (2) Increased or reduced duties.
- (3) Failure to insure.
- (4) Poor quality of goods.
- (5) Noncompliance with law.

b. Specify required notice, if any, to be given with termination.

NOTE:

Termination of a contract by one party, except on the happening of an agreed event, requires that reasonable notification be received by the other party. An agreement dispensing with notification is invalid if its operation would be unconscionable [*Com. Code* § 2309(3)].

13. If contract is "installment contract" [*see Com. Code* § 2612(1) (definition)], specify when nonconforming delivery

constitutes breach of entire agreement [see § 52.333].

NOTE:

Com. Code § 2612(3) provides that whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract, there is a breach of the whole. It is prudent to specify in advance what type or what percentage of nonconformity or default constitutes a substantial impairment.

14. If agreement involves repeated performances, advise buyer to consider stating in advance that his or her failure to object to any nonconforming performance cannot be construed as acquiescence in or acceptance of performance [*Com. Code § 1302(a), (d)*; § 52.334].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseInstallment Contracts



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C. Procedural Guide to Contracts for Sale of Goods

21-52 California Legal Forms--Transaction Guide § 52.133

§ 52.133 Remedies

1. Include provision defining right of aggrieved seller to identify goods after breach [*see* § 52.350], *unless* parties wish aggrieved seller to have following options:

NOTE:

The remedies afforded an aggrieved seller under the Commercial Code are intended to allow the seller the more ascertainable measure of damages associated with identified goods rather than just a cause of action for damages.

a. Identify to contract conforming goods not already identified if, at time he or she learns of breach, they are in his or her possession or control [*Com. Code* § 2704(1)(a)].

b. Treat as subject of resale goods that have demonstrably been intended for particular contract, even though those goods are unfinished [*Com. Code* § 2704(1)(b)].

c. If goods are unfinished, either [*Com. Code* § 2704(2)]:

(1) Complete manufacture and wholly identify goods to contract, or

(2) Cease manufacture and resell for scrap and salvage value or proceed in any other reasonable manner.

2. If buyer wants to restrict seller's right to resell goods on buyer's breach, include a limiting provision [*see Com. Code* § 2706; § 52.351].

3. If seller wants to restrict buyer's right to "cover" [*see Com. Code* § 2712; *see also* § 52.352[1][b]] or require buyer to cover, include provision restricting or requiring cover [*see* § 52.352].

4. If parties want to modify or restrict buyer's statutory remedies, include provision modifying or restricting these remedies [see § 52.353].

NOTE:

The parties have the right to provide for remedies in addition to or in substitution for those provided by Division 2 of the Commercial Code [*Com. Code* §§ 2101-2725] and may limit or alter the measure of damages otherwise recoverable by statute [*Com. Code* § 2719(1)].

5. Regulate use of parol evidence [see § 52.354].

NOTE:

There is no assumption that a written agreement is final as to all of its terms [*Com. Code* § 2202, comment 1]. Unless the court finds the writing to be complete and exclusive, as well as final, evidence of consistent additional terms is admissible [*Com. Code* § 2202(b)]. Even terms found to be final are subject to explanation or supplementation by course of dealing or usage of trade or by course of performance [*Com. Code* § 2202(a)]. Commercial practice and the parties' prior dealings become an element of the meaning of the words used unless carefully negated [*Com. Code* § 2202, comment 2].

a. If writing evidencing agreement is intended to be final between parties both as to its items and as to additional terms, then advise client to do following:

(1) Be sure contract contains all necessary terms.

(2) Clearly state that contract is intended by both parties to be complete and exclusive expression of parties' agreement.

b. If it is desirable to minimize use of parties' course of dealing or usage of trade or course of performance to supplement or explain terms of agreement, include provision expressly negating these items as guides to meaning of contract.

6. If parties want to impose writing requirement and consideration requirement on any waiver of executory performance, include writing requirement or consideration requirement [see § 52.355].

7. If parties want either to prohibit or to expressly permit assignment or delegation, include provision prohibiting or permitting assignment or delegation [see *Com. Code* § 2210; § 52.356].

a. If assignment or delegation is permitted, specify conditions, if any, that must accompany or precede the act, such as:

(1) Notice.

(2) Written permission of other party.

(3) Specific demands for assurances.

(4) Waiver of specific demands for assurances.

b. If assignment or delegation or both are prohibited, consider specifying effects of violation, such as:

(1) Agreement becomes void.

(2) Damages.

(3) Liquidated damages.

8. If parties want to fix liquidated damages, include liquidated damages provision [see § 52.357].

NOTE:

Damages for breach by either party may be liquidated in the contract, but only at an amount that is reasonable in the light of (1) the anticipated or actual harm caused by the breach; (2) the difficulties of proof of loss; and (3) the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A liquidated damages clause fixing unreasonably large liquidated damages is void as a penalty [*Com. Code § 2718(1)*].

In the absence of a liquidated damage provision, a seller may keep from the deposit or advance payment of a defaulting buyer 20 percent of the value of the total performance for which the buyer is obligated under the contract, or \$500, whichever is smaller [*Com. Code § 2718(2)(b)*].

9. Specify which forum's law will apply to transaction [§ 52.358].

NOTE:

With some exceptions [*see Com. Code § 1301(c)*], when a transaction bears a reasonable relation to California and also to another state or nation, the parties may agree that the law either of California or of that other state or nation will govern their rights and duties [*Com. Code § 1301(a)*]. In the absence of agreement, the California Commercial Code applies to transactions bearing an "appropriate relation" to California [*Com. Code § 1301(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGeneral
OverviewCommercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewCommercial Law (UCC)Sales (Article
2)RemediesSeller's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesSeller's
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21-52 California Legal Forms--Transaction Guide §§ 52.134-52.139

[Reserved]

§§ 52.134[Reserved]



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21-52 California Legal Forms--Transaction Guide § 52.140

§ 52.140 Follow-up Letter

1. Prepare and send follow-up letter to client [*see* § 52.370].
2. Advise client as to which points of transaction require careful attention, and when client should seek further legal advice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Form, Formation & Readjustment



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21-52 California Legal Forms--Transaction Guide § 52.141

§ 52.141 Confirmation of Contract

1. Satisfy statute of frauds by confirming oral contract.

NOTE:

Between merchants, if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirement of the statute of frauds against that party [*Com. Code § 2201(2)*].

2. Avoid confirmation of contract by giving written notice [*see § 52.380*] of objection to contents of confirmation within 10 days of receipt [*Com. Code § 2201(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.142

§ 52.142 Offeree's Alternatives in Accepting Offer or Order

1. Accept offer exactly according to its terms, taking care to note whether offer calls for acceptance by [see § 52.120]:

- a. Return promise, or
- b. Performance.

2. If offer did not specify manner of acceptance, accept by any reasonable manner or medium.

NOTE:

For example, an order or offer to buy goods for prompt shipment can be accepted either by a promise to ship or by actual shipment accompanied by notice to the buyer [*Com. Code § 2206*; **see** § 52.381 for notice of acceptance after commencement of performance].

3. Accept offer adding varying or additional terms.

NOTE:

An acceptance with varying or additional terms will act as a counteroffer, or as an automatic addition to the contract if not objected to, depending on whether the parties are merchants [**see** *Com. Code § 2207*; **see also** *PMC Inc. v. Porthole Yachts Ltd.* (1998) 65 Cal. App. 4th 882, 888-889, 76 Cal. Rptr. 2d 832 (no acceptance found under *Com. Code § 2207* due to timing of addendum to agreement sent on last day to accept, contents of addendum which contained new term, and cover letter emphasizing conditional nature of acceptance)].

4. Accept offer, making acceptance conditional on offeror's acceptance of additional or varying terms [see § 52.382].

5. If offeree-seller does not have conforming goods, do one of following [*see* § 52.383 and *Com. Code* § 2206]:

a. Ship nonconforming goods, thus accepting offer and becoming liable for breach of contract.

b. Offer nonconforming goods as accommodation [§ 52.383].

6. Always verify that response is in accord with and not in violation of terms of offer or order, unless there is clear reason for variance.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & Acceptance



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21-52 California Legal Forms--Transaction Guide § 52.143

§ 52.143 Offeror's Review of Acceptance

1. Review acceptance carefully to see whether it is conditional, qualified, adds new terms, or varies terms of offer.
2. If acceptance adds new terms or varies terms of offer, note following:
 - a. Offeror who is not merchant may consider offer as accepted and additions or variations as new proposals for additions to contract [*Com. Code § 2207(2)*; *see § 52.142 P 3*].
 - b. Offeror who is merchant must send notice of objection to additions [*§ 52.384*] unless he or she accepts them, or unless his or her offer excluded qualified or varying acceptances [*Com. Code § 2207(2)*; *see § 52.142 P 3*].
3. If offeror-buyer receives notice offering nonconforming goods instead of acceptance, advise offeror-buyer to reject [*see § 52.400*] unless goods are acceptable.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & Acceptance



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21-52 California Legal Forms--Transaction Guide § 52.144

§ 52.144 Rescission or Modification of Contract

NOTE:

For additional discussion of rescission or modification of contracts, and forms that may be adapted for UCC contracts, see Ch. 77, ***Discharge of Obligations*** .

1. If client wants to rescind contract, advise client of following [see § 52.401]:
 - a. Rescission of written contract must be in writing [*Com. Code § 2209(2)*; see § 52.401].
 - b. No consideration is necessary for effective rescission [*Com. Code § 2209(1)*].
 - c. Rescission of contract does not imply renunciation or discharge of any claim in damages for antecedent breach unless parties so specify [see *Com. Code § 2720*].
2. If client wants to modify contract, advise that [see § 52.420]:
 - a. Modification must be in writing if original contract was in writing [*Com. Code § 2209(2)*] or if contract as modified is within statute of frauds [*Com. Code §§ 2209(3), 2201*].
 - b. No consideration is necessary [*Com. Code § 2209(1)*].
 - c. Fully executed modification may negate writing requirement [*Com. Code § 2209(2)*].
3. If client wants to retract waiver affecting executory portion of contract, advise client to give reasonable notification to other party that strict performance of waived term will be required [*Com. Code*

§ 2209(5); see § 52.430].

NOTE:

Rescissions or modifications that fail because they are not in writing may still operate as waivers [*Com. Code* § 2209(4)]. Notice of retraction of a waiver is not effective if the retraction would be unjust in view of a material change of position in reliance on the waiver [*Com. Code* § 2209(5)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & Waiver



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21-52 California Legal Forms--Transaction Guide § 52.145

§ 52.145 Delegation of Performance; Assignment of Rights

1. If client wishes to assign rights or delegate duties under contract, advise client of following:

a. Contract must be reviewed to see if it prohibits assignment or delegation.

NOTE:

If the contract prohibits assignment of "the contract," this bars only delegation of duties, not assignment of rights [*Com. Code § 2210(4)*].

b. If contract is silent, review *Com. Code § 2210* to see if that section permits assignment or delegation of this type of contract [*see § 52.356[1]*].

c. If assignment or delegation is permissible, under law and contract, review contract to see if it calls for any simultaneous acts (e.g., contract may require assignee to provide specific assurances).

2. Notify other party of assignment or delegation [*see § 52.431*], whether or not required by contract, and observe any contractual requirements for time and manner of notice.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentThird Party Contracts



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21-52 California Legal Forms--Transaction Guide § 52.146

§ 52.146 Specifications and Assurances

1. If client is adversely affected by other party's delay in promised cooperation or specification of details of performance (e.g., a seller awaiting the buyer's later specification of assortment or a seller awaiting shipping instructions), advise client that he or she may choose to give other party notice in order to stimulate performance [*see* § 52.440].
2. If client begins to doubt performance of other party, advise client of following:
 - a. When reasonable grounds for insecurity arise with respect to performance of either party, other party may in writing demand adequate assurance of due performance [*Com. Code* § 2609(1); *see* § 52.441].
 - b. Contract should be reviewed as to whether it specifies grounds for insecurity or what will be considered adequate assurance.
 - c. Between merchants, reasonableness of grounds for insecurity and adequacy of assurance offered is determined according to commercial standards [*Com. Code* § 2609(2)].
 - d. After receipt of justified demand, failure to provide adequate assurance of due performance within a reasonable time not exceeding 30 days is a repudiation of contract [*Com. Code* § 2609(4)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAssurances of PerformanceCommercial Law

(UCC)Sales (Article 2)PerformanceGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.147

§ 52.147 Anticipatory Repudiation

1. If aggrieved party wishes to act on basis of an anticipatory repudiation [*see Com. Code § 2610*], notify repudiating party that repudiation is considered final [*see Com. Code §§ 2610, 2611; see also § 52.450*].
2. If client is repudiating party who wishes to retract repudiation, advise client of following [*see § 52.451*]:
 - a. Repudiation is not available if aggrieved party has, since repudiation, canceled or materially changed his or her position or otherwise indicated that he or she considers repudiation final [*Com. Code § 2611(1)*].
 - b. Retraction must be made before repudiating party's next performance is due [*Com. Code § 2611(1)*].
 - c. Retraction may be by any method which clearly indicates to aggrieved party that repudiating party intends to perform, but must include any assurance justifiably demanded under *Com. Code § 2609* [*Com. Code § 2611(2); see § 52.146 P 2*].
 - d. Retraction reinstates repudiating party's rights under contract with due excuse and allowance to aggrieved party for any delay occasioned by repudiation [*Com. Code § 2611(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAnticipatory Repudiation



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21-52 California Legal Forms--Transaction Guide § 52.148

§ 52.148 Seller's Performance of Obligation to Deliver

1. Advise client/seller to give buyer any notification reasonably necessary to enable buyer to take delivery [*see* § 52.460; *see also Com. Code* § 2503(1)].
2. If client/buyer is notified by seller of material or indefinite delay or allocation justified under *Com. Code* § 2615 [*see* § 52.132 P 1], advise buyer that he or she may by written notification to seller do either of following [*Com. Code* § 2616(1)]:
 - a. Terminate contract and thereby discharge any unexecuted portion of contract [*see* § 52.402]; or
 - b. Modify contract by agreeing to take his or her available quota in substitution [*see* § 52.421].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



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21-52 California Legal Forms--Transaction Guide § 52.149

§ 52.149 Acceptance or Rejection of Goods

1. If goods or tender of delivery fails to conform to contract, advise buyer/client that he or she may do any of the following [*Com. Code § 2601; see § 52.403*]:

NOTE:

Buyer may reject goods if material delay or loss results from seller's failure to notify buyer of shipment or to make a proper contract for transportation [***see § 52.404***; *Com. Code § 2504(c)*]. In that case, the buyer must make the rejection within a reasonable time after delivery or tender, and must seasonably notify seller [*Com. Code § 2602*].

- a. Reject the whole;
- b. Accept the whole; or
- c. Accept any commercial unit or units and reject remainder.

2. If buyer wishes to rely on defect to justify rejection or to establish breach, advise buyer that he or she must particularize reasons for rejection [*Com. Code § 2605(1)*]:

- a. When seller could have cured defect if stated seasonably; or
- b. When, between merchants, seller has after rejection made request in writing for full and final written statement of all defects on which buyer proposes to rely [*see § 52.405* (form for demand by seller)].

3. To cure nonconforming delivery, do one of following:

NOTE:

Notice to the buyer of intent to cure must be seasonably given [*Com. Code § 2508(1), (2)*].

a. Notify buyer of intention to cure before time for performance expires [*see § 52.461*], then make conforming delivery within contract time [*Com. Code § 2508(1)*].

b. If buyer rejects nonconforming tender that seller had reasonable grounds to believe would be acceptable [*Com. Code § 2508(2)*]:

(1) Notify buyer; and

(2) Substitute conforming tender within reasonable time.

4. Advise client that if buyer rejects goods, seller may notify buyer of shipping instructions [*see § 52.462*], which, if reasonable, are binding on merchant buyer [*Com. Code § 2603(1)*].

5. Advise client that buyer is deemed to have accepted goods if any of following occurs [*Com. Code § 2606(1)*]:

NOTE:

If the buyer accepts any part of a commercial unit of goods, he or she is deemed to have accepted the entire unit [*Com. Code § 2606(2)*].

a. After reasonable opportunity to inspect goods, buyer signifies to seller that goods are conforming or that he or she will take or retain them in spite of their nonconformity; or

b. Buyer fails to make effective rejection after he or she has had reasonable opportunity to inspect goods; or

c. Buyer performs any act inconsistent with seller's ownership.

6. If buyer wishes to revoke acceptance of goods, advise client of following:

NOTE:

If the buyer has accepted nonconforming goods, or after acceptance discovers a nonconformity but cannot or chooses not to revoke the acceptance, the buyer must within a reasonable time after he or she discovers or should have discovered any breach notify the seller [*see § 52.386*] of breach or be barred from any remedy [*Com. Code § 2607(3)(a)*].

a. Buyer can revoke acceptance [*see § 52.385*] of lot or commercial unit if [*Com. Code § 2608(1)*]:

(1) Nonconformity of lot or unit substantially impairs its value to buyer, and

(2) Buyer has accepted it either:

(a) On reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) Without discovery of nonconformity if buyer's acceptance was reasonably induced

by difficulty of discovery before acceptance or by seller's assurances.

b. Revocation of acceptance must occur within reasonable time after buyer discovers or should have discovered ground for it and before any substantial change in condition of goods not caused by their own defects [*Com. Code § 2608(2)*].

c. Revocation of acceptance is not effective until buyer notifies seller [*see § 52.385; see also Com. Code § 2608(2)*].

d. Buyer who revokes acceptance has same rights and duties with regard to goods involved as if he or she had rejected them [*Com. Code § 2608(3)*].

7. If merchant buyer has elected to return goods bought on approval, comply with any reasonable instructions from seller for return of goods [*Com. Code § 2327(1)*].

NOTE:

After due notification from the buyer of his or her election to return, the return is at the seller's risk and expense, but a merchant buyer must follow any reasonable instructions from the seller for the return of the goods [*Com. Code § 2327(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsRevocation of AcceptanceNonconforming GoodsCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseBuyer's Rights on Improper Delivery



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21-52 California Legal Forms--Transaction Guide § 52.150

§ 52.150 Actions and Remedies

1. If client is buyer sued by third party for infringement, advise client to notify seller of suit [see § 52.470] within reasonable time after receiving notice of litigation.

NOTE:

If a buyer sued by a third party for infringement fails to notify seller within a reasonable time after receiving notice of the litigation, that buyer will be barred from any remedy over for liability established by the litigation [*Com. Code § 2607(3)(b)*].

2. If buyer is sued for breach of warranty or other obligation for which his or her seller is liable to buyer, advise client of following [*Com. Code § 2607(5)*]:

a. Buyer may give seller notice of litigation [see § 52.471].

NOTE:

The notice may state that the seller may come in and defend, and that if the seller does not do so he or she will be bound in any action against him or her by the buyer by any determination of fact common to the two litigations. If the notice contains this statement, then the seller will be bound after seasonable receipt of the notice unless he or she does come in and defend [*Com. Code § 2607(5)(a)*].

b. If claim is one for infringement, original seller may demand in writing [see § 52.472] that buyer turn over to him or her control of litigation, including settlement, or else be barred from any remedy against seller [*Com. Code § 2607(5)(b)*].

3. To preserve rights and avoid acquiescence to modification, notify other party of objections to performance not in accord with contract, especially if contract calls for repeated performances [*Com. Code § 1302(a), (d)*; see § 52.473].

4. To terminate contract, do the following:

- a. If termination is desirable, review contract to determine terms on which termination is permissible.
- b. If termination is permissible, either because of contract terms or by law, draft and send notice of termination [see § 52.474], unless [Com. Code § 2309(3)]:

- (1) Agreement eliminates notice requirement and results are not unconscionable, or
- (2) Termination is based on happening of agreed event.

5. To inspect, test, or sample goods for purpose of ascertaining facts and preserving evidence, give reasonable notice of test or inspection to other party [Com. Code § 2515(a); see § 52.475].

6. To establish binding third-party inspection or survey to determine conformity or condition of goods, enter into agreement that findings will be binding in subsequent litigation [Com. Code § 2515(b); see § 52.476].

7. To reclaim goods received on credit by insolvent buyer, instruct seller to demand goods within 10 days after goods received by buyer [see § 52.477 (form for seller's demand)].

NOTE:

If a misrepresentation of solvency has been made to the particular seller in writing within three months before delivery, the 10-day limitation does not apply [Com. Code § 2702(2)].

8. If buyer wrongfully rejects or revokes acceptance of goods, fails to make payment due on or before delivery, or repudiates contract, then advise aggrieved seller that he or she may either:

- a. Withhold delivery of goods [Com. Code § 2703(a); see § 52.478]; or
- b. Cancel [Com. Code § 2703(f); see § 52.479].

9. If seller wishes to stop delivery to insolvent buyer of goods in possession of carrier or other bailee [see § 52.480 (form for notice to carrier)] or to stop delivery of carload, truckload, planeload, or larger shipments of express or freight when for any other reason seller has right to withhold or reclaim goods, advise seller that seller must give sufficient notice to enable bailee by reasonable diligence to prevent delivery of goods [Com. Code § 2705(1), (3)].

NOTE:

If the original buyer sells the goods while they are in transit and orders the carrier to change the originally issued waybills to show the original buyer as the shipper and the new buyer as the new consignee with a new destination, that order constitutes a reshipment [see Com. Code § 2705(2)(c)], fixes the rights of the parties as of the time of the order, and protects the buyer against the original seller's right to stop delivery of the goods [*Butts v. Glendale Plywood Co.* (9th Cir. 1983) 710 F.2d 504, 505-506] .

10. If buyer wishes to deduct damages resulting from breach of contract from any part of price still due, advise buyer that buyer may do so on notifying seller [Com. Code § 2717; see § 52.481].

NOTE:

The plain meaning of Com. Code § 2717 is that the buyer may not set off a contractual claim against a debt on a separate contract. Moreover, the statute pre-empts the common law right of equitable set-off, in

situations in which the statute applies [*see AmerisourceBergen Corp. v. Dialysist West, Inc. (9th Cir. 2006) 445 F.3d 1132, 1135-1136* (construing Arizona statute identical to *Com. Code § 2717*)].

11. If seller, or a person in position of a seller [*see Com. Code § 2707*], is holding sale of contract goods pursuant to *Com. Code § 2706* as result of breach by buyer, advise client that seller must:

a. Give buyer reasonable notice of intention to resell if sale is private [*Com. Code § 2706(3)*; *see § 52.482*].

b. Give buyer reasonable notice of time and place of resale if sale is public, unless goods are perishable or threaten to speedily decline in value [*Com. Code § 2706(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)RemediesGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 52 SALES OF GOODS UNDER THE UNIFORM COMMERCIAL CODE
PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures

21-52 California Legal Forms--Transaction Guide § 52.151

§ 52.151 Telephone, Mail Order, Catalog, or Internet Sales

1. Have client comply with early correspondence requirement [*see* P 2, *below*] if client is either [*Bus. & Prof. Code § 17538(a)*]:

- a. Person who sells or leases goods or services or offers them for sale or lease, and who accepts payment from or for buyer.
- b. Person who advertises mailing address or telephone number in connection with sale or lease described in P 1(a), *above*, and who accepts payment from or for buyer.

2. If early correspondence requirement applies, then do not allow 30 days to pass without doing one of following [*Bus. & Prof. Code § 17538(a)*]:

- a. Shipping, mailing, or providing goods or services ordered.
- b. Mailing full refund.
- c. If payment was made by transfer from an account, either crediting account in full amount of debit, or, if third party is creditor, issuing credit memorandum to third party, who must promptly credit account in full amount of debit.
- d. Sending written notice to buyer stating length of expected delay or proposing substitution of goods or services of equivalent or superior quality, and offering to make full refund if buyer so requests.

NOTE:

The notice must include a toll-free telephone number or other cost-free way for the buyer

to communicate a refund request. If substitution is proposed, the vendor must describe the substitute goods or services, stating in full how they differ from the goods ordered [*Bus. & Prof. Code § 17538(a)(3)*].

e. Shipping, mailing, or providing substitute goods or services of equivalent or superior quality, if buyer is given chance to return substitutes and vendor promises refund on return.

NOTE:

Goods or services are of "equivalent or superior" quality only if they are substantially similar to those ordered, fit for the usual purposes for which the goods or services ordered are used, and normally offered by the vendor at a price equal to or greater than the price of those ordered [*Bus. & Prof. Code § 17538(b)*].

(1) Accompany substitute goods or services with notice that [*Bus. & Prof. Code § 17538(a)(4)*]:

(a) Informs buyer of substitution;

(b) Explains how substitutes differ from what was ordered (obvious nontechnical differences, such as color, need not be explained); and

(c) Discloses the buyer's right to reject the substitutes and obtain a full refund.

(2) If desired, omit description of how substitute goods or services differ if notice in (1), *above*, otherwise complies with the statutory requirements and vendor complies with all of the following [*Bus. & Prof. Code § 17538(a)(4)(C)*]:

(a) Vendor maintains at least 100 retail outlets in at least 20 California counties where catalog goods are sold to the public during normal business hours.

(b) Vendor maintains a toll-free telephone number and provides to each buyer, at the time of the buyer's call, a complete description of how substitute goods or services differ from those ordered.

(c) If buyer picks up substitute goods or services from vendor's retail outlet, required notice must be placed on exterior of package containing the goods or handed to buyer.

(d) Notice contains a reference number or other means of identification of ordered goods or services and substitute goods or services.

(e) Notice contains vendor's toll-free number and instructions that buyer may call that number to obtain a complete description of how substitute goods or services differ from those ordered.

3. Do not comply with 30-day response period if [*Bus. & Prof. Code § 17538(a)*]:

a. Advertisement or offering conspicuously states that the requirement does not apply; or

b. Shorter time is clearly communicated by person conducting sale or lease.

4. Respond within 50 days if buyer makes initial application for open-end credit plan [*see 15 U.S.C. § 1682 (definition)*] at same time goods or services are ordered, and goods or services are to be bought on credit [*Bus. & Prof. Code § 17538(c)*].

NOTE:

For discussion of open-end credit plans, see Ch. 46, *Credit Cards and Other Open-End Credit Transactions*.

5. If client is vendor conducting business through Internet or any other electronic means of communications, instruct client to comply with following disclosure requirements:

a. Before accepting or processing any payment, disclose to buyer in writing or by electronic means [see *Bus. & Prof. Code § 17538(d)(1)*]:

(1) Vendor's return and refund policy.

(2) Legal name under which vendor conducts business.

(3) Vendor's complete street address at which business is actually conducted [see *Bus. & Prof. Code § 17538(d)(3)* (exceptions to this disclosure requirement)].

b. If disclosure of legal name and address is made by on-screen notice, do all of following [see *Bus. & Prof. Code § 17538(d)(2)*]:

(1) Disclose information on first screen displayed, or screen on which goods or services are offered, or screen on which buyer may place order or enter payment information.

NOTE:

For nonbrowser based technologies, the information must be disclosed in a manner that gives the user a reasonable opportunity to review the information [see *Bus. & Prof. Code § 17538(d)(2)(A)*]. The communication of this disclosure must not be structured to be smaller or less legible than the text of the offer of the goods or services [see *Bus. & Prof. Code § 17538(d)(2)(A)*].

(2) Accompany disclosure with adjacent statement describing how buyer may receive this information at buyer's e-mail address.

NOTE:

The vendor must provide the disclosure information to the buyer at the buyer's e-mail address within five days of receiving the buyer's request [*Bus. & Prof. Code § 17538(d)(2)(B)*].

(3) Until vendor meets requirements of *Bus. & Prof. Code § 17538(a)* as discussed in PP 1-3, *above*, in connection with all buyers of vendor's goods or services, make on-screen access to required disclosure information available to buyer and any person or entity who may enforce *Bus. & Prof. Code § 17538*.

6. Determine whether goods or services involved fit within one of following exceptions to early correspondence requirement [*Bus. & Prof. Code § 17538.3*; see P 1, *above*]:

NOTE:

The early correspondence requirements of *Bus. & Prof. Code § 17538* [see P 1, *above*] do not apply to the exceptions enumerated in *Bus. & Prof. Code § 17538.3* [see PP a-e, *below*], except that *Bus. & Prof. Code § 17538(d)* (required disclosure of Internet vendors return and refund policy, legal name and address, and other specified information) and *Bus. & Prof. Code § 17538(e)* (requirement that vendor who offers return and refund policy allowing return of goods or cancellation of services to process and

send to buyer any refund due within 30 days or to otherwise arrange to credit buyer's account) apply to *Bus. & Prof. Code § 17538.3(a)-(d)* [PP a-d, **below**].

a. If following requirements relating to advertising are met, one of required events described in P 2, *above*, must occur no later than expiration of period specified in advertisement [*Bus. & Prof. Code § 17538.3(a)*]:

(1) All advertising for goods or services contains notice as to each thing offered that delay may be expected for specified period.

(2) In printed advertisements, notice must be in type at least as large as that showing price.

b. Goods or services, such as quarterly magazines, that by nature are not ready for use or consumption until future date and that for this reason cannot be stocked at time of order.

c. Installments (other than the first installment) of goods, such as magazine subscriptions, ordered for serial delivery.

d. Any telecommunication goods and services sold by telecommunications companies, except those purchased for use primarily for personal, family, or household purposes.

e. Financial services offered in ordinary course of business by supervised bank, national banking association, bank holding company, state or federal savings and loan association, state or federal credit union, or subsidiary or affiliate of any of these, or by authorized industrial loan company, licensed personal property broker, licensed consumer finance lender, licensed commercial finance lender, or persons licensed under the Real Estate Law [*see Bus. & Prof. Code § 10000 et seq.*].

f. Delay in delivery of goods or services caused by United States Postal Service, act of God, or labor strike by vendor's employees.

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet LawInternet BusinessGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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21-52 California Legal Forms--Transaction Guide § 52.152

§ 52.152 Unsolicited Sales

1. Do not offer goods for sale in offer that includes voluntary and unsolicited sending of items not actually ordered or requested by recipient [*Civ. Code § 1584.5*].

NOTE:

The receipt of unsolicited items is deemed an unconditional gift to the recipient, who may use or dispose of the goods or materials in any manner he or she sees fit without any obligation on his or her part to the sender. If the recipient is later billed or receives requests for payment, he or she may bring an action to enjoin this conduct, in which action reasonable attorneys' fees and costs may be awarded to the prevailing party [*Civ. Code § 1584.5*].

2. To avoid ban on unsolicited sales, set up contractual plan or arrangement under which seller periodically provides consumer with form or announcement card that he or she may use to instruct seller not to ship offered merchandise [*Civ. Code § 1584.5(a)*].

NOTE:

Other exceptions from the unsolicited merchandise requirements are continuity plans, subscription arrangements, standing order arrangements, and supplements and series arrangements under which the seller periodically ships merchandise to a consumer who has consented in advance to receive it on a periodic basis [*Civ. Code § 1584.5(b)*].

a. Comply with following requirements for form [*Civ. Code § 1584.5(a)*]:

(1) Specify date by which form must be mailed by consumer ("mailing date") or received by seller ("return date") to prevent shipment of offered merchandise.

(2) Seller must meet one of following requirements:

NOTE:

Whichever system the seller chooses for mailing, the system must be calculated to afford the consumer at least 10 days in which to mail the form [*Civ. Code* § 1584.5(a)].

(a) Mail form at least either:

(i) 25 days prior to return date, or

(ii) 20 days prior to mailing date; or

(b) Provide mailing date of at least 10 days after receipt by consumer.

b. On membership contract or application form, or on same page and immediately adjacent to contract or form, and in clear and conspicuous language, disclose material terms of plan or arrangement, including all of following [*Civ. Code* § 1584.5(a)]:

(1) Aspect of plan under which subscriber must notify seller, in manner provided for by seller, if he or she does not wish to purchase or receive selection.

(2) Any obligation assumed by subscriber to purchase a minimum quantity of merchandise.

(3) Right of a contract-complete subscriber to cancel membership at any time.

(4) Whether billing charges will include amount for postage and handling.

3. If sending or causing to be sent unsolicited advertising by e-mail, include following in all documents to allow recipient to notify sender not to e-mail further unsolicited documents:

NOTE:

The federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (popularly referred to as the CAN-SPAM Act of 2003) [15 U.S.C. § 7701 *et seq.*, Pub. L. 108-187, 117 Stat. 2699] took effect on January 1, 2004. The Act generally requires unsolicited commercial e-mail messages to be labeled (though not by any standard method) and to include opt-out instructions and the sender's physical address. The law prohibits the use of deceptive subject lines and false headers in those messages [*see* 15 U.S.C. § 7704(a); *but see* 15 U.S.C. § 7710(b) (FTC may not require inclusion of specific words, characters, marks, or labels in commercial e-mail messages)]. The law preempts state laws that require labels on unsolicited commercial e-mail or prohibit those messages entirely; however, state laws merely addressing falsity and deception remain in effect [*see* 15 U.S.C. § 7707(b)]. Advertisement or transmission of sexually oriented material is subject to additional requirements [*see* 15 U.S.C. § 7704(d)].

For more detailed discussion of the CAN-SPAM legislation, see *Ch. 50, Advertising and Promotion*, § 50.11[6][b].

a. Functioning return e-mail address, clearly and conspicuously displayed, that recipient may use to submit reply e-mail requesting no further solicitation [*see* 15 U.S.C. § 7704(a)(3)].

- b. Clear and conspicuous identification that the message is advertisement or solicitation [*15 U.S.C. § 7704(a)(5)*].
- c. Clear and conspicuous notice of opportunity to decline to receive further commercial electronic mail messages from the sender [*15 U.S.C. § 7704(a)(5)*].
- d. Sender's valid physical postal address [*15 U.S.C. § 7704(a)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Online Advertising Spam Email Contracts Law Sales of Goods General Overview



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21-52 California Legal Forms--Transaction Guide §§ 52.153-52.199

[Reserved]

§§ 52.153[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 52 SALES OF GOODS UNDER THE UNIFORM COMMERCIAL CODE
PART IV. FORMS
A. Complete Form

21-52 California Legal Forms--Transaction Guide § 52.200

§ 52.200 Simple Contract for Sale of Goods

[1] Comment

[a] Use of Form

This form is a complete simple contract for the sale of goods. It is "simple" in that the parties set out only the basic parts of their agreement and rely on the Commercial Code to define all other rights and obligations. The Commercial Code was intended to allow the enforcement of this type of simple contract as long as the parties intended to contract and there is a reasonably certain basis for giving an appropriate remedy [*Com. Code § 2204(3)*; *see § 52.14[1]*]. Thus, for example, *Com. Code §§ 2305-2311* provide gap-filling rules that apply in the absence of agreement to the contrary. For discussions of these rules, see §§ 52.15, 52.204[1] (output contracts), 52.223[1] (leaving particulars to be specified by one party), 52.230[1] (setting price), 52.234[1] (delivery or payment in installments), 52.250[1] (time for delivery), 52.251[1] (place of delivery), 52.258[1] (oversees shipment bill of lading requirements), 52.259[1] ("no arrival, no sale" clauses), and 52.260[1] (delivery of documents of title against which drafts have been drawn).

[b] Basic Terms of Contract

The "basic terms" of the contract are those terms necessary or advisable to include in all contracts, even when relying on the gap-filling provisions of the Commercial Code. Although a contract for sale may leave one or more terms open, the terms that are provided must be sufficiently definite [*Com. Code § 2311(1)*] to give a reasonably certain basis for an appropriate remedy [*Com. Code § 2204(3)*]. Thus it is always advisable to date the contract, identify the parties, and have the seller agree to sell and deliver and the buyer to accept and pay for specified goods [*see Com. Code § 2301* (basic obligation of parties is for seller to transfer and deliver and buyer to accept and pay for goods in accordance with contract)]. The parties would also be well-advised to consider stating what law governs the transaction, especially if more than one state or nation will be involved [*see Com. Code § 1301*; *see also § 52.358[1]*].

At a minimum, even under the liberal formation rules of the Commercial Code, a contract must include a mutual assent to the transfer of goods for a consideration [*see Zamore v. Whitten (Me. 1978) 395 A.2d 435, 25 U.C.C. Rep. 1245*; Hart & Willier, Forms and Procedures Under the UCC, Article 2: Sales, Part 1, General, P 21.01 (Matthew Bender)]. A

contract for the sale of goods for a price of \$500 or more is unenforceable under the statute of frauds unless it is in writing, evidences a contract for the sale of goods, is signed, and has a quantity term [*Com. Code* § 2201(1), comment 1; see *Com. Code* § 1201(b)(37) "signed" defined; *Donovan v. RRL Corp.* (2001) 26 Cal. 4th 261, 277-278, 109 Cal. Rptr. 2d 807, 27 P.3d 702 (car dealership's printed name appearing in newspaper advertisement constituted signature satisfying statute of frauds); see also § 52.14[3]].

Exactly which other terms should be considered "basic" enough to be included depends on the nature of the transaction and the wishes of the parties. For example, a price term is clearly a very important term even though *Com. Code* § 2305 expressly permits it to be left open [see § 52.230[1]]. However, the nature of a particular industry or the overall economy may make it difficult or unwise to try to set a fixed price if, for example, the seller is a manufacturer whose costs may be subject to sudden steep increases, or if the parties expect significant fluctuations in the market price of the goods.

For a further discussion of contracts for the sale of goods, see § 52.202[1]. For a discussion of general contract principles, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

[2] FORM

Simple Contract for Sale of Goods

CONTRACT FOR SALE OF GOODS

Preamble

_____, "Seller," and _____, "Buyer," with addresses as they appear with their names below, agree as follows:

Description and Quantity

1. Seller shall transfer [and deliver] to Buyer, and Buyer shall accept and pay for the following goods:
_____ [specify].

Delivery

2. Seller shall deliver the goods to Buyer at _____ [specify location], on or before _____ [date] [at _____ (specify hour, e.g., at _____ A.M./P.M. or during regular business hours)] [or specify other arrangement, e.g., Seller shall make goods available to Buyer who shall pick them up on _____ (date) during regular business hours].

Price

3. Buyer shall pay Seller \$ _____ for the goods. Payment shall be made _____ [specify manner and time of payment, e.g., in cash at the time of delivery].

Applicable Law

4. This contract, and all rights and obligations of the parties, shall be governed by the Uniform Commercial Code as enacted and in force in the State of _____ [*add if appropriate: on the date of this contract*].

Executed on _____ [*date*].

_____ [*name of buyer*]

By _____ [*signature*]

[*typed name and title*]

_____ [*address*]

_____ [*name of seller*]

By _____ [*signature*]

[*typed name and title*]

_____ [*address*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)General OverviewCommercial Law (UCC)Sales (Article 2)Contract
TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsGeneral
Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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 PART IV. FORMS
 A. Complete Form

21-52 California Legal Forms--Transaction Guide § 52.201

§ 52.201 Memorandum of Sale or Purchase**[1] Comment--Use of Form**

These forms are memoranda of a sale or purchase. A memorandum is used for simple, straightforward transactions or in any other situation in which a formal contract would be unnecessary or inappropriate--for example, when the time or expense of drafting a formal contract would be a problem. A memorandum can be useful even if the parties plan to draft a more complex and formal agreement at a later time, because some simple record of the parties' agreement may be necessary to avoid a bar to enforcement of the agreement under the applicable statute of frauds [*see Com. Code § 2201; see also § 52.14[3]*].

A memorandum resembles a simple contract in that it states only the essential parts of the agreement. This structure makes the memorandum the appropriate model on which to base purchase orders, sales orders, and other standardized forms that are designed to be filled out immediately after an oral agreement has been reached. The three alternatives illustrated in this form are: (1) a general memorandum; (2) a memorandum used by sales personnel to take orders; and (3) a memorandum of a purchase order. In the case of the last two, the agreement is not complete until accepted by the other party.

[2] FORM**Memorandum of Sale or Purchase-General****MEMORANDUM OF SALE [PURCHASE]****Goods**

Item	Quantity	Description	Price
_____	_____	_____	_____
_____	_____	_____	_____

_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

TERMS OF DELIVERY:

TERMS OF PAYMENT:

Dated: _____.

_____, Buyer

_____, Seller

[OR]

Memorandum of Sale or Purchase-By Sales Personnel to Take Orders

.....DATE _____

SHIP TO _____

ADDRESS _____ ORDER NO. _____

CITY _____ STATE/ZIP _____

SOLD TO _____

ADDRESS _____

CITY _____ STATE/ZIP _____

VIA _____ F.O.B. _____

TERMS _____

Quantity	Description	Price
_____	_____	_____
—	_____	—
_____	_____	_____
—	_____	—
_____	_____	_____
—	_____	—
_____	_____	_____

—	—	—
_____	_____	_____
—	—	—
_____	_____	_____
—	—	—

CONTRACT OF SALE

Purchaser agrees that Purchaser does not acquire any right to sell, assign, or dispose of the above listed property until it is entirely paid for; and in case of default of payment as above stated, seller, or seller's agents or assigns, are hereby authorized to take possession of and remove sold property, on my premises or elsewhere, without demand or other causes, or notice of any kind, whereby all rights for action of trespass or other causes are waived, and to collect reasonable charges for their use. The above contract is subject to strikes, accidents, or other unavoidable causes, and is not subject to cancellation. Seller guarantees property to leave plant in good condition, but is not responsible for breakage or shortage after delivery to transportation company. In the event legal action becomes necessary, actions to be held in _____[city].

Signature of Salesperson

Signature of Purchaser

SUBJECT TO APPROVAL AND AC-
CEPTANCE
OF _____

[name of
company]

[OR]

Memorandum of Sale or Purchase--Purchase Order**PURCHASE ORDER**

NO. _____

Purchase Order Number Must Appear On All
Correspondence, Packages, Invoices, and Ship-
ping Papers

PURCHASE ORDER DATE:

TO:
Seller _____
Address _____
City _____ State/
Zip _____

SHI
P
TO:
Nam
e

Ad-
 dres
 s

City

Stat
 e/
 Zip

DATE NEEDED _____ SHIP VIA _____

If This Order Cannot Be Shipped to Arrive by Date Needed, Notify the Undersigned Immediately

TERMS _____

An error occurred in the processing of a table at this point in the document. Please refer to the table in the online document.

VENDOR COPY

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)General Overview



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 PART IV. FORMS
 A. Complete Form

21-52 California Legal Forms--Transaction Guide § 52.202

§ 52.202 Contract for Sale of Goods With Detailed Provisions

[1] Comment

[a] Use of Form

This form is a complete contract for the sale of goods. Its provisions are more detailed than those of the *form in § 52.200[2]*. In this contract, the parties define most aspects of their transaction and do not rely on the gap-filling provisions of the Commercial Code [*see Com. Code §§ 2305-2311; see also § 52.200[1]*]. If it is necessary or desirable to vary a particular provision in this form, it may be modified by adding any of the optional or alternative provisions illustrated in this chapter.

[b] "Agreement" and "Contract" Defined

"Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances, including course of dealing, usage of trade, and course of performance as provided in the Commercial Code [*Com. Code § 1201(b)(3); see Com. Code §§ 1303, 2202* (implication of agreement from circumstances), including course of dealing or performance or trade usage); *see, e.g., Insurance Co. of No. Am. v. NNR Aircargo Service (USA), Inc. (9th Cir. 2000) 201 F.3d 1111, 1113-1115* (under former *Com. Code § 1205(1)*, now *Com. Code § 1303(b)*, receipt of 47 identical invoices for 47 separate transactions was sufficient to constitute course of dealing, modifying shipping agreement); *see also § 52.15[2]*]. Whether an agreement has legal consequences is determined by the Commercial Code if applicable, and otherwise by the law of contracts [*Com. Code § 1201(b)(3); see Com. Code § 1103(b)* (contract law supplements Commercial Code unless displaced by particular provisions)].

"Contract" means the total legal obligation that results from the parties' agreement as affected by the Commercial Code and any other applicable rules of law [*Com. Code § 1201(b)(12)*]. The statutory rules generally applicable to contracts are contained in *Civ. Code § 1549 et seq.* For discussion of these rules, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

[c] Formation and Definiteness

A contract for the sale of goods may be made in any way that suffices to show agreement, including conduct by both parties that recognizes the existence of the contract [*Com. Code § 2204(1)*]. Even if one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy [*Com. Code § 2204(3)*; see § 52.14]. An agreement for sale that is otherwise sufficiently definite to be a contract is not invalid because it leaves particulars of performance to be specified by one of the parties. However, the specification must be made in good faith and within the limits of commercial reasonableness [*Com. Code § 2311(1)*].

[d] Warranties, Samples, and Models

This contract includes a disclaimer of express warranties [see P 9], including a disclaimer of any warranty that the goods will conform to any sample or model, and a disclaimer of implied warranties [see P 10]. For discussion of express warranties, see § 52.290[1]. For discussion of the disclaimer of express warranties, see §§ 52.291[1] and 52.292[1]. For discussion of the dominance of express warranties over implied in the sale of nonconsumer goods, see § 52.293[1]. For discussion of implied warranties, see § 52.294[1]. For discussion of the disclaimer of implied warranties, see § 52.295[1].

[e] Reducing Time for Bringing Action

Com. Code § 2725(1) provides that an action for the breach of any contract for the sale of goods must be begun within four years after the cause of action accrues. By their original agreement the parties may reduce the period of limitation to not less than one year, but they may not extend it [*Com. Code § 2725(1)*]. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that when a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of that performance, the cause of action accrues when the breach is or should have been discovered [*Com. Code § 2725(2)*; see *Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 131-133, 87 Cal. Rptr. 3d 5* (seller's promise that product would work for 50,000 cycles did not fall within future-performance exception in *Com. Code § 2725(2)* because it did not specify date or time in future, nor did it pertain to time period that could be determined by reference to external source, and buyer could have discovered defect at any time without waiting for completion of 50,000 cycles; additionally, both parties were large and sophisticated companies and could have drafted their agreement to explicitly state duration of warranty so as to ensure that limitation period would extend beyond four years, if that had been their intent); *Carrau v. Marvin Lumber and Cedar Co. (2001) 93 Cal. App. 4th 281, 290-292, 112 Cal. Rptr. 2d 869* (generalized assertions in advertisements and literature do not rise to the level of a warranty explicitly extending to "future performance"; plaintiff thus did not meet exception to four-year limitation period)].

Paragraph 21 of this form contains a provision specifying the period within which an action under the contract must be commenced.

[2] FORM

Contract for Sale of Goods With Detailed Provisions

CONTRACT FOR SALE OF GOODS

This contract is by and between _____ [name of seller], _____ [status of seller, e.g., a California corporation], the "Seller," and _____ [name of buyer], _____ [status of buyer, e.g., a California corporation], the "Buyer." Seller and Buyer are collectively referred to in this contract as the "Parties."

Description--Sale of Goods

1. Seller shall transfer and deliver to Buyer, and Buyer shall pay for and accept, the following goods:
_____ [describe goods by type and quantity, or refer to list or schedule to be attached to contract].

Time of Delivery

2. Buyer shall have the right to specify the date of delivery, but in no event shall the date specified be before _____ [date], or after _____ [date].

Delivery in Lots

3. Buyer shall have the right to demand all of the goods at one time during the period stated in Paragraph 2, or in portions from time to time.

Place of Delivery

4. The goods shall be delivered at Seller's address as it appears below.

Method of Tender

5. Buyer shall give notice to Seller at least _____ [e.g., 24] hours before Buyer desires to take possession of the goods. Seller shall furnish the facilities and labor for loading the goods on trucks furnished by Buyer.

Seller to Package Goods

6. Seller shall package goods in accordance with instructions of Buyer, provided instructions are furnished in sufficient time to permit Seller to complete the packaging before delivery. Buyer shall pay Seller the reasonable cost of packaging.

Identification--Risk of Loss

7. Identification of the goods under *Commercial Code Section 2501* shall occur at the moment this contract is signed by the parties. Risk of loss of the goods shall pass to the Buyer on identification.

Title

8. Title to the goods shall remain with the Seller until Buyer takes physical possession of the goods.

Disclaimer of Express Warranties

9. Seller warrants that the goods are as described in this contract, but no other express warranty is made in respect to the

goods. If any model or sample was shown Buyer, that model or sample was used merely to illustrate the general type and quality of the goods and not to represent that the goods would necessarily conform to the model or sample.

Disclaimer of Implied Warranties

10. THE GOODS SOLD UNDER THIS CONTRACT ARE PURCHASED BY THE BUYER "AS IS" AND THE SELLER DOES NOT WARRANT THAT THEY ARE OF MERCHANTABLE QUALITY OR THAT THEY CAN BE USED FOR ANY PARTICULAR PURPOSE.

Price

11. The price to be paid by Buyer shall be that contained on the Seller's price list last published before the date of actual delivery of the goods.

Time of Payment

12. Buyer shall pay for the goods at the time and place of delivery.

Right of Inspection

13. Buyer shall have the right to inspect the goods at the time and place of delivery before paying or accepting them.

Method of Payment

14. Payment shall be made in cash or by certified check.

Remedies

15. Buyer and Seller shall have all remedies afforded each by the Uniform Commercial Code.

Interpretation and Parol Evidence

16. This writing is intended by the Parties as a final expression of their agreement concerning the matters contained herein, and is also intended as a complete and exclusive statement of the terms of their agreement. No course of prior dealings between the Parties and no usage of the trade shall be relevant to supplement or explain any term used in this contract. Acceptance or acquiescence in a course of performance rendered under this contract shall not be relevant to determine the meaning of this contract even though the accepting or acquiescing party has knowledge of the nature of the performance and opportunity for objection. Whenever a term defined by the Uniform Commercial Code is used in this contract, the definition contained in the Code shall control.

Authority of Seller's Agents

17. No agent, employee, or representative of Seller has any authority to bind Seller to any affirmation, representation, or warranty concerning the goods sold under this contract, and unless an affirmation, representation, or warranty made by an agent, employee, or representative is specifically included within this written contract, it has not constituted a part of the basis of this bargain and shall not in any way be enforceable.

Modifications

18. This contract can be modified or rescinded only by a writing signed by both of the Parties or their duly authorized agents.

Waiver

19. No claim or right arising out of a breach of this contract can be discharged in whole or in part by a waiver or renunciation of the claim or right unless the waiver or renunciation is supported by consideration and is in writing signed by the aggrieved party.

Assignment or Delegation

20. No right or interest in this contract may be assigned by either Buyer or Seller without the written permission of the other party, and no delegation of any obligation owed, or of the performance of any obligation, by either Buyer or Seller, may be made without the written permission of the other party. Any attempted assignment or delegation shall be wholly void and totally ineffective for all purposes unless made in conformity with this paragraph.

Time for Bringing Action

21. Any action for breach of this contract must be commenced within _____ [e.g., two] years after the cause of action has accrued.

Applicable Law

22. This contract shall be governed by the Uniform Commercial Code as adopted in the State of _____ as effective and in force on the date of this contract.

Dated: _____.

SELLER

_____ [name of Seller]

By _____ [signature]

[typed name and title]

_____ [address]

BUYER

_____ [name of Buyer]

By _____ [*signature*]
[*typed name and title*]
[_____ [*address*]]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law
(UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation &
ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesExclusion & Modification



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
 CHAPTER 52 SALES OF GOODS UNDER THE UNIFORM COMMERCIAL CODE
 PART IV. FORMS
 A. Complete Form

21-52 California Legal Forms--Transaction Guide § 52.203

§ 52.203 Bill of Sale

[1] Comment--Use of Form

This form is a bill of sale designed to be used when a sale of goods is to be consummated by immediate transfer rather than executory promises. This is a contract of sale reflecting an immediate transfer of title. Although an ordinary contract of sale could be used for an immediate transfer, a simple bill of sale may be all that is needed, because, unless otherwise agreed, title to goods passes to the buyer when the seller completes delivery [*Com. Code § 2401(2)*].

Bills of sale are governed by *Civ. Code §§ 1052-1072*. A transfer in writing is called a "grant," "conveyance," or "bill of sale" [*Civ. Code § 1053*]. A grant effectively vests the interest to be transferred only on its delivery by the grantor [*Civ. Code § 1054*]. A grant duly executed is presumed to have been delivered on the date it was executed [*Civ. Code § 1055*]. Except as provided in *Civ. Code §§ 1066-1072*, a grant is to be interpreted in the same way as any other contract [*Civ. Code § 1066*; see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*].

[2] FORM

Bill of Sale

BILL OF SALE

This is to acknowledge that I, _____ [*name of seller*], _____ [*address*], have this day sold to _____ [*name of buyer*], _____ [*address*] for the sum of \$ _____, receipt of which is hereby acknowledged, the following goods: _____ [*describe goods by type and quantity*].

I hereby warrant that I am the lawful owner of the described goods, free from the rightful claims of others, and that I will defend _____ [*name of buyer*]'s title to the goods against all persons.

Dated: _____.

_____ [*signature of seller*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) Title, Creditors & Good Faith Purchasers Passing of Title



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DIVISION III: COMMERCIAL TRANSACTIONS
 CHAPTER 52 SALES OF GOODS UNDER THE UNIFORM COMMERCIAL CODE
 PART IV. FORMS
 A. Complete Form

21-52 California Legal Forms--Transaction Guide § 52.204

§ 52.204 Output Contracts

[1] Comment

[a] Use of Form

This form contains two alternative output contracts, the first long and detailed, the second short and simple. The first alternative may be used if the parties want a relatively detailed contract, with provisions covering such points as the ownership of patents and inventions, a noncompetition (exclusive dealing) clause, a hold harmless (or indemnity) clause, access to records, authority to buy raw materials, spare parts, and designs and specifications. The second alternative may be used when the parties need only a simple output contract providing little beyond price, term of agreement, and a description of the goods.

The more detailed first alternative is basically designed to be used in transactions involving the manufacture of complex goods such as heavy machinery. Accordingly, it contains provisions such as Paragraph 6 governing dies, jigs, patterns, and tools, and Paragraph 7 relating to engineering quarters. If this first alternative is to be used for contracts for the sale of other kinds of goods, it must be carefully and thoroughly revised.

[b] Nature of Output Contracts

Output contracts measure the quantity of goods to be sold by the output of the seller. In an output contract, "output" means the actual good faith production of the seller [*Com. Code § 2306(1)*]. This good faith requirement makes an output contract sufficiently definite to be binding [*Com. Code § 2306*, comment 2].

Even though the quantity term may remain indefinite, no quantity unreasonably disproportionate to any stated estimate, or in the absence of a stated estimate, to any normal or otherwise comparable prior output, may be tendered or demanded [*Com. Code § 2306(1)*]. If an output agreement calls for the buyer and seller to buy and sell the kind of goods concerned only to and from each other, it imposes an obligation on the seller to use his or her best efforts to supply the goods and on the buyer to use his or her best efforts to promote their sale, unless otherwise agreed [*Com. Code § 2306*].

[c] Noncompetition Clauses

The first alternative output contract contains a noncompetition or exclusive dealing clause [see P 9]. Although *Bus. & Prof. Code § 16600* provides that, except as otherwise provided by statute, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business is to that extent void, it does not bar an output or requirements contract from requiring that the parties deal exclusively with one another. An agreement of this kind is customary, reasonable, and not contrary to the public interest [Corbin on Contracts (West 1963), vol. 6A, § 1412]. An exclusive dealings agreement is not intended to restrain business, but rather to promote it. If the public interest is not harmed and the restraint on one party is not greater than protection to the other requires, the contract will be sustained even though it may in some degree restrain trade [*Great Western Etc. v. J. A. Wathen D. Co.* (1937) 10 Cal. 2d 442, 445-446, 448-450, 74 P.2d 745 ; see *Dayton Time Lock Service, Inc. v. Silent Watchman Corp.* (1975) 52 Cal. App. 3d 1, 6-7, 124 Cal. Rptr. 678 (exclusive dealing contracts unlawful only if performance will foreclose competition in a substantial share of the affected line of commerce)].

For agreements by employees not to compete with employers, see *Ch. 85, Employment Agreements*, §§ 85.470-85.473. For noncompetition provisions to be included in a contract for the sale of a business, see *Ch. 17, Buying and Selling a Business*, §§ 17.213 and 17.261.

[d] Hold Harmless Clause

The first alternative includes a hold harmless provision. A hold harmless or indemnity provision is one by which a party engages to save another from a legal consequence of the conduct of one of the parties or of some other person [*Civ. Code § 2772*]. An agreement to indemnify against a subsequent act is void if the actor knows at the time of the act that it is illegal [*Civ. Code § 2773*]. For further discussion, see "Definitions of Indemnity and Insurance" in the Legal Background to *Ch. 79, Suretyship, Guaranty, and Indemnity*.

[e] Warranties

The first alternative also includes a warranty clause in which the manufacturer agrees to extend to the buyer the same warranty that the buyer is providing to the user of the goods. The specific terms of the warranty are left blank for the parties to fill in as appropriate to the circumstances of the transaction. For examples of warranty clauses and a discussion of express warranties, see § 52.290. For disclaimers of implied warranties, see § 52.295[2].

[2] FORM

Output Contracts

OUTPUT CONTRACT

THIS CONTRACT is entered into by _____, a corporation organized and existing under the laws of the State of California, hereinafter referred to as the "Company," and _____ Manufacturing Company, a corporation organized and existing under the laws of the State of _____, hereinafter referred to as "Manufacturer," in consideration of the mutual promises and conditions expressed below.

Purpose of Contract

1. The Company is about to undertake the sale of _____ [e.g., tractors] like or substantially like its _____ [e.g., Model B], as shown by the _____ [e.g., tractor] in the possession of the Company and by the preliminary plans and specifications that have been delivered by the Company to the Manufacturer. The Company needs a source of manufacture that will assure the prompt and regular manufacture and

delivery of the Company's _____ [e.g., Model B tractors] in the quantities that may be necessary to fill all orders which the Company may obtain.

Quantity

2. The Company shall buy from the Manufacturer, and the Manufacturer shall manufacture and sell to the Company, all of the _____ [e.g., tractors] to be manufactured within _____ years from the date of this contract or during the term of this contract, and the minimum number of _____ [e.g., Model B tractors] shall be constructed in accordance with the final detailed plans and specifications to be delivered by the Company to the Manufacturer. These plans shall be identified by the signature of the parties and marked as Exhibits A and B. The _____ [e.g., tractors] are to be delivered as follows: During the _____ month after the date of this contract, _____ [number] _____ [e.g., tractors]; during the _____ month, _____ [number] _____ [e.g., tractors]; during the _____ month, _____ [number] _____ [e.g., tractors]. The rate of delivery during subsequent months shall be specified in orders given at least _____ days before the date when delivery is required.

Payment

3. The Company shall pay to the Manufacturer the sum of \$ _____ for each _____ [e.g., Model B tractor] manufactured and delivered under the terms of this contract. On the completion of the manufacture and assembly of the _____ [e.g., tractors] and their test, which shall commence within _____ days after notice of completion and acceptance by the Company, the Manufacturer must submit invoices for each _____ [e.g., tractor]. The Company shall pay the invoices within _____ days following submission of those invoices.

Specifications

4. The Company shall furnish to the Manufacturer all designs, working drawings, and specifications. The Company shall specify all materials and parts necessary or desirable to the manufacture of its _____ [e.g., Model B tractor]. The Company's decision on specifications shall be final, but the Company shall specify materials and parts that are readily obtainable. It is understood and agreed that as between the parties, their successors and assigns, the Company is the owner of and has the sole exclusive right to the possession and use of all plans, specifications, drawings, tracings, blueprints, and designs used in the manufacture of the _____ [e.g., Model B tractors].

Assembly

5. The Manufacturer agrees to buy all raw materials and parts and to manufacture and assemble the _____ [e.g., Model B tractors] complete, in accordance with the plans and specifications marked as Exhibits A and B, as explained or modified by any further plans and specifications that the Company may later deliver to the Manufacturer. If a modification increases the Manufacturer's cost of producing any _____ [e.g., Model B tractor], it is agreed that the amount of the increased cost shall be added to the purchase price of each tractor affected.

Dies, Jigs, Patterns, and Tools

6. The necessary dies, jigs, patterns, and tools, other than machine tools, to be used in the manufacture of the _____ [e.g., tractors] shall be manufactured or purchased by the Manufacturer under the directions of the Company or its representatives. The cost of these items to the Manufacturer shall be reimbursed by the Company in the same manner as payment is made for the _____ [e.g., tractors]. The calculation of the cost shall be based on the out-of-hand payments for labor and materials plus _____ percent on direct labor. The total reimbursement, however, may not exceed the sum of \$ _____. On payment the dies, jigs, patterns, and tools become the Company's property, but the Manufacturer may use them to carry out this contract.

Engineering Quarters

7. The Manufacturer shall furnish to the Company and its representatives suitable quarters for the convenience of the Company's engineering department at the place of manufacture.

Trademarks, Trade Names, and Designs

8. The Company, its successors and assigns shall have the exclusive right to use all designs, trademarks, and trade names that have been or may be used on or in connection with the sale of _____ [e.g., tractors] by the Company, its predecessors, successors, assignors, and assigns, including, in particular, the trade name "_____", and agrees that it shall not use or cause to be used any of these designs, trademarks, or trade names except as permitted by the Company, its successors and assigns.

Noncompetition Provision

9. The Manufacturer agrees that during the period of this contract it shall not manufacture or sell, except for and to the Company, any _____ [e.g., tractor] bearing the name "_____", or any _____ [e.g., tractor] like or substantially like _____ [e.g., Model B tractor], or any other _____ [e.g., tractor] the sale of which is in competition with _____ [e.g., Model B tractor] or any other _____ [e.g., tractor] manufactured or sold by the Company.

Patents

10. The Manufacturer, for itself, its officers, agents, and employees, agrees to transfer to the Company, its successors or assigns any improvements or inventions which, during the term of this contract, shall be made by the Manufacturer or any of its employees on the _____ [e.g., Model B tractor], or which may be suitable for use with or on that _____ [e.g., tractor]. The Manufacturer further agrees immediately on the invention or discovery of any improvement or invention by it or its employees during the term of the contract to disclose that improvement or invention to the Company. At the request of the Company, the Manufacturer shall cause the inventor or inventors of these improvements or inventions to execute, assign, and deliver to the Company any patent applications for the inventions or improvements that the Company prepares for that purpose. The Manufacturer further agrees to give all the assistance and information that the Company may need or desire in the prosecution of the applications. The Company agrees to pay all fees and expenses connected with these applications and to take complete charge of the preparation and prosecution of the patent applications. The parties agree that any patents on any improvements or inventions shall be assigned to the Company. The Manufacturer admits the priority and validity of any patents that may be issued on United States Patent Applications Serial Numbers _____, _____, and _____, filed _____ [date], and of any other patents that the Company may obtain on

the structure or design of _____ [e.g., the Model B tractor]. The Company agrees to hold the Manufacturer harmless from all liability under any patent by reason of the manufacture for or sale to the Company of _____ [e.g., Model B tractors], or any other _____ [e.g., tractors] that the Company may order from the Manufacturer, provided the Manufacturer gives prompt notice to the Company of any claim that the manufacture, use, or sale of these _____ [e.g., tractors] constitutes an infringement of any patent, and of any suit or action that may be commenced because of an alleged infringement. It is agreed that on the receipt of notice of this type of claim or action the Company, at its own expense, shall employ counsel and defend the action or do whatever else may be necessary to hold the Manufacturer harmless.

Access to Records

11. The Company and its representatives shall have full access during business hours to all records of the Manufacturer showing the character, quantity, and price of all materials purchased, and labor performed, and to all other records pertaining to this contract or to the performance of this contract.

Spare Parts

12. The spare parts that are or may be necessary for repairs or replacements on _____ [e.g., tractors] sold under this contract shall be manufactured and carried in stock by the Manufacturer (on the order of the Company) in sufficient quantity to meet, without delay, all reasonable requirements for spare parts. The Company agrees to pay semiannually the carrying charge on the money involved in the actual cost of the completed parts at the rate of _____ percent per annum. The Manufacturer shall furnish the necessary room for the storage of the spare parts and the Company shall make sales and shipments from that stock and shall pay for the spare parts shipped from the plant of the Manufacturer in the same manner as payment is made for the _____ [e.g., tractors], and at the prices later agreed on between the parties; provided, however, that if the parties cannot agree on a price the Company shall have the right to get the needed spare parts from any source it may desire.

Warranty

13. The Manufacturer understands that the Company intends to deliver to the user of the _____ [e.g., tractors] a guaranty in the exact form set forth below. The Manufacturer hereby makes to the Company the same guaranty as to faults of materials or labor: _____ [set forth exact wording of warranty; see § 52.290[2]].

Limited License to Use Patents and Inventions

14. The Company hereby agrees that for the purpose of performing this contract, but not otherwise, the Manufacturer is licensed to use in the manufacture of _____ [e.g., Model B tractors] sold to this Company all inventions and patents that the Company owns or controls, including patents or inventions that the Company is licensed by others to use, provided that the Manufacturer conforms to the terms of those licenses and affixes to the _____ [e.g., Model B tractors] all notices of patents and patents pending that the Company requires. It is understood, however, that the Manufacturer will not be required to pay any license fee or royalty by reason of that use.

Replacement of Nondefective Parts

15. In the event that the Company desires, as a matter of policy, to replace in the finished _____ [e.g.,

tractors] any parts that are not defective, the Manufacturer shall supply the replacement parts at cost.

Termination or Cancellation

16. The Manufacturer agrees to deliver to the Company on the termination or cancellation of this contract or on the order of the Company all plans, specifications, blueprints, designs, drawings, tracings, and models used in the manufacture of the _____ [e.g., Model B tractor], or delivered to the Manufacturer by the Company, and also all dies, jigs, patterns, and tools that the Company has paid for or ordered, or spare parts that may be manufactured or in process, as provided in Paragraph 12 of this contract.

It is agreed that the estimate of output capabilities of the Manufacturer with respect to the _____ [e.g., tractors] is _____ per month. This estimate is based on data supplied by the Manufacturer to the Company's industrial engineer.

IN WITNESS WHEREOF, the parties, acting through their presidents, have executed this instrument on the _____ day of _____, _____ [month, year].

COMPANY

_____ [name of company]

By _____ [signature]

[typed name and title]

MANUFACTURER

_____ [name of company]

By _____ [signature]

[typed name and title]

[OR]

OUTPUT CONTRACT (SHORT FORM)

_____ [date]

_____ [name of seller], hereinafter referred to as "Seller," is _____ [identify and describe seller, e.g., a California corporation engaged in the business of manufacturing toy and novelty items. The chief executive officer of Seller is _____]. _____ [name of buyer], hereinafter referred to as "Buyer," is _____ [identify and describe buyer, e.g., a general partnership organized under the laws of California and engaged in the business of selling souvenirs and novelties. The partners are _____ and _____].

Seller agrees to sell and deliver to Buyer at _____ Street, _____, California, all of the _____ [e.g., Model No. 2B novelty hats], known as "_____" which the Seller can produce at its present facilities located at _____ Street, _____, California, for a period of _____ [e.g., two] years from the date of this contract. The goods shall be delivered at least once a month and more frequently as required. The colors shall be _____. The sizes shall be _____. The Seller represents that it is now producing these _____ [e.g., hats] at the average monthly rate of _____ gross.

The price shall be \$ _____ per gross and \$ _____ for every gross accepted in excess of _____ gross. Price is payable within _____ [e.g., 30] days of the date each invoice is received, and there shall be a _____ [e.g., 10] percent discount on any shipment paid for at the time of delivery.

Either party to this contract may buy or sell similar goods from or to any other party, but the parties agree that the Seller shall deliver and the Buyer shall buy a minimum of _____ [number] _____ [e.g., hats] every month during the term of this contract.

This instrument is the entire contract and exclusively determines the rights and obligations of the parties, any prior course of dealing, custom or usage of trade, or course of performance notwithstanding.

SELLER

_____ [name of seller]

By _____ [signature]

[typed name and title]

BUYER

_____ [name of buyer]

By _____ [signature]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOutput, Exclusive & Requirements
AgreementsCommercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewContracts LawSales of GoodsOutput,
Exclusive & Requirements AgreementsLabor & Employment LawEmployment RelationshipsEmployment
ContractsConditions & TermsTrade Secrets & Unfair CompetitionNoncompetition & Nondisclosure Agreements



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 52 SALES OF GOODS UNDER THE UNIFORM COMMERCIAL CODE
PART IV. FORMS
A. Complete Form

21-52 California Legal Forms--Transaction Guide § 52.205

§ 52.205 Requirements Contracts

[1] Comment

[a] Use of Form

This form consists of two alternative requirements contracts. A "requirements" contract measures the quantity of goods to be purchased by the requirements of the buyer. In other words, the buyer promises to purchase from the seller all the goods of a specific type that the buyer requires in his or her business [*Com. Code § 2306(1)*; see *Varilease Technology Group, Inc. v. U.S. (Fed. Cir., 2002) 289 F.3d 795, 799* (distinguishing indefinite delivery, indefinite quantity ("ID/IQ") contract from requirements contract)]. This good faith requirement makes a requirements contract sufficiently definite to be binding [*Com. Code § 2306*, comment 2].

The first alternative is designed to be used when the parties want a relatively detailed contract, with provisions covering such points as manufacturing facilities, packaging requirements, future cooperation, warranties, the buyer's right to return defective goods, indemnity [see § 52.204[1][d]] and insurance, risk of loss [see *Com. Code §§ 2509, 2510*; see also §§ 52.280 and 52.281] and governing law [see *Com. Code § 1301*; see also § 52.358]. The second alternative is designed to be used when the parties need only a simple requirements contract providing little beyond price, term of agreement, and a description of the goods.

Both contracts provide an integration clause [see § 52.354]. Both set limits on the dealings of the parties in goods of the kind covered by the contract. For a discussion of the validity of restrictions on the right to deal in goods that are the subject of an output or requirements agreement, see § 52.204[1][c].

The specific terms of the manufacturer's warranty required by Paragraph 9 of the first alternative are left blank for the parties to fill in as appropriate to the circumstances of the transaction. For examples of warranty clauses and a discussion of express warranties, see § 52.290. For disclaimers of implied warranties, see § 52.295.

[b] Quantity Term

Even though the quantity term remains indefinite, no quantity unreasonably disproportionate to any stated estimate, or in the absence of a stated estimate, to any normal or otherwise comparable prior requirements, may be tendered or demanded [Com. Code § 2306(1)]. If an output [see § 52.204] or requirements contract provides for exclusive dealing in the kind of goods concerned, it imposes an obligation on the seller to use best efforts to supply the goods and on the buyer to use best efforts to promote their sale, unless otherwise agreed [Com. Code § 2306]. Paragraph 12 of the first alternative does vary this obligation somewhat by calling for "reasonable" efforts.

[c] Allocation of Production

When the occurrence of a contingency not contemplated by the parties affects a portion of the seller's ability to perform under a sales contract, including a requirements sales contract, the seller must allocate production and delivery among customers in a manner that is fair and reasonable [Com. Code § 2615(b); see § 52.320[1][c]]. Thus during the gasoline shortage of 1973, oil companies that had requirements contracts with their service station dealers were able to allocate gasoline and petroleum products among those dealers according to the amount sold by each dealer in preceding years [see *Terry v. Atlantic Richfield Co.* (1977) 72 Cal. App. 3d 962, 966, 971, 140 Cal. Rptr. 510].

[2] FORM

Requirements Contracts

REQUIREMENTS CONTRACT

THIS CONTRACT is entered into this _____ day of _____ [month, year], by _____ [name], a California corporation with its principal place of business at _____ [address], hereinafter referred to as "Seller," and _____ [name], _____ [principal address], hereinafter referred to as "Buyer," in consideration of the mutual promises and conditions expressed below.

Purpose of Contract

1. Buyer is in the _____ [e.g., retail household merchandise business] with a number of large consumer outlets, and Seller has acquired exclusive patent rights on a certain _____ [e.g., electric carving knife] known as "_____" and referred to in this contract as the _____ [e.g., "knife"]. A copy of the letters patent is attached to and made a part of this contract. Buyer wants to market the _____ [e.g., knife] in its retail outlets at a price that will be lower than that of the major competitors, and Seller wants to manufacture substantial quantities of the _____ [e.g., knife].

Manufacturing Facilities

2. Seller shall immediately undertake to tool up and arrange the necessary industrial facilities to manufacture the _____ [e.g., knife] by means of mass production. Buyer shall advance to Seller the sum of \$ _____ to help defray the cost of this mechanization, on the execution of this contract, receipt of which is hereby acknowledged as an advance payment and not as a loan. The advance payment shall be applied to the price of the initial deliveries until it has been absorbed. Seller represents that it has title to the realty located in _____ County where its plant is located, and that these facilities will be used for the manufacture of the _____ [e.g., knife]. Seller may, at its option, at any time cause these facilities to be relocated or build or acquire new or additional facilities, provided that the estimated production schedules and projected delivery schedules in this contract are not interrupted or impaired.

Quantity

3. Seller shall manufacture and deliver and Buyer shall accept and buy all of the _____ [e.g., knives] that may be required by Buyer in its business. The parties agree that this item is new and that any projections or estimates in this contract are subject to change. It is agreed that Buyer estimates that it will require approximately _____ [number] _____ [e.g., knives] every year for the duration of this contract. Seller estimates that it will be able to manufacture the amount of _____ [e.g., knives] Buyer will require and that it will be able, after some experience and time for experimentation, to increase the production schedule. The term of this contract shall be for a period of _____ years from its date.

Price

4. Buyer agrees to pay to Seller \$ _____ for each _____ [specify pricing unit, e.g., gross of or box of 100] _____ [e.g., knives]. Payment is due _____ [specify time for payment, e.g., within 30 days after Buyer receives the goods]. If Seller reduces manufacturing costs by more than _____ percent through the reasonable efforts to improve production procedures required by Paragraph 12 of this contract, then the price per _____ [unit] to Buyer must be reduced by a percentage equal to the percentage of reduction in manufacturing costs.

Increase in Requirements

5. If Buyer requires more than _____ [number] _____ [e.g., knives], Buyer shall pay in advance an amount equal to _____ [e.g., one-third] of the price for the additional _____ [e.g., knives] needed for the ensuing _____ [e.g., six] months after written notice to Seller of an increase in requirements. Seller agrees to use the advance funds for the sole purpose of making the necessary arrangements to increase the production to meet Buyer's additional requirements.

Delivery

6. The approximate initial delivery date shall be _____ months from the date of this contract. Seller shall, on or before that date, deliver the _____ [e.g., knives], contained in _____ [e.g., corrugated individual packaging] and ready for immediate retail marketing. Thereafter, Seller shall deliver to Buyer all of the _____ [e.g., knives] required by Buyer as indicated by Buyer in writing to Seller. Seller shall deliver the _____ [e.g., knives] on Buyer's written request to the particular warehouse, storage facility, or retail outlet requested by Buyer.

Sale of Goods to Other Parties

7. It is agreed that Seller will not sell, deliver, or in any way place the _____ [e.g., knives] in the hands of any other party without the prior written consent of Buyer. If Buyer does consent, Buyer shall be entitled to a commission of _____ percent on each and every sale of the _____ [e.g., knives] to a third party by Seller. Seller agrees to deliver the _____ [e.g., knives], on the written request of Buyer to the particular warehouse, storage facility, or retail outlet designated by Buyer.

Cooperation

8. Seller agrees to provide the necessary cooperation and assistance to the advertising agent of Buyer and Seller agrees to permit photographs, films, and other reproductions to be taken in its plant at _____ [address], and to supply any data, on reasonable request, for advertising purposes, including the submission of the _____ [e.g., knife] to any tests conducted for the purpose of enhancing its sale. Buyer agrees to use all reasonable efforts to promote and sell the _____ [e.g., knife] at its retail outlets. It is understood, however, that Buyer has already made commitments with respect to competing merchandise and it is understood that Buyer will continue to market competing merchandise. It is the intent of Buyer to market the _____ [e.g., knives] sold under this contract at a lower price than any competing instrument, but Buyer is under no obligation to continue to sell the _____ [e.g., knives] at this lower cost. Seller agrees to continue to make reasonable efforts to improve the _____ [e.g., knife] and to improve production procedures so as to reduce manufacturing costs, and Buyer agrees to use reasonable efforts to promote and sell the _____ [e.g., knife] and to attempt to sell it at a lower cost than competing _____ [e.g., knives] to the purchasing public.

Inclusion of Manufacturer's Warranty

9. Seller agrees to place the following manufacturer's warranty, in writing, in each package sold: _____ [insert the exact wording of the warranty; see § 52.290[2]].

Return of Defective Goods to Seller

10. Seller agrees to accept all defective _____ [e.g., knives] returned and to credit Buyer with the cost of these _____ [e.g., knives].

Indemnity and Insurance

11. Seller agrees to hold Buyer harmless and to defend any and all actions, claims, suits, or proceedings that may subject Buyer to liability for defects in the _____ [e.g., knives]. Seller represents that it now has in force a valid comprehensive liability insurance policy in the amount of \$ _____ with _____ [name of insurance company], and that the policy covers the risk of liability for defects in the _____ [e.g., knives]. If this insurance coverage should change or lapse, Seller agrees that Buyer may pay the insurance premiums and deduct this expenditure from the payment due on the _____ [e.g., knives], beginning with the first shipment of _____ [e.g., knives] following the expenditure.

Reasonable Efforts

12. Seller shall continue to make reasonable efforts to improve the _____ [e.g., knives] and to improve production methods in order to reduce manufacturing costs. Buyer shall use reasonable efforts to promote and sell the _____ [e.g., knives] and to try to sell them at a lower cost to the public than competing _____ [e.g., knives].

Risk of Loss

13. All goods shall be shipped at the expense and risk of Seller until receipt of the goods by Buyer as set out in

Paragraph 4 of this contract.

Termination

14. If Seller determines, at any time, that some unavoidable occurrence will prevent the continuing production of the _____ [e.g., knives] at the rate specified in this contract, Seller shall immediately notify Buyer of that fact and state its best estimate of the reduced schedule and the projected date on which production will be resumed at the previous rate. If the estimated rate or production falls below _____ percent and continues for a period of _____ months, Buyer may, at its option and without liability, notify Seller in writing of its decision to terminate this Agreement. If the reduced production is due to the neglect or fault of the Seller, termination of this contract will not be deemed a waiver of any damages for breach or of any other right or remedy. If Seller is not negligent or at fault, and notifies Buyer in writing as soon as it discovers the circumstances necessitating a reduced production rate, the termination of this contract shall not entitle Buyer to any damages.

Modification

15. The parties shall, from time to time, meet and reappraise the estimated schedule, costs, design, and production of the _____ [e.g., knife] with a view toward enhancing its marketability and reducing its cost.

Governing Law

16. This contract shall be governed by and interpreted according to California law.

Integration Clause

17. This instrument is the entire contract and exclusively determines the rights and obligations of the parties, any prior course of dealing, custom or usage of trade, or course of performance notwithstanding.

In witness of the mutual promises made above, Buyer and Seller have executed this contract this _____ day of _____ [month, year].

SELLER

_____ [name of seller]

By _____ [signature]

[typed name and title]

BUYER

_____ [name of buyer]

By _____ [signature]

[typed name and title]

[Attach patent letters described in Paragraph 1 of contract.]

[OR]

REQUIREMENTS CONTRACT (SHORT FORM)

_____ [date]

_____ [name of seller], hereinafter referred to as "Seller," is _____ [identify and describe seller, e.g., a California corporation engaged in the business of manufacturing vacuum cleaner bags, with its principal place of business at _____. The chief executive officer of Seller is _____].

_____ [name of buyer], hereinafter referred to as "Buyer," is _____ [identify and describe buyer, e.g., a California corporation engaged in the business of manufacturing vacuum cleaners, with its principal place of business at _____. The chief executive officer of Buyer is _____].

Seller agrees to deliver to the Buyer all of the _____ [e.g., plastic-coated vacuum cleaner bags], known as "_____" required by Buyer for a period of _____ years from the date of this contract. It is estimated that Buyer will require _____ [number] of these _____ [e.g., bags] every month during the term of this contract.

The price for the _____ [e.g., bags] is \$ _____ per gross, and \$ _____ for every gross in excess of _____ gross, and \$ _____ for every gross in excess of _____ gross that is accepted by Buyer during any calendar month during the term of this contract. The first shipment of _____ [e.g., bags] shall be delivered on or before _____ [date]. All _____ [e.g., bags] shall be shipped in bales of _____ [e.g., 1,000] to Buyer's warehouse located at _____ [address], California, at the expense and risk of Seller. Seller is not required to provide any form of packaging.

In the event the _____ [e.g., vacuum cleaner] is changed in design so as to require a _____ [e.g., bag] of different dimensions or material, Seller shall provide the new _____ [e.g., bag] for Buyer on the same terms and conditions as set forth in this contract, except that the parties shall agree on the price when Buyer makes the specifications of the new _____ [e.g., bag] known to Seller.

Buyer shall notify Seller in writing of its requirements at least _____ [e.g., 10] business days in advance of any requested shipment.

Buyer shall not purchase goods similar to those covered by this contract from any other party. Seller shall be free to sell _____ [e.g., plastic-coated vacuum cleaner bags] to other parties. However, if Seller sells the same goods in comparable quantities to any other party at a price lower than the one set forth in this contract, Buyer shall be entitled to a reduction in price that makes the price to Buyer equal to the lower price charged to the third party.

SELLER

_____ [name of seller]

By _____ [signature]

[typed name and title]

BUYER

_____ [name of buyer]

By _____ [signature]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsGeneral OverviewCommercial Law
(UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOutput, Exclusive & Requirements Agreements



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DIVISION III: COMMERCIAL TRANSACTIONS
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PART IV. FORMS
A. Complete Form

21-52 California Legal Forms--Transaction Guide § 52.206

§ 52.206 Contract for Sale on Consignment With Factor

[1] Comment

[a] Use of Form

This form is a contract for sales on consignment with a factor. It may be used as a model for drafting factor's, jobber's, distributor's, and wholesaler's agreements. For a discussion of these types of agreements, see Ch. 91, *Contracts With Sales Representatives*. For more detailed coverage of factoring arrangements, see Ch. 44, *Accounts Receivable Financing and Factoring*.

[b] Factors

A "factor" is an agent who, in the pursuit of an independent calling, is employed by another to sell property for him or her, and is vested by him or her with the possession or control of the property, or authorized to receive payment for the property from the buyer [*Civ. Code* § 2026.]

[c] Consignment Sales and Creditors' Rights

Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is a "sale or return" if the goods are delivered primarily for resale [*Com. Code* § 2326(1)(b)]. If the goods are delivered primarily for use, the transaction is a "sale on approval" [*Com. Code* § 2326(1)(a)]. Goods held on approval are not subject to the claims of the buyer's creditors until acceptance. Goods held on sale or return are subject to these claims while in the buyer's possession [*Com. Code* § 2326(2)]. Creditors of a business dealing in goods held on sale or return who have a priority security interest in those goods have an interest in the proceeds of their sale; that is, *Com. Code* § 2326(2) does not apply only to "goods" in the "possession" of the business [*Bank of California v. Thornton-Blue Pacific Inc.* (1997) 53 Cal. App. 4th 841, 850-852, 62 Cal. Rptr. 2d 90 (sale of flowers and termination of security interest in them resulted in creditor holding security interest in sale proceeds under former *Com. Code* § 9306(2)--decided under prior law; now see *Com. Code* § 9315(a)(1), dealing with secured party's rights on disposition of collateral and in proceeds)].

If a person delivers or consigns for sale goods that the person used or bought for use for personal, family, or household purposes, these goods do not become the property of the deliverer or consignee unless the deliverer or consignee purchases and fully pays for the goods. However, the deliverer or consignee may act as the deliverer's agent to transfer title to these goods to a buyer who pays the full purchase price. Any payment received by the deliverer or consignee from a buyer of these goods, minus any amount which the deliverer expressly agreed could be deducted from the payment for commissions, fees, or expenses, is the property of the deliverer and is not be subject to the claims of the deliverer's or consignee's creditors [*Com. Code § 2326(4)*].

[2] FORM

Contract for Sale on Consignment With Factor

CONTRACT FOR SALE ON CONSIGNMENT

THIS AGREEMENT is made this _____ day of _____ [*date*], by _____ [*name of principal*], a corporation duly organized and existing under the laws of the State of California and having a principal place of business at _____ [*address*], referred to as the "Principal," and _____ [*name of factor*], _____ [*address*], called the "Factor," in consideration of the mutual covenants and agreements expressed below. "Principal" and "Factor" are collectively referred to in this contract as the "Parties."

Purpose of Contract

1. Principal is engaged in the manufacture and sale of _____ [*specify nature of goods sold*], and Factor is engaged in the distribution of _____ [*specify type of goods*] in _____ [*specify area*]. Principal desires to engage the services of Factor in the distribution of _____ [*specify type of goods*] in the territory described in Paragraph 2 of this contract.

Appointment and Description of Territory

2. Principal hereby appoints Factor as a factor for the distribution of the goods presently or in the future manufactured or sold by Principal in _____ [*specify area*], and Factor hereby accepts this appointment and agrees to act as a factor under the terms and conditions specified in this contract.

Term of Contract

3. This contract shall continue for a period of _____ year(s) from its date, unless it is terminated before that date by mutual agreement of the Parties or by either party on _____ days written notice to the other [*or otherwise specify period during which agreement is to continue in force*].

Quantity of Goods

4. Principal shall consign to Factor those goods manufactured by Principal that are designated by Factor up to the amounts specified in Schedule A attached to this contract.

Title to Goods

5. The absolute title to all goods consigned to Factor by Principal shall remain in Principal until the goods have been delivered to a purchaser or purchasers obtained by Factor.

Best Efforts of Factor to Sell Goods

6. Factor shall at all times during the continuance of this contract use its best efforts to sell the consigned goods to [the retail trade *or* merchants]. For that purpose, Factor shall maintain a place of business in _____[*city or county*], California and shall employ enough sales personnel throughout the State of California to sell the largest amount of goods possible.

Storage and Insurance

7. At all times while the goods are in the possession of the Factor, Factor shall furnish and maintain a suitable place for the storage of the goods and shall keep the goods and products insured in the name of Principal against loss by fire or theft for an amount equal to at least _____ percent of the value of the goods and products. Factor shall send the insurance policies to Principal.

Compensation

8. As compensation for the services to be rendered by Factor under this contract, Principal shall allow to Factor, out of the sales price of all goods sold by Factor, a commission of _____ percent of the wholesale list price of the goods sold by Factor for Principal. Principal shall also allow to Factor a service fee of _____ percent of the wholesale list price of all orders for its goods amounting to \$ _____ or over, delivered by Factor from the stocks consigned to Factor.

Notice of Changes

9. Principal reserves to itself the right to add to or change the goods covered by the contract and to bring within the provisions of this contract any additional goods that it may later want to market through Factor. Principal may make these changes only on written notice to Factor. The notice must set forth the name and purpose of the goods, their wholesale list price, and Factor in order to properly handle the goods.

Report

10. Factor shall on the _____ day of each month during the continuance of this contract furnish to Principal a written statement which shall show (a) all goods of Principal received during the preceding calendar month [*or other period*], (b) the names and addresses of all purchasers of Principal's goods during that period, (c) the quantities purchased by the purchasers, (d) the wholesale list price charged for the goods, and (e) the percentage discounts allowed on them.

Remittance to Principal

11. Factor shall remit to Principal on or before the _____ day of each month an amount equal to the wholesale list price of all goods of Principal sold and delivered by Factor during the previous [calendar month *or other period*] (as shown by the report described in Paragraph 10) minus the compensation allowable to Factor under this contract.

In witness of the mutual promises made above, Principal and Factor have executed this contract this _____ day of _____ [month, year].

PRINCIPAL

_____ [name of principal]

By _____ [signature]

[typed name and title]

FACTOR

_____ [name of factor]

By _____ [signature]

[typed name and title]

[Attach Schedule A as described in Paragraph 4 of contract, if applicable.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsSales on Approval or Return



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DIVISION III: COMMERCIAL TRANSACTIONS
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 A. Complete Form

21-52 California Legal Forms--Transaction Guide § 52.207

§ 52.207 Offer to Sell Goods**[1] Comment--Use of Form**

This form illustrates an offer to contract for the sale of goods. It is intended to be used as a model for the structure of an offer to sell, with particulars to be filled in from specific forms and clauses elsewhere in this chapter as indicated in the bracketed directions in the form. The specific terms and conditions are not filled in because a model offer with specific terms would merely repeat material already contained in the other complete contract forms. This is because the terms and conditions of the offer become the terms and conditions of the contract.

For specific clauses identifying the offer as firm, revocable, or one kept open for consideration, see § 52.220[2]. The drafter may also insert particular provisions to condition the acceptance of the offer [see § 52.221[2]] or control the effect of additional terms [see § 52.222[2]]. It is even possible to leave certain particulars to be specified later [see *Com. Code* § 2311; see also §§ 52.223, 52.224]. For a general discussion of offers to contract for the sale of goods, see § 52.14[4].

[2] FORM**Offer****OFFER TO CONTRACT FOR SALE OF GOODS**

TO: _____[*name of buyer*] _____[*address*]

_____ [*name of seller*], referred to in this offer as "Seller," offers to sell to
 _____ [*name of buyer*], referred to in this offer as "Buyer," [*describe goods, e.g., 20 Model B Tractors*]
 on the following terms and conditions:

Obligations of Seller

[Specify obligations of seller, e.g., delivery (see §§ 52.250-52.265) and warranties (see §§ 52.290-52.297).]

Obligations of Buyer

_____ [Specify obligations of buyer, e.g., amount and time of payment (see §§ 52.230-52.235).]

Rights and Remedies of the Parties

[Specify rights and remedies of parties, e.g., liquidated damages (see § 52.357[2]), right to demand assurances of performance (see § 52.441[1]), and right to cure (see § 52.461[1]).]

Manner of Acceptance

[Specify offer and acceptance terms, e.g., nature and duration of offer (see § 52.220[2]), limits on means of acceptance (see § 52.221[2]), and effect of additional terms in acceptance (see § 52.222[2]).]

General Provisions

[Include desired general provisions, e.g, parol evidence (see § 52.354[2]), choice of law (see § 52.358[2]), and assignment or delegation (see § 52.356[2]).]

Dated: _____.

SELLER

_____ [seller]

By _____ [signature]

[typed name and title]

_____ [address]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & Acceptance



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21-52 California Legal Forms--Transaction Guide §§ 52.208-52.219

[Reserved]

§§ 52.208[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
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PART IV. FORMS
B. Alternative and Optional Clauses
1. Offer and Acceptance

21-52 California Legal Forms--Transaction Guide § 52.220

§ 52.220 Firm Offers, Revocable Offers, and Options

[1] Comment

[a] Use of Form

This form contains clauses to insert in three alternative types of offers for the sale of goods. The type of clause that should be used depends on whether the offeror wants the offer to be revocable. Whichever clause is used, it must be included within a complete offer to contract, such as the *form in § 52.207[2]*.

[b] Firm Offers

The first group of alternative clauses presented in this form is intended to provide "assurance" within the meaning of *Com. Code § 2205*. That section provides that an offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open may not be revoked for lack of consideration during the time stated or, if no time is stated, for a reasonable time. The period of irrevocability may not exceed three months in any case. If the form containing the offer is supplied by the offeree, the firm offer clause must be separately signed by the offeror in order to be effective [*Com. Code § 2205(a)*].

[c] Firm Offers by Contractors

Special rules apply to firm offers made to contractors. An offer by a merchant to supply goods to a licensed contractor [see *Ch. 30D, Construction Contracts and Subcontracts, § 30D.21*] is irrevocable for a limited time without consideration if the merchant has actual or imputed knowledge that the contractor is licensed and that the contractor will rely on the offer in bidding for a construction contract with a third party. This rule applies whether the offer is oral or written. The offer relied on will be irrevocable for 10 days after the awarding of the contract to the prime contractor, but in no event for more than 90 days after the merchant's offer. An oral offer for more than \$2500 must be confirmed in writing by the contractor or the contractor's agent within 48 hours or the merchant is released from the offer. A merchant may vary these rules by providing that the offer will be held open for less than the time provided in this statute

[*Com. Code* § 2205(b)].

[d] Revocable Offers

The second group of alternatives in this form protects the offeror's right to revoke, preventing the offeror from unintentionally making a firm or irrevocable offer within the meaning of *Com. Code* § 2205.

[e] Options

The third group of alternatives is clauses to be included in offers that are irrevocable because they are supported by consideration, i.e., options [see *Ch. 75, Formation of Contracts and Standard Contractual Provisions*, § 75.13]. They are designed for use when offer periods in excess of three months are desired [see *Com. Code* § 2205] or when consideration has in fact been given for an offer.

[2] FORM

Firm Offers, Revocable Offers, and Options

Firm Offer

This is a firm offer and will not be revoked before _____[*date*].

[OR]

_____ [*name*] gives assurance that this offer is firm and will be held open until
_____ [*date*].

[OR]

This offering is irrevocable until _____ [*date*]. After that date the price of the goods will be subject to an across-the-board increase of _____ percent.

[OR]

Revocable Offer

Notwithstanding any other provision in this offer, this is not a firm offer, and [Seller or Buyer] reserves the right to revoke it at any time prior to acceptance.

[OR]

Price, terms, and availability of merchandise subject to change without notice.

[OR]

Option

In consideration of _____ [*specify, e.g., Buyer's order for* _____], this offer will not be revoked for _____ days after its date.

[OR]

In consideration of \$ _____ and other valuable consideration, receipt of which is hereby acknowledged, [Buyer *or* Seller] will have the option to accept this offer until _____ [*date*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentFirm OffersCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & Acceptance



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DIVISION III: COMMERCIAL TRANSACTIONS
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21-52 California Legal Forms--Transaction Guide § 52.221

§ 52.221 Clauses Conditioning the Acceptance of Offers

[1] Comment--Use of Form

This form consists of clauses that set conditions on the way an offer may be accepted. One of these clauses may be included in an offer when it is desirable to restrict acceptance of the offer to the method specified in that clause. For example, a retailer under pressure to deliver goods to a customer might need to know quickly that the wholesaler had accepted its offer and could deliver the necessary goods within the time set by the offer. This retailer might want to use the alternative below that provides for acceptance by return telegram.

When the offeror wants to control the manner of indicating acceptance and the medium through which acceptance must be communicated, the offer should so specify. Otherwise, any reasonable manner or medium of acceptance, including performance, may be effective [*Com. Code § 2206(1)*; see § 52.14[5]].

[2] FORM

Clauses Conditioning the Acceptance of Offers

Manner of Acceptance

This order may be accepted only by a written memorandum or confirmation promising to ship the merchandise ordered.

[OR]

This order may be accepted only by prompt shipment of the merchandise specified above. If so accepted, notice of shipment must be sent to Buyer at the address shown above within [*e.g.*, 24] hours of shipment.

[OR]

This offer must be accepted by a return promise communicated by return [mail *or* telegram *or* email].

[OR]

This offer may be accepted only by signing one copy of the order and returning it to Seller so that it is received by Seller no later than [time], on _____[date].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & Acceptance



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DIVISION III: COMMERCIAL TRANSACTIONS
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B. Alternative and Optional Clauses
1. Offer and Acceptance

21-52 California Legal Forms--Transaction Guide § 52.222

§ 52.222 Clauses Controlling the Effect of Additional Terms in Acceptances

[1] Comment

[a] Use of Form

This form sets out clauses that allow the offeror to control the effect of additional terms in an acceptance. The form contains three alternatives. These alternatives allow the offeror to control the effect of a qualified acceptance either by making it inoperative as an acceptance [see first alternative]; by rejecting in advance its modifications of or additions to the offer [see second alternative]; or by rejecting the addition of any terms and conditions without specific written assent [see third alternative]. In the absence of a clause controlling the effect of additional terms in an acceptance, a definite and seasonable acceptance operates as an acceptance even though it states terms additional to or different from those offered, unless acceptance is expressly made conditional on assent to the additional or different terms [*Com. Code § 2207(1)*; see, e.g., *PMC Inc. v. Porthole Yachts Ltd.* (1998) 65 Cal. App. 4th 882, 888-889, 76 Cal. Rptr. 2d 832 (no acceptance found under *Com. Code § 2207(1)* due to timing of addendum to agreement sent on last day to accept, contents of addendum which contained new term, and cover letter emphasizing conditional nature of acceptance); *Textile Unlimited, Inc. v. A..BMH and Co. Inc.* (9th Cir. 2001) 240 F.3d 781, 787-788 (contract containing new terms, including arbitration clause, not formed under *Com. Code § 2207(1)* when no specific and unequivocal assent was given to supplemental conditions)].

[b] Construction and Effect of Additional Terms

The additional terms are construed as proposals for addition to the contract [*Com. Code § 2207(2)*]. Between merchants, the additional terms become part of the contract unless (1) the offer expressly limits acceptance to terms of the offer; (2) they materially alter it; or (3) notification of objection to them has already been given or is given within a reasonable time after notice of them is received [*Com. Code § 2207(2)*]. If the terms of the offer and acceptance differ, the terms of the offer become part of a contract between merchants if the offer expressly limits acceptance to its own terms or if the varying terms of acceptance materially alter the terms of the offer [*Steiner v. Mobil Oil Corp.* (1977) 20 Cal. 3d 90, 94, 141 Cal. Rptr. 157, 569 P.2d 751 ; see *Lockheed Electronics Co. v. Keronix, Inc.* (1981) 114 Cal. App. 3d 304,

311-313, 170 Cal. Rptr. 591] .

If the writings of the parties are not sufficient to establish a contract, a contract is still established if the conduct of both parties recognizes the existence of a contract. In that case, the contract terms consist of those terms on which the writings of the parties agree, plus any other terms incorporated under any provision of the Commercial Code [*Com. Code* § 2207(3); see *Steiny and Company, Inc. v. California Electric Supply Co. Inc.* (2000) 79 Cal. App. 4th 285, 294-296, 93 Cal. Rptr. 2d 920 (when conduct by subcontractor and seller showed that contract had been formed despite materially differing terms of purchase order and invoice, trial court's failure to instruct jury on *Com. Code* § 2207 was prejudicial error); see also *Textile Unlimited, Inc. v. A..BMH and Co. Inc.* (9th Cir. 2001) 240 F.3d 781, 787-788 (because under *Com. Code* § 2207(3) disputed additional terms on which parties do not agree drop out from contract, disputed arbitration clause did not become part of contract; UCC does not contain "gap-filler" provision providing for arbitration)].

[c] Cautionary Note

The attorney should be cautious in incorporating a provision, such as the first alternative, that totally rejects a qualified acceptance. This type of provision is generally inadvisable because the standard forms used in commercial transactions usually contain differing terms and conditions. However, use of a provision rejecting qualified acceptance will not preclude the existence of a contract between the parties if their course of conduct is sufficient to establish existence of a contract [*Com. Code* § 2207(3)].

[2] FORM

Clauses Controlling the Effect of Additional Terms in Acceptances

Rejection of Qualified Acceptances

Acceptance of this offer must be made on its exact terms. If additional or different terms are proposed by the offeree, the offeree's response shall constitute a counteroffer, and no contract shall come into existence without the offeror's assent to the counteroffer.

[OR]

Rejection of Additional Term of Acceptance

Acceptance of this offer is limited to its terms. Acceptances or confirmations that state additional or differing terms from this [offer or order] shall be operative as acceptances; provided, however, that all additional or differing terms shall be deemed material alterations within the meaning of *Commercial Code* 2207(2)(b), and notice of objection to them pursuant to *Commercial Code* Section 2207(2)(c) is hereby given.

[OR]

Written Assent to Additional Terms Required

This offer is subject to acceptance only on the terms and conditions stated in this offer. Any additional or different terms and conditions proposed by [Seller or Buyer] are hereby rejected, and shall be of no force or effect unless expressly assented to in writing by [Buyer or Seller]. There shall be no contract except on the terms and conditions provided in

this offer.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & Acceptance



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21-52 California Legal Forms--Transaction Guide § 52.223

§ 52.223 Provisions Leaving Particulars of Performance to Be Specified by One Party

[1] Comment--Use of Form

This form contains provisions that do not fix the particulars of performance, but leave them to be specified by one party. The specifications must be made in good faith and within the limits of commercial reasonableness [*Com. Code § 2311(1)*]. A contract containing this type of provision is not invalid for indefiniteness, because the requirement of good faith and commercial reasonableness prevents surprise and limits the range of permissible variation [*Com. Code § 2311(1)*]. For further discussion, see § 52.15[8]. For clauses providing for the subsequent specification by one party of the assortment of the contract goods, see § 52.224[2].

The alternative provisions in this form are, of necessity, purely illustrative. The range of possible provisions is as broad and varied as commerce itself, because *Com. Code § 2311(1)* sets no restrictions on the areas of performance that may be left for future specification. The first alternative is broadly written and is appropriate for use whenever the parties decide to leave the specifics of packaging to the seller. The other two are more narrowly written, and are suitable for use only when the particular point, e.g., the design of the dispenser for the goods, is at issue in the contract. The provisions may be inserted into an offer, an acceptance, or a contract, and should be placed wherever the particular of performance at issue is or should be mentioned in the writing.

[2] FORM

Provisions Leaving Particulars of Performance to Be Specified by One Party

Packaging of Goods

Seller shall determine the type of container and arrange for suitable packing of the goods for transport and delivery.

[OR]

Stripping

Buyer may designate the type and amount of stripping to be installed on the [*product*] sold under this contract, and may alternate or choose different stripping from time to time provided that Seller is given at least _____ days notice of any change.

[OR]

Design of Dispenser

Buyer shall, on or before _____ [*date*], specify the exact design of the [*e.g.*, plastic dispensers] to be used to contain the goods sold under this contract, including any trademark or trade name or other symbol to be placed on the dispenser.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.224

§ 52.224 Clauses Allowing Subsequent Specification by One Party of Assortment of Goods

[1] Comment--Use of Form

This form contains alternative clauses that give one party the right to specify the assortment or variety of the goods to be sold under a contract of sale. Unless the parties agree otherwise, this option belongs to the buyer [*Com. Code § 2311(2)*; see § 52.122]. For discussion of the power of the parties to leave particulars of performance to be specified later, see § 52.15[8]; for additional discussion on the use of this type of provision, see § 52.223[1]. The use of the second alternative clause below, which provides for shipments according to consumer demand, will require a provision in the contract that explains how consumer demand is to be quantified.

[2] FORM

Clauses Allowing Subsequent Specification by One Party of Assortment of Goods

Assortment of Goods

[Buyer or Seller] shall determine the assortment of [*e.g.*, sizes and colors] to be shipped in accord with the terms of this contract.

[OR]

Seller shall determine the amount and variety of the goods sold under this contract to be shipped during any one shipment, and Seller agrees to continue shipments that reflect the consumer demand with respect to the [*e.g.*, various models] referred to in this contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral Overview



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21-52 California Legal Forms--Transaction Guide §§ 52.225-52.229

[Reserved]

§§ 52.225[Reserved]



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21-52 California Legal Forms--Transaction Guide § 52.230

§ 52.230 Provisions Setting the Contract Price

[1] Comment

[a] Use of Form

This form contains alternative price provisions for a contract for the sale of goods. Most of these provisions leave the price to be fixed later, either by agreement of the parties or by some method that is explained in the provision. For examples of price provisions that give a set price per unit of goods, see the price provisions in the complete contracts in §§ 52.200[2], 52.201[2], 52.204[2], and 52.205[2]. The alternatives fit into four groups:

- Those that express an intent not to be bound unless the price is fixed.
- Those that express an intent to be bound.
- Those that provide a method for fixing the price.
- Those that provide a method for adjusting a stated price.

Which group of alternatives will best fit the needs of the parties will depend on how the parties want *Com. Code* § 2305 (covering open price terms) to apply to their transaction. Which particular provision in a group the parties should use depends on which provision most closely fits the facts of the transaction and the wishes of the parties.

[b] Open Price Term--Intent to Be Bound

Parties who intend to make a binding agreement can conclude a contract for sale even when the price is not settled [*Com. Code* § 2305(1)]. If the price is not settled, the price is a reasonable price at the time for delivery if (1) nothing is said as to price; (2) the price is left to be agreed on by the parties and they fail to agree; or (3) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or

recorded [*Com. Code § 2305(1)*].

The question left by *Com. Code § 2305(1)* is how to determine whether the parties intended to be bound. The Code provides only that the issue is generally a question for the trier of fact [*Com. Code § 2305*, comment 2]. The best and safest way is to expressly state in the contract whether or not the parties intend to be bound if the price remains unsettled. This is the purpose of the first and second groups of alternatives, and the parties are advised not to leave the price open without clearly stating their intent [see Duesenberg & King, *Sales and Bulk Transfers Under the U.C.C.*, Ch. 4, *The Code and Contract Principles*, § 4.03[1][a] (Matthew Bender)].

If the parties do not state whether they intend to be bound if the price remains unsettled, their intent will be determined by the rules that apply to the interpretation of any contract for the sale of goods. The trier of fact will consider the words of the agreement, the course of performance under it, and any applicable prior course of dealing or usage of trade [see *Com. Code §§ 1303, 2202*]. For example, a contract for the sale of citrus without a price term was held to be valid because contracts with open price terms are common in the citrus industry. The nature of an industry that deals in the sale of future crops will require some terms to be left open [*Bornstein v. Somerson (Fla. App. 1977) 341 So. 2d 1043, 1047-1048*, cert. denied, *348 So. 2d 944 (1977)*]. Furthermore, the more terms a party leaves open, the less likely it is that they intended to make a binding agreement, but the actions of the parties may often be conclusive on this issue despite omissions [*Com. Code § 2205*, comment].

[c] Good Faith; Failure to Fix Price Through Fault of Party

When an agreement leaves the price to be fixed by the seller or the buyer, the price must be fixed in good faith [*Com. Code § 2305(2)*]. When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through the fault of one party, the other may at his or her option treat the contract as canceled or fix a reasonable price [*Com. Code § 2305(3)*].

[d] Intent Not to Be Bound Unless Price Is Fixed

If the parties intend not to be bound unless the price is fixed or agreed on, and it is not fixed or agreed on, there is no contract. If this happens, the buyer must return any goods already received or, if unable to do so, must pay their reasonable value at the time of delivery, and the seller must return any portion of the price paid on account [*Com. Code § 2305(4)*]. The alternatives in the first group express the intent of the parties not to be bound if the price remains open.

[e] Method for Determining Price or Adjusting Stated Price

The alternatives in the third group each provide a method for determining an open price term. The alternatives in the fourth group provide a method for adjusting a stated price, although the stated price is not included in the provision [see forms at §§ 52.200[2], 52.201[2], 52.204[2], and 52.205[2] for price provisions stating a set price per unit of goods]. Although it is generally true that it is advisable to state directly whether the parties intend to be bound if the price cannot be settled [see [b], *above*], most of the alternatives in groups three and four should not pose a problem on this point, because most of them provide expressly what is to be done if the parties cannot agree on a price or an adjusted price.

[2] FORM

Provisions Setting the Contract Price

Price

[Use the following clauses if the parties do not intend to be bound unless the price of the goods is fixed:]

Notwithstanding any other provision to the contrary, the parties agree that in the event a price for the goods sold is not definitely and precisely fixed and agreed on by them before the first delivery, then this agreement shall be void and of no effect.

[OR]

The parties do not intend to be bound by it if they cannot agree on the price to be charged for the goods sold under this agreement. If the parties fail to agree on the price, there is no contract, and Buyer shall return all goods received. If Buyer is unable to return any of these goods, Buyer shall pay the reasonable value of the unreturned goods. The value of the unreturned goods is to be determined as of the date of their delivery.

[OR]

The parties shall agree on the price of the goods at least _____ [e.g., five] days prior to the date of delivery. If they fail to agree by that time, neither will be bound by this agreement.

[OR]

[Use the following clauses if the parties intend to be bound even though the price of goods is not fixed:]

The parties intend to enter into a binding contract even if they fail to agree on a price for the goods. The parties agree that if they fail to agree on a price, the price shall be a reasonable price at the time of delivery.

[OR]

The parties shall agree as to the price of the goods within _____ [e.g., five] days after the goods are delivered. If the parties are unable to agree, then the Buyer shall pay the prevailing market price for the goods.

[OR]

[Use the following clauses to provide for determination of price at a future time:]

The parties shall agree on the price of the goods at least _____ [e.g., five] days prior to the date of delivery. If the parties cannot agree, the price shall be the average market price of goods of like kind and quality sold in _____ [specify locality] during the week of _____ [date(s)] as reported in the _____ [specify authoritative trade journal in common use].

[OR]

If at any time during the term of this contract Buyer is able to get a specific amount of any goods covered by this contract of equal quality from another manufacturer at a lower price than that set by this contract, and if, after notice in writing, Seller is unwilling to meet this lower price, Buyer shall have the right to buy that specific amount and apply it against this contract.

[OR]

Buyer shall pay for _____ [*specify goods*] whatever price is fixed by an appraisal of the goods by Seller and Buyer. If Buyer and Seller cannot agree on the appraisal, each shall select one person, and the two selected shall together name a disinterested person. The three so named shall then make an appraisal of the property, and Buyer shall pay the price fixed by these three as the fair and reasonable value of the goods sold.

[OR]

Buyer shall pay as a price the unit cost of each item sold under this contract as it appears on Seller's price list on the date of shipment multiplied by the number of units shipped.

[OR]

The price of the goods shall be Seller's cost of production, including a reasonable allowance for overhead, plus _____ [*e.g.*, 10] percent.

[OR]

The price stated in _____ [*identify clause stating price, e.g., Paragraph _____*] may be increased to the extent that Seller's cost for the goods sold under this contract is increased by (1) any agreements, codes, or legislative enactments made or enacted in pursuance of federal, state, or municipal legislation; (2) an increase in the costs of labor, raw materials, or overhead; (3) taxes or other charges imposed by governmental authority on the production or sale of the goods or of materials used in their manufacture; or (4) the increase of existing freight rates. If Buyer is unwilling to accept the increase as computed by Seller, Buyer shall have the right to purchase in open market, and any quantities so purchased shall be deducted from the total amount of the goods [*or products*] to be sold under this contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOpen Price



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21-52 California Legal Forms--Transaction Guide § 52.231

§ 52.231 Clauses Providing Credit Arrangements for Payment

[1] Comment

[a] Use of Form

This form contains six alternative provisions for the payment of goods on credit. Unless otherwise agreed, the buyer's duty to pay for the goods arises on tender of delivery by the seller [*Com. Code § 2507(1)*]. For additional discussion of the time for payment, see §§ 52.15[7] and 52.123 P 2. For an explanation of the law governing promissory notes, see Ch. 55, *Negotiable Instruments*.

[b] Application of Usury Law

If a credit or finance charge is to be made for overdue payments, that charge may constitute interest on a loan, subjecting the contract to the California usury law in *Article XV, Section 1 of the California Constitution* [see *Crestwood Lumber Co. v. Citizens Sav. & Loan Assn.* (1978) 83 Cal. App. 3d 819, 824-825, 148 Cal. Rptr. 129].

[2] FORM

Clauses Providing Credit Arrangements for Payment

Credit Arrangements

Buyer shall have _____ [e.g., 30] days in which to make payment of the purchase price specified in Paragraph ____.

[OR]

Buyer has paid \$ _____ to Seller, receipt of which is hereby acknowledged, and Buyer shall pay to

Seller \$ _____ on delivery of the goods and the remainder of \$ _____ in _____ consecutive monthly installments beginning _____ [date]. Each installment shall be in the amount of \$ _____, except the final installment, which shall be \$ _____. All of the payment obligations are evidenced by and due under the terms of the promissory note or notes executed with this contract.

[OR]

Buyer shall pay Seller \$ _____ in _____ successive monthly installments of \$ _____ each. The last monthly installment may be unequal in order to allow for payment of the exact amount due. Buyer shall begin paying these installments on _____ [date], and must make a payment on the _____ day of each successive month thereafter, until the amount is paid in full.

[OR]

Buyer shall pay the price within _____ [e.g., 30] days after receipt of the goods. However, payment within _____ [e.g., 10] days of receipt will entitle Buyer to a _____ [e.g., two] percent discount.

[OR]

Buyer shall have the option of paying the net price when delivery is made or paying the amount due plus a credit charge within _____ [e.g., 60] days. If payment is not made on delivery, Buyer shall pay a credit charge of _____ [e.g., one] percent of the total price.

[OR]

If credit is extended to Buyer under this contract, Buyer shall execute negotiable promissory notes evidencing its obligation to pay. These notes shall be in whatever form Seller requires and shall contain a provision permitting Seller to accelerate payment whenever Seller feels insecure about Buyer's performance of its obligation to pay.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.232

§ 52.232 Clauses Providing for Manner of Tender of Payment**[1] Comment--Use of Form**

This form contains alternative clauses covering the time when payment for goods must be made and the form in which that payment must be made. Unless the parties agree otherwise, tender of payment is a condition to the seller's duty to tender and complete any delivery [*Com. Code § 2511(1)*], and payment is due at the time and place at which the buyer is to receive the goods [*Com. Code § 2310(a)*].

The tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in cash and gives any extension of time reasonably necessary to procure it [*Com. Code § 2511(2)*]. A payment by check is conditional and is defeated as between the parties if the check is not honored when presented for payment [*Com. Code § 2511(3)*]. The phrase "by check" includes not only the buyer's own check but also any check that does not effect a discharge under *Com. Code § 3310* [see *Com. Code § 3310*; see also Ch. 55, *Negotiable Instruments*]. If a buyer's check is dishonored, *Com. Code §§ 2507(2)* and *2511(3)*, construed together, evidence a legislative intent that the buyer cannot retain, and, conversely, that the seller has the right to reclaim, goods sold in a cash transaction. The unpaid cash seller prevails over an attaching lien creditor [*Citizens Bank of Roseville v. Taggart* (1983) 143 Cal. App. 3d 318, 321-326, 191 Cal. Rptr. 729] .

[2] FORM**Clauses Providing for Manner of Tender of Payment****Tender of Payment**

It is agreed that the goods shall be delivered by Seller as set forth in _____[specify relevant portion of contract e.g., Paragraph _____] of this contract, and Buyer shall pay the price by check within _____ days after delivery.

[OR]

It is agreed that payment for the goods shall be made at the time of delivery only by certified check payable to the order of Seller.

[OR]

It is agreed that Buyer shall pay for the goods by check, and Seller agrees not to demand payment in cash.

[OR]

In the event Seller demands payment in cash, it is agreed that Buyer shall have _____ days after delivery to make payment, and Seller agrees to provide messenger service for the collection of this payment.

[OR]

If payment is made by any means other than cash or certified check, it is agreed that Buyer shall forward the payment for collection, and the goods shall be delivered after collection.

[OR]

Payment of the price shall be governed by the provisions of this contract, and Buyer agrees to abide by these price provisions and to make payment in the manner so provided notwithstanding any custom or usage of trade or prior dealings.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformancePayment by CheckCommercial Law (UCC)Sales (Article 2)PerformancePayment Tender



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21-52 California Legal Forms--Transaction Guide § 52.233

§ 52.233 Provisions Requiring Payment for Goods by Letter of Credit

[1] Comment--Use of Form

This form contains two provisions requiring letters of credit as the means of payment for goods. Unless otherwise agreed, the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, when the shipment is overseas, of good international repute. The term "confirmed credit" means that the credit must also carry the direct obligation of a financing agency of good repute that does business in the seller's financial market [*Com. Code § 2325(3)*]. That is, if the credit is issued by a bank or other agency that does not do direct business in the seller's financial market, it should be confirmed by one that does [*Com. Code § 2325, comment 3*]. The delivery of a proper letter of credit to the seller suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may, on seasonable notification to the buyer, require payment directly from the buyer [*Com. Code § 2325(2)*]. The failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale [*Com. Code § 2325(1)*]. An action is taken "seasonably" when it is taken at or within the time agreed or, if no time is agreed on, at or within a reasonable time [*Com. Code § 1205(b)*].

For detailed coverage of letters of credit, see Ch. 56, *Letters of Credit and Electronic Fund Transfers*.

[2] FORM

Provisions Requiring Payment for Goods by Letter of Credit

Letter of Credit

Buyer shall furnish Seller a letter of credit in the amount of the contract price. If the letter of credit offered is not drawn on an agency doing business in Seller's financial market, it is not valid unless it is a "confirmed credit" by the

_____ Bank.

[OR]

Within _____ [e.g., 10] days from the signing of this contract, Buyer shall establish with a bank in _____ [specify city and state] a confirmed, revolving, irrevocable letter of credit in favor of Seller, in the amount of that portion of the total price of the goods which is to be paid at the time of the first shipment, for the term of _____ [e.g., six] months, to cover the first shipment under this contract. The amount of the letter of credit shall be replenished, and the term extended, to cover each subsequent shipment at least _____ [e.g., 10] days prior to the date of subsequent shipments. The letter of credit must provide that partial shipments against the letter of credit shall be permitted, and must also provide that payment shall be made in the amount of _____ [e.g., 90] percent of the provisional invoice when any of the following documents is presented: (1) provisional commercial invoice; (2) consular invoice, if required; (3) clean dock or ship's receipt, or received-for-shipment ocean bill of lading, or other transportation receipt; (4) certified weight certificate; and (5) Buyer's certificate of inspection and acceptance.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Letters of Credit (Article 5)General Overview



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21-52 California Legal Forms--Transaction Guide § 52.234

§ 52.234 Clauses Providing for Delivery and Payment in Single or Several Installments

[1] Comment--Use of Form

The alternatives in this form are different types of delivery and time of payment clauses. These clauses should be used to clarify the rights between the parties with respect to delivery in a single lot or in installments and with respect to when payment is due. These clauses do this with groups of alternatives that provide for delivery in single lots, delivery in multiple lots, delivery at the option of the seller or buyer, and delivery in installments required in time of payment clauses. Unless the parties agree otherwise, all goods called for by a contract for sale must be tendered in a single delivery, and payment is due only when this single delivery is tendered. However, when circumstances give either party the right to make or demand delivery in lots, the price may be demanded for each lot if the price can be apportioned [Com. Code § 2307].

[2] FORM

Clauses Providing for Delivery and Payment in Single or Several Installments

Delivery in Single Lot

It is agreed, notwithstanding any prior dealings or usage of trade to the contrary, that all of the goods referred to in this contract shall be delivered as provided in _____ [specify relevant portion of contract, e.g., Paragraph _____ or Section _____] in a single delivery.

[OR]

The goods sold under the terms of this shall be delivered in a single lot.

[OR]

Delivery in Multiple Lots

On or before the _____ day of each month during the term of this contract, Seller shall deliver an installment of the goods described in _____ [*specify relevant portion of agreement, e.g., Paragraph _____*] equal to _____ percent of the total amount of the described goods.

[OR]

The goods to be sold by Seller to Buyer shall be delivered to Buyer in approximately equal monthly installments not to vary more than _____ [*specify, e.g., 15*] percent on the _____ day of each month, the final installment of the goods to be delivered not later than the _____ day of _____ [*month, year*].

[OR]

Delivery at Option of Buyer or Seller

Seller has the right to deliver all of the goods at one time or to deliver the goods in portions from time to time, but delivery must be made before the date provided in _____ [*specify relevant portion of agreement, e.g., Paragraph _____*].

[OR]

Buyer has the right to demand all of the goods at one time or in portions from time to time within the time of delivery provided in this contract.

[OR]

Each installment of goods that is to be delivered under this contract shall be deemed to be sold under a separate contract. In the event of Seller's default in any such delivery, the party in default shall be liable in damages only for failure to deliver that installment.

[OR]

Payment for Installment Deliveries

Seller shall have no right to demand payment on the delivery of each installment of the goods. Payment shall be due and owing only at the time the last shipment of goods under this contract is received by Buyer.

[OR]

Buyer shall pay _____ [e.g., 85] percent of the price of the goods delivered under each installment of this contract at the time of delivery. The remaining _____ [e.g., 15] percent, along with the entire price of the final shipment, shall be due and owing at the time the last shipment is received by Buyer.

[OR]

At the time of each shipment under this contract Seller shall prepare an invoice showing the price of the goods shipped. Buyer shall pay the amount of this invoice at the time of delivery.

[OR]

Irrespective of the amount of goods to be shipped in each installment under this contract, Buyer shall pay Seller _____ [e.g., 20] percent of the total purchase price each month on the first day of the month for the _____ [e.g., five] months following the date of this contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseInstallment ContractsCommercial Law (UCC)Sales (Article 2)Contract TermsGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.235

§ 52.235 Clauses Prohibiting or Restricting Substitute Manner of Payment

[1] Comment--Use of Form

This form consists of two alternative contract clauses to be used to prohibit or restrict the right to substitute a substantially equivalent means or manner of payment. If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment that is, commercially, a substantial equivalent [*Com. Code § 2614(2)*]. The parties may bar or restrict the effect of this statute by agreeing otherwise [*see Com. Code § 1302* (except as otherwise provided, Com. Code provisions may be varied by agreement)]. If the buyer has already taken delivery, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive, or predatory [*Com. Code § 2614(2)*].

[2] FORM

Clauses Prohibiting or Restricting Substitute Manner of Payment

No Substitute Manner of Payment

It is agreed that under no circumstances will Seller be required to accept payment other than by the means and manner set forth in this contract. If, for any reason, payment cannot be made in accord with terms of this contract, Buyer must immediately notify Seller in writing of this fact and the reasons why payment in the agreed manner is impossible. Seller then shall have the option of either canceling this contract without penalty, or accepting the proposed manner of payment.

[OR]

The method of payment specified in this contract is of the essence. If the agreed method of payment fails for any reason,

including prohibition by government regulation, Seller may withhold or stop delivery even though Buyer provides a means or manner of payment that is, commercially, a substantial equivalent. If delivery has already been taken, payment by means or in the manner provided by the regulation may be made. If delivery has not been taken, and Seller withholds or stops delivery under this paragraph, that withholding or stopping of delivery shall terminate this contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral Overview



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21-52 California Legal Forms--Transaction Guide §§ 52.236-52.249

[Reserved]

§§ 52.236[Reserved]



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21-52 California Legal Forms--Transaction Guide § 52.250

§ 52.250 Clauses Specifying Time for Delivery

[1] Comment

[a] Use of Form

This form contains nine alternative clauses, each of which fixes the time for delivery of the contract goods. The first two alternatives address the effect of *Civ. Code* § 1722 [see [b], below]. The third through fifth alternatives set a specific time for delivery. The remaining four give the buyer the right to specify the shipping instructions later [see *Com. Code* § 2311(1), (2) (subsequent specifications of shipping arrangements); see also § 52.264], but require that this be done on or before a certain time. This form includes clauses for shipments F.O.B. [see *Com. Code* § 2319(1)(c); see also § 52.253] and installment shipments.

The final two alternatives are the most complex. One provides for the giving of shipping instructions not later than the "shipping date," a term defined by the clause. Both allow for contract extensions if the instructions are late, and both provide for the payment of carrying charges on the extensions.

[b] Time of Delivery

Under *Civ. Code* § 1722, if a consumer and a retailer with more than 25 employees have entered into a contract for the sale of merchandise that is to be delivered by the retailer or the retailer's agent at a later date, and the contract requires the presence of the consumer at the time of delivery, the retailer and the consumer must agree, at the time of sale or at a later date before delivery, on a four-hour period within which delivery will be made [*Civ. Code* § 1722(a)(1)]. Unexcused failure to deliver the goods within the specified time gives rise to an action for the buyer's damages in small claims court [see *Civ. Code* § 1722(a)(2)]. Any provision included in the contract in which the consumer or subscriber agrees to modify or waive these rights is void as against public policy [*Civ. Code* § 1722(d)].

The first alternative clause in this form acknowledges the necessity of the consumer's presence at the time of delivery and specifies a four-hour time period for delivery. The second alternative clause acknowledges the necessity of the

consumer's presence at the time of delivery and stipulates that time of delivery will be agreed to at a later date.

[2] FORM

Clauses Specifying Time for Delivery

Time of Delivery

The goods will be delivered on _____ [date] between the hours of _____ and _____ [specify four-hour time period]. Buyer must be present to accept delivery of goods.

[OR]

Buyer will be present at the time of delivery of the goods sold under this Agreement. Time of delivery will be agreed to at a later time, but in no event will the agreed-on time of delivery exceed a four-hour period.

[OR]

The goods described in _____ [specify relevant portion of contract, e.g., Paragraph _____ or Section _____] will be delivered F.O.B. at _____ [place] on or before _____ [date]; otherwise, Seller may cancel this contract.

[OR]

The goods described in _____ [specify relevant portion of contract, e.g., Paragraph _____] are to be shipped by freight and delivered F.O.B. at _____ [place], on or about _____ [date].

[OR]

On or before the _____ day of each month during the term of this contract, Manufacturer will deliver to Buyer at _____ [address] an installment of the goods described at _____ [specify relevant portion of contract, e.g., Paragraph _____ or Section _____] equal to _____ percent of the total amount of those goods.

[OR]

Buyer will furnish Seller with written instructions for the shipment and delivery of the goods at _____ [specify relevant portion of contract, e.g., Paragraph _____] of this contract. Buyer must receive these instructions _____ [specify time, e.g., on or before _____ [date] or _____ days before the first shipment]. The instructions will state the times and places of delivery and the quantity to be delivered in each shipment.

[OR]

Buyer will have the right to specify the time of delivery, but Buyer will not require that the goods be delivered before _____ [date] or after _____ [date].

[OR]

Buyer will notify Seller of the date on which the goods are shipped. That date will not be later than the shipping date. The "shipping date" means the date specified in this contract for shipment of the goods or, if this contract specifies a shipping period, then "shipping date" means a date no later than the last day of the shipping period or of any mutually agreed on extension of the shipping period. If this contract does not specify a time for shipment, then the _____ [e.g., 60th] day from the date of this contract will be the shipping date. Buyer will pay to Seller for all extensions of time to furnish shipping directions a sum (herein referred to as "carrying charges") equal to \$ _____ for each day, or fraction thereof, that the shipping date is extended. These carrying charges are due on demand. Any carrying charges accrued on the date of any shipment may be included in the draft for that shipment. Seller will have the option of granting an extension. Shipping directions will not bind Seller unless received at its _____ [region or place, e.g., Baltimore] office in writing before _____ [time of day] on the shipping date or on the last day of the extension of the shipping date, if any, unless Seller sees fit to act on those directions. Seller will not ship under any circumstances until it has received shipping directions as provided in this paragraph.

[OR]

If Buyer fails to furnish complete shipping instructions to Seller at its _____ [region or place, e.g., Baltimore] office by _____ days before the date for any shipment specified in this contract, then the provisions of this contract in respect to that shipment will be automatically extended without notice from day to day until Buyer furnishes complete shipping instructions or notifies Seller that it does not want that shipment, or until Seller exercises its right to terminate this contract. For each day during which the contract is automatically extended in this way, Buyer will pay Seller carrying charges at the rate of \$ _____ per day.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping Terms



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21-52 California Legal Forms--Transaction Guide § 52.251

§ 52.251 Clauses Specifying Place of Delivery of Goods

[1] Comment

[a] Use of Form

This form consists of clauses specifying the place for delivery of goods under a contract of sale. Unless the parties agree otherwise, the place for delivery of goods is the seller's place of business, or if the seller has no place of business, his or her residence [*Com. Code § 2308(a)*]. However, if the contract is one for the sale of identified goods that the parties know at the time of contracting to be in some place other than the seller's place of business or residence, then that other place is the place for their delivery [*Com. Code § 2308(b)*]. Documents of title may be delivered through customary banking channels [*Com. Code § 2308(c)*].

The alternatives in this form allow the parties to overcome the effect of *Com. Code § 2308* by providing in the contract for a place of delivery. One alternative leaves the place of delivery to be specified by the buyer. *Com. Code § 2311* permits the parties to leave some particulars of performance to be specified later [*see § 52.223[1]*]. If the parties want the subsequent specification of place of delivery to be at the buyer's option, this must be expressly stated as it is here, because shipping specifications are generally at the seller's option unless otherwise agreed [*Com. Code § 2311(2)*; *see § 52.264*]. Another provides that the contract goods have been bailed [*see Ch. 102, Bailments*] with a warehouse company, and that the buyer will receive delivery from there. For discussion of the seller's right to stop delivery of goods in the possession of a bailee under *Com. Code § 2705*, *see § 52.480[1]*.

[b] Documents of Title and Warehouse Receipts

The final two alternatives in this form provide for delivery, respectively, by negotiation of a negotiable warehouse receipt and by transfer of a nonnegotiable document of title. A "warehouse receipt" is a receipt issued by a warehouse [*Com. Code § 1201(b)(42)*], that is, a person engaged in the business of storing goods for hire [*Com. Code § 7102(a)(13)* (definition)]. If goods, including distilled spirits and agricultural commodities, are stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, a

receipt issued for the goods is deemed to be a warehouse receipt, even if issued by a person that is the owner of the goods and is not a warehouse [Com. Code § 7201(b)]. A "document of title" includes a bill of lading, dock warrant, dock receipt, warehouse receipt, or order for the delivery of goods, and any other document that, in the regular course of business or financing, is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which either are identified or are fungible portions of an identified mass [Com. Code § 1201(b)(16); see Com. Code §§ 1201(b)(18), 7102(a)(1) ("fungible" and "bailee" defined)].

The difference between a negotiable document of title and a nonnegotiable document of title lies in the effect of negotiability on who is entitled to delivery of goods under the document. A negotiable document that calls for delivery of the goods to a named person is negotiated by his or her indorsement and delivery of the document [Com. Code § 7501(a)(1)]. A negotiable document of title that calls for delivery of the goods to the bearer is negotiated by delivery alone [Com. Code § 7501(a)(2)], as is a negotiable document of title running to the order of a named person that has been indorsed in blank or to bearer [Com. Code § 7501(a)(3)]. The result is that the person entitled to delivery under a negotiable document of title is the holder of the document, but the person entitled to delivery under the nonnegotiable document of title is the person to whom delivery is to be made by the terms of or pursuant to instructions in that document [Com. Code § 7102(a)(4)].

For discussion of warehouse receipts and a general form for a nonnegotiable warehouse receipt, see Ch. 54A, *Storage of Goods*. For discussion of the delivery of documents of title against which a draft has been drawn, see § 52.261[1].

[2] FORM

Clauses Specifying Place of Delivery of Goods

Place of Delivery

The goods shall be delivered at Seller's [or Buyer's] place of business set forth with Seller's [or Buyer's] signature below.

[OR]

Buyer shall have the right to specify the place to which goods are to be delivered, provided that the place specified is within _____ [e.g., 50] miles of _____, California.

[OR]

The goods shall be delivered to Buyer at _____.

[OR]

The goods sold under this contract are presently bailed with _____ Warehouse Company, located at _____ [address]. Buyer shall receive delivery of the goods from the warehouse company at the warehouse company's address.

[OR]

The goods sold under this contract are presently in the possession of _____ Warehouse Company, located at _____[*address*]. Delivery shall be made under this contract by the due negotiation of a negotiable warehouse receipt representing the goods.

[OR]

The goods sold under this contract are presently in the possession of _____ Warehouse Company, located at _____[*address*]. In order to effect delivery, Seller shall transfer to Buyer a nonnegotiable document of title covering the goods.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Documents of Title (Article 7)General OverviewCommercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.252

§ 52.252 Clauses to Vary Statutory Duties of Seller Who Is Authorized or Required to Ship Goods

[1] Comment--Use of Form

This form consists of clauses to be used when the seller is required or authorized to send the goods to the buyer but is not required to deliver them at a particular destination. In the absence of an agreement to the contrary, the seller must do three things. First, the seller must put the goods in the possession of a carrier and make a contract for their transportation. The carrier chosen and the contract made must be reasonable considering the nature of the goods and the other circumstances of the case. Second, the seller must obtain and promptly deliver or tender in due form any documents necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade. Third, the seller must promptly notify the buyer of the shipment. Failure to notify the buyer of the shipment or make a proper contract for transportation of the goods is a ground for rejection of the goods only if a material delay or loss ensues [*Com. Code § 2504*].

The alternative clauses in this form can be used to vary the statutory result. For example, in the third alternative, buyer and seller agree that failure by the seller to notify buyer will be a ground for rejecting the goods even if no material delay or loss ensues.

[2] FORM

Clauses to Vary Statutory Duties of Seller Who Is Authorized or Required to Ship Goods

Duties of Seller With Respect to Shipment

Seller agrees to arrange for shipment of the goods to Buyer at _____ [*location*]. In arranging for the shipment, Seller shall contract with the following common carrier: _____. The goods shall be routed as follows: _____. The goods shall be shipped via the fastest means available from the named carrier. If refrigeration, protection against cold, or the like is required to preserve the goods, Seller shall arrange with the carrier for the necessary protection.

[OR]

In arranging for the shipment of the goods, Seller shall agree to a limited valuation with the carrier and procure insurance from a reliable insurance company of Seller's choosing covering the goods during the shipment in the amount of their price under this contract.

[OR]

Seller shall notify Seller of the shipment by telegram immediately on making the contract with the carrier and delivering the goods to the point of shipment. Failure by the Seller to notify Buyer shall be a ground for rejecting the goods even if no material delay or loss ensues.

[OR]

Seller shall be responsible for loading the goods on the carrier. Any cost involved shall be paid by Seller and the risk of loss shall not pass to Buyer until the goods are properly loaded.

[OR]

Seller shall pay any expense incurred in loading the goods on the carrier, but the risk of loss shall pass to Buyer as soon as the goods are deposited with the carrier.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.253

§ 52.253 "F.O.B." and "F.A.S." Terms

[1] Comment

[a] Use of Form

This form consists of alternatives using the shipping terms "F.O.B." and "F.A.S." in clauses to be placed in contracts for the sale of goods. *Com. Code* §§ 2319-2324 fix the definitions of commonly used mercantile shipping terminology [see § 52.124 PP 3, 4].

[b] Definitions

"F.O.B." means "free on board" [*Com. Code* § 2319(1)]. "F.A.S." means "free alongside" [*Com. Code* § 2319(2)].

[c] Requirements Applicable to Sales of Goods "F.O.B."

Unless the parties agree otherwise, the term F.O.B. at a named place is a delivery term, even if it is used only in connection with the stated price. Under this delivery term, the following requirements apply [*Com. Code* § 2319(1)]:

- If the term is "F.O.B. the place of shipment" [see first alternative clause], the seller must ship the goods at that place in the manner required by *Com. Code* § 2504 [see § 52.252[1]] and bear the expense and risk of putting them into the possession of the carrier.
- If the term is "F.O.B. the place of destination" [see second alternative clause], the seller, at his or her own expense and risk, must transport the goods to that place and there tender delivery of the goods in the manner required by *Com. Code* § 2503 [see §§ 52.262[1] and 52.263[1]].
- If the term is either "F.O.B. the place of shipment" or "F.O.B. the place of destination," and it is also "F.O.B. vessel" (or car or other vehicle), the seller must also load the goods on board at his or her own

expense and risk. If the term is "F.O.B. vessel," the buyer must name the vessel and, in an appropriate case, the seller must comply with the requirements of *Com. Code* § 2323 [see § 52.258[1]] on the form of the bill of lading [*Com. Code* § 2319(1)].

[d] Requirements Applicable to Sales of Goods "F.A.S."

Unless the parties agree otherwise, the term "F.A.S. vessel" at a named port is a delivery term, even if it is used only in connection with the stated price. Under this delivery term, the seller, at his or her own expense and risk, must deliver the goods alongside the vessel in the manner usual in that port or on a dock designated by the buyer, and obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading [*Com. Code* § 2319(2)].

[e] Instructions

In the case of an F.A.S. term or an F.O.B. term other than "F.O.B. the place of destination," the buyer must, unless otherwise agreed, seasonably give any needed instructions for making delivery, including the loading berth of the vessel and its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under *Com. Code* § 2311 [*Com. Code* § 2319(3); for discussion of cooperation under *Com. Code* § 2311, see §§ 52.15[8], 52.223[2], and 52.264[1]; for discussion of the consequences of failure to cooperate, see § 52.440[1]].

[f] Tender of Documents

Unless the parties agree otherwise, when the terms "F.O.B. vessel" or "F.A.S." are used in a contract of sale, the buyer must make payment against tender of the required documents and the seller may not tender, nor the buyer demand, delivery of the goods in substitution for the documents [*Com. Code* § 2319(4)].

[2] FORM

"F.O.B." and "F.A.S." Terms

F.O.B.

Goods are sold F.O.B. [cars] _____ [*specify seller's point of shipment*]. Seller shall arrange for transportation to Buyer at _____ [*location*]. Goods shall be shipped under a straight bill of lading naming Buyer as consignee. The bill of lading shall be sent to Buyer at the address that accompanies _____ [his or her] signature to this contract.

[OR]

Goods are sold F.O.B. _____ [*specify city of destination*]. Seller shall arrange for transportation to Buyer at this point. Buyer shall receive goods from the carrier's regular place for discharging goods in the named city. Goods shall be shipped under a straight bill of lading naming Buyer as consignee. The bill of lading shall be sent to Buyer at the address that accompanies _____ [his or her] signature to this contract.

[OR]

Goods are sold F.O.B. _____ Street, _____ [*city and state*]. Seller shall arrange transportation to Buyer at this address. Any documents necessary to enable Buyer to obtain the goods from the carrier when tendered shall be mailed to Buyer at the address that accompanies _____ [his or her] signature to

this contract.

[OR]

Goods are sold F.O.B. cars, _____ Railroad Company, _____ [city and state]. Seller shall transport goods to the named city and load them on the named carrier in that city for reshipment. Seller shall procure from the named carrier any documents necessary to enable Buyer to obtain a bill of lading for the reshipment, or, if instructed by Buyer before the goods have arrived in the named city, shall procure a bill of lading from the named carrier to any further point. The cost of any transportation beyond the named point shall be paid by Buyer.

[OR]

Goods are sold F.O.B. vessel. Delivery shall be made to the _____ [name of ship], a vessel owned by the _____ Steamship Company, at _____ [city and state]. Buyer reserves the option of substituting another vessel or vessels that may sail from the same port at or about the same time. If this substitution of vessels is made, Buyer must notify Seller in sufficient time to permit Seller to arrange for loading on substituted vessel.

[OR]

The goods described in _____ [specify relevant portion of contract, e.g., Paragraph ____] shall be delivered F.O.B. cars at _____ [location], and delivery shall be deemed complete when these goods are so delivered.

[OR]

The goods specified in this contract shall be delivered F.O.B. cars at _____ [location] on or before _____ [date]; otherwise Buyer may cancel this contract.

[OR]

Delivery shall be made to the _____ [name of ship], a vessel owned by the _____ Steamship Company, F.O.B. vessel at _____ [city and state]. The Seller, however, reserves the option of substituting, with or without notice, another vessel or vessels that may sail from the same port at or about the same time. Should the vessel to be used for delivery, whether substituted by Seller or not, be lost, damaged, commandeered, diverted by government order, seized, captured, or delayed before or after sailing, Seller shall have a reasonable time within which to substitute another vessel or may at _____ [his or her] option cancel the portion of the delivery so affected. Seller must give Buyer written notice of any substitution or cancellation within a reasonable time.

[OR]

F.A.S.

Goods are sold F.A.S., _____ [specify city and state]. Seller shall deliver the goods at the appropriate

loading time alongside the vessel named by Buyer. Buyer must give notification of the vessel's name at least _____ [e.g., 10] days before the date for loading. Seller shall procure from shipping company whatever documents are necessary in order for Buyer to procure a bill of lading for the goods, or, if instructed by Buyer, Seller shall obtain a bill of lading from the shipping company.

[OR]

The goods shall be delivered F.A.S., _____ [name of vessel], in the port of _____. Buyer reserves the right to change the name of the vessel by giving Seller notice not later than _____ [e.g., five] days before the goods are to be delivered.

Legal Topics:

For related research and practice materials, see the following legal topics:

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21-52 California Legal Forms--Transaction Guide § 52.254

§ 52.254 "C.I.F.," "C. & F.," and "C.F." Terms

[1] Comment

[a] Use of Form

This form consists of alternative "C.I.F." and "C. & F." (also called "C.F.") clauses. These alternatives should be used when the lump sum price of the goods includes the cost of the goods and freight to the named destination or cost, insurance, and freight to the destination [*see Com. Code § 2320(1)*; *see also* [b], *below*].

[b] Definitions

"C.I.F." stands for "cost, insurance, and freight." The term means that the price includes in a lump sum the cost of the goods, insurance, and freight to the named destination. "C. & F." stands for "cost and freight." The term means that the price includes cost and freight to the named destination. [*Com. Code § 2320(1)*].

[c] Requirements of C.I.F. and C. & F. Agreements

The terms "C.I.F." and "C. & F." impose the same obligations on the seller except the obligation as to insurance [*Com. Code § 2320(3)*]. With that one difference, the use of either term, unless otherwise agreed, requires the seller to do the following at his or her own expense and risk:

- Put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination [*Com. Code § 2320(2)(a)*].
- Load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for [*Com. Code § 2320(2)(b)*; *see Mitsui O.S.K. Lines, Ltd. v. Dynasea Corp. (1999) 72 Cal. App. 4th 208, 209-211, 85 Cal. Rptr. 2d 1* (when seller prepaid freight with check that was dishonored, carrier could not enforce payment from buyer)].

■ For C.I.F., but not C. & F., obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern. The seller may add to the price the amount of the premium for any such war risk insurance [*Com. Code § 2320(2)(c)*].

■ Prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract [*Com. Code § 2320(2)(d)*].

■ Forward and tender with commercial promptness all the documents in due form and with any endorsement necessary to perfect the buyer's rights [*Com. Code § 2320(2)(e)*].

These requirements apply even if the C.I.F. or C. & F. term is used only in connection with the stated price and destination [*Com. Code § 2320(2)*]. Unless the parties agree otherwise, the buyer must make payment against tender of the required documents and the seller may not tender, nor the buyer demand, delivery of the goods in substitution for the documents [*Com. Code § 2320(4)*].

[d] Application to Mail Order and Internet Sales

As a general rule, a contract containing no provision that explicitly allocates the risk of loss is a "shipment contract" rather than a "destination contract." Under a shipment contract, the risk of loss passes to the buyer when the goods are duly delivered to the carrier [*Com. Code § 2509(1)*; *Wilson v. Brawn of California, Inc. (2005) 132 Cal. App. 4th 549, 555, 556 n.4, 33 Cal. Rptr. 3d 769*; see § 52.280[1][c]]. The use of "C.I.F." in the contract has the same effect. In a standard C.I.F. contract, the buyer bears the risk of loss in transit even though the cost of insurance is rolled into the purchase price and is in fact paid by the seller. While "C.I.F." is not commonly used in consumer mail order or internet sales, the same result would follow from the practice of expressly requiring the buyer to pay for transit insurance as part of the total price for the sale [*Wilson v. Brawn of California, Inc. (2005) 132 Cal. App. 4th 549, 556-557, 33 Cal. Rptr. 3d 769*] .

[2] FORM

"C.I.F.," "C. & F.," and "C.F." Terms

Price of Goods C.I.F.

It is agreed that the price of the goods sold under this contract is \$ _____ C.I.F.
_____ [city and state].

[OR]

The price stated above for the _____ [describe or specify goods] is C.I.F. _____ [city and state].

[OR]

The goods are sold C.I.F. _____ [city and state]. Seller shall ship the goods to arrive no later than _____ [date]. Seller may ship the goods under a straight bill of lading, and "freight collect." If the goods are shipped freight collect, the cost of transportation shall be deducted from the price. Seller shall not procure war

risk insurance on the goods. The bill of lading, certificate of insurance, and an invoice of the goods shall be sent to Buyer at Buyer's place of business, which appears with Buyer's name below.

[OR]

The price to be paid for the goods by the Buyer is \$ _____, C.I.F., _____ [city and state]. Seller shall forward documents of title to the _____ Bank at _____ Street, _____ [city and state]. On notice that the documents have arrived, Buyer shall pay the price to the bank in exchange for the documents.

[OR]

The price to be paid by Buyer is \$ _____, C.I.F. _____ [city and state]. The price shall be paid by Buyer on arrival of the goods and after Buyer has had an opportunity to inspect them.

[OR]

Price of Goods C. & F. [or C.F.]

It is agreed that Buyer shall pay \$ _____ for the goods sold under this contract. This price is C. & F. _____ [city and state].

[OR]

The price stated above is C.F. _____ [city and state].

[OR]

The price to be paid for the goods by Buyer is \$ _____, C. & F. _____ [city and state]. Seller shall forward documents of title to the _____ Bank, at _____ Street, _____ [city and state]. On notice that the documents have arrived, Buyer shall pay the price to the bank in exchange for the documents.

[OR]

The goods are sold C. & F. _____ [city and state]. Seller shall ship the goods to arrive no later than _____ [date]. Seller may ship the goods under a straight bill of lading and may ship them "freight collect."

Legal Topics:

For related research and practice materials, see the following legal topics:

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21-52 California Legal Forms--Transaction Guide § 52.255

§ 52.255 "Net Landed Weights" Terms

[1] Comment

[a] Use of Form

This form consists of alternative "net landed weights" clauses. These clauses are designed to be used in sales contracts providing for prices based on, or adjusted according to, "net landed weights" or similar terms [*see Com. Code § 2321(1)*]. If the second alternative clause is used, arrangements will have to be made for a bank representative to tender the documents of title as called for in that provision.

[b] Payment of Estimated Price

Under a contract containing a term C.I.F. or C. & F. [*see Com. Code § 2320; see also § 52.254*], if the contract price is based on or is to be adjusted according to "net landed weights," "delivered weights," "out turn" quantity or quality, or a similar term, then, unless the parties agree otherwise, the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the estimated amount, but after final adjustment of the price a settlement must be made with commercial promptness [*Com. Code § 2321(1)*]. For discussion of who bears the risk of deterioration under this type of agreement, see § 52.256[1].

[2] FORM

"Net Landed Weights" Terms

Net Landed Weights

The price of the goods sold under this contract is \$ _____ per pound, C.I.F., and it is agreed that the "net landed weights" shall be actual gross weights. It is further agreed that the goods shall be weighed at Seller's expense as soon as practicable after landing and that they shall be weighed in whatever lots the Buyer may request, if

the request is made in writing before the goods are landed.

[OR]

The price to be paid for the goods by Buyer is \$ _____ per pound, C.I.F. net landed weights, _____ [city and state]. Before shipment Seller shall weigh the goods and compute the approximate price allowing _____ [e.g., 10] percent for shrinkage during shipment. As soon as the goods are unloaded, they shall be weighed by Buyer at Buyer's expense and in the presence of _____, or _____'s agent. Any deficiency or overage shown by this weighing shall be promptly reported to Seller and an adjustment will be made to the price. The price estimated by Seller shall be payable on tender of the documents of title. Documents shall be tendered by and at the _____ Bank.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.256

§ 52.256 Risk of Deterioration**[1] Comment--Use of Form**

This form consists of a clause designed to modify the risk of deterioration of goods. A contract with a C.I.F. or C. & F. term [see *Com. Code* § 2320(1) (definition, set forth at § 52.254[1][b])] which provides that the price is to be based on or adjusted according to "net landed weights" or a similar term [see *Com. Code* § 2321(1); see also § 52.255[1]] places on the seller the risk of ordinary deterioration, shrinkage, and the like in transportation, but has no effect on the place or time of identification to the contract for sale or delivery [see *Com. Code* § 2501; see also § 52.284[1]] or on the passing of the risk of loss [see *Com. Code* § 2321(2)]. The parties may modify that risk by simple agreement [see *Com. Code* § 1302 (effect of Commercial Code provisions may be varied by agreement except as otherwise provided)] in a clause like the one provided in this form. The parties may not agree to shift the burden to the buyer, however, because this would simply cancel out the requirement of a payment adjusted according to "net landed weights." This form also includes an estimated price provision as required by *Com. Code* § 2321(1) [see § 52.255[1][b]]. The estimated price provision and the risk of deterioration clause should be included together in a contract or offer.

[2] FORM**Risk of Deterioration****Estimated Price**

Seller estimates that the price of each shipment shall be \$ _____. This estimate is based on a shipment of _____ [number of units] units of _____ [number of cartons] cartons containing _____ [e.g., 15 ounces] per carton at \$ _____ per ounce.

Risk of Deterioration

The price stated in this contract is C.I.F., _____[*city and state*], to be adjusted according to net landed weights. The goods sold under this contract shall be delivered in packages conforming to established trade custom. Even though the price is to be adjusted according to net landed weights, no allowance in price shall be made for a shortage of average weights that is [less than _____ (*e.g.*, one) percent *or* more than _____ (*e.g.*, three) percent]. The average weight of a shipment is to be ascertained and certified by a public weigher on a weighing for gross of not less than _____ [*e.g.*, 50] percent of that shipment. The goods will average _____ [*e.g.*, 15 ounces] net per carton when packed.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.257

§ 52.257 "Ex-Ship" Terms

[1] Comment

[a] Use of Form

This form consists of alternative clauses with "ex-ship" terms. The first alternative is merely a simple statement of an "ex-ship" term. The second and third alternatives should be used to vary the ordinary effects of a term for delivery of goods "ex-ship."

[b] Definition and Delivery From a Particular Vessel

Delivery "ex-ship" means delivery from the carrying vessel. Unless the parties agree otherwise, a term for delivery of goods "ex-ship" or in equivalent language is not restricted to a particular ship and requires delivery from a ship that has reached a place at the named port of destination where goods of the kind are usually discharged [*Com. Code § 2322(1)*]. The second alternative below varies this provision by requiring delivery by a particular vessel. Under an ex-ship term, unless the parties agree otherwise, the seller must discharge all liens arising out of carriage and furnish the buyer with a direction that puts the carrier under a duty to deliver the goods [*Com. Code § 2322(2)(a)*]. Unless otherwise agreed, the risk of loss does not pass to the buyer until the goods leave the ship's tackle or are otherwise properly unloaded [*Com. Code § 2322(2)(b)*].

[c] Documents of Title

A contract fixing a price "ex-ship" with payment "cash against documents" calls only for those documents that are appropriate to the contract. The seller is not required to tender a bill of lading as a document of title or to insure the goods for the buyer's benefit [*Com. Code § 2322*, comment 4]. The third alternative in this form avoids the language "cash against documents" and expressly requires documents of title.

[2] FORM

"Ex-Ship" Terms**Delivery of Goods "Ex-Ship"**

Goods shall be delivered by Seller "ex-ship" in _____ Harbor.

[OR]

Goods shall be delivered by Seller "ex-ship" in _____ Harbor. Goods must be shipped on the _____ [name of ship], a vessel owned by the _____ Shipping Company, in order for Seller to make a proper tender under this contract.

[OR]

Goods shall be delivered by Seller "ex-ship," _____ Harbor. Seller must send negotiable documents of title covering the goods to Buyer as soon as the goods are delivered to the shipper at the port of origin. Failure to conform with this provision shall constitute a breach of this contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Documents of Title (Article 7)General Overview



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21-52 California Legal Forms--Transaction Guide § 52.258

§ 52.258 Overseas Shipment Bill of Lading Requirements

[1] Comment--Use of Form

This form consists of two clauses that vary the statutory duty of the seller in overseas shipment agreements.

Com. Code § 2323(1) requires that if a contract contemplates overseas shipment and contains a term C.I.F. or C. & F. [see *Com. Code § 2320*; see also *§ 52.254[1]*] or F.O.B. vessel [see *Com. Code § 2319*; see also *§ 52.253[1]*], the seller, unless the parties agree otherwise, must obtain a negotiable bill of lading stating that the goods have been loaded on board, or, in the case of a term C.I.F. or C. & F., received for shipment. The alternatives in this form should be used to vary this requirement by agreement. Depending on the terms of the bill of lading, the seller (consignor) may have rights under it even if it is obtained by the buyer. For instance, an overseas bill of lading with a "surrender-on-delivery" clause, indicating that the cargo is not to be turned over to the buyer (consignee) unless the consignee produces an endorsed bill of lading, will provide the basis for an action for misdelivery by the seller against the carrier if the carrier surrenders the cargo without the endorsed bill of lading [see *Lite-On Peripherals v. Burroughs Aire Express* (9th Cir. 2001) 255 F.3d 1189, 1191, 1194-1196 ; *C-Art, Ltd. v. Hong Kong Islands Line America, S.A.* (9th Cir. 1991) 940 F.2d 530, 533] .

[2] FORM

Overseas Shipment Bill of Lading Requirements

Duty of Seller

It is expressly agreed that any and all bills of lading required to be procured by Seller under any statute or provision of this contract shall be nonnegotiable.

[OR]

It is expressly agreed that notwithstanding the fact that the terms of this contract call for an overseas shipment, C.I.F. vessel, _____ Harbor, Seller shall not be required to obtain a negotiable bill of lading. Buyer expressly agrees to obtain the negotiable bill of lading and to relieve Seller of this duty.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Documents of Title (Article 7)Bills of Lading



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21-52 California Legal Forms--Transaction Guide § 52.259

§ 52.259 "No Arrival, No Sale" Terms

[1] Comment--Use of Form

This form consists of two clauses varying the duty of the seller under "no arrival, no sale" terms. *Com. Code § 2324* provides two rules that apply to contracts with a "no arrival, no sale" term unless the parties otherwise agree. First, the seller must properly ship conforming goods and, if they arrive by any means, he or she must tender them on arrival, but the seller assumes no obligation that the goods will arrive unless he or she has caused the non-arrival [*Com. Code § 2324(a)*]. Second, the buyer may proceed as if there had been casualty to identified goods when, without fault of the seller, (1) part of the goods is lost; (2) the goods have so deteriorated that they no longer conform to the contract; or (3) the goods arrive after the contract time [*Com. Code § 2324(b)*]. A buyer's options after a casualty to identified goods are set out in *Com. Code § 2613* [for discussion, see § 52.321[1]].

[2] FORM

"No Arrival, No Sale" Terms

Liability for Failure of Goods to Arrive

The goods shall be shipped as provided in this contract on a "no arrival, no sale" basis. However, it is specifically understood that any other provision contained in this contract to the contrary notwithstanding, Seller shall not be liable for loss occasioned by the non-arrival of the goods whether or not the non-arrival is the fault of Seller.

[OR]

It is agreed that the goods described in _____ [*specify relevant portion of contract, e.g., Paragraph _____*] shall be forwarded "no arrival, no sale"; it is expressly agreed that the sole remedy of the Buyer in the event the goods do not arrive, whether or not as a result of the fault of Seller, shall be the right to cancel the contract on notice to

Seller in writing.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseCasualty to Identified GoodsCommercial Law (UCC)Sales (Article 2)Contract TermsGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.260

§ 52.260 Provision Prohibiting Seller's Reservation of Security Interest

[1] Comment--Use of Form

This form is a clause to be used to protect the buyer from the seller's right to reserve a security interest in goods identified by or before shipment. When this type of clause is not included in a sales agreement, the methods by which the seller may reserve a security interest are contained in *Com. Code § 2505*. For discussion of those methods, see § 52.124 P 3(f). For discussion of security interests under Division 9 of the Commercial Code, see Ch. 42, *Secured Transactions*.

[2] FORM

Provision Prohibiting Seller's Reservation of Security Interest

Reservation of Security Interest Prohibited

It is agreed that Seller shall not reserve a security interest in the goods sold under this contract once Seller has caused the goods to be shipped. It is further agreed that Seller shall in no way encumber the goods or impair Buyer's ability to obtain financing for the goods.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Title, Creditors & Good Faith PurchasersReservation for Security



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21-52 California Legal Forms--Transaction Guide § 52.261

§ 52.261 Provisions Requiring Delivery of Documents of Title Against Which Drafts Have Been Drawn

[1] Comment

[a] Use of Form

This form consists of alternative clauses to regulate the delivery of documents of title against which a draft has been drawn. In the absence of an agreement to the contrary, documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment [*Com. Code § 2514*].

The alternative clauses in this form provide for the delivery of a negotiable bill of lading, a nonnegotiable warehouse receipt, a bill of lading, and documents of title in general. The first two alternatives are designed to avoid any delays on account of the draft drawn against the negotiable bill of lading or the nonnegotiable warehouse receipt. The first alternative provides that delivery will not be withheld on account of any draft, and the second provides for issuance of the nonnegotiable warehouse receipt when the goods are delivered. The last two alternatives provide that delivery is to be withheld until the dependent draft is paid in full.

[b] Definitions

A "draft" is a negotiable instrument that is an order [*Com. Code § 3104(b), (e)*]. A "negotiable instrument" is an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges, that complies with all of the following [*Com. Code § 3104(a)*]:

- It is payable to bearer or to order at the time it is issued or first comes into the holder's possession.
- It is payable on demand or at a definite time.
- It does not state any other undertaking or instruction by the person promising or ordering payment,

with limited exceptions [*see Com. Code § 3104(a)(3)*].

An "order" is a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to anyone [*Com. Code § 3103(a)(6)*].

A "bill of lading" is a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods [*Com. Code § 1201(b)(6)*; *see Com. Code § 7102(a)(9)* (definition of "persons entitled under the document"); *see also § 52.251[1][b]*]. For definition and discussion of "document of title" and "warehouse receipt," and for discussion of the difference between a negotiable and nonnegotiable document of title, see § 52.251[1][b].

[2] FORM

Provisions Requiring Delivery of Documents of Title Against Which Drafts Have Been Drawn

Delivery of Documents of Title Against Which Drafts Have Been Drawn

It is agreed that Seller shall forward a negotiable bill of lading to Buyer, and this bill shall not be withheld on account of any draft.

[OR]

Seller shall issue a nonnegotiable warehouse receipt to Buyer at the time of delivery of the goods. Seller agrees that the consignee shall be entitled to the receipt before acceptance of the bill of exchange referred to in _____.
[specify relevant portion of contract, e.g., Paragraph ____].

[OR]

It is expressly agreed that Buyer shall not be entitled to the bill of lading until the draft drawn against that bill has been paid in full.

[OR]

Buyer agrees that all documents of title shall be withheld until full payment of all drafts drawn against these documents of title.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Documents of Title (Article 7)General Overview



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21-52 California Legal Forms--Transaction Guide § 52.262

§ 52.262 Provisions for Tender of Delivery

[1] Comment--Use of Form

This form consists of tender of delivery clauses. The alternatives in this form are examples of tenders of delivery by sellers whose contractual obligations do not require delivery at a particular destination. The seller is required to put and hold conforming goods at the buyer's disposition and to give the buyer any notification [see § 52.460] reasonably necessary to enable him or her to take delivery [Com. Code § 2503(1)]. The manner, time, and place for tender are determined by the contract and by Com. Code §§ 2101-2801. Tender must be at a reasonable hour, and any goods tendered must be kept available as long as reasonably necessary for the buyer to take possession. Thus the five days suggested in this form as the time within which the buyer must pick up the goods may have to be extended if five days is not as long as the buyer reasonably needs to take possession. It is up to the buyer to furnish suitable facilities for the receipt of the goods [Com. Code § 2503(1)].

If the seller is not delivering the goods, but shipping them, then the seller must comply with Com. Code § 2504 [Com. Code § 2503(2); see § 52.252]. If the goods are in the possession of a bailee and are to be delivered without being moved, then the seller must comply with Com. Code § 2503(4) [see § 52.263[1]].

The first and second alternative clauses below both provide for the buyer to receive delivery at the seller's place of business. They differ in two ways. First, the first clause provides for tender of delivery when the goods are ready, with notice of tender to the seller, but the second calls for the goods to be available on a certain date, and this contract date is the buyer's only notice of tender. The second clause also provides that failure to call for the goods within the time allowed is a repudiation of the agreement. The third alternative, like the second, also sets a specific date for the goods to be ready and omits any other notice of tender to the buyer. It differs from both other alternatives in not specifying where the buyer is to receive delivery and by requiring the buyer to give the seller notice before demanding delivery.

[2] FORM

Provisions for Tender of Delivery

Tender of Delivery

Seller shall give notice to Buyer as soon as the goods are ready for delivery. Buyer agrees to receive the goods at Seller's place of business within _____ [e.g., five] days after having been given notice that they are being held at Buyer's disposal.

[OR]

Buyer agrees to receive the goods at Seller's place of business on _____ [date]. Seller shall have the goods available on this date and shall hold them for _____ [e.g., five] days thereafter at the disposal of Buyer. Failure by Buyer to call for the goods within this _____ [e.g., five]-day period shall constitute a repudiation of this contract.

[OR]

Seller shall have the goods ready for Buyer on the date specified in this contract for delivery. Buyer agrees to receive the goods within _____ [e.g., five] days thereafter and to give Seller at least _____ [e.g., three] hours notice before demanding their delivery.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



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21-52 California Legal Forms--Transaction Guide § 52.263

§ 52.263 Provisions for Tender of Delivery When Bailee Holds Goods

[1] Comment--Use of Form

The form contains alternative clauses specifying the manner of tender of delivery when the goods are in the hands of a bailee and are to be delivered without being moved. Unless the parties agree otherwise, tender of goods so held requires that the seller either tender a negotiable document of title covering the goods or get the bailee to acknowledge the buyer's right to possession [*Com. Code § 2503(4)(a)*]. However, tender to the buyer of a nonnegotiable document of title or of a record directing the bailee to deliver is sufficient tender unless the buyer seasonably objects [*Com. Code § 2503(4)(b)*]. A refusal by the bailee to honor this latter type of tender defeats the tender [*Com. Code § 2503(4)(b)*].

[2] FORM

Provisions for Tender of Delivery When Bailee Holds Goods

Tender of Delivery

The goods sold under this contract are presently bailed with _____ Warehouse Company located at _____. Buyer shall receive delivery of the goods from the warehouse company at this address.

[OR]

The goods sold under this contract are presently in the possession of _____ Warehouse Company, located at _____. Delivery shall be effectuated when Seller obtains an acknowledgment from the warehouse company of Buyer's right to possession of the goods and the acknowledgment is delivered to Buyer.

[OR]

The goods sold under this contract are presently in the possession of _____ Warehouse Company, located at _____. Delivery shall be effectuated by Seller transferring to Buyer a nonnegotiable document of title covering the goods. A refusal by the bailee to honor a valid document transferred under this paragraph shall not defeat the tender.

[OR]

If Seller obtains a document of title to the goods and desires to effectuate tender by delivery of the document, the document shall be sent to Buyer at the address that appears with Buyer's name below.

[OR]

Seller shall obtain a negotiable [or nonnegotiable] bill of lading covering the goods and tender it to Buyer at _____ [address or place, e.g., Buyer's office] during regular business hours no later than _____ [e.g., three] days before the expected time of arrival of the goods.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



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21-52 California Legal Forms--Transaction Guide § 52.264

§ 52.264 Provisions for Subsequent Specification of Shipping Arrangements by One Party

[1] Comment--Use of Form

This form consists of alternative clauses that designate the party who has the right to arrange or specify the means of shipping or certain particulars connected with shipping. Unless otherwise agreed and except as otherwise provided in *Com. Code § 2319(1)(c), (3)* [For discussion of *Com. Code § 2319*, which applies to agreements to ship F.O.B. or F.A.S., see § 52.253[1]], specifications or arrangements relating to shipping are at the seller's option [*Com. Code § 2311(2)*].

The first of the two alternatives provided in this form is very simple and very general. It may be used to designate either the buyer or the seller as the party who has the right to specify shipping arrangements. The only restriction is that the specification must be made in writing before the first shipment. If any particular detail of the shipment arrangements is crucial to the feasibility of the transaction, as, for example, a particular means of shipment for fragile or perishable goods, that point can and should be added to this first alternative and agreed on in advance, with the remaining details of the shipping arrangements left to be specified by the buyer or the seller.

The second alternative is much more specific. It provides for delivery by the seller to the buyer's warehouse, with the buyer having the right to specify shipping arrangements from the rail depot to the warehouse. This alternative is suitable for use only when it fits the facts of the transaction at hand, although the parties may look to it for some of the points to be considered in agreeing on a clause providing for the future specification of shipment arrangements. For example, the parties must consider which party will have the right to make the specification, who will make the necessary arrangements for shipping, who will pay the transportation charges, which points should be left to future specification, and which should be agreed on at the time the contract is entered into.

[2] FORM

Provisions for Subsequent Specification of Shipping Arrangements by One Party

Arrangements for Shipping

It is agreed that _____ [Buyer or Seller] shall designate to _____ [Seller or Buyer] the carrier and dates of shipment in writing on or before the first shipment under this contract.

[OR]

The goods shall be delivered by Seller to Buyer's warehouse located at _____ [address]. Buyer shall have the right to choose the means of shipment from the rail depot. Buyer shall make all necessary arrangements for that transportation. Seller agrees to pay the transportation charges for shipment from the rail depot provided the charges are reasonable.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



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21-52 California Legal Forms--Transaction Guide § 52.265

§ 52.265 Provisions Specifying Whether Seller May Ship Under Reservation

[1] Comment--Use of Form

This form contains alternative clauses allowing or prohibiting the seller from shipping goods under a reservation of security interest. In the absence of any agreement, a seller who is authorized to ship goods may ship them under reservation, tendering documents of title, although the buyer may inspect before payment unless inspection is inconsistent with the terms of the contract [*Com. Code § 2310(b)*]; *see Com. Code § 2513(3)* (times when buyer is not entitled to inspect before payment); *see also § 52.311[1]*].

Shipment under reservation allows the buyer to inspect the goods before paying for them, while it also protects the seller. The seller is not required to give up possession of the goods until he or she has been paid for them, unless the contract allows the buyer to purchase on credit [*Com. Code § 2310*, comment 2]. Two of the alternative clauses in this form determine the issue of shipment under reservation without express mention of it by addressing the underlying purposes of this type of shipment. One provides that the buyer is entitled to possession even if he or she does not pay for the goods on delivery. In the other, the seller agrees not to withhold possession of the goods to assure payment.

For a clause to be used to protect the buyer from the seller's right to reserve a security interest in goods identified by or before shipment, *see § 52.260*. For discussion of security interests under Division 9 of the Commercial Code, *see Ch. 42, Secured Transactions*.

[2] FORM

Provisions Specifying Whether Seller May Ship Under Reservation

Shipment Under Reservation

Seller may ship the goods sold under this contract "under reservation."

[OR]

It is agreed that Seller shall maintain the right of possession in the goods sold under this contract until Buyer pays for those goods.

[OR]

Seller agrees not to ship the goods under reservation.

[OR]

It is agreed that possession of the goods sold under this contract shall be given to Buyer even though payment is not made at the time of delivery.

[OR]

Seller agrees not to withhold possession of the goods from Buyer to assure payment for those goods.

[OR]

Seller is not authorized to ship the goods under reservation and no tender of a bill of lading shall operate as a tender of the goods. Buyer shall pay for the goods on or before _____[date].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



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21-52 California Legal Forms--Transaction Guide §§ 52.266-52.279

[Reserved]

§§ 52.266[Reserved]



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21-52 California Legal Forms--Transaction Guide § 52.280

§ 52.280 Clauses Specifying Risk of Loss in Absence of Breach

[1] Comment

[a] Use of Form

This form contains seven alternative clauses, six of which specify when the risk of loss of the goods passes from the seller to the buyer. The seventh provides that the parties will bear equally any loss not covered by insurance that occurs before the goods reach the buyer. The risk of loss cannot pass before the goods are identified to the contract [see Hart & Willier, *Forms and Procedures Under the UCC, Article 2, Sales, Part 2, Obligations of Seller*, P 22.07A[3] (Matthew Bender)]. The time for the passing of the risk of loss varies under these alternatives; the earliest specified time is the time the goods are identified to the contract, while the latest is when the buyer has actually received the goods. The best alternative in any given transaction depends on the facts of the transaction and the wishes of the parties. In choosing an alternative, the parties should consider the value of the goods, the likelihood that a loss will occur, and whether insurance will cover any loss. For valuable perishable goods, the seller may want the risk of loss to pass to the buyer as soon as possible, while the buyer may want to delay assumption of that risk until the goods are actually in his or her possession.

[b] General Rules Governing Risk of Loss Absent Breach

Unless the transaction involves a contract that requires or authorizes the seller to ship the goods by carrier [see [c], *below*] or goods held by a bailee to be delivered without being moved [see [d], *below*], the risk of loss passes to the buyer on his or her receipt of the goods if the seller is a merchant [*Com. Code* § 2509(3); see *Com. Code* § 2104 (definition); see also § 52.13[4]]. Otherwise, the risk passes to the buyer on tender of delivery [*Com. Code* § 2509(3)].

[c] Risk of Loss When Contract Requires or Authorizes Seller to Ship Goods by Carrier

If the contract requires or authorizes the seller to ship the goods by carrier, and does not require the seller to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even

if the shipment is under reservation [*Com. Code § 2509(1)(a)*; see § 52.124 P 3(f) regarding indicia of shipments under reservation]. If, however, the contract requires the seller to deliver the goods at a particular destination and the goods are tendered at that destination while in the carrier's possession, the risk of loss passes to the buyer when the goods are tendered there, to enable the buyer to take delivery [*Com. Code § 2509(1)(b)*].

[d] Goods Held by Bailee

When the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer [*Com. Code § 2509(2)*; see § 52.263]:

- On his or her receipt of possession or control of a negotiable document of title covering the goods; or
- On acknowledgment by the bailee of the buyer's right to possession of the goods; or
- After the buyer's receipt of possession or control of a nonnegotiable document of title or other direction to deliver in a record, as provided in *Com. Code § 2503(4)(b)*.

[e] Exceptions

The statutory rules governing risk of loss in the absence of breach are subject to the contrary agreement of the parties and to the provisions of *Com. Code § 2327* regarding sale on approval. For a discussion of sales on approval, see § 52.282[1]. For a discussion of the effect of breach on the risk of loss under *Com. Code § 2510*, see § 52.281[1].

[2] FORM

Clauses Specifying Risk of Loss in Absence of Breach

Risk of Loss in Absence of Breach

The risk of loss of the goods shall pass to Buyer as soon as the goods are properly loaded on the carrier.

[OR]

If the goods are lost or destroyed, in whole or in part, before they reach Buyer, the parties agree to share equally any loss not covered by insurance.

[OR]

The risk of loss of the goods shall pass _____ [as soon as or two days after] Seller sends Buyer notification that they are ready for delivery.

[OR]

As soon as the goods are identified to the contract, the risk of loss shall pass to Buyer.

[OR]

The risk of loss of the goods shall pass to Buyer as soon as the goods are ready for delivery, and without regard to any

notice that they are ready for delivery.

[OR]

The risk of loss of the goods shall not pass to Buyer until Buyer actually receives the goods from the warehouse company.

[OR]

The risk of loss of the goods shall pass to Buyer as soon as the goods are delivered to Buyer at _____
[place].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceRisk of Loss



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21-52 California Legal Forms--Transaction Guide § 52.281

§ 52.281 Clauses Specifying Risk of Loss in Event of Breach

[1] Comment--Use of Form

This form consists of alternative clauses that provide for the effect of breach on risk of loss. In the absence of such a provision, the rules specified in *Com. Code § 2510* apply. Under that statute, if a tender or delivery of goods so fails to conform to the contract as to give a right of rejection, the risk of their loss remains on the seller until cure or acceptance [*Com. Code § 2510(1)*]. If the buyer rightfully revokes acceptance, then the buyer, to the extent of any deficiency in his or her effective insurance coverage, may treat the risk of loss as having rested on the seller from the beginning [*Com. Code § 2510(2)*]. If the buyer repudiates or is otherwise in breach as to conforming goods already identified to the contract for sale [*see Com. Code § 2501* (when goods are identified to the contract); *see also § 52.284*] before risk of their loss has passed to that buyer, then the seller may to the extent of any deficiency in his or her effective insurance coverage treat the risk of loss as having rested on the buyer for a commercially reasonable time [*Com. Code § 2510(3)*].

Risk of loss in the absence of breach is governed by *Com. Code § 2509*, which is discussed at § 52.280[2][b].

[2] FORM

Clauses Specifying Risk of Loss in Event of Breach

Risk of Loss in Event of Breach

Buyer, at Buyer's own expense, shall independently seek adequate insurance coverage for the goods sold under this contract. The risk of loss shall pass to Buyer on the signing of this contract. Buyer shall not look to Seller for any deficiency in insurance coverage, notwithstanding the fact that Buyer may have the right of rejection, or that Seller may be in breach of this agreement.

[OR]

Seller shall secure, at its own expense, adequate insurance coverage for the goods sold under this contract. If the goods are lost or damaged, the party then bearing the risk of loss under applicable law shall look to the insurance proceeds for full satisfaction, regardless of the adequacy of those proceeds and without regard to a breach by either party.

[OR]

Buyer, at Buyer's expense, shall secure adequate insurance against loss with respect to the goods sold under this contract. The parties agree that in the event of calamity or disaster, their sole remedy shall be that insurance coverage, without regard to a breach or default and without regard to the adequacy of the recovery of insurance proceeds.

[OR]

The risk of loss shall not be altered by the fact that the conduct of either party may constitute a default or breach.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceRisk of Loss



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21-52 California Legal Forms--Transaction Guide § 52.282

§ 52.282 Provisions for Sale on Approval and Sale or Return

[1] Comment

[a] Use of Form

This form contains alternative provisions for sales under arrangements called "sale on approval" and "sale or return." If delivered goods may be returned by the buyer even though they conform to the contract, the transaction is a "sale on approval" if the goods are delivered primarily for use; or a "sale or return" if the goods are delivered primarily for resale [*Com. Code § 2326(1)*].

This form illustrates four "sale on approval" alternatives and three "sale or return" alternatives. Three of the four sale on approval provisions state the number of days within which the buyer must accept or reject the goods. The third sale on approval provision shifts the risk of loss to the buyer [*see Com. Code § 2327(1)(a)*; *see also* [b], *below*]. The fourth provides that the time set for notice of the election to return the goods held on approval is of the essence.

The first sale or return alternative provides that the goods held by the buyer are to be returned on demand of the seller, and that the buyer, or consignee, assumes the obligation of an absolute insurer with respect to the goods until they are received by the seller. The second alternative varies the rule that the return is at the buyer's expense [*see Com. Code § 2327(2)(b)*; *see also* [b], *below*] by providing that the seller will pick up any returned goods from the buyer's place of business. The final sale or return alternative requires the buyer to prove that the goods are insured against fire and theft.

The right to return, risk of loss, and creditors' rights rules that apply to the goods depend on whether they were sold on approval or on sale or return. For a discussion of the consequences of sales on approval and sales or returns, see [b] and [e], *below*.

[b] Right to Return and Risk of Loss; Sale on Approval

Unless the parties agree otherwise, under a sale on approval the risk of loss and the title do not pass to the buyer until

acceptance of the goods, even though they are identified [*Com. Code* § 2327(1)(a)]. Use of the goods consistent with the purpose of trial is not acceptance, but the failure to seasonably notify [*see* [c], *below*] the seller of the election to return the goods constitutes an acceptance of those goods [*Com. Code* § 2327(1)(b)]. If all of the goods involved in a sale on approval conform to the contract, acceptance of any part of the goods is acceptance of all of them unless the parties agree otherwise [*Com. Code* § 2327(1)(b)]. Acceptance of part of the goods falls outside the normal intent of the parties in a sale on approval. A case in which the buyer takes home two items in order to select one commonly involves two distinct contracts. If not, it is covered by the right of the parties to agree otherwise [*Com. Code* § 2327, comment 1].

After a buyer gives due notice [*see* [c], *below*] to the seller that he or she has elected to return the goods, the seller must assume the risk and expense of that return. However, if the buyer is a merchant, he or she must follow the seller's reasonable instructions regarding the return [*Com. Code* § 2327(1)(c)].

[c] Sale or Return

Unless the parties agree otherwise, under a sale or return the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably [*Com. Code* § 2327(2)(a)]. The return is at the buyer's risk and expense [*Com. Code* § 2327(2)(b)]. In a sale or return, the risk of loss remains on the buyer throughout [*Com. Code* § 2327, comment 3].

[d] "Seasonable" Notice or Exercise Defined; "Due" Notice Distinguished

Both the notice of election to return goods held on sale on approval [*Com. Code* § 2327(1)(b); *see* [b], *above*] and the exercise of the option to return goods held on sale or return must be "seasonable" [*Com. Code* § 2327(2)(a); *see* [c], *above*]. A thing is done "seasonably" if it is done at or within the time agreed on, or, if no time is agreed on, at or within a reasonable time [*Com. Code* § 1205(b)].

What constitutes due notification as required in sales on approval [*see Com. Code* § 2327(1)(c); *see also* [b], *above*] is governed by the Commercial Code provisions on good faith and notice. "Good faith" means honesty in fact in the conduct or transaction concerned [*Com. Code* § 7102(a)(6)]. A person "notifies" or "gives" a notice or notification to another by taking the steps that are reasonably required to inform the other in ordinary course, whether or not the other actually comes to know of it [*Com. Code* § 1202(d)].

[e] Creditors' Rights in Goods Sold on Approval or Return

Goods held on approval are not subject to the claims of the buyer's creditors until acceptance, but goods held on sale or return are subject to those claims while the goods are in the buyer's possession [*Com. Code* § 2326(2)]. Creditors of a business dealing in goods held on sale or return who have a priority security interest in those goods have an interest in the proceeds of their sale; that is, *Com. Code* § 2326(2) does not apply only to "goods" in the "possession" of the business [*Bank of California v. Thornton-Blue Pacific Inc.* (1997) 53 Cal. App. 4th 841, 850-852, 62 Cal. Rptr. 2d 90 (sale of flowers and termination of security interest in them resulted in creditor's holding security interest in sale proceeds under former *Com. Code* § 9306(2) [decided under prior law; *now see Com. Code* § 9315(a)(1), dealing with secured party's rights on disposition of collateral and in proceeds)]].

If a person delivers or consigns for sale goods that were used or bought for use for personal, family, or household purposes, the goods do not become the retailer's property unless the retailer buys and pays for them in full. The retailer may act as the deliverer's agent to transfer title to a buyer who pays the full purchase price. However, the net proceeds are the property of the deliverer and are not subject to the retailer's creditors [*Com. Code* § 2326(4)].

[f] No Application to Ordinary Retail Sales

Retail sales often are made on the basis of, or are accompanied by, the seller's statement to the effect that the buyer has

a specified right to return the goods and receive a partial or full refund of the amount paid. This is not the kind of transaction contemplated by *Com. Code* §§ 2326 and 2327. In particular, the sale is not a "sale on approval" to which those code sections apply [*Wilson v. Brawn of California, Inc. (2005) 132 Cal. App. 4th 549, 558-559, 33 Cal. Rptr. 3d 769*] .

[2] FORM

Provisions for Sale on Approval and Sale or Return

Sale on Approval

The goods described in this contract are sold on a sale on approval basis. Buyer shall have _____ days within which to examine and test the goods and to notify Seller in writing of Buyer's acceptance or rejection of the goods. If no notice is given to Seller within that time period, Buyer shall be deemed to have accepted the goods.

[OR]

The sale of the goods specified in this contract shall be subject to _____ days free trial and the approval of Buyer. If, during that trial period, Buyer decides not to accept the goods, they may be returned to Seller at _____ [Buyer's or Seller's] expense.

[OR]

This sale is a sale on approval; however, it is expressly agreed that the risks of loss shall be borne by Buyer from the time the goods are delivered.

[OR]

It is agreed that Buyer takes the goods described in this contract on approval, and must notify Seller in writing within _____ days after delivery if Buyer decides to return the goods. Failure to notify Seller of that election within the time limit set forth in this Paragraph shall be deemed an acceptance, and it is agreed that time is of the essence with respect to that notice.

[OR]

Sale or Return

The goods described and valued as below are sent to you for examination only. They remain the property of _____ and are to be returned to it on demand. Title to any of the articles does not pass until after a bill is rendered for that article. The consignee agrees that these goods, until returned and actually received by _____ are at his, her, or their own risk from any and all hazards whatsoever. The consignee assumes full responsibility for their return on demand without any excuse or defense for accident or any other cause. The consignee assumes the obligation of absolute insurer.

No right or power is given to the consignee to sell, pledge, hypothecate, or otherwise dispose of any of this merchandise, regardless of prior transactions, unless the consignee receives a bill for the goods or is given written

permission.

Description of goods: _____.

[OR]

It is agreed that although this sale is a "sale or return," any goods returned shall be picked up by Seller from Buyer's place of business. Buyer must notify Seller of any election to return any of the goods in writing and on or before _____[*date*]. Failure to so notify Seller shall be construed as an acceptance, and Buyer shall then be liable for the price of the goods as provided in this contract, with no right of return.

[OR]

All of the goods under the sale or return provided for in this contract shall be insured by Buyer against loss by theft and fire in an amount of not less than \$ _____ for the benefit of Seller. Buyer shall forward to Seller within _____ days proof of this insurance and proof that the premium for the insurance has been paid.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsSales on Approval or ReturnCommercial Law (UCC)Sales (Article 2)PerformanceRisk of Loss



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21-52 California Legal Forms--Transaction Guide § 52.283

§ 52.283 Clauses Prohibiting or Restricting Substitute Tender of Delivery

[1] Comment--Use of Form

This form contains clauses prohibiting or restricting the right to substitute a commercially reasonable manner of delivery. In the absence of some restrictive agreement [*see Com. Code § 1302* (Commercial Code provisions may be varied by agreement, except as otherwise provided)], *Com. Code § 2614(1)* provides that when without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impractical but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted.

Both alternative clauses in this form restrict performance by a substituted means of delivery, and both provide for termination of the contract. The two differ in that the first alternative does allow the seller the option of choosing an alternate carrier, if the seller agrees to bear the expense of shipment and to assume the risk of loss in shipment [*see Com. Code §§ 2509* (risk of loss in absence of breach), *2510* (risk of loss in event of breach); *see also §§ 52.280, 52.281* (risk of loss clauses)]. In addition, the only requirement the first alternative imposes on the means of shipment is that it must be by truck, whereas the second clause makes the agreed loading, berthing, or unloading facilities and the agreed type of carrier essential requirements of the contract. Thus, the first alternative should be used to limit substitutions while still allowing some flexibility, and the second clause should be used to insist strictly on compliance with all delivery requirements.

[2] FORM

Clauses Prohibiting or Restricting Substitute Tender of Delivery

Substitute Tender of Delivery

If the goods sold under this contract cannot be shipped by _____ [*e.g., truck*] as provided in _____ [*specify relevant portion of contract, e.g., Paragraph _____*] for any reason whatsoever, Buyer

shall not be required to accept any alternate mode of shipping. However, Seller has the option of choosing an alternate carrier if Seller agrees to bear the expense of shipping and agrees to assume the risk of loss until the goods are received by Buyer. If Seller elects to exercise this option, _____[he or she] must give written notice of the details of the alternative shipment to Buyer prior to shipment. If the option is not exercised by Seller, this contract shall be deemed null and void without liability to either party.

[OR]

The method of tender, including the agreed loading, berthing, or unloading facilities and the agreed type of carrier, is of the essence, and no substitution shall operate to satisfy Seller's obligations even if it is commercially reasonable and the agreed method of tender is made commercially impractical. If the agreed method of tender becomes commercially impractical, and no tender is made by Seller, this contract shall automatically terminate.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



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21-52 California Legal Forms--Transaction Guide § 52.284

§ 52.284 Clauses to Determine When Identification of Goods Occurs

[1] Comment--Use of Form

This form consists of alternative identification of goods clauses. By using these or similar clauses, the parties can agree to fix the time at which goods will be identified to the contract. Unless the parties explicitly agree otherwise, the provisions of *Com. Code § 2501* determine when identification of goods to a contract occurs.

The buyer obtains a special property interest and an insurable interest in goods by identification of existing goods as goods to which the contract refers, even if the identified goods are nonconforming and even if the buyer has an option to return or reject them. This identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs [*Com. Code § 2501(1)*]:

- When the contract is made, if it is for the sale of goods already existing and identified.
- If the contract is for the sale of future goods other than those next described, when goods are shipped, marked, or otherwise designated by the seller as goods to which the contract refers.
- If the contract is for the sale of unborn young or future crops, when the crops are planted or otherwise become growing crops or the young are conceived.

[2] FORM

Clauses to Determine When Identification of Goods Occurs

Identification of Goods

Identification of the goods sold under this contract shall not occur until Seller places the goods in the hands of the carrier for delivery as provided for in _____ [*specify part of contract that provides for delivery, e.g.,*

Paragraph ____].

[OR]

Seller agrees to notify Buyer in writing as soon as the goods are ready for shipment. Identification shall not occur until Buyer receives this notice.

[OR]

Identification of the described goods to the contract shall not occur until the goods are received by Buyer. Seller agrees to bear all risk of loss and deterioration until the goods are actually received by Buyer.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceInsurable Interest & Identification



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21-52 California Legal Forms--Transaction Guide §§ 52.285-52.289

[Reserved]

§§ 52.285[Reserved]



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5. Warranties

21-52 California Legal Forms--Transaction Guide § 52.290

§ 52.290 Express Warranties and Disclaimers

[1] Comment

[a] Use of Form

The form consists of three alternatives to be used in making express warranties. The first alternative is a detailed "full warranty" provision within the meaning of the Magnuson-Moss Consumer Warranty Act [*see 15 U.S.C. § 2303(a)(1)*]; *see also* discussion under [k][vi], *below*. This alternative should be used to provide a full warranty for consumer goods. The other two alternatives are short, simple statements of a particular express warranty.

The attorney must study the applicable statutory provisions [*see § 52.294[1]*] in order to be familiar with the implied warranties that govern in the absence of a contrary agreement. The attorney then must ensure that any rights desired by the client that differ from the Commercial Code are embodied in the agreement. The alternative clauses in this form illustrate how an attorney can provide for nonstatutory rights.

For express warranties with disclaimers, *see § 52.291*. For disclaimers of express warranties, *see § 52.292*. For provisions expressing the dominance of express warranties over implied warranties, *see § 52.293*. For implied warranties that are made express, *see § 52.294*. For disclaimers of implied warranties, *see § 52.295*. For sales "as is" or "with all faults," *see § 52.296*. For warranties of title or against infringement, *see § 52.297*. For a checklist of considerations applicable to the making of express warranties, *see § 52.128*.

[b] Creation of Warranty

Express warranties by the seller may be created in any of several ways. Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise [*Com. Code § 2313(1)(a)*]. Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods will conform to the description [*Com. Code § 2313(1)(b)*]. If a sample or model is made part of the basis of the bargain, this creates an express warranty

that the goods will conform to the sample or model [*Com. Code* § 2313(1)(c)].

Warranties are easily created. It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used or that there be a specific intention to make a warranty. However, a mere affirmation of the value of the goods or a statement purporting to be only the seller's opinion or commendation of the goods does not create a warranty [*Com. Code* § 2313(2)].

[c] Basis of the Bargain

The creation of an express warranty under *Com. Code* § 2313(1) [see [b], *above*] requires an affirmation of fact or promise by the seller to the buyer that relates to the goods and "becomes part of the basis of the bargain" [*Com. Code* § 2313(1)(a)] or a description of the goods or a sample or model that is "made part of the basis of the bargain" [*Com. Code* § 2313(1)(b), (c)]. For a discussion of the similar requirement under the Magnuson-Moss Warranty Act [see 15 U.S.C. §§ 2301-2312; see also [k], *below*] for a "written warranty," see the discussion under [k][ii], *below*.

[d] Definition; The Reliance Requirement

If an express warranty requires that the affirmation, promise, description, sample, or model be a "part of the basis of the bargain" [see *Com. Code* § 2313(1); 15 U.S.C. § 2301(6)], then the question is whether something is a "part of the basis of the bargain." More specifically, there is a question whether the change in language from the Uniform Sales Act to the Uniform Commercial Code means that the reliance required by Section 12 of the Uniform Sales Act is no longer a necessary element of an express warranty. Section 12 of the Uniform Sales Act, which was the predecessor to the Uniform Commercial Code-Sales [see *Com. Code* §§ 2101-2801], provided that an affirmation of fact or promise by the seller relating to the goods created an express warranty if the natural tendency of the promise or affirmation was to "induce" the buyer to buy the goods, and if the buyer bought the goods "relying" on the affirmation or promise. Further, the predecessor to *Com. Code* § 2313, former *Civ. Code* § 1732, required "an affirmation of fact or promise by the seller and reliance thereon by the buyer."

The Commercial Code does not define the phrase "basis of the bargain" [see *Com. Code* § 2313(1)], and commentators say that it is unclear [Duesenberg & King, *Sales and Bulk Transfers Under the U.C.C.*, Ch. 6, *Express Warranties*, § 6.01 (Matthew Bender); Williston on Sales (4th ed. 1974, LCP), vol. 3, § 17-5] and has no generally understood legal meaning [1 New York Law Revision Commission Report, Study of the U.C.C., p. 393; White & Summers, *Hornbook on the Uniform Commercial Code* (2d ed., West 1980), § 9-4]. Courts [see, e.g., *Alan Wood Steel Co. v. Capital Equip. Enter. Inc.* (Ill. App. 1976) 349 N.E.2d 627, 635 (reliance required); *Massey-Ferguson, Inc. v. Laird* (Ala. 1983) 432 So. 2d 1259, 1261 (reliance not required)] and commentators [see, e.g., White & Summers, *Hornbook on the Uniform Commercial Code* (2d ed., West 1980), § 9-4 (reliance required); Note, "*Basis of the Bargain*"--*What Role Reliance?* 34 U. Pitt. L. Rev. 145, 150-152 (1972) (reliance not required)] have divided over whether "reliance" is still part of the test for the creation of an express warranty.

There are several apparent indications that reliance is no longer required for an express warranty under the "basis of the bargain" test. Two of the strongest are the following:

- First, the Commercial Code omits any mention of reliance in favor of the "basis of the bargain" requirement for express warranties [*Com. Code* § 2313(1)], but the reliance requirement is retained for an implied warranty of fitness of purpose [see *Com. Code* § 2315; see also § 52.294[1][e]]. This indicates that the removal of the reliance requirement from the express warranty provisions was deliberate, done with the intent to modify pre-Uniform Commercial Code Law [see Note, "*Basis of the Bargain*"--*What Role Reliance?* 34 U. Pitt. L. Rev. 145, 150-151 (1972)].
- Second, California Code comment 3 to *Com. Code* § 2313 states, in effect, that the requirements for

an express warranty under *Com. Code* § 2313(1)(a) are broader than under Former *Civ. Code* § 1732 with its reliance requirement because "no particular reliance on [affirmations of fact] need be shown"

On the other hand, there are also strong indications that reliance is still required under the "basis of the bargain" test. For one thing, the great majority of both courts [*see, e.g., Slyman v. Pickwick Farms (Ohio App. 1984) 472 N.E.2d 380, 384, 15 Ohio B. 47*; *Alan Wood Steel Co. v. Capital Equip. Enter. Inc. (Ill. App. 1976) 349 N.E.2d 627, 635*] and commentators [*see, e.g., Henson, The Law of Sales (ALI/ABA 1985), § 6.04*; White & Summers, Hornbook on the Uniform Commercial Code (2d ed., West 1980), § 9-4] favor this position. Perhaps the strongest argument is that it is hard to say what making a thing part of the "basis of the bargain" means if it does not mean relying on it [*see 1 New York Law Revision Commission Report, Study of the U.C.C., p. 393 (reliance is used for lack of any other meaningful standard)*].

One commentator has concluded that "for all practical purposes it is suggested that no great change was wrought by the [Uniform Commercial] Code. Whether one speaks of reliance or basis of the bargain, little difference exists between the two. In neither case should the statement be required to have been the sole factor leading the buyer to purchase. In either case, the statement should, at least, be one of such factors. What is really crucial is whether the statement was made as an affirmation of fact, the goods did not live up to the statement, and the defect was not so apparent that the buyer could not be held to have discovered it for himself" [Duesenberg & King, *Sales and Bulk Transfers Under the U.C.C., Ch. 6, Express Warranties*, § 6.01, fn. 4] (Matthew Bender)].

The official comments provide that express warranties rest on "dickered" aspects of the individual bargain [*Com. Code* § 2313, comment 1]. No particular reliance on any affirmation of fact need be shown. In fact, it is presumed that any affirmation of fact [*Com. Code* § 2313, comment 3] or any model or sample involved in the transaction is intended to become a basis of the bargain [*Com. Code* § 2313, comment 6]. The question is whether the language, samples, or models are fairly to be regarded as part of the contract [*Com. Code* § 2313, comment 7].

It appears that California courts have generally adopted the position that the change of language from former law to that in *Com. Code* § 2313 modifies both the degree of reliance and the burden of proof in express warranties under the code. The seller's representation need only be *part* of the basis of the bargain, or merely *a factor* or consideration inducing the buyer to enter into the bargain. A warranty statement made by a seller is presumptively part of the basis of the bargain, and the burden is on the seller to prove that the resulting bargain does not rest *at all* on the representation [*Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 23, 220 Cal. Rptr. 392* (citing UCC Comment 2-313, Comment 3, and out-of-state authority); *see Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 890, 263 Cal. Rptr. 64* (defendant, not plaintiff, had burden of proof on issue of reliance); *see also Hauter v. Zogarts (1975) 14 Cal. 3d 104, 116-117, 120 Cal. Rptr. 681, 534 P.2d 377*; *McDonnell Douglas Corp. v. Thiokol Corp. (9th Cir. 1997) 124 F.3d 1173, 1176* (relying on *Keith v. Buchanan, above*)].

[e] Violation of Law

A clear and conspicuous provision limiting a seller's liability for breach of an express warranty that the goods have been labeled by him or her as required by a federal or state statute has been held invalid. *Civ. Code* § 1668 prohibits as against public policy any contract that seeks to exempt a person from responsibility for his or her willful or negligent violation of law. Thus *Civ. Code* § 1668 makes the statement of limitation of liability, as it pertains to the express warranty that the goods have been labeled as required by law, void as against public policy [*Agr. Services Ass'n. Inc. v. Ferry-Morse Seed Co. (5th Cir. [Tenn.] 1977) 551 F.2d 1057, 1066-1067* (applying California law)].

[f] Effect of Assignment

The acceptance of an assignment of a purchase agreement containing a warranty provision that includes an exculpatory clause barring negligence actions, the validity of which is not contested, constitutes agreement on the part of the

assignee to be bound by the exculpatory clause [*Aeronaves de Mexico, S.A. v. McDonnell Douglas* (9th Cir. [Cal.] 1982) 677 F.2d 771, 773 ; see *Com. Code* § 2210(5) (assignment of contract is delegation of duties unless words or situation indicate otherwise)].

[g] Getting the Right Warranty

The buyer should insist, if possible, that all express warranties on which he or she relies in buying the goods be stated in the contract. At the very least, the buyer should take care that any warranty relied on has been created in a way recognized by *Com. Code* § 2313 [see [b], *above*]. If a warranty is oral, it is important to be sure that proof of it will not be hindered by a merger clause or the parol evidence rule [see § 52.354[1]]. The buyer must also carefully review the sale documents or announcements accompanying the goods to see if any of the relied on warranties are being disclaimed.

The seller should disclaim warranties that are or might be associated with this type of transaction but are not in fact extended in this particular transaction, or that might have been inferred from the seller's opinions of or puffing related to the goods, but were not intended as warranties [see *Com. Code* § 2313(2) (mere opinion or commendation of goods not a warranty)]. The seller should include general disclaimers [see §§ 52.291, 52.292], a denial of authority of agents to make warranties, and a merger clause [see § 52.354] to prevent later allegations of warranties not intended by the seller. The seller must realize, however, that he or she cannot extend and then disclaim express warranties. The seller cannot warrant in one clause of the contract that the material is fit for use in the manufacture of shirts, and then in a later clause disclaim all express warranties. *Com. Code* § 2316(1) provides that a disclaimer is inoperative to the extent it cannot be construed as consistent with an express warranty.

[h] Disclaimers

For a discussion of *Com. Code* § 2316 and the exclusion or modification of warranties, see § 52.295[1].

[i] Cumulation or Conflict of Express or Implied Warranties

Sometimes the accumulation of warranties in a contract covering a single transaction results in contradictions and ambiguities. This can happen if, for example, the seller provides a sample of the goods that is made part of the basis of the bargain [see *Com. Code* § 2313(1)(c) (sample made part of basis of bargain creates express warranty)], and the contract includes an inconsistent description of the goods with which the goods are warranted to comply. In a situation like this, the warranties, whether express or implied, must be construed as consistent with each other and as cumulative unless that construction is unreasonable, in which case the intention of the parties determines which warranty is dominant. In ascertaining that intention, the following rules apply [*Com. Code* § 2317]:

- Exact or technical specifications displace an inconsistent sample or model or general language of description.
- A sample from an existing bulk displaces inconsistent general language of description.
- Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

[j] Consumer Product Warranty Statutes

Both California and the federal government have enacted consumer product warranty laws to protect the buying public. The federal law is the Magnuson-Moss Consumer Warranty Act [15 U.S.C. § 2301 *et seq.*; see 16 C.F.R. §§ 700.1-703.8 (implementing regulations)], discussed under [k], *below*. The California law is the Song-Beverly Consumer Warranty Act [Civ. Code § 1790 *et seq.*], discussed under [l], *below*.

[k] Federal Consumer Warranty Statute**[i] Warranty Requirement; Minimum Standards**

Under the Magnuson-Moss Consumer Warranty Act [*see* 15 U.S.C. § 2301 *et seq.*], there is no requirement that a warranty be given with respect to a consumer product. However, when a warranty is actually offered to a consumer, the warranty and certain services connected with it must meet certain specifications [*see, e.g.,* 15 U.S.C. § 2304 (minimum federal standard for written warranties)]. For discussion of the requirements of the Act applicable to express warranties, see § 52.128 P 7. For discussion of the requirements applicable to implied warranties, see § 52.129 P 4.

[ii] Written Warranties

The Magnuson-Moss Act provides two definitions of the term "written warranty":

- First, a "written warranty" is any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to the buyer that relates to the nature of the material or workmanship and affirms or promises that the item is free of defects or will meet a specified level of performance over a specified period of time.
- Second, a "written warranty" is an undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to the product if it fails to meet the specifications set forth in the undertaking.

Either type of warranty becomes part of the basis of the bargain between a supplier and buyer for purposes other than resale of the product [15 U.S.C. § 2301(6); *see, e.g., Milicevic v. Fletcher Jones Imports, Ltd.* (2005) 402 F.3d 912, 914 (purchaser of automobile sued auto dealer and manufacturer for breach of written warranty under Act)]. To be "part of the basis of the bargain," a written warranty must be conveyed at the time of the sale of the consumer product, and the consumer must not give any consideration beyond the purchase price of the consumer product [16 C.F.R. § 700.11(b)]. An agreement that fails to qualify as a written warranty only because it is not part of the basis of the bargain is a service contract [*see* [viii], *below*].

[iii] Implied Warranties

An "implied warranty" under the Magnuson-Moss Act is one arising under state law in connection with the sale by the supplier of the consumer product [15 U.S.C. § 2301(7)]. The Act does not create any new implied warranties, but does modify local law by prohibiting warrantors from disclaiming implied warranties and restricting their right to limit the duration of an implied warranty [15 U.S.C. § 2308].

[iv] Non-Warranties

Warranties should be distinguished from statements or representations which are similar to expressions of general policy concerning customer satisfaction and which are not subject to specific limitations. These matters are not subject to the disclosure or warranty content provisions of the federal warranty law [15 U.S.C. § 2303(b)].

[v] Disclosure of Terms and Conditions of Warranty

Any written warranty for a consumer product actually costing the consumer more than \$15 must clearly and conspicuously disclose in a single document, in simple and readily understood language, all of the following [16 C.F.R. § 701.3(a); *see* 15 U.S.C. § 2302(a) (disclosures FTC may require to be included in warranties for consumer goods actually costing consumer more than \$5)]:

- The identity of the parties to whom the written warranty is extended, if the enforceability of the written warranty is limited to the original consumer purchaser or is otherwise limited to persons other than every consumer owner during the term of the warranty.
- A clear description and identification of products, parts, characteristics, components, or properties covered by, and where necessary for clarification, excluded from, the warranty.
- A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with the written warranty, including the items or services the warrantor will pay for or provide, and when necessary for clarification, those that the warrantor will not pay for or provide.
- The point in time or event on which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration.
- A step-by-step explanation of the procedure that the consumer should follow to obtain performance of any warranty obligation, including the persons or class of persons authorized to perform warranty obligations. This includes the name of the warrantor, the mailing address of the warrantor, and/or the name or title and the address of any employee or department of the warrantor responsible for the performance of warranty obligations, and/or a telephone number that consumers may use without charge to obtain information on warranty performance.
- Information concerning the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with 16 C.F.R. Part 703.
- Any limitations on the duration of implied warranties, disclosed on the face of the warranty as provided in 15 U.S.C. § 2308, accompanied by the following statement: "Some States do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you."
- Any exclusions of or limitations on relief such as incidental or consequential damages, accompanied by the following statement, which may be combined with the required statement in the preceding item, above: "Some States do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you."
- A statement in the following language: "This warranty gives you specific legal rights, and you may also have other rights which vary from State to State."

In general, the seller or warrantor of a consumer product with a written warranty, actually costing the consumer more than \$15, must make the text of the warranty available for examination by the prospective buyer before purchase [16 C.F.R. § 702.3(a), (b)]. The FTC will not prescribe durations of warranties, although some adjustments may be allowed for tolling warranty periods during times of product dysfunction [15 U.S.C. § 2302(b)].

Warrantors may not require that consumers pay for prescribed trade name products to use in association with the guaranteed product unless the FTC is first satisfied that the warranted product will function properly only if the identified article or service is used [15 U.S.C. § 2302(c)]. A warrantor may not condition the continued validity of a warranty on the use of only authorized repair service and/or authorized replacement parts for non-warranty service and maintenance. However, a warrantor may exclude itself from or deny liability for defects or damage caused by "unauthorized" articles or service [16 C.F.R. § 700.10(c)].

Under a limited warranty that provides only for replacement of defective parts and no portion of labor charges, the warrantor may not require that the consumer use only labor identified by the warrantor to install the parts. A warrantor

or its representative may not provide parts under the warranty in a manner that impedes the consumer's choice in deciding who will install the parts [16 C.F.R. § 700.10(b)].

[vi] "Full" or "Limited" Warranties

Warranted products costing more than \$10 [15 U.S.C. § 2303(d)] must in all relevant instances be clearly and conspicuously labeled as carrying either a "full _____ (term, e.g., 10-year) warranty," or a "limited warranty." The full warranty is one that meets the federal minimum standards [15 U.S.C. § 2303(a)]. However, the FTC may determine when the label need not be applied [15 U.S.C. § 2303(c)]. For a warranty to qualify as a full warranty, the warrantor must do all of the following [15 U.S.C. § 2304(a)]:

- Remedy the product within a reasonable time and without charge.
- Not impose time limits on the warranty.
- Unless conspicuously noting otherwise, not limit consequential damages for breach of warranty.
- Allow the customer to elect a refund or free replacement after failure of a reasonable number of repair attempts.

Normally the consumer need only notify the warrantor of the problem or defective condition of the product to obtain warranty care. The warrantor is entitled to show that the defect complained of resulted from unreasonable use or improper care [15 U.S.C. § 2304(c), (d)].

A consumer product may carry both full and limited warranties when they are clearly and conspicuously distinguished [15 U.S.C. § 2305].

[vii] Disclaimer or Modification of Implied Warranties

A supplier may not disclaim or modify an implied warranty if it either makes a written warranty to the consumer on the product or either at the time of sale or within 90 days thereafter enters into a service contract with the consumer as to the product. However, an implied warranty may be limited to the time period of the written warranty if the latter is of reasonable duration and the limitation is conscionable and set forth in clear and unmistakable language, and if it is prominently displayed on the face of the warranty [15 U.S.C. § 2308]. However, the latter limitation is available as a practical matter only in the case of limited warranties [see 15 U.S.C. § 2304(a)(2)].

[viii] Service Contracts; Representatives of Warrantors

A supplier or warrantor may enter into a service contract with the consumer in addition to or in lieu of a written warranty, but the contract must fully, clearly, and conspicuously disclose its terms and conditions in simple and readily understood language [15 U.S.C. § 2306(b)]. The FTC may undertake to spell out the requirements of service contract conditions [15 U.S.C. § 2306(a)].

An agreement that would be a written warranty except that it is not "part of the basis of the bargain" [see [ii], above; see also [c], above] is a service contract. For example, an otherwise qualified agreement that calls for a consideration in addition to the purchase price is a service contract [16 C.F.R. § 700.11(c)]. While warrantors may designate representatives to perform duties under warranties, they may not be relieved of their direct responsibilities to the consumer, nor may they make the representative a co-warrantor [15 U.S.C. § 2307].

[ix] Resolving Disputes

The Act contains detailed provisions for resolving disputes. Warrantors are formally encouraged to establish informal settlement mechanisms [15 U.S.C. § 2310(a)(1)], and the FTC has set minimum standards [see 16 C.F.R. §§ 703.1-703.8] for settlement mechanisms that are incorporated into written warranties governed by the Act [15 U.S.C. § 2310(a)(2)]. Detailed provisions for individual or class actions are set forth in the Act [15 U.S.C. § 2310(d)], although consumers may not be able to bring a civil action without first having tried the approved settlement procedures provided for in the warranty [15 U.S.C. § 2310(a)(3)].

[x] Preemption of State Law

In general, the Magnuson-Moss Consumer Warranty Act does not invalidate or restrict any right or remedy of a consumer under state or federal law [15 U.S.C. § 2311(b)(1)]. However, state laws that are in conflict with 15 U.S.C. §§ 2302-2304 do not apply to written warranties that are in compliance with the requirements of those sections [15 U.S.C. § 2311(c)(1)], but the FTC will allow state law to apply when the state law affords greater protection to the consumer without unduly burdening interstate commerce [15 U.S.C. § 2311(c)(2)].

[l] California Consumer Warranty Statute

The Song-Beverly Consumer Warranty Act [Civ. Code § 1790 et seq.] applies to sales of new and used consumer goods [Civ. Code §§ 1791(a), 1795.5]. This Act, coupled with the Magnuson-Moss Consumer Warranty Act [15 U.S.C. § 2301 et seq.; see [k], above], affords maximum protection to the consumer. For a discussion of the requirements of the Song-Beverly Consumer Warranty Act applicable to express and implied warranties, see § 52.128 P 6 and § 52.129 P 3. The Act also affects service and repair responsibilities, and requires the inclusion of specific language in work orders and repair invoices for warranty repairs [Civ. Code §§ 1793.1, 1793.2, 1794.4; see Ch. 92, Service Contracts, § 92.50 et seq.].

The Song-Beverly Act specifically allows the creation of express warranties, but provides that those warranties may not limit, modify, or disclaim the implied warranties that are guaranteed by the Act to purchasers of consumer goods [Civ. Code § 1793]. Express warranties must be fully set forth in simple, readily understood language, and must clearly identify the party making the warranties (that is, whether the express warranty is made by the manufacturer, the distributor, or the retailer) [Civ. Code § 1793.1(a)(1)]. Unless disclaimed in the prescribed manner, consumer goods sold at retail in California must be accompanied by the manufacturer's and retail seller's implied warranty that the goods are merchantable [Civ. Code §§ 1792, 1792.4; see Com. Code § 2314(2) ("merchantable goods" defined); see also § 52.129 P 1(a)]. In addition, every retail sale of consumer goods in California by a manufacturer who has reason to know at the time of the sale that the goods are required for a particular purpose and that the buyer is relying on the manufacturer's skill or judgment to select or furnish suitable goods must be accompanied by the manufacturer's implied warranty of fitness for that purpose [Civ. Code § 1792.1]. A similar requirement is applicable to retailers and distributors [see Civ. Code § 1792.2]. No implied warranty of merchantability or (when applicable) fitness may be waived, except in the case of a sale on an "as is" or "with all faults" basis [Civ. Code § 1792.3; see Civ. Code § 1792.4; see also § 52.296].

Further, if a manufacturer, distributor, or retailer provides a warranty or product registration card or form (or electronic online warranty or registration card) to be completed and returned by buyer, that card or form must inform the buyer that it is for product registration and that failure to return card does not diminish buyer's warranty rights [see Civ. Code § 1973.1(a)].

Nothing in the Song-Beverly Act prevents the sale of service contracts to buyers in addition to or in lieu of express warranties if the terms, conditions, and exclusions are fully and conspicuously disclosed in simple and readily understood language [Civ. Code § 1794.4(a) (not applicable to home protection contracts)]. Specific provisions must be included in the service contract [see Civ. Code § 1794.4(c)].

A special provision applicable to vehicle manufacturers [see *Veh. Code* § 672(a) (definition of "vehicle manufacturer")] who alter new vehicles into housecars requires that those manufacturers assume, in addition to any new product warranty, any warranty responsibility of the original vehicle manufacturer for any and all components of the finished product which are, by virtue of any act of the alterer, no longer covered by the warranty issued by the original vehicle manufacturer [*Civ. Code* § 1793.05]. For discussion of specific Song-Beverly Act provisions concerning motor vehicles, see *Ch. 92, Service Contracts*, § 92.50 et seq.

[m] Preemption by Federal Drug and Medical Device Laws

If a prescription or over-the-counter drug has been approved by the FDA, state warranty claims regarding it are preempted by the Food & Drug Modernization Act of 1997 [21 U.S.C. § 379r(a)], even claims that the statements on the label are no longer true and the product is no longer effective because the parasites the drug was intended to treat have become resistant since FDA approval [*Kanter v. Warner-Lambert Co. (2002) 99 Cal. App. 4th 780, 797, 122 Cal. Rptr. 2d 72*] . Similarly, no claim for such a drug can be stated under the Magnuson-Moss Warranty Act (15 U.S.C. § 2301 et seq.), because Magnuson-Moss is expressly inapplicable to any written warranty the making or content of which is otherwise governed by another federal law [15 U.S.C. § 2311(d)] and by definition, drugs, devices, and cosmetics are not consumer products within the meaning of Magnuson-Moss [*Kanter v. Warner-Lambert Co. (2002) 99 Cal. App. 4th 780, 797-798, 122 Cal. Rptr. 2d 72*] .

A medical device that has received premarket approval from the FDA in accordance with the Medical Device Amendments (1976) to the Food, Drug and Cosmetic Act is insulated from state law claims because approval indicates the device had been shown to be safe and effective for use as recommended in the submitted label [21 U.S.C. § 360k(a); see *Steele v. Collagen Corp. (1997) 54 Cal. App. 4th 1474, 1480, 63 Cal. Rptr. 2d 879*] .

[2] FORM

Express Warranties and Disclaimers

Express Written "Full Warranty"

This _____ [describe product or part] is warranted as follows: _____ [elements, terms, and conditions of warranty in words that would not mislead a reasonable average consumer as to its nature and scope].

[Add if some characteristics of product or part not covered by warranty:]

The characteristics or properties of the [product or part(s)] not covered by this warranty are as follows:
_____ [description].

[Add if warranty is subject to exclusions or exceptions:]

The exceptions and exclusions from the terms of this warranty are as follows: _____ [set forth exceptions or exclusions].

[Continue with the following:]

This warranty is extended by _____ [names and addresses of warrantors] to _____ [identity of parties to whom warranty is extended, e.g., the original consumer purchaser and any other person to whom the _____ (product or part) is transferred during the duration of the warranty]. This warranty takes effect on _____ [the date of purchase or other effective date] and is effective until _____ [date warranty period ends].

In the event of a defect, malfunction, or failure to conform with this warranty, the warrantor will _____
 [statement of what will be done, e.g., repair or replace the goods] without charge within _____
 [reasonable time within which the obligation will be performed]. [Add if applicable: The warrantor will not pay for the
 following items or provide the following services: _____.] If the warrantor cannot replace the goods
 and repair either is not commercially practicable or cannot be made within _____ [specify time], the
 warrantor will refund the purchase price. In order to make a claim under this warranty, the consumer must
 _____ [describe what must be done, e.g., notify _____ (the warrantor or the
 warrantor's representative or the warrantor or its representative) of the failure of the goods to conform to the warranty].
 In order to obtain performance of any obligation under this warranty, the consumer must _____ [set
 forth step-by-step procedure, including identification of any person or class of persons authorized to perform the
 warranty obligation, name and address of warrantor, name or title and address of employee or department responsible
 for performance of warranty obligation, and toll-free telephone number consumers may use to obtain information on
 warranty performance].

The consumer will have the following remedies: _____ [set forth a brief, general description of the
 legal remedies without excluding or limiting consequential damages unless that exclusion or limitation is clearly stated
 in the warranty].

[Add if an informal dispute settlement procedure is available to consumer:]

The following informal dispute settlement procedure is available to the consumer: _____ [provide
 informal dispute settlement procedure in compliance with 16 C.F.R. §§ 703.1-703.8]. This informal procedure [if
 warranty is one for sale of consumer goods: must otherwise: must or need not] be resorted to before the consumer
 pursues any legal remedies in the courts.

[Add if there are any limitations on duration of implied warranties:]

[Set forth text of limitation on duration of implied warranty].

Some States do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to
 you.

[Add if there are any exclusions or limitations on relief such as incidental or consequential damages:]

[Set forth text of exclusion or limitation on relief].

Some States do not allow exclusion or limitation of incidental or consequential damages, so the above limitation or
 exclusion may not apply to you.

[Continue with the following:]

This warranty gives you specific legal rights, and you may also have other rights which vary from State to State.

[OR]

Seller warrants that _____ [specify, e.g., the paint has been treated for mildew resistance].

[OR]

Seller warrants that the goods will conform in quality to the sample previously submitted to Buyer.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection Magnuson-Moss Warranty Act General Overview Commercial Law
(UCC) Sales (Article 2) Warranties General Overview Commercial Law (UCC) Sales (Article 2) Warranties Exclusion &
Modification Commercial Law (UCC) Sales (Article 2) Warranties Express Warranties



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 52 SALES OF GOODS UNDER THE UNIFORM COMMERCIAL CODE
PART IV. FORMS
B. Alternative and Optional Clauses
5. Warranties

21-52 California Legal Forms--Transaction Guide § 52.291

§ 52.291 Express Warranties With Disclaimers

[1] Comment--Use of Form

This form consists of express warranties with disclaimers. Each of the four alternative provisions offers an express warranty while disclaiming any other express warranties. The seller must realize, however, that he or she cannot extend and then disclaim express warranties. The seller cannot warrant in one clause of the contract that the material is fit for use in the manufacture of shirts, and then in a later clause disclaim all express warranties. *Com. Code § 2316(1)* provides that a disclaimer is inoperative to the extent it cannot be construed as consistent with an express warranty. This statutory provision is meant to deal with sales contract clauses that seek to exclude "all warranties, express or implied," and to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when it is inconsistent with language of express warranty [*Com. Code § 2316, comment 1*]. Thus a specific bargained-for disclaimer that is not unexpected should be effective [*see Forms & Procedures Under the UCC, Article 2, Sales, § 22.33[3]* (Matthew Bender)].

The first alternative in this form leaves the express warranty to be filled in, while disclaiming any warranties by description, sample, or model, or any other express warranties except the one given. This provision is for that rare case in which the buyer will agree that he or she is not even entitled to a warranty that the goods will be as described. Indiscriminate use of this broad disclaimer is unwise. If it is used when the buyer would normally expect the description to be a warranty, the court will probably hold the disclaimer to be inoperative under either *Civ. Code § 1670.5* [*see Civ. Code § 1670.5* (court may deny or limit enforcement of contract found to be unconscionable as a matter of law); *see also § 52.295[1][d]*] or *Com. Code § 2316(1)*.

Each of the other three alternatives provides a specific express warranty while disclaiming all others. The warranties provided are that the goods are as described; that the goods are free from defects in workmanship or materials for a set time; or that the goods will be basically as described, but the seller may modify certain details. In each case, it is important to use one of these provisions only when it is bargained for and fits the facts of the transaction [*see Com. Code § 2316, comment 1*].

For discussion of express warranties, see § 52.290[1]. For disclaimers of express warranties not accompanied by the giving of an express warranty, see § 52.292. For disclaimers of implied warranties when express warranties are given in the sale of nonconsumer goods, see § 52.293. For disclaimers of implied warranties, see § 52.295.

[2] FORM

Express Warranties With Disclaimers

Express Warranties With Disclaimers

Any description of the goods contained in this contract is for the sole purpose of identifying them, is not part of the basis of the bargain, and does not constitute a warranty that the goods will conform to that description. The use of any sample or model in connection with this contract is for illustrative purposes only, is not part of the basis of the bargain, and is not to be construed as a warranty that the goods will conform to the sample or model. No affirmation of fact or promise made by Seller, whether or not in this contract, will constitute a warranty that the goods will conform to the affirmation or promise [except that Seller does expressly warrant that _____ (*include any warranties given by seller*)].

[OR]

Seller warrants that the goods are as described in this contract, but no other express warranty is made concerning the goods. If any model or sample was shown to Buyer, that model or sample was used merely to illustrate the general type and quality of the goods and not to represent that the goods would necessarily be of that type or nature.

[OR]

The goods sold under this contract are warranted to be free from defects in workmanship and materials for _____ [*e.g.*, 90] days. No other express warranty is given and no affirmation of Seller, by words or action, will constitute a warranty.

[OR]

Seller agrees that the goods will be basically as described in this contract. However, Seller retains the right to modify or change the composition, design, color, and appearance of the goods if in Seller's judgment this is advisable. There are no express warranties other than those contained in this contract, and all representations or affirmations made were for illustrative purposes only.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesExclusion & ModificationCommercial Law (UCC)Sales (Article 2)WarrantiesExpress Warranties



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5. Warranties

21-52 California Legal Forms--Transaction Guide § 52.292

§ 52.292 Disclaimers of Express Warranties

[1] Comment

[a] Use of Form

This form contains two alternative clauses for the disclaimer of express warranties. It is to be used only to disclaim express warranties. To make one or more express warranties while disclaiming other express warranties, see § 52.291. To provide in a sale of goods other than consumer goods that the express warranty dominates any implied warranties, see § 52.293. To disclaim implied warranties, see § 52.295.

[b] Inconsistent Disclaimers

A disclaimer that conflicts with words or conduct that tend to create an express warranty is inoperative to the extent that it is unreasonable to construe the two as consistent [*Com. Code § 2316(1)*]. For further discussion of this statutory provision and its implications for disclaimers, see § 52.291[1].

[c] Implied Warranties

Both seller and buyer must be aware of warranties that will be implied by law-the seller, to disclaim those not bargained for; the buyer, to evaluate what he or she is giving up if he or she accepts a disclaimer. For a detailed discussion of implied warranties, see §§ 52.294[1] and 52.295[1].

[2] FORM

Disclaimers of Express Warranties

Disclaimers

No agent, employee, or representative of Seller has any authority to bind Seller to any affirmation, representation, or

warranty concerning the goods sold under this contract, and unless an affirmation, representation, or warranty made by an agent, employee, or representative is specifically included within this contract, it will not be enforceable by Buyer.

[OR]

It is the intent of the parties to provide in this contract an effective disclaimer of all express warranties with respect to the goods sold under this contract. Both parties are represented by competent counsel and have reduced the entire agreement of the parties to this writing. No statement of fact, promise, representation, affirmation, or other indication has been made with respect to the quality of the goods other than those which appear in this written contract. The description of the goods contained in this contract is the sole basis for the agreement of the parties, and no statements or representations other than those embodied herein have been made or relied on. Any sample or model that has been referred to in this contract was not intended as a basis for this contract and Buyer acknowledges that the model or sample was used for the purposes of approximate illustration only and that no reliance was placed on it in arriving at the terms of this contract. It is agreed that any opinions or statements of Seller as to the value or quality of the goods sold under this contract do not form a basis for this contract, and unless the statements or opinions are specifically embodied in this writing, they do not, in any way, constitute a warranty. Any modification of this contract that relates in any way to a warranty must be in writing and signed by Seller; otherwise the purported modification will be null and void.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesExclusion & ModificationCommercial Law (UCC)Sales (Article 2)WarrantiesExpress Warranties



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21-52 California Legal Forms--Transaction Guide § 52.293

§ 52.293 Clauses Providing for the Dominance of an Express Warranty in a Sale of Nonconsumer Goods

[1] Comment

[a] Use of Form

This form consists of five alternative clauses providing for the dominance of express warranties in a sale of nonconsumer goods. The use of this form must be limited to nonconsumer goods because of the state and federal consumer warranty statutes [*see* [b], *below*]. By saying that the express warranty dominates, it is meant that an express warranty is provided while implied warranties, and in some cases all other express warranties, are disclaimed. The language disclaiming implied warranties in these alternatives is shown in all capitals or in all capitals and boldface because language disclaiming implied warranties of merchantability or fitness must be "conspicuous" [*Com. Code* § 2316(2); *see* [c], *below*].

Each of the alternatives in this form disclaims the implied warranties of fitness and merchantability [*see Com. Code* § 2314 (merchantability); *Com. Code* § 2315 (fitness for purpose); *see also* § 52.294[1][b], [e]]. The main difference between the alternatives is the nature of the express warranty provided and the language of disclaimer, if any, for express warranties other than the one stated. Thus, for example, the first alternative provides that the goods will be free from defects in workmanship or materials and that the seller warrants only that he or she will repair or replace nonconforming goods. The second states that the warranty is on the reverse side of the agreement and that it is the exclusive and only warranty on the contract goods. For this alternative and the third, which provides for replacement and repair in accord with the stated warranty, it will be necessary to consult the express warranty alternatives in § 52.290[2] and the express warranty disclaimers in § 52.291[2] to see if any of the warranties stated fit the facts of the transaction or can serve as a model. Alternatives two through four disclaim all other warranties, including express warranties. The attorney or other drafter must remember that a disclaimer that conflicts with words or conduct that tend to create an express warranty is inoperative to the extent that it is unreasonable to construe the two as consistent [*Com. Code* § 2316(1)]. For further discussion of this statutory provision and its implications for disclaimers, *see* § 52.291[1].

[b] Consumer Warranty Statutes

Consumer product warranties are regulated by the federal government under the Magnuson-Moss Consumer Warranty Act [*see* 15 U.S.C. § 2301 *et seq.*; *see also* § 52.290[1][j]] and by California under the Song-Beverly Consumer Warranty Act [*see* Civ. Code § 1790 *et seq.*; *see also* § 52.290[1][l]]. The California statute forbids the disclaimer of the implied warranties provided under the Act, except in a sale "as is" or "with all faults" [Civ. Code §§ 1792.3, 1793]. The federal statute prohibits the disclaimer of implied warranties if the supplier has made any written warranty [*see* 15 U.S.C. § 2301(6) ("written warranty" defined); *see also* § 52.290[1][k][ii]] on the same consumer product or enters into a service contract on that product within 90 days of the sale [15 U.S.C. § 2308(a)].

[c] "Conspicuous" Defined

A term or clause is "conspicuous" when it is written, displayed, or presented so that a reasonable person against whom it is to operate ought to notice it [Com. Code § 1201(b)(10)]. Conspicuous terms include (1) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color compared to the surrounding text of the same or lesser size, and (2) language in the body of a record or a display in larger type than the surrounding text, or in contrasting type, font, or color compared to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language [Com. Code § 1201(b)(10)(A), (B)]. Whether a term is conspicuous is a decision for the court [Com. Code § 1201(b)(10)], because subjecting conspicuousness to fact-finding would introduce too much uncertainty into the drafting process [*In re Bassett* (9th Cir. 2002) 285 F.3d 882, 885].

A term is not necessarily conspicuous because it is in capitals. It is entirely possible for text to be conspicuous without being in capitals [*In re Bassett* (9th Cir. 2002) 285 F.3d 882, 886]. Conversely, a term in capitals can still be inconspicuous if it is hidden on the back of a contract in small type [*see, e.g., Sierra Diesel Injection Service, Inc. v. Burroughs Corp.* (9th Cir. 1989) 890 F.2d 108, 114 (warranty exclusions in 7 point type and not bold face)], if it is in hard-to-read type, or buried deep in a long paragraph that is all in capitals. Formatting matters, but conspicuousness ultimately turns on the likelihood that a reasonable person would actually see a term in an agreement. Brevity promotes conspicuousness [*In re Bassett* (9th Cir. 2002) 285 F.3d 882, 886-887]. In *In re Bassett*, the term at issue was on the first page of a two page agreement, the second page of which was an attorney's statement. Roughly the top three-fourths of the first page contained blanks to be filled in to identify the transaction. The term in question was the first sentence following those blanks. There were only three sentences in the agreement. The last one, the one directly above the buyer's signature was in capitals. The fact that nearby language was in capitals and the term in question was not did not render that term inconspicuous [*In re Bassett* (9th Cir. 2002) 285 F.3d 882, 885-887].

[2] FORM

Clauses Providing for the Dominance of an Express Warranty in a Sale of Nonconsumer Goods

Dominance of Express Warranty

Seller warrants that the goods sold under this contract will be free from defects in material and workmanship for a period of _____ months, and this warranty will be limited to the repair and replacement of parts and the necessary labor and services required to repair the goods. **IT IS EXPRESSLY AGREED THAT THIS WARRANTY WILL BE IN LIEU OF ALL WARRANTIES OF FITNESS AND IN LIEU OF THE WARRANTY OF MERCHANTABILITY.**

[OR]

The warranty of Seller appears on the reverse side of this contract, and it is agreed that this warranty is the exclusive and only warranty to pass with the goods under this contract and **THAT WARRANTY IS IN PLACE AND LIEU OF**

ALL WARRANTIES OF MERCHANTABILITY AND FITNESS.

[OR]

It is the intent of the parties to this contract to fully and completely state the rights and obligations of the parties in this contract, and Seller has specifically set forth in this contract the extent and nature of the warranty on the goods to be sold. Therefore, it is expressly agreed that the liability of Seller will be limited to the replacement and repair of the goods in accord with the stated warranty, and there are no other warranties or representations with respect to the nature and quality of the goods. Any other warranty is agreed to be inconsistent with the stated warranty, and it is the intent of the parties to specifically **DISCLAIM THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS.**

[OR]

It is agreed that although Buyer has been shown a sample from the stock of Seller, Seller warrants that the goods sold under this contract will comply with the description of the goods contained in this contract, even though the description may be deemed general language. It is the intent of the parties to rely on the description of the goods contained in this contract rather than rely on the sample, and therefore there are no other warranties other than those appearing in writing in this contract, **INCLUDING THE WARRANTIES OF FITNESS AND MERCHANTABILITY**, and it is agreed that any other purported warranties, express or implied, will be deemed inconsistent with Seller's warranty by description in this contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection Magnuson-Moss Warranty Act General Overview Commercial Law (UCC) Sales (Article 2) Warranties General Overview Commercial Law (UCC) Sales (Article 2) Warranties Express Warranties Commercial Law (UCC) Sales (Article 2) Warranties Warranty Cumulation & Conflict



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DIVISION III: COMMERCIAL TRANSACTIONS
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21-52 California Legal Forms--Transaction Guide § 52.294

§ 52.294 Implied Warranties Made Express

[1] Comment

[a] Use of Form

The alternatives in this form are clauses that make implied warranties express. These clauses reflect what the Commercial Code would provide in the absence of agreement. It is prudent for the parties to state warranties on which they are relying, both to provide notice and to avoid problems of proof, such as the chance that they will be contradicted by parol evidence [see § 52.354[1]]. As in any drafting of documents to which the Commercial Code applies, the attorney must study the applicable provisions in order to be familiar with the warranties that would be implied in the absence of a contrary agreement.

[b] Implied Warranties In General

Both seller and buyer must be aware of warranties that will be implied by law into the sale-the seller so that he or she may disclaim those not bargained for; the buyer to evaluate what is being given up if he or she accepts a disclaimer. For a discussion of disclaimers of implied warranties and a selection of disclaimer clauses, see § 52.295. The creation of implied warranties is governed by *Com. Code* §§ 2314 and 2315.

[c] Merchantability

A warranty that the goods will be merchantable is implied, unless duly excluded or modified [see *Com. Code* § 2316; see also § 52.295[1]], in a contract for their sale, if the seller is a merchant with respect to goods of that kind [*Com. Code* § 2314(1)]. For a discussion of merchantability [see *Com. Code* § 2314(2) (definition)], see § 52.129 P 1(a).

[d] Course of Dealing or Usage of Trade

Course of dealing or usage of trade [see § 52.15[2]] may create implied warranties [*Com. Code* § 2314(3)] unless those

warranties are duly excluded or modified [*see Com. Code § 2316; see also § 52.295[1]*]. A typical example of this situation is the obligation to provide pedigree papers in the sale of a pedigreed animal [*Com. Code § 2314, UCC comment 12*].

[e] Fitness for Purpose

When the seller at the time of contracting has reason to know any particular purpose for which the goods are required, and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless duly excluded or modified [*see Com. Code § 2316; see also § 52.295[1]*], an implied warranty that the goods will be fit for that purpose [*Com. Code § 2315*].

[2] FORM

Implied Warranties Made Express

Implied Warranties Made Express

Seller warrants that the goods are merchantable in accordance with *Commercial Code Section 2314*.

[OR]

Seller is aware that Buyer is purchasing these goods for use _____ [*specify, e.g., in the manufacturing of permanent press shirts*], and that Buyer is relying on Seller's warranty that the goods are fit for this purpose.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesExpress WarrantiesCommercial Law (UCC)Sales (Article 2)WarrantiesFitnessCommercial Law (UCC)Sales (Article 2)WarrantiesMerchantability



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21-52 California Legal Forms--Transaction Guide § 52.295

§ 52.295 Disclaimer of Implied Warranties

[1] Comment

[a] Use of Form

The alternatives in this form are clauses that disclaim implied warranties. For a discussion of implied warranties, see § 52.294[1][b]. For a discussion of sales "as is" or "with all faults," see § 52.296[1].

[b] Written Disclaimers

Implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyers' attention to the exclusion of warranties and makes plain that there is no implied warranty [Com. Code § 2316(3)(a); see § 52.296]. In addition to this type of exclusion, to exclude or modify the implied warranty of merchantability or any part of it, the language must mention merchantability, and, if the disclaimer is in writing, the language must be conspicuous. To exclude or modify any implied warranty of fitness, the exclusion must be in writing and must be conspicuous [Com. Code § 2316(2); see Com. Code § 1201(b)(10) ("conspicuous" defined); see also discussion in § 52.293[1][c]]. Language to exclude all implied warranties of fitness is sufficient if it states, for example: "There are no warranties that extend beyond the description on the face hereof" [Com. Code § 2316(2)].

[c] Disclaimer by Conduct, Including Course of Dealing, Course of Performance, or Usage of Trade

Implied warranties may also be excluded by conduct. When the buyer before entering into the contract has examined the goods or the sample or model as fully as he or she desires or has refused to examine the goods, there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed to the buyer [Com. Code § 2316(3)(b); e.g., *Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp.* (2007) 148 Cal. App. 4th 937, 952, 56 Cal. Rptr. 3d 177 (substantial evidence supported trial court's finding that abrasiveness of oil-seal lips was not defect that buyer ought to have discovered)]. This exclusion of implied warranties by examination or for refusal to examine has four aspects that need to be stressed. First, the examination or refusal to examine must occur before the buyer enters

into the contract. Second, the examination must be as full and thorough as the buyer wants it to be [*Com. Code* § 2316(3)(b)]. Third, before there can be a refusal to examine there must be a demand by the seller that the buyer examine the goods. It is not enough that the goods are available for inspection. The demand serves to put the buyer on notice that he or she is assuming the risk of any defects that the examination ought to reveal [*Com. Code* § 2316, *UCC* comment 8]. Fourth, the examination or the refusal to examine excludes implied warranties only as to those defects that the examination ought to have revealed to the buyer under the circumstances [*Com. Code* § 2316(3)(b)].

An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade [*Com. Code* § 2316(3)(c)]. For a definition and discussion of "course of performance," "course of dealing," and "usage of trade," [see *Com. Code* §§ 1303, 2202], see § 52.15[2].

[d] Unconscionability

Although the California Legislature did not adopt UCC § 2-302 (on unconscionability) as part of the California Commercial Code, an unconscionable disclaimer of express and implied warranties may be denied enforcement despite technical compliance with the requirements of *Com. Code* § 2316 [*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal. App. 3d 473, 483-485, 186 Cal. Rptr. 114 ; see *Civ. Code* § 1670.5 (applying unconscionability provisions like those in UCC § 2-302 to contracts in general)].

[2] FORM

Disclaimer of Implied Warranties

Disclaimer of Implied Warranties

IT IS SPECIFICALLY AGREED THAT THE GOODS SOLD UNDER THIS CONTRACT ARE SOLD WITHOUT ANY WARRANTY OF MERCHANTABILITY.

[OR]

NO WARRANTY OF MERCHANTABILITY WILL ATTACH TO THE GOODS SOLD UNDER THIS CONTRACT.

[OR]

THE SELLER DOES NOT WARRANT THAT THE GOODS SOLD UNDER THIS CONTRACT ARE MERCHANTABILITY.

[OR]

IT IS AGREED THAT THE INTENT OF THE PARTIES IS TO DISCLAIM ANY WARRANTY OF MERCHANTABILITY WITH RESPECT TO THE SUBJECT GOODS, AND THE BUYER AGREES THAT BUYER WILL ACCEPT THE GOODS WITHOUT ANY WARRANTY OF MERCHANTABILITY.

[OR]

THE SELLER DOES NOT WARRANT THAT THE GOODS ARE MERCHANTABILITY, AND THE BUYER

AGREES TO THIS BY AFFIXING THE BUYER'S INITIALS IN THE MARGIN ALONGSIDE THIS DISCLAIMER.

[OR]

SELLER MAKES NO WARRANTY OF MERCHANTABILITY WITH RESPECT TO THE GOODS SOLD UNDER THIS CONTRACT.

[OR]

SELLER MAKES NO WARRANTY THAT THE GOODS SOLD UNDER THIS CONTRACT ARE FIT FOR ANY PARTICULAR PURPOSE.

[OR]

THERE ARE NO WARRANTIES THAT EXTEND BEYOND THE DESCRIPTION ON THE FACE OF THIS CONTRACT.

Buyer affirms that Buyer has not relied on Seller's skill or judgment to select or furnish goods for any particular purpose, and this sale is made **WITHOUT ANY WARRANTY BY SELLER THAT THE GOODS ARE SUITABLE FOR ANY PARTICULAR PURPOSE.**

[OR]

Buyer affirms that Buyer has had ample opportunity to inspect and examine the model or sample of the goods as fully as Buyer desires, and that Buyer has examined the model or sample and found no defects therein. **NO WARRANTY** is made by Seller except that the goods to be delivered under this contract will be substantially identical with the model or sample inspected.

[OR]

Seller acknowledges receipt of plans and specifications for the goods to be sold under this contract, and Seller warrants that the goods furnished will comply, within the limitations stated below, to the plans and specifications. Seller makes no other warranty, express or implied as to the goods. **THE WARRANTY OF MERCHANTABILITY IS EXPRESSLY EXCLUDED FROM THIS AGREEMENT BY THE PARTIES.**

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsUnconscionable AgreementsCommercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesExclusion & ModificationCommercial Law (UCC)Sales (Article 2)WarrantiesFitnessCommercial Law (UCC)Sales (Article 2)WarrantiesMerchantability



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21-52 California Legal Forms--Transaction Guide § 52.296

§ 52.296 Provisions for Sales "As Is" or "With All Faults"

[1] Comment

[a] Use of Form

This form contains four alternative clauses providing for the sale of goods "as is" or "with all faults." These clauses may be used to disclaim implied warranties [see § 52.295]. Implied warranties are excluded by expressions such as "as is," "with all faults," or other language [see *Com. Code* § 2316, UCC comment 7 (other language includes "as they stand")] which in common understanding calls the buyers' attention to the exclusion of warranties and makes plain that there is no implied warranty [*Com. Code* § 2316(3)(a)]. The words "as is" or "with all faults" should be conspicuous when reduced to writing [see [c], *below*].

[b] Disclaimers in Compliance With Consumer Warranty Statutes

The final two alternatives in this form are intended to be used to disclaim implied warranties as to consumer goods when no express warranties have been given. This is necessary to comply with the Magnuson-Moss Consumer Warranty Act [see 15 U.S.C. § 2301 *et seq.*; see also § 52.290[1][j]], which prohibits the disclaimer of implied warranties on a consumer product [see 15 U.S.C. § 2101(1) ("consumer product" defined)] when the supplier gives a written warranty or enters into a service contract within 90 days of the sale [15 U.S.C. § 2308(a); see § 52.293[1][b]].

The final two alternatives are also designed to comply with the Song-Beverly Consumer Warranty Act [*Civ. Code* § 1790 *et seq.*], which prohibits the waiver of an implied warranty of merchantability or an applicable implied warranty of fitness unless the sale is on an "as is" or "with all faults" basis [*Civ. Code* § 1792.3]. To be effective, the disclaimer must be by means of a conspicuous writing attached to the goods that clearly informs the buyer before sale in simple and concise language of each of the following [*Civ. Code* § 1792.4(a)]:

- The goods are being sold on an "as is" or "with all faults" basis.

- The entire risk as to quality and performance is on the buyer.
- If the goods prove defective after purchase, the buyer alone assumes the entire cost of all necessary servicing or repair.

Because the Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*] requires all of these statements to be conspicuous, the third and fourth alternatives include more language in boldface and all capitals than the other alternatives.

[c] Conspicuous Written Disclaimers

Although *Com. Code § 2316(3)* does not require "as is" or "with all faults" to be conspicuous when written, it has been held that the requirement of conspicuous language for the disclaimer of an implied warranty of merchantability or fitness [*see Com. Code § 2316(2)*; *see also § 52.295[1][b]*] should be read to apply to the writing or printing of "as is" or "with all faults" when used to disclaim these types of warranties [*Osborne v. Genevieve (Fla. App. 1974) 289 So. 2d 21, 23* ; *Gindy Mfg. Corp. v. Cardinale Trucking Corp. (N.J. Super. 1970) 111 N.J. Super. 383, 268 A.2d 345, 350-353*]. For discussion of what constitutes a conspicuous [*see Com. Code § 1201(10)* ("conspicuous" defined)] term or clause of an agreement, see § 52.293[1][c]. The Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*] requires disclaimer by a conspicuous writing attached to the goods [*see [b], above*].

[2] FORM

Provisions for Sales "As Is" or "With All Faults"

Disclaimer of Implied Warranties

The goods sold under this contract are purchased by Buyer **"AS IS."**

[OR]

The goods sold under this contract are purchased by Buyer **"AS IS,"** and **SELLER DOES NOT WARRANT THAT THEY ARE OF MERCHANTABLE QUALITY OR THAT THEY CAN BE USED FOR ANY** particular purpose.

[OR]

[Use one of the following two alternatives when seller intends to disclaim implied warranties of consumer goods and no written warranty has been extended:]

No express warranties are given and no affirmation of Seller, by words or action, will constitute a warranty. The goods being sold pursuant to this contract are being sold on an ["**AS IS**" or "**WITH ALL FAULTS**"] basis. **THE ENTIRE RISK AS TO THE QUALITY AND PERFORMANCE OF THE GOODS IS WITH THE BUYER. SHOULD THE GOODS PROVE DEFECTIVE FOLLOWING THEIR PURCHASE, THE BUYER** and not the manufacturer, distributor, or retailer **ASSUMES THE ENTIRE COST OF ALL NECESSARY SERVICING OR REPAIR.**

[OR]

The [goods sold under this contract or goods being purchased] are being sold on [an "**AS IS**" or a "**WITH ALL**

FAULTS"] basis. THE ENTIRE RISK AS TO THE QUALITY AND PERFORMANCE OF THE GOODS IS WITH THE BUYER. SHOULD THE GOODS PROVE DEFECTIVE FOLLOWING THEIR PURCHASE, THE BUYER and not the manufacturer, distributor, or retailer ASSUMES THE ENTIRE COST OF ALL NECESSARY SERVICING OR REPAIR.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection Magnuson-Moss Warranty Act General Overview Commercial Law (UCC) Sales (Article 2) Warranties Exclusion & Modification Commercial Law (UCC) Sales (Article 2) Warranties Fitness Commercial Law (UCC) Sales (Article 2) Warranties Merchantability



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21-52 California Legal Forms--Transaction Guide § 52.297

§ 52.297 Warranties of Title or Against Infringement

[1] Comment

[a] Use of Form

This form contains clauses that create, disclaim, or limit warranties of title or warranties against infringement. If the parties do not agree on their own warranties or disclaimers, warranties of title [see [b], *below*] and warranties against infringement [see [c], *below*] are governed by *Com. Code § 2312*.

This form includes a warranty of title, a warranty against infringement, and a promise by the buyer to hold the seller harmless against infringement claims arising out of the seller's compliance with specifications furnished by the buyer. Each of these clauses is under its own separate heading and each merely confirms the rights that *Com. Code § 2312* provides to the parties in the absence of agreement.

This form also includes six more clauses, two alternatives under each heading, that vary the effects of *Com. Code § 2312* by agreement. The first two of these alternatives provide that the goods are sold subject to a security interest. This seems like a disclaimer of the warranty of title, but it is not. The warranty of title includes a warranty that the goods are not subject to security interests of which the buyer has no knowledge [see *Com. Code § 2312(1)*; see also [b], *below*]. Recognizing the existence of a security interest in the contract of sale means that the buyer knows about it, and therefore no warranty exists to be disclaimed. There are also alternative disclaimers of both warranties against infringement and warranties of title.

[b] Warranties of Title

In the absence of disclaimer, there is in a contract for sale a warranty that (1) the title conveyed will be good and its transfer rightful; and (2) the goods will be delivered free from any security interest or other lien or encumbrance of which the buyer has no knowledge at the time of contracting [*Com. Code § 2312(1)*]. Rightful transfer of good title means that the buyer will not be subjected to a lawsuit in order to protect the title [*Com. Code § 2312*, UCC comment

1]. For a lien or encumbrance not to be covered by the warranty of good title, the buyer must have actual knowledge of it, not mere notice [*Com. Code* § 2312, comment 1].

The warranty of good title may be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the seller does not claim title or is purporting to sell only whatever right or title the seller or a third person may have [*Com. Code* § 2312(2)]. For example, sales by sheriffs, executors, foreclosing lienors, and those similarly situated are so out of the ordinary commercial course that the limited nature of the rights sold is immediately apparent to the buyer, and no personal obligation is imposed on the seller [*Com. Code* § 2312, comment 5]. The warranty of good title is not designated an implied warranty and may not be disclaimed in the manner of an implied warranty, as, for example, by a sale "as is" or "with all faults" [*Com. Code* § 2312, comment 6; *see also* §§ 52.295 and 52.296].

[c] Warranties Against Infringement

Unless otherwise agreed, a seller who is a merchant regularly dealing in goods of the kind warrants that the goods will be delivered free of the rightful claim of any third person by way of infringement or the like, but a buyer who furnishes specifications to the seller must hold the seller harmless [*see* Ch. 79, *Suretyship, Guaranty and Indemnity*] against any claim that arises out of compliance with these specifications [*Com. Code* § 2312(3)].

A "rightful claim" under *Com. Code* § 2312(3) is not synonymous with a claim that ultimately will prove successful in litigation. Rather, it is a nonfrivolous claim of infringement that has any significant and adverse effect on the buyer's ability to make use of the goods [*Pacific Sunwear of Cal., Inc. v. Olaes Enters., Inc.* (2008) 167 Cal. App. 4th 466, 470, 481, 84 Cal. Rptr. 3d 182] .

[d] Meaning of "Infringement or the Like"

The warranty against infringement is described as a warranty by the seller that the goods will be delivered free of rightful claims of "infringement or the like" [*Com. Code* § 2312(3)]. This raises the questions of (1) what type of infringement is being referred to; and (2) what is "the like."

Com. Code § 2312, comment 3 clarifies the first question somewhat by stating that when the warranty applies it is the seller's duty to see that "no claim of a patent or trademark infringement by a third party will mar the buyer's title." The Commercial Code and comments do not mention copyright infringement. It has been argued that literary property rights are not covered by the warranty against infringement because they are not "goods" [*see Com. Code* § 2105(1) ("goods" defined); *see also* § 52.13[2]]. However, the warranty expressly covers patent and trademark infringement even though patents and trademarks, like literary property rights, are general intangibles [*Com. Code* § 2312, comment 3]. Further, what is being protected (at least with respect to patents and trademarks) is not the intangible interest that may exist in the goods themselves, but rather the possibility that the goods may infringe on similar interests held by third parties [*see Com. Code* § 2312, comment 3]. Accordingly, whether the warranty against infringement protects the buyer of goods from third party claims that the goods infringe on copyrighted materials must be regarded as an open question in the absence of case law to the contrary.

With respect to the second question, there is no indication of what the drafters of the UCC meant by "the like." Perhaps this is merely a cautious legalism, with the drafters qualifying the term "infringement" even though they had nothing specific in mind. In any case, if the parties believe that the goods in their transaction might give rise to a claim similar to infringement that would mar the buyer's title [*see Com. Code* § 2312], then they may include a warranty against that type of claim irrespective of whether or not it is or may be covered by the UCC. For example, the parties may fear that a third party might claim that the sale of the goods was unfair competition [*see* California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*]. Otherwise, the parties should simply provide a warranty against infringement, and leave it at that.

[2] FORM**Warranties of Title or Against Infringement****Warranty of Title**

Seller warrants that _____ [he or she] has title to the goods and that they are not subject to a security interest, lien, or other encumbrance.

[OR]

Warranty Against Infringement

Seller warrants that the goods will be delivered free of the rightful claim of any third person by way of infringement.

[OR]

Buyer's Promise to Hold Seller Harmless for Compliance With Specifications

Buyer, in furnishing specifications to seller, agrees to hold Seller harmless against any claims by way of infringement or the like that arise out of compliance with the specifications.

[OR]

Goods Subject to Security Interest

The goods sold under this contract are subject to a security interest in the amount of \$ _____ held by the _____ Bank. Buyer takes the goods subject to this security interest and agrees to pay the stated indebtedness as it becomes due.

[OR]

The goods sold under this contract are subject to a security interest in the amount of \$ _____ held by _____. Seller will pay this indebtedness as it becomes due and on full payment will obtain a termination statement from the secured party and deliver it to Buyer.

[OR]

Disclaimer of Warranty Against Infringement

Seller makes no warranty that the goods sold under this contract are delivered free of the rightful claim of any third party by way of infringement.

[OR]

As part of this contract for sale, Seller agrees to ascertain whether goods manufactured in accordance with the specifications attached to this contract will give rise to the rightful claim of any third person by way of infringement. Buyer makes no warranty that the production of goods according to the specifications will not give rise to an infringement claim, and in no event will Buyer be liable to Seller for indemnification if Seller is sued on the grounds of infringement. If Seller is of the opinion that no infringement will result, Seller will notify Buyer to this effect in writing within _____ [e.g., two] weeks after the signing of this contract, and if Buyer is subsequently held liable for infringement, Seller will hold Buyer harmless. If Seller ascertains that production of the goods in accordance with the specifications will result in an infringement, this contract will be null and void except that Buyer will pay Seller the reasonable cost of Seller's search for infringements.

[OR]

Disclaimer of Warranty of Title

Seller gives no warranty that Seller has any title whatsoever to the goods or that they are not subject to a security interest, lien, or other encumbrance. *[Add if desired: If the goods are reclaimed by a third party as rightful owner or there exists a security interest, lien, or other encumbrance on the goods, Buyer shall (not) have the right to restitution of the purchase price.]*

[OR]

It is agreed that Seller is acting as an intermediary, and does not have title to the goods sold. Title to the goods is in a third party, _____ [name]. Seller has no knowledge about the title to the goods and makes no representations concerning the title to the goods. Buyer agrees not to bring any action against or seek any remedy from Seller on any questions of title.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesWarranties of Title



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5. Warranties

21-52 California Legal Forms--Transaction Guide §§ 52.298-52.309

[Reserved]

§§ 52.298[Reserved]



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*21-52 California Legal Forms--Transaction Guide § 52.310***§ 52.310 Provisions Requiring Payment by Buyer Before Inspection****[1] Comment****[a] Use of Form**

This form contains alternative provisions requiring the buyer to pay the purchase price before inspecting the goods. In the absence of such a provision, the buyer will have the right to inspect the goods prior to payment or acceptance [*Com. Code § 2513(1)*; *see § 52.311[1]*]. The essence of a contract requiring the buyer to pay before inspection is the intention of the parties to shift to the buyer the risks that would usually be on the seller. The advantage to the seller is obvious--the buyer must pay first and litigate any defects later [*Com. Code § 2512*, comment 1], because nonconformity of the goods does not excuse the buyer from paying before the inspection. The only times the buyer does not need to pay before inspection are (1) when the nonconformity appears without inspection and (2) when, despite tender of the required documents, the circumstances justify injunction against honor under *Com. Code § 5109(b)* (issuer's obligations to customer) [*Com. Code § 2512(1)*].

From the buyer's perspective, there seems to be no possible advantage to such a provision. It would seem that the buyer would accept this type of clause only when the seller enjoys some significant advantage in bargaining power, as, for example, when only the seller makes the article that the buyer needs.

[b] Acceptance; Buyer's Rights and Remedies

Payment prior to inspection does not constitute an acceptance of the goods, nor does it impair any of the buyer's remedies [*Com. Code § 2512(2)*]. The buyer still has the right to reject the goods by revoking his or her acceptance [*see Com. Code § 2608*; *see also § 52.385[1]*] after inspection. The exercise of this right is merely delayed, along with the inspection, until after payment. There is, however, no fast or easy way for the buyer to get back the money paid. This is the main risk assumed by the buyer in agreeing to pay before inspection [*see former Com. Code § 2512*, comment 1 (essence of contract providing for payment before inspection is intent to shift to buyer risks usually borne by seller)].

The parties could, of course, agree that the buyer is entitled to immediate return of the payment if inspection reveals the goods to be nonconforming, but this would still leave the buyer to sue for the money if the seller does not cooperate. The only solution would be to agree to a mechanism that would insure fast return of the payment, such as payment before inspection to a third party with return of the payment to the buyer on his or her demand after inspection. The difficulty is that a provision of this nature leaves the agreement to pay before inspection worthless, and it is hard to see the value to either party of an agreement containing both provisions.

If the buyer knows or suspects that the goods are nonconforming, the buyer may refuse to pay. Although the seller can bring an action for the buyer's breach of the agreement, the suit should be futile if the goods are indeed defective, because the seller will not be able to show any damages. For discussion of the remedies available to a rejecting buyer, see § 52.18[3].

[c] Legal Effect of Contract

The requirements of *Com. Code* § 2512 apply not only when the contract requires payment before inspection by the express agreement of the parties, but also when payment before inspection is required because of the effect in law of the contract. For that reason, *Com. Code* § 2512 should be considered in conjunction with *Com. Code* § 2513(3) [*Com. Code* § 2512, comment 6]. For discussion of *Com. Code* § 2513(3), see § 52.311[1][c].

[2] FORM

Provisions Requiring Payment by Buyer Before Inspection

Buyer to Make Payment Before Inspection

It is agreed that Buyer shall pay the contract price in the manner agreed [above or below], and this payment shall be made prior to any inspection.

[OR]

Payment of the agreed price shall be made at the time of delivery and before inspection by Buyer.

[OR]

Any rights of Buyer with respect to inspection shall be deferred until after payment of the purchase price.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformancePayment Tender



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21-52 California Legal Forms--Transaction Guide § 52.311

§ 52.311 Clauses Providing for Inspection of Goods by Buyer

[1] Comment

[a] Use of Form

This form consists of 12 alternative clauses delineating the buyer's right of inspection prior to payment or acceptance of the goods under *Com. Code § 2513*. Most of these alternatives are fairly specific, and the parties should use the one that best fits the intentions of the parties and the facts of the transaction. If, for example, the parties want to vary the statutory rule that expenses of inspection are to be borne by the buyer [*see Com. Code § 2513(2)*; *see also* [d], *below*], they should use the tenth alternative.

[b] Buyer's Right of Inspection

Unless the parties agree otherwise, and subject to certain exceptions [*see* [c], *below*], when goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect the goods at any reasonable place and time and in any reasonable manner [*Com. Code § 2513(1)*]. If the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival [*Com. Code § 2513(1)*]. The exceptions to buyer's rights to inspect goods before payment or acceptance are documentary sales, C.O.D. deliveries [*Com. Code § 2513(3)*] and certain aspects of C.I.F. deliveries [*Com. Code § 2321(3)*; *see* § 52.254[1]].

[c] Circumstances Under Which Buyer Does Not Have Right of Inspection

When a sales contract contains certain delivery and payment provisions, the buyer loses the right to inspect the goods before payment unless the parties specifically agree otherwise. Absent an agreement to the contrary, the buyer has no right of inspection when the sales contract requires that payment be made against documents of title, except when that payment is due only after the goods are available for inspection [*Com. Code § 2513(3)(b)*]. Likewise, the buyer has no right to inspect goods when the sales contract includes a provision specifying that delivery will be made "C.O.D." or on similar terms [*Com. Code § 2513(3)(a)*]. However, unless the parties agree otherwise, if the contract provides for

delivery of goods "C.I.F." and requires payment on or after arrival of the goods, the seller must allow a preliminary inspection; but if the goods are lost, the documents must be delivered and payment must be made when the goods should have arrived [*Com. Code* § 2321(3); *see Com. Code* § 2513(1)].

For a discussion of "C.I.F." delivery provisions and representative clauses, see § 52.254.

[d] Expenses of Inspection

The buyer must bear the expenses of inspection, but is entitled to recover these expenses from the seller if he or she rightfully rejects the goods for failure to conform to the contract [*Com. Code* § 2513(2)]. The parties may agree to allocate the expenses of inspection differently [*Com. Code* § 2513, comment 4], as, for example, in the tenth alternative in this form.

[e] Exclusive Place or Method of Inspection; Avoidance of Contract

A place or method of inspection fixed by the parties is presumed to be exclusive, but unless the parties expressly agree otherwise, fixing a place or method of inspection does not postpone the identification of goods to the contract [*see Com. Code* § 2501; *see also* § 52.284] or shift the place for delivery [*see Com. Code* § 2308; *see also* § 52.251] or for passing the risk of loss [*see Com. Code* §§ 2509, 2510; *see also* §§ 52.280, 52.281]. If compliance with the agreed place or method becomes impossible, inspection will be as provided for in the Commercial Code [*see Com. Code* § 2513], unless the place or method agreed to was clearly intended as an indispensable condition the failure of which avoids the contract [*Com. Code* § 2513(4)].

[2] FORM

Clauses Providing for Inspection of Goods by Buyer

Inspection by Buyer

Buyer shall have the right, and shall be given an opportunity, to inspect the goods as soon as they are ready for shipment. Inspection shall be at Seller's plant and shall be made within _____ [*e.g.*, three] days after Seller gives Buyer written notice that the goods are ready for shipment. Failure to inspect the goods at that time shall constitute a waiver of Buyer's right of inspection.

[OR]

Buyer shall inspect the goods as soon as Buyer is informed in writing that they have arrived in the city of destination. Inspection shall be made while the goods are still in the hands of the carrier and before they have been unloaded from the cars. Any charges made by the carrier in connection with Buyer's inspection, including charges for demurrage, shall be paid by Buyer. Failure to inspect within _____ [*e.g.*, five] days after notice of their arrival shall be deemed an acceptance of the goods.

[OR]

The goods shall be inspected on tender to Buyer. Failure to inspect within _____ [*e.g.*, five] days after tender shall constitute a waiver of Buyer's rights of inspection and shall be equivalent to acceptance of the goods.

[OR]

Buyer shall have the right to inspect the goods on tender by Seller. If Buyer receives the goods or takes possession of them without inspection, this shall constitute a waiver of Buyer's right to inspect.

[OR]

Buyer shall have the opportunity, at the time and place of inspection, to run adequate tests to determine whether the goods tendered conform to the specifications of this contract. Use of a portion of the goods for the purpose of testing shall not constitute an acceptance of the goods. However, if the goods are rejected, Buyer shall recompense Seller, at the contract price, for all goods used in testing.

[OR]

Buyer shall have the right to install and operate for _____ [e.g., five] days the machinery sold under this contract before either accepting it or paying for it. During this period of _____ [e.g., five] days, suitable tests may be run to determine whether the machinery conforms to the description and warranties expressed in this contract.

[OR]

If, on inspection, Buyer determines that the goods do not conform to the description in this contract, Buyer shall have the right to preserve and keep a small sample of the goods tendered for the purpose of having evidence of the tendered goods' kind and quality.

[OR]

Buyer shall have the right to make a visual inspection of the goods, but no testing requiring use of the goods shall be conducted prior to acceptance and payment.

[OR]

Notwithstanding any other provisions of this contract, Buyer shall have the right to inspect the goods prior to payment and acceptance.

[OR]

Any expense incurred in the inspection of the goods shall be borne equally by Seller and Buyer, whether or not the goods are rejected as nonconforming.

[OR]

As soon as the goods are ready for shipment, Seller shall notify _____ [name of third party],
_____ [address and firm affiliation, if applicable], who shall inspect the goods at Seller's plant within
_____ [e.g., three] days after notification and submit a written report to Buyer and Seller. This inspection

shall be fully and finally determinative of whether the goods conform to this contract. Defects that are not noted and brought to the attention of Seller at this time shall not constitute the basis of any claim or defense under this contract. Buyer shall have no other right of inspection before accepting and paying for the goods.

[OR]

As soon as the goods are ready for shipment Seller shall notify _____ [*name of third party*], _____ [*address and firm affiliation, if applicable*], hereafter referred to as "Inspector." Inspector shall arrange to take samples of the goods, which shall be analyzed to determine whether they meet the standards of quality, strength, and purity set forth in this contract. The results of these tests shall be forwarded to both Seller and Buyer as soon as available, and these results shall be final and conclusive unless either Seller or Buyer objects within _____ [*e.g., three*] days after receiving notice of them.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceBuyer's Rights



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21-52 California Legal Forms--Transaction Guide §§ 52.312-52.319

[Reserved]

§§ 52.312[Reserved]



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21-52 California Legal Forms--Transaction Guide § 52.320

§ 52.320 Clauses Specifying Situations in Which Parties Excused

[1] Comment

[a] Use of Form

This form contains seven alternative clauses that specify when performance may be excused or modified. If the parties do not provide such a clause, excuse of performance due to a failure of presupposed conditions is governed by *Com. Code § 2615*.

The first, second, and sixth alternatives allow both parties to be excused. The third, fourth, and seventh alternatives excuse only the seller, while the fifth excuses only the buyer. Notice of the claimed excuse for nonperformance is required from both parties in the first alternative, from the seller in the third, and from the buyer in the second and fifth alternatives.

The terms of excuse in the first alternative are substantially similar to those provided in *Com. Code § 2615*, except that the permissible causes are specified and the buyer as well as the seller may be excused. The other alternatives differ more sharply from *Com. Code § 2615*, with alternatives three and five contrasting most sharply. Alternative three allows the seller to be excused from delivering the contract goods if the seller receives so many other orders that it cannot deliver the goods from excess production. Alternative five excuses the buyer if it determines after a market survey that marketing the goods in question would not be profitable for it. Because the buyer is required to give the seller notice of this determination by a certain date, alternative five should not be so unreasonable [*see Com. Code § 1302(b)*] (obligation of reasonableness may not be disclaimed by agreement)] or unconscionable [*see Civ. Code § 1670.5* (court may refuse to enforce unconscionable contract)] as to be invalid.

[b] Force Majeure

The term "force majeure" used in the final alternative in this form is French for "superior strength." It is a term for a supervening impossibility of performance that serves as a defense to nonperformance [Corbin on Contracts (West

1962), Ch. 74, § 1324; see Ch 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.65].

[c] Unforeseen Contingencies

Com. Code § 2615(a) provides that, except so far as a seller has assumed a greater obligation, delay in delivery or nondelivery is not a breach of the seller's contractual duty if the agreed performance is now impracticable due to the occurrence of a contingency the nonoccurrence of which was a basic assumption of the contract or due to good faith compliance with a foreign or domestic governmental regulation or order. The test is "commercial impracticability," not "impossibility" or "frustration of performance" [*Com. Code § 2615*, comment 3]. Thus increased cost alone does not excuse performance unless the increase is caused by an unforeseen contingency that alters the essential nature of the performance [*Com. Code § 2615*, comment 4]. *Com. Code § 2615* applies when a particular source of supply is exclusive [see § 52.205] under the agreement and fails through casualty [*Com. Code § 2615*, comment 5].

[d] Allocations; Notice

If only part of the seller's capacity to perform is affected by the unforeseen contingency, he or she must allocate production and deliveries among customers in a fair and reasonable manner [*Com. Code § 2615(b)*]. The seller must notify the buyer seasonably of any delay or nondelivery and of the estimated quota under any required allocation [*Com. Code § 2615(c)*].

[2] FORM

Clauses Specifying Situations in Which Parties Excused

Situations in Which Parties Excused

Seller shall not be liable for any delay or failure to deliver any or all of the goods if that delay or failure is caused by labor disputes, strikes, war, riots, insurrection, civil commotion, fire, flood, accident, storm or any act of God, failure of crops or supplies, or other causes beyond Seller's control. Buyer shall not be liable for failure to take delivery of the goods attributable to any of the causes specified in this paragraph if they render it commercially impractical for Buyer to receive the goods. If only a part of Seller's or Buyer's capacity to perform is excused under this paragraph, that party must allocate production, deliveries, or receipt of deliveries among that party's various customers or suppliers, as the case may be, then under contract for similar goods. The allocation must be in a commercially fair and reasonable manner. When either Seller or Buyer claims an excuse for nonperformance under this paragraph, the party claiming the excuse must give seasonable notice to the other party. When an allocation has been made of the estimated quota made available for each Buyer, the Seller must give notice of this allocation.

[OR]

Seller shall not be held responsible for any delivery or failure to make delivery of all or any part of the merchandise purchased under this contract if that failure is due to any cause, contingency, or circumstance not subject to its control that prevents or hinders the manufacture or delivery of the merchandise, including federal, state, or municipal action, statute, ordinance, or regulation; strike or other labor trouble; fire damage to or destruction in whole or in part of merchandise or manufacturing plant; or the lack of or inability to obtain raw materials, labor, fuel, or supplies. Seller shall be released from Seller's obligations under this contract under any of the circumstances specified in this paragraph. Buyer shall be released under like circumstances if notice of the circumstances is given to Seller before shipment is made.

[OR]

Seller has granted a reduced price to Buyer in anticipation that Seller will be able to fill this order from Seller's excess production. If Seller accepts other orders which require full use of Seller's usual production capacity, Seller shall give notice to Buyer that Seller cannot deliver the goods under this contract. Buyer shall have the option to terminate this contract or to agree to accept the goods when Seller can deliver them from excess production. If no election is made by Buyer within _____ [e.g., 10] days after receiving notice under this paragraph, this contract shall be automatically terminated.

[OR]

It is understood and agreed that shipment is to be made under this contract by ship or ships from the City of _____ to the City of _____. Seller shall furnish to Buyer the names of the ship or ships in which the goods are shipped. Should the ship or ships fail to arrive at the port of destination for any cause, Seller is relieved of responsibility and not liable under this contract for any goods shipped by the ship or ships.

[OR]

If Buyer determines after a suitable testing of the market that it is inadvisable to offer the _____ [identify goods] for sale, Buyer shall be excused from all obligations imposed by this contract on timely notice to Seller. The notice to Seller is timely only if Seller receives the notice during regular business hours at its _____ [specify location, e.g., main office at 111 Morgan Street, Reno, Nevada or factory in the Jack London Industrial Park, Oakland, California] no later than _____ [give time with precision, e.g., 5:00 P.M. on ____ (date)].

[OR]

Neither party shall be held responsible for any losses resulting if the fulfillment of any terms or provisions of this contract is delayed or prevented by an excusing cause, including revolutions or other disorders, wars, acts of enemies, strikes, fires, floods, or acts of God. Without limiting any of the listed causes, the term "excusing causes" also includes any other cause not within the control of the party whose performance is interfered with that this party is unable to prevent by the exercise of reasonable diligence, whether it is one of the listed causes or not.

[OR]

Seller shall not be responsible for delay, nondelivery, or default in shipment in whole or in part if occasioned by strike, war, riot, or revolutions, or for any delay in transportation due to demands or embargoes of the United States Government or any other government, or nondelivery or delays through fire, floods, droughts, accidents, insurrections, lockouts, breakdown of machinery, commandeering of vessels carrying goods, or for loss or damage in transit, or detention of or delay in vessels resulting directly or indirectly from acts of God, perils of the sea, stoppage of labor, shortage of carriers, or refusal of any necessary license or government restrictions considered as "force majeure," or any other unavoidable cause other than Seller's own negligence at any stage of the transit of goods beyond Seller's control. In no case shall Seller be responsible after delivery of goods in good order or condition to the carrier or carriers at the point of shipment.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law
(UCC)Sales (Article 2)Breach, Repudiation & ExcuseExcuse From Performance



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21-52 California Legal Forms--Transaction Guide § 52.321

§ 52.321 Provisions Specifying Rights and Duties When There Is a Casualty to Identified Goods

[1] Comment--Use of Form

This form contains four alternative clauses that specify the rights and duties of the parties when there is a casualty to identified goods. In the absence of agreement, *Com. Code § 2613* is controlling. If the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term [*see Com. Code § 2324; see also § 52.259*], then the contract is avoided if the loss is total. If the loss is partial or the goods have so deteriorated that they no longer conform to the contract, the buyer may nevertheless demand inspection and at his or her option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity, but without further right against the seller [*Com. Code § 2613*].

The time at which the risk of loss passes to the buyer is a pivotal point under *Com. Code § 2613* and the last two alternatives in this form. In the absence of breach, the general rule is that the risk of loss passes to the buyer on its receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery [*Com. Code § 2509(3)*]. Different rules apply if the contract requires or authorizes the seller to ship the goods by carrier [*see Com. Code § 2509(1)*] or if the goods are held by a bailee to be delivered without being moved [*see Com. Code § 2509(2)*]. For discussion of risk of loss in the absence of breach, see *§ 52.280[1]*. For discussion of risk of loss in the event of breach, see *§ 52.281[1]*.

[2] FORM

Provisions Specifying Rights and Duties When There Is a Casualty to Identified Goods

Casualty to Identified Goods

Seller represents that the goods referred to in this contract are in existence and available for immediate shipment. If the goods are lost or destroyed before shipment for any reason, and regardless of fault, Seller shall undertake to deliver in

accordance with the terms of this contract, but shall be allowed an additional _____ days for delivery.

[OR]

Seller shall not be excused from performing Seller's obligations under this contract if the goods identified are destroyed. Seller shall tender substitute goods of equal quantity and quality.

[OR]

If the goods covered by this contract are destroyed before the time the risk of loss passes to Buyer, Seller shall be excused from performing Seller's obligations under this contract and the contract shall be avoided. This provision shall apply whether or not the goods are destroyed through the negligence of Seller.

[OR]

If the goods covered by this contract are destroyed, in whole or in part, before the time the risk of loss passes to Buyer, this contract shall be avoided and Seller excused from all obligations hereunder. If the loss is partial, Buyer shall have no right to accept that portion of the goods which conforms to the contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseCasualty to Identified Goods



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21-52 California Legal Forms--Transaction Guide § 52.322

§ 52.322 Clauses Restricting Buyer's Right to Accept Partial Shipment

[1] Comment--Use of Form

This form contains alternative clauses restricting the right of a buyer to accept only a part of a delivery. Unless the parties agree otherwise by including in their sales agreement a provision like those in this form, if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may reject the whole, accept the whole, or accept any commercial unit or units and reject the rest [*Com. Code § 2601*].

[2] FORM

Clauses Restricting Buyer's Right to Accept Partial Shipment

Buyer's Right to Accept a Partial Shipment

If Buyer rejects any shipment of goods, and elects to accept only a part of that shipment, it is agreed that the portion of goods rejected shall be returned to Seller within _____ days, and the return shipment shall be at the expense and risk of Buyer.

[OR]

It is agreed that if Buyer should accept only a part of the goods delivered pursuant to this contract, the provisions of the contract dealing with credit terms shall not apply and Buyer shall pay in full, by cash or certified check, the price set forth above for the accepted goods.

[OR]

Any partial acceptance by Buyer of any shipment of goods pursuant to this contract shall be limited to a minimum of _____ [e.g., 50] percent of any single shipment.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseBuyer's Rights on Improper Delivery



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21-52 California Legal Forms--Transaction Guide § 52.323

§ 52.323 Clauses Limiting Time Within Which to Give Notice of Rejection

[1] Comment

[a] Use of Form

This form contains six alternative clauses limiting the buyer's right to reject nonconforming goods. Unless the parties agree otherwise [*Com. Code § 1302* (effect of code provisions may be varied by agreement except as otherwise provided)], the time, manner, and effect of a rightful rejection are governed by *Com. Code § 2602* [see [b], below]. The first four alternatives require written notice of rejection within a stated number of days or hours. The last two provide, respectively, that keeping the goods for a stated period or failing to make a claim for damage, errors, or shortages within a stated time amounts to an irrevocable acceptance of the goods. In deciding what time limit to put on the right to reject goods, it is vital to remember that contract provisions limiting the time for rejection are effective only if the time set gives the buyer a reasonable time for discovery of defects [*Com. Code § 2602*, comment 1].

[b] Time, Manner, and Effect of Rejection

Even a wholly nonconforming tender or delivery of goods under a contract of sale requires affirmative action by the buyer to avoid acceptance [*Com. Code § 2602*, comment 1]. Goods must be rejected within a reasonable time after they are delivered or tendered. The rejection is ineffective unless the buyer seasonably notifies the seller [*Com. Code § 2602(1)*]. A thing is done "seasonably" if it is done at or within the time agreed on, or, if no time is agreed on, at or within a reasonable time [*Com. Code § 1205(b)*; see also *Com. Code §§ 1202* (specifying what constitutes notice), 2602, comment 1]. For discussion of what "notifies" means, see § 52.282[1][d].

After rejection, any exercise of ownership over the goods by the buyer is wrongful as against the seller. The buyer is under a duty after rejection to hold the goods with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them, unless the buyer has a security interest in the goods under *Com. Code § 2711(3)* [*Com. Code § 2602(2)(b)*]. These duties are subject to the buyer's options to salvage rightfully rejected goods under *Com. Code § 2604* [see § 52.326[1]]. For the rules that apply to goods rejected by merchant buyers, see § 52.324[1]. For the

form for an actual notice of rejection, see § 52.403[2].

[c] Rightful Rejection

The provisions of *Com. Code* § 2602 apply only to a rightful rejection by the buyer. If the seller's tender conforms in all respects to the contract, then the buyer has a positive duty to accept, and failure to do so is a wrongful rejection that gives the seller immediate remedies for breach [*Com. Code* § 2602, comment 3; see § 52.18[2]].

[2] FORM

Clauses Limiting Time Within Which to Give Notice of Rejection

Time Limit for Rejection Notice

As soon as the goods are delivered to Buyer, Buyer shall inspect them. Notice in writing shall be given within _____ [e.g., 24] hours after receipt of goods of any defects or omissions. Failure to give notice within _____ [e.g., 24] hours after receipt shall constitute an irrevocable acceptance of the goods.

[OR]

Buyer shall have _____ [e.g., 24] hours after receipt of the goods to inspect and either accept or reject them. If Buyer does reject the goods, then Buyer must give Seller written notice of the rejection, and this notice must arrive no later than _____ [e.g., 48] hours after Buyer receives the goods.

[OR]

The parties agree that a reasonable time for notification of rejection shall be the _____ [e.g., fifth] business day following receipt by Buyer of the bill of lading. Any attempted notification of rejection thereafter shall be null and void.

[OR]

Any notices pertaining to rejection or claims of nonconformity must be made in writing specifying in detail the objections of Buyer, and those notices must be forwarded within _____ [e.g., seven] calendar days after delivery of the goods.

[OR]

If Buyer retains the goods in Buyer's possession for a period in excess of _____ [e.g., 48] hours after delivery of them to Buyer's place of business, this shall be regarded as an irrevocable acceptance by Buyer of the goods delivered.

[OR]

All claims for damages, errors, or shortage in goods delivered by Seller to Buyer under this contract must be made by Buyer in writing within a period of _____ [e.g., two] days after the goods are delivered to Buyer. Failure to make any claim within [e.g., two] days shall constitute an irrevocable acceptance of the goods and an

admission that they fully comply with all terms, conditions, and specifications of this contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsNotice
RequirementsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseRightful
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21-52 California Legal Forms--Transaction Guide § 52.324

§ 52.324 Clauses Specifying Duties of Merchant Buyer With Respect to Rejected Goods

[1] Comment--Use of Form

This form contains alternative provisions that define the obligations of a merchant buyer to the seller of goods when those goods are rejected. In the absence of agreement, and subject to any security interest in the buyer under *Com. Code* § 2711(3), when the seller has no agent or place of business at the market of rejection, a merchant buyer who has rightfully rejected goods that are in his or her possession or control has a duty to follow any reasonable instructions from the seller about the goods. In the absence of instructions from the seller about the goods, the merchant buyer has a duty to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily [*Com. Code* § 2603(1)]. If the buyer demands indemnity for expenses, the seller's instructions are not reasonable unless they include the indemnity [*Com. Code* § 2603(1)].

When a buyer sells rejected goods for the seller's account, he or she is entitled to reimbursement from the seller or out of the proceeds of the sale for reasonable expenses of caring for and selling them. If the expenses include no selling commission, then the buyer is entitled to the commission that is usual in the trade, or, if there is none, to a reasonable sum not to exceed 10 percent of the gross proceeds [*Com. Code* § 2603(2)].

[2] FORM

Clauses Specifying Duties of Merchant Buyer With Respect to Rejected Goods

Duties With Respect to Rejected Goods

It is agreed that Buyer, on rejecting any goods delivered under this contract, shall hold the goods at Buyer's place of business until Seller has been notified in writing of the rejection and has had a reasonable opportunity to arrange for suitable transportation.

[OR]

It is agreed that if Buyer rejects any of the goods sold pursuant to this contract, Buyer's only duty shall be to seasonably notify Seller of this rejection and hold the goods for the disposition of Seller. It is further agreed that under no circumstances shall Buyer be required to resell the rejected goods.

[OR]

Seller has no agent or place of business located at or near Buyer's place of business. The goods sold under this contract are perishable. Buyer represents that Buyer is a merchant, and agrees to sell immediately the goods for Seller's account on rejection of any delivery. In the event of a resale after a rightful rejection, Buyer shall be entitled to a commission of _____ [e.g., 10] percent, which commission shall include all costs and expenses of the sale. Buyer may sell any rejected goods before or after notification of rejection to Seller, but the notice must be made in writing within _____ [e.g., two] business days after rejection. Buyer need not await instructions from Seller with respect to a rejection, but may immediately dispose of the goods.

[OR]

If Buyer rejects any tender of goods under this contract, Buyer shall reship the goods to the Seller, express collect, within _____ [e.g., 24] hours after rejection.

[OR]

If Buyer rejects any goods tendered under this contract, Buyer shall resell them for Seller's account in the _____ market as soon as is practical. In no event shall Buyer accept any price for the goods that is more than _____ [e.g., 20] percent below the price stated in this contract. If no sale can be made in accordance with this provision, Buyer shall immediately inform Seller by telephone and follow whatever instructions are given. In the event of a sale by Buyer for Seller's account, Seller agrees to pay the reasonable expenses of the sale including a commission of _____ [e.g., 5] percent to the Buyer, provided that the rejection was proper.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseRightful Rejection



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21-52 California Legal Forms--Transaction Guide § 52.325

§ 52.325 Clauses Relieving Buyer From Waiver Due to Failure to Particularize Basis for Rejection of Goods

[1] Comment--Use of Form

This form consists of alternative clauses which provide generally that a buyer who rejects goods does not waive reliance on an alleged defect by failing to particularize the basis of the rejection. In the absence of such a provision, a rejecting buyer's failure to specify a defect discoverable by reasonable inspection precludes the buyer from relying on that defect to justify or to establish breach when the seller could have cured it if stated seasonably [*see Com. Code § 1205(b)* ("seasonably" defined); *see also § 52.282[1]*]. Between merchants, the buyer may not rely on an unstated defect when the seller, after rejection, makes a written request for a full and final written statement of all defects on which the buyer proposes to rely [*Com. Code § 2605(1)*].

[2] FORM

Clauses Relieving Buyer From Waiver Due to Failure to Particularize Basis for Rejection of Goods

No Liability for Failure to Specify Defects

The failure of Buyer to specify a defect that is a cause of any rejection shall not preclude Buyer from relying on the unstated defect to justify rejection or to establish a breach.

[OR]

The failure of Buyer to seasonably specify any defects in rejected goods shall not prevent Buyer from relying on the defect to establish a breach, even though Seller could have cured the defect on proper notification.

[OR]

Notwithstanding any other provision in this contract to the contrary, Buyer shall in no event be penalized or precluded from establishing a defect in rejected goods by reason of any failure to particularize the defects.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseRightful Rejection



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21-52 California Legal Forms--Transaction Guide § 52.326

§ 52.326 Clauses Restricting Buyer's Option to Resell Rejected Goods

[1] Comment--Use of Form

This form contains alternative clauses limiting the buyer's rights under *Com. Code § 2604* to dispose of rejected goods. In the absence of agreement, and subject to the provisions of *Com. Code § 2603* on perishables [*see § 52.324[1]*], if the seller gives no instructions within a reasonable time after notification of rejection, the buyer may store the rejected goods for the seller's account, reship them to the seller, or resell them for the seller's account [*Com. Code § 2604*].

[2] FORM

Clauses Restricting Buyer's Option to Resell Rejected Goods

Restriction of Option to Resell Rejected Goods

In the event of rejection, Buyer shall in no event resell the goods, even in the absence of instructions from Seller. It is agreed that the goods are not perishable, and Buyer agrees to transport, at Buyer's own expense, all rejected goods to any storage facility in an area reasonably near to Buyer's place of business. All storage charges shall be borne by Seller.

[OR]

If Buyer rejects any of the goods sold under this contract, Buyer shall notify Seller of this rejection in writing within _____ [*e.g.*, 48] hours, and Buyer agrees that Buyer shall not resell or dispose of the rejected goods in any manner, and shall hold the goods without charge to Seller until Seller may reasonably arrange for transportation. Should Buyer sell the goods, the sale shall be deemed an unequivocal acceptance of the goods.

[OR]

The sole option of Buyer with respect to any goods that may be rejected under this contract shall be to ship the goods to Seller, freight express, collect within _____ days after rejection, and to notify Seller in writing within _____ [e.g., 24] hours of the rejection.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseRightful RejectionCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesResale of Goods



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21-52 California Legal Forms--Transaction Guide § 52.327

§ 52.327 Prohibiting Cure of Improper Tender by Seller

[1] Comment--Use of Form

This form contains alternative clauses prohibiting a seller from curing a nonconforming tender of goods. If a sales contract does not contain this type of clause, the seller may cure a nonconforming tender within the contract time, or within a reasonable time if the seller had reasonable grounds to believe that the nonconforming goods would be acceptable, as long as the buyer is given seasonable [*see Com. Code § 1205(b)*] (action is seasonable if taken at or within time agreed or if no time is agreed at or within reasonable time)] notice [*Com. Code § 2508*].

[2] FORM

Prohibiting Cure of Improper Tender by Seller

Prohibition Against Cure of Improper Tender

Every tender of goods must fully comply with all provisions of this contract. Any tender that does not fully conform shall constitute a breach, and Seller shall not have the right to substitute a conforming tender.

[OR]

Seller understands that the specifications for the goods must be fully met and that no variation from the specifications is permitted. Any tender of goods that does not meet the specifications shall constitute a breach of this contract, and Seller shall have no right to substitute a conforming tender.

[OR]

If goods are tendered that do not fully comply with the provisions of this contract, and those goods are rejected by Buyer, Seller shall have no right to cure the tender by substituting a conforming tender. Any rights seller may otherwise have had under the provisions of the Uniform Commercial Code or any other applicable law or regulation to cure a nonconforming tender are expressly negated.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



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§ 52.328 Clauses Specifying Manner of Acceptance of Goods

[1] Comment--Use of Form

This form consists of alternative clauses that specify what constitutes acceptance of the contract goods. Unless the parties agree otherwise, the provisions of *Com. Code § 2606* define the acts that constitute acceptance of goods. Under that section, acceptance of goods occurs when the buyer does any of the following [*Com. Code § 2606(1)*]:

- After a reasonable opportunity to inspect the goods, signifies to the seller that the goods are conforming or that he or she will take or retain them in spite of their nonconformity.
- Fails to make an effective rejection after having a reasonable opportunity to inspect the goods.
- Does any act inconsistent with the seller's ownership.

Acceptance of a part of any commercial unit [*see Com. Code § 2105(6)* (definition of "commercial unit")] is acceptance of the entire unit [*Com. Code § 2606(2)*].

[2] FORM

Clauses Specifying Manner of Acceptance of Goods

Manner of Acceptance

It is agreed that the retention by Buyer for a period of _____ [*e.g.*, 10] days of any installment shipment of goods sold under this contract shall constitute an irrevocable acceptance of the goods contained in the installment.

[OR]

Removal of the goods sold under this contract from the _____ Warehouse by Buyer shall constitute an acceptance of the goods removed.

[OR]

Because the described goods are perishable, Buyer agrees to notify Seller in writing of Buyer's acceptance or rejection of the goods within _____ [e.g., eight] hours after delivery.

[OR]

Acceptance shall occur when Buyer removes the goods from Seller's storage facilities at _____ [address or location]. Seller agrees to grant Buyer access during normal business hours to examine and inspect the goods at _____ [address or location], during a period of _____ [number] days before delivery.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceGeneral Overview



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§ 52.329 Clauses Restricting Buyer's Right to Revoke Acceptance

[1] Comment--Use of Form

This form consists of alternative clauses designed to restrict the buyer's right to revoke an acceptance of goods. In the absence of such a restriction, the conditions under which a buyer may revoke an acceptance are governed by *Com. Code* § 2608. For a discussion of *Com. Code* § 2608, see § 52.385[1].

[2] FORM

Clauses Restricting Buyer's Right to Revoke Acceptance

Restriction of Revocation of Acceptance

The parties agree that the inspection provisions of this contract are adequate to protect Buyer. Buyer shall either accept or reject the goods, and after accepting them shall not be entitled to revoke that acceptance.

[OR]

Any attempt by Buyer to revoke acceptance for any reason whatever after Buyer has accepted any shipment shall constitute a breach of this contract.

[OR]

If Buyer accepts goods tendered under this contract, Buyer's acceptance shall be final and irrevocable. No attempted revocation shall have any effect whatsoever.

[OR]

It is agreed that by reason of the nature of the goods sold under this contract, _____ days is a reasonable time for Buyer to discover any latent defects after acceptance. Revocation of acceptance must be made within that time, in writing. Any revocation after that time shall be void and of no effect.

[OR]

Once Buyer accepts goods tendered under this contract, Buyer shall have no right to revoke that acceptance after _____ days. Acceptance of the goods shall automatically become irrevocable on the expiration of _____ days from the date of acceptance.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsRevocation of AcceptanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.330

§ 52.330 Clauses Setting Conditions Under Which Demand for Assurance of Performance Is Proper

[1] Comment--Use of Form

This form consists of alternative clauses that allow the parties to fix the conditions under which a demand for assurance of performance is proper.

In the absence of an agreement to the contrary, *Com. Code § 2609* defines the conditions under which one party may demand assurance of performance from the other party. A contract of sale imposes on each party an obligation not to impair the other party's expectation of receiving due performance. Any party who has reasonable grounds for insecurity concerning the performance of the other may make a written demand for adequate assurance of due performance. Until the party demanding assurance receives it, he or she may, if commercially reasonable, suspend any performance for which he or she has not yet received the agreed return [*Com. Code § 2609(1)*; see § 52.146 P 2]. Failure to provide adequate assurance of due performance within a reasonable time (not to exceed 30 days) after receipt of a justified demand is a repudiation of the contract [*Com. Code § 2609(4)*].

Between merchants [see § 52.13[4] (definition)], the reasonableness of grounds for insecurity and the adequacy of any assurance offered will be determined according to commercial standards [*Com. Code § 2609(2)*]. This means that the grounds for the insecurity need not arise from or be directly related to the contract in question. For example, a buyer who falls behind in his or her account with the seller impairs the seller's expectation of due performance, even though the items involved have to do with separate and legally distinct contracts [*Com. Code § 2609*, comment 3].

For provisions specifying or negating the assignment of rights or the delegation of duties (including clauses waiving the right to demand assurance or requiring specific assurances), see § 52.356[2].

[2] FORM

Clauses Setting Conditions Under Which Demand for Assurance of Performance Is Proper

Demand for Assurance of Performance

If any of the deliveries provided for in this contract are more than _____ days late or if the quantity of any delivery drops by _____ percent or more below the quantity set for each delivery, Buyer shall have the right to demand assurance of performance with respect to ensuing deliveries. Seller agrees to give as assurance a performance bond with sufficient sureties in the amount of \$ _____, conditioned on the proper, timely, and full delivery of all of the ensuing deliveries called for in this contract. The bond shall be furnished within _____ days after receipt of the demand for assurance by Seller, at the address stated _____ [above or below].

[OR]

Seller shall have the immediate right to demand assurance of full payment from Buyer if any of the following events occur:

- (a) Buyer is delinquent in making any payment hereunder for a period of _____ days.
- (b) Buyer fails to meet Buyer's obligations with Buyer's other suppliers as they occur.
- (c) A judgment is entered against Buyer in excess of \$ _____ in any court of competent jurisdiction, whether or not the judgment is stayed pending appeal.
- (d) By reason of a labor dispute or otherwise, there is a work stoppage of more than _____ days at Buyer's _____ factory.

On proper demand for assurance by Seller, Buyer shall within _____ days after receipt of that demand furnish, in an amount sufficient to secure the full payment of the balance due under this contract on the purchase price, a penalty bond issued by any competent surety company, or shall post securities or other liquid collateral to be held in escrow by _____ [name of escrow holder] to secure payment of the purchase price.

[OR]

If any of Seller's products, whether or not of the type described in this contract, are the subject of an action by the Federal Food and Drug Administration, Buyer shall have the right to demand assurance that all goods to be delivered under this contract meet all applicable federal and state standards and do not violate any federal, state, or local law, regulation, or ordinance. If Buyer makes this demand, Seller shall furnish assurance within _____ [e.g., 10] days of the demand. When Buyer has a right to assurances under this provision, Seller shall (1) state in writing at the time of each shipment under this contract that the shipment complies with all federal, state, and local laws, regulations, and ordinances; and (2) furnish Buyer with a guaranty or undertaking in accordance with *Title 21, Section 333(c) of the United States Code*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAssurances of Performance



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21-52 California Legal Forms--Transaction Guide § 52.331

§ 52.331 Representations by Buyer With Respect to Solvency

[1] Comment

[a] Use of Form

This form contains alternative clauses in which the buyer represents to the seller that the buyer is solvent. The seller may want to include this type of provision as protection against an insolvent buyer.

[b] "Insolvency" Defined

A person is "insolvent" if any of the following is true [*Com. Code § 1201(b)(23)*]:

- The person has generally ceased to pay debts in the ordinary course of business, other than as a result of bona fide dispute.
- The person cannot pay his or her debts as they become due.
- The person is insolvent within the meaning of the federal bankruptcy law [*see* 11 U.S.C. §§ 1-1330; *see also* Ch. 78, *Creditors' Agreements: Nonbankruptcy Alternatives*].

[c] Seller's Remedies on Discovery of Buyer's Insolvency

Ordinarily, the seller has only two remedies on discovering that the buyer is insolvent. If the goods have not yet been delivered, the seller may refuse delivery except for cash. This right extends to stopping delivery of goods in the hands of a carrier [*Com. Code § 2702(1)*; *see Com. Code § 2705* (seller's stoppage of delivery); *see also* § 52.480[1]]. If the seller discovers the insolvency after the buyer has already received the goods on credit, the seller may reclaim the goods, but only if he or she makes a demand for reclamation within 10 days after buyer's receipt of the goods [*Com. Code § 2702(2)*]. Use of the provisions in this form should enable the seller to reclaim goods beyond the otherwise

applicable 10-day period, because *Com. Code* § 2702(2) states that the 10-day limit does not apply if the buyer has misrepresented his or her solvency to the seller in writing within three months before delivery. However, a seller who is entitled to reclaim goods after the 10-day limit should act promptly, because the right to reclamation is subject to the rights of a buyer in ordinary course or other good faith purchaser [*Com. Code* § 2702(3)]. A person with voidable title has power to transfer a good title to a good faith purchaser for value [*Com. Code* § 2403(1); see § 52.17[3]]. A "buyer in ordinary course of business" is a person who buys in ordinary course from a person in the business of selling goods of that kind. The purchase must be in good faith and without knowledge that the sale violates a third party's ownership rights in the goods purchased. A pawnbroker is not a buyer in ordinary course of business [*Com. Code* § 1201(b)(9)]. "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing [*Com. Code* § 1201(b)(20)].

[2] FORM

Representations by Buyer With Respect to Solvency

Solvency of Buyer

Buyer represents that Buyer is able to pay Buyer's debts as they become due, is in fact now paying Buyer's debts in the ordinary course of business, and is not insolvent within the meaning of the Federal Bankruptcy Act. Buyer makes these representations with full knowledge that Seller is relying on them in extending credit under this contract.

[OR]

Buyer, for the purpose of inducing Seller to extend credit, represents that Buyer is not insolvent as that term is defined in applicable state or federal statutes.

[OR]

Buyer represents by signing this contract that Buyer is not insolvent as that term is defined in *Commercial Code Section 1201(b)(23)*. If Buyer becomes insolvent before delivery of the goods, Buyer shall notify Seller. A failure to notify Seller shall be construed as a reaffirmation of Buyer's solvency at the time of delivery.

[OR]

Buyer shall furnish to Seller a statement in writing at the time each delivery is tendered that Buyer is not insolvent as that term is defined in *Commercial Code Section 1201(b)(23)*. Seller shall not be obligated to deliver possession of the goods to Buyer until Buyer has provided Seller with a statement of solvency.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDiscovery of Buyer's Insolvency



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21-52 California Legal Forms--Transaction Guide § 52.332

§ 52.332 Termination and Accompanying Notice

[1] Comment

[a] Use of Form

This form contains alternative clauses providing for termination of a sales contract on the occurrence of a specified event or events. The alternatives in this form provide for termination on various events, such as violations of applicable law, bankruptcy, and the failure to get and maintain insurance. The parties should choose the alternative that best fits their intentions and the facts of their transaction. The parties, if they wish to provide for termination on the happening of more than one event or type of event, may include more than one of these alternatives.

[b] Notice Requirement

The termination of a contract by one party, except on the happening of an agreed event, requires that the other party receive reasonable notification [*Com. Code § 2309(3)*]. This normally requires a notification of termination that will give the other party a reasonable time to seek a substitute arrangement [*Com. Code § 2309*, comment 8]. A person has "notice" of a fact if the person either [*Com. Code § 1202(a)*; see *Com. Code § 1202(d)* (giving notice)]:

- Has actual knowledge of it;
- Has received a notice or notification of it; or
- Has reason to know that it exists, from all facts and circumstances known to the person at the time in question.

[c] Unconscionability

An agreement dispensing with notification is invalid if its operation would be unconscionable [*Com. Code § 2309(3)*];

see *Civ. Code* § 1670.5 (court may deny enforcement to unconscionable contract or clause)]. Unconscionability is generally recognized to include an absence of meaningful choice on the part of one party together with contract terms unreasonably favorable to the other party [*Chretien v. Donald L. Bren Co.* (1984) 151 Cal. App. 3d 385, 389, 198 Cal. Rptr. 523 ; *Williams v. Walker-Thomas Furniture Company* (D.C. Cir. 1965) 350 F.2d 445, 449] . Absence of meaningful choice is indicated by lack of knowledge and lack of voluntariness [Duesenberg & King, Sales and Bulk Transfers Under the U.C.C., Ch. 4, *The Code and Contract Principles*, § 4.08[2][c][ii] (Matthew Bender)]. The basic test is whether, in light of the general background and the needs of the particular case, the contract or clause involved is so one-sided as to be unconscionable under the circumstances existing when the contract was made. The purpose is to prevent oppression and unfair surprise [Legislative Committee Comment, *Civ. Code* § 1670.5]. For example, a confession of judgment clause is not per se unconscionable. But a confession of judgment clause does operate in a one-sided way, and if it is placed in the body of a contract in a deceptive manner, this constitutes unfair surprise and the clause is unconscionable [*Architectural Cabinets, Inc. v. Gaster* (Del. Super. 1971) 291 A.2d 298, 300-301] .

[2] FORM

Termination and Accompanying Notice

Termination On Noncompliance With Applicable Law

Buyer shall strictly observe and comply with all federal, state, and local laws, ordinances, and regulations that govern the manufacture, sale, handling, and disposal of any products covered by this contract. If Buyer violates any such laws, ordinances, or regulations, or is officially charged with a violation to the detriment or damage of Seller, Seller in its sole discretion may immediately terminate this contract and any other existing agreements with Buyer and may refuse to make any further deliveries.

[OR]

Termination On Bankruptcy

If Buyer becomes bankrupt or insolvent during the period covered by this contract, Seller may immediately terminate the same on written notice to Buyer. This termination shall not prejudice Seller's rights to the amounts then due under this contract.

[OR]

Termination On Failure to Obtain and Maintain Insurance Covering Goods

During the term of this contract and until full payment for all the goods has been made by Buyer, Buyer shall keep the goods insured against loss by fire, with the insurance proceeds, if any, payable to Seller as its interest may appear. The insurance shall be in the sum of not less than \$ _____. Buyer shall promptly pay all premiums due or to become due on the insurance and shall keep it in full force and effect. If Buyer fails to obtain insurance or fails to keep the insurance in full force or effect, Seller may take out the insurance and pay the premium, and the amount so paid shall be repaid to Seller by Buyer, or Seller may, at its option, terminate this contract by written notice.

[OR]

Termination On Imposition of Duties and Tariffs

If any additional duty is imposed on any of the contract goods by the United States Government between the date of this contract and the date of the arrival of the goods at a port of entry into the United States, Seller shall have the right to terminate this contract by mailing promptly to Buyer a written notice stating that all shipments due or to become due on or after the effective date of the change have been canceled.

[OR]

If the United States enters into any agreement that reduces the existing tariff duty on any of the goods covered by this contract, Buyer shall have the right to terminate this contract by written notice to Seller within _____ days after execution of the tariff reduction agreement, unless within _____ days after the receipt of the notice of cancellation Seller agrees in writing to reduce the selling price of the goods by an amount equal to the reduction in the existing tariff duty.

[OR]

Quality of Goods

It is an essential condition of this contract that the goods sold under it by Seller must be of the quality represented by Seller. If the goods or any part of them fail to comply with Seller's representations, Buyer shall have the right to reject the goods or to terminate this contract, at Buyer's option, and on written notice to Seller.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsUnconscionable AgreementsCommercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.333

§ 52.333 Clauses Specifying When a Nonconforming Installment Delivery Is Breach of Entire Agreement

[1] Comment

[a] Use of Form

This form contains alternative clauses defining the circumstances under which the seller's delivery of a nonconforming installment will constitute a breach of the entire sales contract.

[b] Breach Resulting From Delivery of Nonconforming Installment

In an installment contract, whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract, there is a breach of the whole. However, the aggrieved party reinstates the contract if he or she accepts a nonconforming installment without giving seasonable [*see Com. Code § 1205(b)*] (action is seasonable if taken at or within time agreed or if no time is agreed at or within reasonable time)] notice of cancellation; brings an action with respect only to past installments; or demands performance of future installments [*Com. Code § 2612(3)*].

[2] FORM

Clauses Specifying When a Nonconforming Installment Delivery Is Breach of Entire Agreement

Nonconforming Installment Delivery

If any installment delivery under this contract contains nonconforming goods to the extent of _____ percent of the shipment in question, Buyer, on proper notification, may treat the nonconformity as a breach of the entire contract unless more than _____ [*e.g.*, 90] percent of all shipments provided for in this contract have been made.

[OR]

It is agreed that Buyer is paying an additional price for the described goods, and Seller is placed on notice that it is essential to Buyer that all installment shipments be of the exact quantity called for in each delivery, and that all of the goods conform exactly to the specifications set forth _____ [e.g., in Paragraph _____] of this contract. If any installment is more than _____ hours late, or if the goods in any installment fail to conform for any reason whatsoever, Buyer has the right to treat the variance in quantity or the nonconformity as a breach of the entire contract.

[OR]

Notwithstanding any other provision of this contract, it is the intent of the parties to treat any nonconforming installment delivery as a breach of the entire contract whether or not the nonconforming delivery may be seasonably cured.

[OR]

Nothing in this contract shall be construed as restricting or limiting Buyer's right to demand exact performance with respect to each and every installment delivery. If Buyer rightfully rejects any installment shipment as nonconforming, for any reason, Seller shall be deemed to have breached the entire contract.

[OR]

Buyer has the right to treat any nonconforming installment shipment as a breach of the entire contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseInstallment Contracts



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21-52 California Legal Forms--Transaction Guide § 52.334

§ 52.334 Clause Reserving Rights on Failure to Object

[1] Comment

[a] Use of Form

This form is a clause that reserves the buyer's right to object to a course of performance in the future, despite the buyer's failure to make a present objection. It is intended to protect a buyer from being deemed, by failure to object to a course of performance, to have accepted a nonconforming performance or waived any objection to that performance.

In the absence of such a provision, the effect of a party's failure to object to a course of performance is governed by *Com. Code § 1303(d)*.

[b] Course of Performance

The protection provided by this form is necessary to vary the effect of *Com. Code §§ 1303, 2202*, which provides that a course of performance accepted or acquiesced in without objection may be relevant to show a waiver or modification of any term inconsistent with that course of performance [*Com. Code §§ 1303(a), (d), 2202(a)*].

For further discussion of course of performance, see § 52.15[2]. For a discussion of modification and waiver, see § 52.16.

[2] FORM

Clause Reserving Rights on Failure to Object

Reservation of Rights

The failure of Buyer to object to the manner of performance of any of the terms of this contract shall not be considered a

waiver of any rights or remedies, past, present, or future. The failure of Buyer to object to a nonconforming performance shall not be construed as an acceptance of or acquiescence in the performance. Buyer reserves the right to insist on strict compliance with this contract at all times.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)General OverviewCommercial Law (UCC)Sales (Article 2)Breach,
Repudiation & ExcuseAcceptance of GoodsRevocation of AcceptanceNonconforming Goods



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21-52 California Legal Forms--Transaction Guide §§ 52.335-52.349

[Reserved]

§§ 52.335[Reserved]



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21-52 California Legal Forms--Transaction Guide § 52.350

§ 52.350 Clauses Limiting Right of Seller to Identify Goods to Contract After Buyer's Breach

[1] Comment

[a] Use of Form

This form consists of clauses limiting the seller's right to identify goods to the contract after the buyer's breach. For discussion of the identification of goods to the contract, see § 52.284[1].

[b] Seller's Right to Identify Goods to Contract after Buyer's Breach

If the parties do not agree otherwise [*see Com. Code § 1302* (effect of code provisions may be varied by agreement except as otherwise provided)], the seller's right to identify goods to the contract after a breach is governed by *Com. Code § 2704*. Specifically, an aggrieved seller [*see Com. Code § 2703* (aggrieved seller may pursue certain remedies after breach of all or part of contract); *see also § 52.18[2]*] may do either of the following [*Com. Code § 2704(1)*]:

- Identify to the contract conforming goods not already identified if, when the seller learns of the breach, the goods are in his or her possession or control.
- Resell any goods demonstrably intended for the particular contract even if the goods are unfinished.

[c] Unfinished Goods

When the goods are unfinished, an aggrieved seller has two choices. The choice must be made in the exercise of reasonable commercial judgment, for the purpose of avoiding loss and of effective realization. The seller may either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell the goods for scrap and salvage value. The seller may also "proceed in any other reasonable manner" [*Com. Code § 2704(2)*]. The effect of these rights is to allow the seller the more ascertainable measure of damages associated with identified goods rather than just a cause of action for damages.

[2] FORM**Clauses Limiting Right of Seller to Identify Goods to Contract After Buyer's Breach****Seller's Right to Identify Goods After Breach**

Under no circumstance shall Seller identify goods to the contract after the time of any breach or other cause for modification or termination of this contract, without the express written consent of Buyer.

[OR]

If Buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to any goods covered by this contract, Seller shall have no right to identify any goods to the contract after learning of the rejection, revocation, breach, or repudiation.

[OR]

Seller hereby waives any rights that Seller may acquire to identify goods to the contract after a breach by Buyer.

[OR]

If there is any dispute or grievance under the terms of this contract, whether or not it is caused by a breach, Seller agrees not to complete unfinished goods for the purpose of identifying them to the contract, and Seller agrees not to sell any unfinished goods for scrap or salvage.

[OR]

Seller waives any and all right to finish or resell any goods after a breach by Buyer.

[OR]

If Buyer wrongfully rejects or revokes acceptance of goods, or fails to make payment due on or before delivery, or repudiates with respect to any goods covered by this contract, Seller shall have no right to complete or resell any goods unfinished at the time Seller learns of the rejection, revocation, breach, or repudiation.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesLimitation & ModificationGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesResale of Goods



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21-52 California Legal Forms--Transaction Guide § 52.351

§ 52.351 Clauses Specifying Method of Resale on Breach

[1] Comment

[a] Use of Form

This form contains alternative clauses that place advance limitations and specifications on the seller's right to resell goods that have been wrongfully rejected by the buyer. The second alternative provides for sale by an auctioneer [*see* [c], *below*] and the third for sale by consignment to a third party with instructions to sell. For discussion of sale by consignment, see "Essential Elements of Consignment" in the Legal Background to Ch. 91, *Contracts With Sales Representatives*.

[b] Right of Resale After Breach

In the absence of agreement, the right of resale is subject to *Com. Code* § 2706, which provides that, under the conditions stated in *Com. Code* § 2703 regarding seller's remedies [*see* § 52.18[2]], the seller may resell the goods concerned or the undelivered balance of the goods. If the resale is made in good faith and in a commercially reasonable manner, the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under *Com. Code* § 2710, minus expenses saved by the breach [*Com. Code* § 2706(1)]. Unless otherwise agreed, the resale may be either public or private [*Com. Code* § 2706(2)], but if it is private the seller must give the buyer reasonable notice of his or her intent to sell [*Com. Code* § 2706(3)]. Every aspect of the sale must be commercially reasonable [*Com. Code* § 2706(2)].

If the resale is a public sale, the following requirements apply [*Com. Code* § 2706(4)]:

- Only identified goods can be sold unless there is a recognized market for public sale of futures in goods of the kind.
- It must be held at a usual place or market for public sale if one is reasonably available and, unless the

goods are perishable or threaten to decline quickly in value, the seller must give the buyer reasonable notice of the time and place of resale.

- If the people at the sale will not be able to see the goods, the notification of sale must state where the goods are located and provide for reasonable inspection by prospective bidders.

- The seller may bid and buy.

[c] Auction Sales

The sale of goods by auction is subject to special rules under Division 2 of the Commercial Code [*see Com. Code §§ 2101-2801*]. First, if the goods are put up for sale in lots, each lot is the subject of a separate sale [*Com. Code § 2328(1)*]. Second, a sale by auction is complete when the auctioneer announces completion by the fall of the hammer or in some other customary manner. If a bid is made while the hammer is falling to accept an earlier bid, the auctioneer may reopen the bidding or declare the goods sold on the earlier bid [*Com. Code § 2328(2)*]. Third, the sale of goods by auction is with reserve unless the goods are explicitly put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he or she announces that the sale is complete. If the auction is without reserve, an article or lot cannot be withdrawn once the auctioneer calls for bids, unless no bid is made within a reasonable time. In either case, a bidder may retract a bid until the auctioneer announces that the sale is complete, but the retraction does not revive any previous bid [*Com. Code § 2328(3)*]. Finally, unless the sale is a forced sale, if bids by or on behalf of the seller are to be allowed, notice must be given that liberty for such bidding is reserved. Otherwise, if the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, the buyer has the option to either avoid the sale or take the goods at the price of the last good faith bid [*Com. Code § 2328(4)*].

[2] FORM

Clauses Specifying Method of Resale on Breach

Resale

If Seller has the right to resell the goods under the relevant provisions of the Commercial Code, the resale must be public and conducted in accordance with those Commercial Code provisions.

[OR]

If Seller has a right to resell the goods under the Commercial Code, the resale must be public, in accord with those provisions, and in accord with the following additional requirements:

- (a) _____ [*name*], Auctioneer, of _____ [*firm*], shall be engaged to hold the sale;
- (b) The sale shall be advertised in the ordinary and usual manner of Auctioneer and shall be held at Auctioneer's place of business;
- (c) The sale shall be with reserve and no bid shall be accepted that is more than _____ [*e.g., 10*] percent below the price of the goods stated in this contract;
- (d) Any profit realized from any individual item shall be credited to Buyer against the total damages claimed by Seller.

[OR]

If Seller has a right to resell the goods under the Commercial Code, Seller may exercise that right only by consigning the goods to _____, Consignee, with instructions to sell the goods for Seller at a price of no more than _____ [e.g., 15] percent less than the price stated in this contract. The amount received from this sale is to be credited to Buyer's account with Seller. Consignee is to be given not more than _____ [e.g., 30] days to effectuate a sale.

[OR]

If Seller elects to resell the goods in accordance with Seller's rights under the Commercial Code, Seller shall give notice to Buyer by registered or certified mail at least _____ [e.g., 10] days before the date of the sale, whether it is public or private.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsSale by AuctionCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesResale of Goods



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21-52 California Legal Forms--Transaction Guide § 52.352

§ 52.352 Clauses Specifying Whether Buyer May or Must "Cover"

[1] Comment

[a] Use of Form

This form contains four alternative clauses that specify remedies afforded the buyer in limitation of the remedies generally available under Division 2 of the Commercial Code [see *Com. Code § 2101-2801*] as provided in *Com. Code § 2711*. These alternatives should be used by parties who want to limit the remedies otherwise available under the Commercial Code. Specifically, these alternatives either require or forbid the buyer to "cover" by getting substitute goods [see *Com. Code § 2712*]. For discussion of "cover," see [b], *below*.

Com. Code § 2719 specifically grants the right to limit or modify the remedies otherwise provided under Division 2 of the Commercial Code [see *Com. Code §§ 2101-2801*]. For discussion of *Com. Code § 2719*, and for examples of forms that modify or limit remedies other than the right to "cover" by obtaining substitute goods [see *Com. Code § 2712*; see also [b], *below*], see § 52.353.

For discussion of the remedies provided in *Com. Code § 2711*, see § 52.18[3].

[b] Cover

After a breach of the contract by the seller that is within the scope of *Com. Code § 2711* [see § 52.18[3]], the buyer may "cover" by making any reasonable purchase of goods or any reasonable contract to purchase goods in substitution for the goods due from the seller. The purchase or contract to purchase must be made in good faith and without unreasonable delay [*Com. Code § 2712(1)*]. The test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner. It is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective [*Com. Code § 2712*, comment 2].

A buyer who gets substitute goods may recover from the seller as damages the difference between the cost of cover and

the contract price, plus any incidental or consequential damages, but minus any expenses saved by the seller's breach [*Com. Code* § 2712(2)]. The failure to effect cover does not bar the buyer from any other remedy [*Com. Code* § 2712(3)]. Cover is not a mandatory remedy. The buyer is free to choose between cover and damages for non-delivery or repudiation under *Com. Code* § 2713. However, failure to effect cover may affect the recovery of consequential damages [*see Com. Code* § 2715(2) (consequential damages limited to losses that could not reasonably be prevented by cover)] and the availability of the remedies of strict performance [*see Com. Code* § 2716(1) (specific performance available for unique goods and in other proper circumstances); *Com. Code* § 2716, comment 2 (inability to cover is strong evidence of "other proper circumstances") and replevin [*Com. Code* § 2712, comment 3; *see Com. Code* § 2716(3) (replevin limited to cases in which cover not available and goods have been identified to the contract)].

[2] FORM

Clauses Specifying Whether Buyer May or Must "Cover"

Remedies of Buyer

The parties acknowledge that the raw materials used in the manufacture of the goods specified in this contract are not readily available and are difficult to obtain. Accordingly, Buyer waives all rights to damages in any form whatsoever, except the costs incurred in the rental of suitable storage facilities from the date of the initial delivery provided for in this contract until Seller notifies Buyer in writing that Seller is unable to procure the raw materials after the exercise of a good faith effort. Nothing in this provision or elsewhere in this contract shall be construed as relieving Seller of any liability for any breach of this contract other than a breach occasioned by the lack of the raw materials.

[OR]

If Seller breaches or repudiates this contract, Buyer shall be entitled to no damages unless Buyer effectuates "cover" as that term is defined in *Commercial Code Section 2712*. Incidental and consequential damages are included within the meaning of "damages" as used in this paragraph.

[OR]

If Seller breaches or repudiates this contract, Buyer shall be entitled to recover only incidental and consequential damages unless Buyer effectuates "cover" by contracting for substitute goods.

[OR]

If Seller breaches or repudiates this contract, Buyer's right to damages shall be limited to the difference between the contract and market price of the goods, and Buyer shall not have the right to "cover" and fix damages by contracting for substitute goods.

[OR]

If Seller breaches this contract, Buyer's sole right to damages shall be to the difference between the contract price and the market price. Buyer shall have no right to cover by procuring substitute goods, and no right to incidental or consequential damages.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesCoverCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesLimitation & ModificationGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.353

§ 52.353 Clauses Limiting Damages or Remedies

[1] Comment

[a] Use of Form

This form contains alternative clauses modifying or limiting damages or remedies pursuant to *Com. Code § 2719*.

[b] Contractual Modification or Limitation of Remedy

Com. Code § 2719 provides that an agreement may provide for remedies in addition to or in substitution for those provided in Division 2 of the Commercial Code [*see Com. Code § 2101 et seq.*] and may alter or limit the measure of damages recoverable under Division 2. For example, an agreement may limit the buyer's remedies to the return of the goods and a refund of the purchase price or to repair and replacement of nonconforming goods or parts [*Com. Code § 2719(1)(a)*]. Resort to a remedy provided by agreement of the parties is optional unless the contract expressly states that the remedy is exclusive. In that case, the remedy agreed to is the sole remedy [*Com. Code § 2719(1)(b)*].

[c] Consequential Damages

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable [*Com. Code § 2719(3)*]. For discussion of unconscionability, see § 52.332[1][c]. Limitation of consequential damages for a personal injury caused by consumer goods [*see Com. Code § 9102(a)(23)*] ("consumer goods" are those used or bought for use primarily for personal, family, or household purposes)] is invalid unless it is proved that the limitation is not unconscionable. If the loss is commercial, such a limitation is valid unless proved to be unconscionable [*Com. Code § 2719(3)*]. The purpose of this provision is to allocate the burden of proving the validity of provisions limiting consequential damages [Law Revision Commission Comment, *Com. Code § 2719*]. In one case, for example, a provision limiting consequential damages for commercial loss in a contract between an oil company and a dealer was held unconscionable. The key factors included the following [*Johnson v. Mobil Oil Corp. (E.D. Mich. 1976) 415 F. Supp. 264, 266-269*] :

- The dealer's eighth grade education and poor reading skills.
- The failure of the oil company's representative to point out or explain the limitation of damages clause.
- The oil company's representative's lack of authority to vary the terms of the standard printed contract.
- The immense bargaining power of the oil company.
- The fact that the dealer did not read the contract before signing it.

[d] Failure of Essential Purpose

When circumstances cause an exclusive or limited remedy established by a contract of sale to fail in its essential purpose, the parties are still entitled to the remedies provided by the Commercial Code [*Com. Code § 2719(2)*]. That is, when circumstances cause an apparently fair and reasonable clause to fail in its purpose or to deprive either party of the value of the bargain, that clause must give way to the general remedy provisions of Division 2 of the Commercial Code [*Com. Code § 2719*, comment 1].

This restoration of Commercial Code remedies when the essential purpose of a limited or exclusive remedy fails has caused some confusion when a clause limiting or excluding remedies for breach of warranty is included with a clause excluding consequential damages. The standard measure of damages for breach of warranty in the sale of goods is the difference at the time and place of acceptance between the value of goods accepted and the value they would have had if they had been as warranted [*Com. Code § 2714(2)*], but this is not intended as an exclusive measure of damages [*Com. Code § 2714*, comment 3]. Consequential damages include any injury to person or property proximately resulting from any breach of warranty [*Com. Code § 2715(2)(b)*].

Thus, when a manufacturer in its sales agreement limited the buyer's remedy for breach of warranty to repair and replacement of nonconforming goods or parts, and expressly excluded the recovery of all consequential damages for the breach, the manufacturer's inability to repair the machine, despite a good faith attempt, posed a difficult question. It was clear that the inability to fix the machine was a failure of the essential purpose of the limited warranty. This failure invalidated that limitation and made the usual Commercial Code remedy for breach of warranty available to the buyer [*S.M. Wilson & Co. v. Smith Intern., Inc.* (9th Cir. [Cal.] 1978) 587 F.2d 1363, 1375 ; see *Com. Code § 2719(2)*]. The difficult question was whether the failure of purpose due to the inability to repair also invalidated the disclaimer of consequential damages for breach of warranty. It did not, in that case, for two reasons. First, placement of the risk of consequential damages on the buyer was a negotiated allocation of the risk of loss bargained for by parties of relatively equal bargaining power. Second, the failure of the repair remedy in the contract was due to inability, not a willful refusal to repair [*S.M. Wilson & Co. v. Smith Intern., Inc.* (9th Cir. [Cal.] 1978) 587 F.2d 1363, 1375, 1376] .

This result seems reasonable because the buyer can still be compensated for any direct loss [see *Com. Code § 2714(2)* (usual measure of damages for breach of warranty)]. Furthermore, the seller, who is guilty of no wrongdoing, is not deprived of the bargained for allocation of risk [see Eddy, *On the 'Essential' Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)* , 65 Calif. L. Rev. 28, 86-88 (1977)]. If the failure to repair is deliberate, however, the exclusion of consequential damages is also invalidated [*Jones & McKnight Corp. v. Birdsboro Corporation* (N.D. Ill. 1970) 320 F. Supp. 39, 43-44 ; see Eddy, *On the 'Essential' Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)* , 65 Calif. L. Rev. 28, 86 (1977)].

[2] FORM

Clauses Limiting Damages or Remedies**Limitation of Damages or Remedies**

The parties acknowledge that it is difficult to obtain the raw materials essential to the production of the goods sold under this contract, and that the supply of those materials is uncertain. Therefore, it is agreed that if Seller is unable after a good faith effort to get enough raw materials to manufacture _____ percent of the goods required under the terms of this contract, Buyer's exclusive remedy shall be the return of any money paid on account of the price. Nothing in this contract shall be construed to limit Buyer's rights to any applicable remedy or damages if Seller fails to properly perform any other obligation under this contract.

[OR]

Because the machinery needed to produce the goods is highly complicated and of relatively new design, Buyer agrees to accept all nonconforming deliveries and Seller agrees to replace or repair all defective or nonconforming goods or parts without any expense whatsoever on the part of Buyer. Replacement and repair shall be the sole remedy of Buyer with respect to any nonconforming goods and parts and shall be in lieu of any other remedy available under applicable law. The provisions of this contract with respect to limitation of remedies shall not apply to a failure by Seller to deliver the goods.

[OR]

If Seller breaches or repudiates this contract, Buyer shall not be entitled to recover any incidental damages as that term is defined in *Commercial Code Section 2715*.

[OR]

If Seller breaches or repudiates this contract, Buyer shall be entitled to recover as incidental damages, in addition to those provided for in the Uniform Commercial Code, the following:

- (a) Any finder's fee paid to anyone who procured this contract for Buyer.
- (b) A reasonable rental charge for goods leased while Buyer effectuates a purchase elsewhere.
- (c) Any expenses incurred in leasing substitute goods for use until Buyer procures goods elsewhere.

[OR]

If Seller breaches or repudiates this contract, Buyer shall not be entitled to any consequential damages as defined in the Uniform Commercial Code except that if the goods sold are "consumer goods," personal injuries shall be recoverable.

[OR]

If Seller breaches or repudiates this contract, Buyer shall be entitled to recover as consequential damages, in addition to all other rights granted by the Uniform Commercial Code, any profit lost on a contract to resell the goods if Buyer is unable to recover.

[OR]

If Seller breaches or repudiates this contract, Buyer shall not be entitled to any consequential damages in excess of \$ _____. This limitation shall not apply, however, to damages for injury to the person.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesLimitation & ModificationGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesLimitation & ModificationUnconscionable Limitations



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21-52 California Legal Forms--Transaction Guide § 52.354

§ 52.354 Merger or Integration Clause; Parol or Extrinsic Evidence

[1] Comment--Use of Form

This form contains alternative merger clauses designed to be included in sales contracts. In a "merger" or "integration" clause, the parties agree that the contract is complete, final, and integrated in order to prevent the use of extrinsic evidence to contradict, explain, or supplement the terms of the written contract. In the absence of a merger or integration clause, there is no assumption that a written agreement is final as to all of its terms, unless a court expressly makes that finding, and even terms found to be final are subject to explanation or supplementation by course of dealing, usage of trade, or course of performance [*Com. Code* § 2202]. For further discussion of the parol evidence rule, see § 52.14[2].

[2] FORM

Merger or Integration Clause; Parol or Extrinsic Evidence

Finality of This Writing

The parties intend this writing to be the final expression of their agreement and it is intended also as a complete and exclusive statement of the terms of their agreement. No course of prior dealings between the parties and no usage of the trade shall be relevant to supplement or explain any term used in this contract. Acceptance or acquiescence in a course of performance rendered under this contract shall not be relevant to determine the meaning of this contract even when the accepting or acquiescing party has knowledge of the nature of the performance and opportunity for objection.

[OR]

This writing constitutes the entire contract between the parties and exclusively determines the rights and obligations of the parties, any prior course of dealing, custom or usage of trade, or course of performance notwithstanding.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGeneral OverviewContracts
LawContract Conditions & ProvisionsIntegration Clauses



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21-52 California Legal Forms--Transaction Guide § 52.355

§ 52.355 Clauses Limiting Waiver of Executory Performance

[1] Comment--Use of Form

This form is a clause intended to prevent waivers of executory portions of a sales contract unless based on a writing and on consideration. If the parties do not agree otherwise [*see Com. Code § 1302* (effect of code provisions may be varied by agreement except as otherwise provided)], oral executory waivers are possible without consideration; as, for example, when the parties have attempted an ineffective modification [*Com. Code § 2209(4)*; *see § 52.16*]. It is doubtful, however, that this form can prevent a waiver that leads to a detrimental reliance [*Com. Code § 2209(5)*; Hart & Willier Forms and Procedures Under the UCC, Article 2: Sales, Part 1, *General*, P 21.07[4] (Matthew Bender); *see § 52.430[1]*].

[2] FORM

Clauses Limiting Waiver of Executory Performance

Ineffective Waivers

No waiver of an executory portion of this contract shall be valid and enforceable unless supported by consideration, in writing, and signed by the waiving party.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewContracts LawContract Conditions & ProvisionsWaiversGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.356

§ 52.356 Provisions Covering Assignment of Rights and Delegation of Performance

[1] Comment

[a] Use of Form

This form contains alternative provisions that provide for or negate the assignment of rights or the delegation of duties under a sales contract.

Unless the parties agree otherwise, they may discharge their duties under a sales contract in either of two ways. A party's duties may be performed by a delegate unless the other party has a substantial interest in having the original promisor perform or control the acts required by the contract [*Com. Code § 2210(1)*]. Alternatively, except as otherwise provided in *Com. Code § 9406*, a party may assign his or her rights unless that assignment would materially change the duty of the other party or materially increase the burden or risk imposed on the other party by the contract [*Com. Code § 2210(2)*]. The creation, attachment, perfection, or enforcement of a security interest in the seller's interest under a contract is not a transfer that materially changes the duty of or increases materially the burden or risk imposed on the buyer or impairs materially the buyer's chance of obtaining return performance unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the seller [*see Com. Code § 2210(3)*]. Even if the desires of the parties concerning the delegation and assignment of their contractual duties are reflected in *Com. Code § 2210*, it is always prudent to specify them in the contract.

[b] Effect of Right to Demand Assurance

The drafter should consider the right of the nondelegating party to demand assurance [*see Com. Code § 2609; see also §§ 52.330, 52.441*] from the assignee. In the absence of agreement, *Com. Code § 2210(6)* provides for this right. This form provides alternatives both for waiving of this right and for setting out specific assurances and methods of assurance that may be demanded. The alternatives that prohibit assignment, or delegation, or both, provide different penalties and effects for the making of prohibited assignments and delegations.

[c] Alternative Provisions in Form

There are 11 alternative clauses under eight headings in this form. The first group contains three clauses, each permitting both assignment and delegation. The second group contains two alternatives, each requiring written consent for both assignment and delegation. The remaining six alternatives are each under a different heading. The first two of these remaining alternatives, under the third and fourth headings, provide for damages. The clause under the third heading provides for damages if an assignment or delegation is made without the written permission of the other party. The clause under the fourth heading provides liquidated damages for any assignment or delegation in violation of the contract. The next two alternatives, under the fifth and sixth headings, require consent. The clause under the fifth heading requires consent for assignment of rights. The clause under the sixth heading requires consent for a delegation of duties. The final two alternatives provide for the effect of delegation of duties on the right to demand assurance of performance [see § 52.441]. The clause under the seventh heading provides that a delegation constitutes a waiver of the right to demand assurances. The final clause establishes a right to demand a performance bond as assurance that delegated duties will be performed.

[d] Effect of Assignment

An assignment of "the contract" or "all my rights under the contract" (or assignments containing similar general terms) is an assignment of rights and, unless the language or the circumstances indicate the contrary, it is a delegation of performance of the assignor's duties. Its acceptance by the assignee amounts to a promise by him or her to perform those duties [Com. Code § 2210(5)]. The acceptance of an assignment of a purchase agreement containing a warranty provision that includes an exculpatory clause barring negligence actions, the validity of which is not contested, constitutes agreement on the part of the assignee to be bound by the exculpatory clause [*Aeronaves de Mexico, S.A. v. McDonnell Douglas* (9th Cir. 1982) 677 F.2d 771, 773] .

[2] FORM**Provisions Covering Assignment of Rights and Delegation of Performance****Assignment and Delegation**

Either party to this contract may assign that party's rights under this contract in whole or in part and may delegate that party's duties under this contract in whole or in part.

[OR]

Either party to this contract may assign that party's rights under this contract in whole or in part and may delegate that party's duties under this contract in whole or in part. If any assignment is made, notice must be given to the nonassigning party at least _____ [e.g., five] days before the assignment and the nonassigning party will receive credit for any payments or deliveries made to the assignor. If any delegation is made, notice must be given to the nondelegating party at least _____ [e.g., five] days before the delegation, and the delegator shall remain fully liable for performance of the delegated duties.

[OR]

Seller intends to assign Seller's rights and delegate Seller's duties under this contract, and Buyer agrees to this assignment. Notwithstanding any assignment or delegation by Seller, Seller shall remain fully responsible to Buyer for any obligation under this contract.

[OR]

Consent to Assignment or Delegation

No right or interest in this contract may be assigned by either Buyer or Seller without the written permission of the other party, and no delegation of any obligation owed by either Buyer or Seller may be made without the written permission of the other party. Any attempted assignment or delegation shall be wholly void and totally ineffective for all purposes.

[OR]

This contract shall not be assignable or delegable by either party without the written consent of the other. This written consent shall not be unreasonably withheld.

[OR]

Assignor Liable for Damages

The power of either Buyer or Seller to assign rights and delegate duties acquired or imposed under this contract is not limited. However, if any assignment or delegation is made without the written permission of the other party, the assignor shall be liable for any damages caused the other party by the assignment or delegation.

[OR]

Liquidated Damages

If either Buyer or Seller assigns rights or delegates duties in violation of this contract, the party making the assignment shall be liable in the amount of \$ _____. The parties agree that this sum is a reasonable approximation of the actual damages which they presently anticipate would result from an assignment or delegation, and that it is inserted here not as a penalty but for the sole purpose of avoiding the difficulties of proof of the actual damages.

[OR]

Consent Required for Assignment

No right or interest in this contract may be assigned by either Buyer or Seller without the written permission of the other party, and any attempted assignment shall be wholly void and totally ineffective for all purposes. This paragraph is intended to prohibit assignment of rights only, and the right to delegate duties is in no way impaired by reason of this provision.

[OR]

Consent Required for Delegation

No delegation of any duty owed by either Buyer or Seller may be made without the written permission of the other party. Any attempted delegation shall be wholly void and totally ineffective for all purposes. However, no permission is necessary with respect to any assignment of rights under this contract.

[OR]

Waiving Right to Demand Assurances On Delegation

Either party may delegate that party's duties under this contract in whole or in part and whether or not in conjunction with an assignment of rights. If a delegation of duties is made, the other party shall have no right to assurances from the delegatee-assignee, and the right to those assurances is hereby waived.

[OR]

Bond Required as Assurance of Performance On Delegation

If Seller [or Buyer or either Seller or Buyer] delegates any obligations imposed by this contract, or assigns rights and delegates performance, the other party shall have the right to demand that the assignee-delegatee [or assignor-delegator] post bond in the amount of \$ _____ to assure performance of this assignment. Until the bond is posted, the other party may, if commercially reasonable, suspend any performance for which that party has not been paid. If the assignee-delegatee [or assignor-delegator] refuses or fails to post bond in this amount within _____ days, the other party may treat the refusal or failure as a repudiation of this contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAssurances of PerformanceCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentThird Party Contracts



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21-52 California Legal Forms--Transaction Guide § 52.357

§ 52.357 Liquidated Damages Clauses

[1] Comment

[a] Use of Form

This form contains alternative clauses that set liquidated damages as permitted by *Com. Code § 2718*. The last alternative in this form is appropriate for use when the goods covered by the sales contract are machine components.

For a liquidated damages clause that applies when the buyer or the seller assigns rights or delegates duties in violation of the contract of sale, see § 52.356[2].

[b] Amount of Liquidated Damages for Breach

The Commercial Code allows the parties to set liquidated damages to be imposed in event of a breach. The liquidated damages set must be in an amount that is reasonable in light of (1) the anticipated or actual harm caused by the breach; (2) the difficulties of proof of loss; and (3) the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A liquidated damages clause fixing unreasonably large liquidated damages is considered a penalty and is therefore void [*Com. Code § 2718(1)*].

[c] Buyer's Right to Restitution

When the seller justifiably withholds delivery because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum that he or she has paid exceeds the amount to which the seller is entitled as liquidated damages under an agreement in accordance with *Com. Code § 2718(1)* [*Com. Code § 2718(2)(a)*]. If there are no liquidated damages provisions, then the buyer is entitled to restitution of any amount by which the sum that he or she has paid exceeds 20 percent of the value of the total performance for which the buyer is obligated under the contract, or \$500, whichever is smaller [*Com. Code § 2718(2)(b)*]. In either case, the buyer's right to restitution is subject to offset to the extent that the seller establishes a right to recover damages other than liquidated damages under *Commercial Code*

§§ 2701-2725 and to the extent that the seller establishes the amount or value of any benefits received by the buyer by reason of the contract [*Com. Code § 2718(3)*].

[2] FORM

Liquidated Damages Clauses

Liquidated Damages

If Buyer wrongfully refuses to accept the goods, Buyer must pay to Seller, in lieu of the enforcement of this contract, as liquidated damages, the sum of \$ _____, and, if shipment has been made, Buyer must also reimburse Seller for all costs of shipment.

[OR]

Buyer shall have the right to terminate this contract by giving notice to Seller before the goods are shipped, provided that Buyer tenders to Seller _____ [*e.g.*, one-third] of the purchase price with _____ [his or her] notice of termination. The sum of _____ [*e.g.*, one-third] of the purchase price shall constitute liquidated damages, and shall be the exclusive remedy of Seller when notice of termination is properly given. The liquidated damages are assessed to cover Seller's usual costs of processing this contract (including payment of sales commission), recordkeeping, and profit.

[OR]

If Seller fails to deliver goods conforming to this contract, Seller shall pay Buyer the sum of \$ _____ as liquidated damages.

[OR]

Because the goods sold under this contract are to be specially manufactured by Seller and are not readily available on the open market, and because the goods sold are to become part of machinery to be manufactured by Buyer, any failure to deliver the goods as required by this contract will delay Buyer's manufacturing operations and result in substantial damages. For this reason, and because of the difficulty of accurately proving loss and the nonfeasibility of Buyer's obtaining an adequate remedy, Seller agrees to pay as liquidated damages the following amounts: For each day's delay in delivery Seller agrees to pay \$ _____ up to a maximum of _____ [*e.g.*, 15] days. If at the end of _____ [*e.g.*, 15] days subsequent to the time of delivery Buyer has not received the goods, Seller shall pay in addition to the per diem amounts the sum of \$ _____. If Seller notifies Buyer that the goods will not be delivered as provided in this contract, and if Buyer can obtain the goods elsewhere before the expiration of _____ days after the time of delivery provided in this contract, then Seller shall pay as liquidated damages the per diem rate for the time of the resulting delay plus the difference between the contract price and the amount Buyer pays to buy the goods from another source.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesLimitation & ModificationLiquidated Damages



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21-52 California Legal Forms--Transaction Guide § 52.358

§ 52.358 Choice of Law

[1] Comment--Use of Form

This form contains alternative provisions that enable the parties to choose, to the extent permitted by *Com. Code § 1301(c)*, the law they wish to apply to the transaction. With certain exceptions [*see, e.g., Com. Code § 2402* (rights of seller's creditors against sold goods)], when a transaction bears a reasonable relation to California and also to another state or nation, the parties may agree that the law either of California or of the other state or nation will govern their rights and duties [*Com. Code § 1301(a)*]. If the parties make no agreement on this point, the Commercial Code will apply to transactions bearing an appropriate relation to California [*Com. Code § 1301(b)*].

[2] FORM

Choice of Law

Applicable Law

This contract, and all the rights and obligations of the parties under this contract, shall be governed by the Uniform Commercial Code as enacted and in force in the State of _____ on the date of this contract.

[OR]

The construction and performance of this contract shall be determined by the laws of _____ [*state or nation*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Subject MatterChoice of Law



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[Reserved]

§§ 52.359[Reserved]



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1. Follow-up Letter

21-52 California Legal Forms--Transaction Guide § 52.370

§ 52.370 Follow-up Letter to Client

[1] Comment--Use of Form

This form is a follow-up letter to a client. An attorney who has advised a client on the drafting or accepting of a sales transaction may be called on to further advise the client on situations that develop during the life of the contract, such as the appropriate course of action if the other side delays performance. The conscientious attorney will advise the client when to call for legal advice in the course of the transaction. This advice may be given simply and generally, as in this form, or the attorney may provide the client with detailed checklists based on the client's particular transaction.

[2] FORM

Follow-up Letter to Client

[Letterhead of attorney]

_____ *[date]*

_____ *[name of client]*

_____ *[address]*

Dear _____:

Now that your sales contract with _____ has been consummated, I enclose my bill for professional services rendered.

There are several important points that you should keep in mind during the life of the contract. First, always inspect shipments on arrival to determine whether the goods conform to specifications. If they do not, call me for further advice.

Second, as a general rule, whenever delivery or other details of performance are not as you expected, do not simply acquiesce to the change or otherwise proceed on your own, but contact me immediately for advice.

The reason for this caution is that if you proceed on your own incorrectly, you may give up valuable rights that might have been protected.

Sincerely,

_____ [*signature of attorney*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)General Overview



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21-52 California Legal Forms--Transaction Guide §§ 52.371-52.379

[Reserved]

§§ 52.371[Reserved]



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 2. Acceptance, Accommodation, or Confirmation

21-52 California Legal Forms--Transaction Guide § 52.380

§ 52.380 Notice of Objection to Confirmation**[1] Comment--Use of Form**

This form is a notice of objection to confirmation. It is designed to be used by a merchant who receives a confirmation of a purchase or sale that he or she purportedly made.

The confirmation of an alleged oral agreement binds the merchant unless he or she notifies the other party of his or her objections within 10 days after receiving the confirmation [*Com. Code § 2201(2)*; for further discussion, see § 52.14[3]].

[2] FORM**Notice of Objection to Confirmation****NOTICE OF OBJECTION TO CONFIRMATION**

_____ [date]
 _____ [name]
 _____ [address]

Dear _____:

PLEASE TAKE NOTICE that we hereby object to your purported confirmation of _____ [sale or purchase] dated _____, received by us on _____ [date]. _____ [NO agreement or contract was entered into or *object to details of the confirmation*] and we hereby give notice of this pursuant to *Commercial Code Section 2201(2)*.

_____ [signature of objecting party]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceAdditional TermsCommercial
Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsMerchant Rule



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21-52 California Legal Forms--Transaction Guide § 52.381

§ 52.381 Notice of Acceptance After Commencement of Performance**[1] Comment--Use of Form**

This form is a notice of acceptance by performance. When the beginning of a requested performance constitutes a reasonable mode of acceptance, the offeree must notify the offeror when he or she commences performance. An offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance [*Com. Code* § 2206(2)]. This form should be used to give an appropriate notice under *Com. Code* § 2206(2).

[2] FORM**Notice of Acceptance After Commencement of Performance****NOTICE OF COMMENCEMENT OF PERFORMANCE**

TO: _____ [name of offeror]
 _____ [address]

On _____ [date], we accepted your offer of _____ [date], concerning
 _____ [specify nature of offer], and _____ [we began performance or specify type of
 performance] on that date.

Dated: _____.

_____ [signature of offeree]
 [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & AcceptanceCommercial Law
(UCC)Sales (Article 2)PerformanceGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.382

§ 52.382 Acceptance Conditioned on Consent to Additional Terms**[1] Comment--Use of Form**

This form consists of alternative acceptances, each of which is conditioned on the other party's consent to additional or differing terms. These alternatives are designed to be used on their own, not as a clause in an agreement. Each conditional acceptance, together with the offer being accepted, is sufficient to constitute the agreement of the parties, although the parties may wish to draw up a more formal agreement.

In the absence of a condition of this kind in the acceptance, the acceptance may be effective even though the additions or differing terms are rejected by the offeror [*Com. Code* § 2207(1); *see, e.g., PMC Inc. v. Porthole Yachts Ltd. (1998) 65 Cal. App. 4th 882, 888-889, 76 Cal. Rptr. 2d 832* (no acceptance found under *Com. Code* § 2207(1) due to timing of addendum to agreement sent on last day to accept, contents of addendum which contained new term, and cover letter emphasizing conditional nature of acceptance); *Textile Unlimited, Inc. v. A..BMH and Co. Inc. (9th Cir. 2001) 240 F.3d 781, 787-788* (contract containing new terms, including arbitration clause, not formed under *Com. Code* § 2207(1) when no specific and unequivocal assent was given to supplemental conditions); *see also* § 52.222[1]].

[2] FORM**Acceptance Conditioned on Consent to Additional Terms****CONDITIONAL ACCEPTANCE**

_____[date]

To: _____[name]

_____[address]

I, _____[name and title], of _____[name of firm] accept your offer dated

_____, to _____ [e.g., sell us _____ (number) of _____ (product) every month from _____ [date], to _____ [date], at a price of \$ _____ each]. However, I must insist that _____ [e.g., delivery be by the 1st of each month, not the 5th, and that each _____ (product) be packaged separately and individually in corrugated containers].

This acceptance is expressly made conditional on my [or our] assent to any terms additional to or different from those proposed in the purchase order.

[OR]

Your purchase order dated _____ re: _____ [describe goods and quantity] has been received. We are unable to ship the goods before _____ [date]. Unless you can agree to this shipment date, we will not consummate a contract.

[OR]

We accept your offer if you agree to the following modifications:

(1) _____

(2) _____

(3) _____

If these modifications are not accepted in full, we refuse to purchase.

_____ [signature of party]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) Form, Formation & Readjustment Offer & Acceptance



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21-52 California Legal Forms--Transaction Guide § 52.383

§ 52.383 Notice by Seller That Nonconforming Goods Are Offered as Accommodation

[1] Comment--Use of Form

This form is a notice by the seller that nonconforming goods are offered as accommodation. The alternative notices presented in this form are designed to allow a seller to ship nonconforming goods in response to an order or offer without being deemed to have accepted that order or offer.

Unless the seller provides a notice that nonconforming goods are offered as an accommodation, he or she will be deemed to have accepted the buyer's offer by the shipment of nonconforming goods [*Com. Code § 2206(1)(b)*] and may be liable for breach of contract [*Com. Code § 2206*, comment 4]. The shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer [*Com. Code § 2206(1)(b)*].

Sellers who cannot fill orders often feel that the needs of the buyer will be better satisfied by the nonconforming goods than by no goods at all. Thus the necessity for the notice provided in this form arises frequently in commercial transactions. The effect of shipping nonconforming goods along with this notice is to create a new offer that may be rejected by the buyer.

[2] FORM

Notice by Seller That Nonconforming Goods Are Offered as Accommodation

NONCONFORMING GOODS AS ACCOMMODATION

_____[date]
_____[buyer]
_____[address]

Dear _____:

Thank you very much for your purchase order dated _____.

Unfortunately, the goods that you ordered are out of stock at the present time. However, as an accommodation to you, today we shipped _____ [*describe goods*], which are similar to the goods you ordered and which we believe are equal or superior in quality. We hope that you will be able to use these goods in substitution for those that you ordered.

You are, of course, free to reject our offer. If you do, please inform us of your decision and we will send shipping instructions for their return.

Sincerely,

_____ [*signature of seller*]
[*typed name*]

[OR]

_____ [*date*]

TO: _____ [*buyer*]
_____ [*address*]

PLEASE TAKE NOTICE that the goods shipped in response to your purchase order do not exactly conform to your specification and are shipped only as an accommodation to you. At the present time we do not have the goods that you ordered in stock, and hence it is impossible to accept your offer. We do believe that the goods furnished will be a satisfactory substitute for those ordered. If you wish to return the shipped articles, please contact us for shipping instructions.

_____ [*signature of seller*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & AcceptanceCommercial Law (UCC)Sales (Article 2)Subject MatterGoodsGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.384

§ 52.384 Notice of Objection to Additional Terms of an Acceptance**[1] Comment--Use of Form**

This form contains alternative notices of objection to additional terms of an acceptance. It is designed to protect an offeror merchant from being bound by the additional or differing terms contained in an acceptance of the offer. If the merchant has not limited the offeree's power of acceptance [see § 52.222], he or she may be bound by additions to an acceptance unless the additions materially alter the offer, or unless the notice of objection in this form is communicated to the offeree within a reasonable time [Com. Code § 2207(2)].

[2] FORM**Notice of Objection to Additional Terms of an Acceptance****NOTICE OF OBJECTION TO ADDITIONAL OR DIFFERING TERMS**

_____ [date]

TO: _____ [name of offeree]
 _____ [address]

PLEASE TAKE NOTICE that pursuant to *Commercial Code Section 2207*, the undersigned hereby objects to and rejects the additional and differing terms contained in your acceptance dated _____.

We will continue to perform our part of the contract in accord with our offer dated _____, which you accepted.

[OR]

Your request for shipment on or before _____[*date*] cannot be granted, due to the status of the current market. Therefore, we are compelled to object to the inclusion of any additional term in our contract, and shipment will be made as agreed.

[OR]

Our low price offer is predicated on the terms and conditions previously stated. We cannot alter those terms and therefore we must object to inclusion of the following additional terms:

(1) _____

(2) _____

(3) _____

_____ [*signature of offeror*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & Acceptance



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21-52 California Legal Forms--Transaction Guide § 52.385

§ 52.385 Notice of Revocation of Acceptance**[1] Comment--Use of Form**

This form contains alternative notices from the buyer to the seller that the buyer's acceptance of goods is revoked.

The buyer may have the right to revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the buyer. The buyer has the right to reject the goods if he or she has accepted the goods on the reasonable assumption that the nonconformity would be cured and this has not been done seasonably [*see Com. Code § 1205(b)*; (a thing is done "seasonably" if it is done at or within the time agreed on, or, if no time is agreed on, at or within a reasonable time)]. The buyer also has the right to revoke a nonconforming lot or commercial unit when he or she has accepted it without discovery of the nonconformity if the acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances [*Com. Code § 2608(1)*].

Revocation of acceptance must occur through notification to the seller within a reasonable time after the buyer discovers or should have discovered the ground for it, and before any substantial change occurs in condition of the goods that is not caused by their own defects [*Com. Code § 2608(2)*].

[2] FORM**Notice of Revocation of Acceptance****NOTICE OF REVOCATION OF ACCEPTANCE**

_____ [date]
 TO: _____ [seller]
 _____ [address]

PLEASE TAKE NOTICE that pursuant to *Commercial Code Section 2608*, the undersigned hereby revokes the prior acceptance of the goods delivered on _____ [date] pursuant to our contract dated _____

_____.

You have failed to comply with your promise to _____ [*specify, e.g., replace the defective binding on the outer rim of the outdoor tables*], which we received pursuant to our contract dated _____, and your failure to cure this nonconformity in the goods necessitates this revocation of our prior acceptance.

[OR]

PLEASE TAKE NOTICE that pursuant to *Commercial Code Section 2608*, the undersigned hereby revokes acceptance of the goods delivered on _____ [*date*] pursuant to our contract dated _____.

[*Specify nonconformity, e.g., Examination of the wood paneling in the goods reveals that the panels have become warped, split, and have otherwise lost shape so as to force the wood to become separated from the edges into which they were inserted. Chemical and expert analysis reveals that the cause of this is improper aging of the lumber before finishing.*] These defects were not discoverable before acceptance because of the nature of the defect, and because we were induced to accept by reason of your assurances that _____ [*specify, e.g., the wood paneling was of first-rate quality*].

_____ [*signature of buyer*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsNotice
RequirementsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of
GoodsRevocation of AcceptanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation &
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21-52 California Legal Forms--Transaction Guide § 52.386

§ 52.386 Notice of Breach Discovered After Acceptance**[1] Comment--Use of Form**

This form contains two alternative notices of breach discovered after acceptance. These notices are designed to be given under *Com. Code* § 2607 by a buyer who has already accepted goods and discovers a breach. A buyer is barred from pursuing any remedies if he or she fails to notify the seller of a breach within a reasonable time after he or she discovers, or should have discovered, that breach [*Com. Code* § 2607(3)(a); see *Fieldstone Co. v. Briggs Plumbing Prods., Inc.* (1997) 54 Cal. App. 4th 357, 370-371, 62 Cal. Rptr. 2d 701 (delay of three years barred recovery on claims of breach of express warranty); *Davidson v. Herring H. M. Safe Co.* (1955) 131 Cal. App. 2d Supp. 874, 877, 280 P.2d 549 (delay of 15 months unreasonable as matter of law); *Ice Bowl, Inc. v. Spalding Sales Corp.* (1943) 56 Cal. App. 2d 918, 921-922, 133 P.2d 846 (delay of four months unreasonable as matter of law)].

The buyer has the burden of proving reasonable notice. The question whether notice was properly given must be determined from the particular circumstances, and where but one inference can be drawn from undisputed facts, the issue may be determined as a matter of law [*Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal. App. 4th 116, 135-136, 87 Cal. Rptr. 3d 5] .

[2] FORM**Notice of Breach Discovered After Acceptance****NOTICE OF BREACH DISCOVERED AFTER ACCEPTANCE**

_____[date]

TO: [seller]

_____[address]

Dear _____:

Pursuant to *Commercial Code Section 2607*, we hereby give you notice of the below-listed defects in goods we have accepted pursuant to a contract for sale naming you as Seller and us as Buyer dated _____. The defects, which we believe constitute a breach of this contract, were present in a shipment that we received and accepted on _____ [date]. Due to the nature of the breach, it was impossible to discover it on inspection, and we in fact did not discover it until today.

The defects are as follows: _____ [describe].

Sincerely,

_____ [signature of buyer]
[typed name]

[OR]

_____ [date]
TO: _____ [seller]
_____ [address]

Pursuant to *Commercial Code Section 2607*, notice is hereby given that you have breached our contract dated _____ for the sale of _____ [specify, e.g., garden rakes]. _____ [Specify defect, e.g., The binding on the rakes is too weak to withstand the force of normal use, causing them to split easily and rendering the rakes useless].

This condition could not be discovered on inspection, and we have learned of it from customer complaints. [After receiving these complaints, our salespeople tested the rakes by subjecting them to normal use, and confirmed the existence of this problem.]

_____ [signature of buyer]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse Acceptance of Goods Notice Requirements Notice of Breach



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21-52 California Legal Forms--Transaction Guide §§ 52.387-52.399

[Reserved]

§§ 52.387[Reserved]



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21-52 California Legal Forms--Transaction Guide § 52.400

§ 52.400 Notice of Rejection of Offer of Nonconforming Goods

[1] Comment--Use of Form

This form consists of alternative letters notifying the seller the buyer does not wish to accept the seller's accommodation. For discussion of the substitution of nonconforming goods as an accommodation, see § 52.383[1].

[2] FORM

Notice of Rejection of Offer of Nonconforming Goods

REJECTION OF OFFER OF NONCONFORMING GOODS

_____[date]
_____[seller]
_____[address]

Dear _____:

Your shipment of _____ [describe goods and indicate quantity] as an accommodation has arrived, and we are unable to use them. Therefore, we reject your offer. We await shipping instructions regarding the return of these goods.

[OR]

We do not care to purchase the nonconforming goods shipped by you. We revoke our previous offer and reject your offer of the goods shipped. Please make immediate arrangements for return of the goods on or before _____[date]. Storage charges will be incurred after that date.

Sincerely,

_____ [*signature of buyer*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseRightful RejectionCommercial Law
(UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & Waiver



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21-52 California Legal Forms--Transaction Guide § 52.401

§ 52.401 Rescission of Contract With or Without Reservation of Rights**[1] Comment--Use of Form**

This form consists of alternatives under which the parties agree to rescind or cancel a contract. The first two alternatives provide for cancellation or rescission with full reservation of rights. Even in the absence of agreement to reserve rights, *Com. Code § 2720* provides that, unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like will not be construed as a renunciation or discharge of any claim in damages for an antecedent breach. The second two alternatives provide that a cancellation of the contract will be accompanied by a release of all rights.

[2] FORM**Rescission of Contract With or Without Reservation of Rights****RESCISSION OF CONTRACT WITH RESERVATION OF RIGHTS**

It is hereby agreed between the undersigned parties that the written contract dated _____, for the sale of _____ is hereby canceled. Seller acknowledges the return of all goods referred to in the contract of sale and Buyer acknowledges receipt of all monies paid on account under that contract.

Nothing contained in this rescission agreement will be construed as a waiver by either party of any cause of action that either party may have by reason of the described contract of sale.

Dated: _____.

BUYER

_____ [signature of buyer]

[typed name]

SELLER

_____ [signature of seller]
[typed name]

[OR]

_____ [date]

The contract entered into between the undersigned parties and dated _____, is hereby rescinded. Both parties reserve all rights and remedies to which they may be entitled by reason of any breach of this prior contract.

BUYER

_____ [signature of buyer]
[typed name]

SELLER

_____ [signature of seller]
[typed name]

[OR]

RESCISSION OF CONTRACT WITHOUT RESERVATION

The undersigned parties, who entered into a contract for the sale of _____, dated _____, now wish to rescind the contract dated _____, without liability. The parties agree that the described contract is hereby rescinded without reservation, and that this rescission operates as a mutual release of each party to the other for any and all rights and remedies that may have arisen by reason of the contract dated _____.

Dated: _____.

BUYER

_____ [signature of buyer]
[typed name]

SELLER

_____ [signature of seller]
[typed name]

[OR]

_____ [date]

The undersigned agree that the contract entered into by them dated _____, is hereby rescinded without reservation, and neither party will be entitled to any remedy by reason of any act of commission or omission with respect to that contract.

BUYER

_____ [signature of buyer]

[*typed name*]

SELLER

_____ [*signature of seller*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & Waiver



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21-52 California Legal Forms--Transaction Guide § 52.402

§ 52.402 Notice From Buyer That Contract Is Terminated**[1] Comment--Use of Form**

This form is a notice from the buyer to the seller that the contract between them has been terminated. It may be used by a buyer who has received notification of a justified delay or allocation under *Com. Code* § 2615 [see § 52.320; see also § 52.132 P 1] to notify the seller that the contract is terminated pursuant to *Com. Code* § 2616(1)(a). For an outline of the requirements imposed by *Com. Code* § 2616, see § 52.148 P 2. Compare the notice of termination in § 52.474[2], for use in situations governed by *Com. Code* § 2309.

[2] FORM**Notice From Buyer That Contract Is Terminated****NOTICE OF TERMINATION OF CONTRACT**

_____[date]

TO: _____[seller]

_____[address]

PLEASE BE ADVISED that by reason of your notice dated _____, of an indefinite delay in the delivery of the goods required under the terms of our contract dated _____, _____[name of buyer], pursuant to the provisions of *Commercial Code* Section 2616, hereby elects to terminate and discharge the unexecuted portion of the contract.

The delay in delivery has substantially impaired the value of the contract, and arrangements must be made with other suppliers.

_____[signature of buyer]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)General OverviewCommercial Law (UCC)Sales (Article 2)Breach,
Repudiation & ExcuseAcceptance of GoodsNotice RequirementsNotice of Breach



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21-52 California Legal Forms--Transaction Guide § 52.403

§ 52.403 Notice of Rejection of Goods**[1] Comment--Use of Form**

This form consists of two alternative notices of rejection of goods. These alternatives illustrate the type of notice that must be sent by the buyer to the seller in order to effectively reject nonconforming goods under *Com. Code* § 2602. For a discussion of the requirements imposed by *Com. Code* § 2602 see § 52.323[1].

[2] FORM**Notice of Rejection of Goods****NOTICE OF REJECTION**

_____[date]
 TO: _____[seller]
 _____[address]

PLEASE TAKE NOTICE that the undersigned hereby gives notice of _____[his or her] rejection of the following described goods: _____[specify, e.g., the 500 sets of pedestal-wheel bases delivered _____(date), at our Oakland warehouse]. These goods were purportedly delivered pursuant to our written contract dated _____.

These goods have been rejected because _____[specify reason, e.g.: the ball bearing casements deviate by more than 7.6 percent from specifications, thereby causing friction and wear that would make it impossible to use these parts in our finished product].

Please forward immediate shipping instructions for the return of these goods. Please be advised that no other shipments will be accepted unless we are assured that the goods fully conform with the specifications of our contract dated _____.

_____ [signature of buyer]
[typed name]

[OR]

_____ [date]
_____ [seller]
_____ [address]

Dear _____:

We acknowledge receipt of a shipment of goods tendered to us on _____ [date] under the contract naming you as Seller and us as Buyer signed on _____ [date]. Unfortunately we are forced to reject this shipment and to refuse to accept it. The reason for our refusal is _____ [specify]. Because of these _____ [e.g., defects and omissions], we must regard the goods as nonconforming and take the position that you have breached our contract.

Please send instructions as to our disposition of the goods tendered. If we do not hear from you within _____ [e.g., 72 hours], we will reship them to you express collect.

Sincerely,
_____ [signature of buyer]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse Buyer's Rights on Improper
Delivery Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse Rightful Rejection



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21-52 California Legal Forms--Transaction Guide § 52.404

§ 52.404 Notice of Rejection Based on Failure to Notify Buyer of Shipment**[1] Comment--Use of Form**

This form is a notice of rejection for use by a buyer who wishes to reject a shipment of goods on the grounds provided in *Com. Code § 2504*, which states the obligations of the seller with respect to a shipment contract [see § 52.252]. Unless the parties agree otherwise, *Com. Code § 2504* applies when the seller is required or authorized to send the contract goods to the buyer, but the contract does not require delivery at a particular destination. *Com. Code § 2504* further specifies that failure to notify the buyer of the shipment promptly or to make a proper shipment contract is a ground for rejection if material delay or loss ensues.

[2] FORM**Notice of Rejection Based on Failure to Notify Buyer of Shipment****NOTICE OF REJECTION**

_____[date]
 TO: _____[seller]
 _____[address]

PLEASE TAKE NOTICE that the undersigned hereby rejects the delivery of the goods pursuant to our contract dated _____. The reasons for the rejection are (1) you failed to make a proper contract with the carrier for the shipment of these goods, and because of this failure the goods arrived on _____[date], which was a material delay, and the goods were so damaged as to be useless to Buyer; and (2) you failed to notify Buyer of the shipment promptly, and because of this failure, Buyer was not notified of the presence of the goods at the _____ freight yard until _____[date], which caused material delay and led Buyer to incur additional storage charges.

_____ [signature of buyer]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law
(UCC)Sales (Article 2)Breach, Repudiation & ExcuseRightful Rejection



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21-52 California Legal Forms--Transaction Guide § 52.405

§ 52.405 Demand by Seller for Final Statement of Defects on Which Buyer Relied in Rejecting Goods**[1] Comment--Use of Form**

This form is a demand for a statement of defects relied on in rejecting goods. Between merchants, when the seller makes a request in writing for a full and final written statement of all defects on which the buyer proposes to rely to justify rejection or to establish breach, the buyer must comply on penalty of waiver of the alleged unspecified defects [Com. Code § 2605].

[2] FORM**Demand by Seller for Final Statement of Defects on Which Buyer Relied in Rejecting Goods****DEMAND FOR FINAL STATEMENT OF DEFECTS**

_____ [date]

TO: [buyer]

_____ [address]

PLEASE TAKE NOTICE that pursuant to *Commercial Code Section 2605*, the undersigned hereby demands that you now submit a full and final written statement of all defects that you propose to rely on to justify your rejection of the goods delivered pursuant to our contract dated _____.

Your failure to furnish the particulars asked for in this demand will result in your being precluded from relying on any alleged defect to justify your rejection.

_____ [signature of seller]

[typed name]

[OR]

_____[date]

TO: [buyer]

_____[address]

Dear _____:

We have received notice that you have rejected a shipment of goods tendered under a contract for sale naming you as Buyer and us as Seller, signed on _____[date].

We hereby demand, under *Commercial Code Section 2605*, a full and final written statement of all defects on which you propose to rely.

Sincerely,

_____ [signature of seller]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseRightful Rejection



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21-52 California Legal Forms--Transaction Guide §§ 52.406-52.419

[Reserved]

§§ 52.406[Reserved]



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21-52 California Legal Forms--Transaction Guide § 52.420

§ 52.420 Modification of Contract of Sale

[1] Comment--Use of Form

This form consists of two alternative agreements to modify a contract for the sale of goods. No consideration is required to support the modification of sales contracts [*Com. Code § 2209(1)*]. Nevertheless, modifications must meet the test of good faith. The extortion of a "modification" without good commercial reason is ineffective because it violates this duty of good faith [*Com. Code § 2209*, comment 2]. For this reason, a writing evidencing a modification not supported by consideration should incorporate the commercial reasons behind its making, negating extortion or duress. A mere technical consideration will not support a modification made in bad faith [*Com. Code § 2209*, comment 2].

For a further explanation of *Com. Code § 2209*, including the matter of whether a modification need be in writing, see the *discussion under § 52.16*. For discussion of the common law rules governing modification of contracts, and additional forms that can be adapted for transactions governed by the Commercial Code, see Ch. 77, *Discharge of Obligations*.

[2] FORM

Modification of Contract of Sale

MODIFICATION AGREEMENT

_____, "Seller," and _____, "Buyer," parties to a sales contract dated _____, agree that it is in their mutual interests to modify that contract. Buyer and Seller agree and affirm that neither party exercised any duress or made any unreasonable demands in the negotiations preceding this modification, and each agrees and affirms that the other observed reasonable commercial standards of fair dealing in the trade during the negotiations leading to this modification. This modification has become necessary because _____ [*specify reason for modification*].

Therefore, Seller and Buyer agree as follows _____ [specify, e.g.,:

- (1) That the price of the goods under their previous contract will be increased by 10 percent.
- (2) That the quantity of the goods under their previous contract will be decreased by 20 percent.
- (3) That the goods will be delivered to Buyer at Buyer's Sacramento office, _____ (address), instead of the address indicated in their contract. Cost of transportation and risk of loss will remain as in the prior contract.].

This modification applies to all goods covered by the original contract.

All terms of the prior contract between Seller and Buyer that are not specifically changed by this modification will remain binding and legally enforceable.

This modification agreement is to be construed in, and governed by, the Commercial Code as enacted and in force in the State of California on the date of this agreement.

Dated: _____.

SELLER

_____ [signature of seller]
[typed name]

BUYER

_____ [signature of buyer]
[typed name]

[OR]

_____ [date]
_____ [buyer]
_____ [address]

Dear _____:

Confirming our [conversation or exchange of emails or specify other communication] of _____ [e.g., yesterday or Thursday or specify date], our contract dated _____, is modified to the extent that _____ [specify, e.g., all goods will be individually packaged in corrugated boxes with appropriate labels]. No additional charge will be made, and all other terms of the contract will remain in force and effect.

_____ [signature of seller]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & Waiver



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21-52 California Legal Forms--Transaction Guide § 52.421

§ 52.421 Notice From Buyer of Consent to Modification**[1] Comment--Use of Form**

This form is a notice of a buyer's consent to the modification of a sales contract. It is designed to be used by a buyer who has received notice of an allocation justified under *Com. Code* § 2615 [see § 52.320[1]] to notify the seller that the contract is modified to the extent that the buyer is agreeing to take his or her available quota in substitution for the quantity provided in the contract for sale, as permitted under *Com. Code* § 2616(1)(b) [see § 52.148 P 2].

[2] FORM**Notice From Buyer of Consent to Modification****CONSENT TO MODIFICATION**

_____ [date]
 TO: _____ [seller]
 _____ [address]

PLEASE TAKE NOTICE that the undersigned, pursuant to *Commercial Code Section 2616*, hereby consents to the modification of our contract dated _____, to the extent of accepting the available quota of goods set forth in your notice dated _____, claiming excuse for failure to deliver.

This consent is expressly limited to a reduction in the quantity of goods to be delivered in accord with your estimate contained in the described notice. A reasonable time will be allotted for delivery. This consent will in no way be interpreted to relieve you of any other obligation contained in our contract dated _____.

_____ [signature of buyer]
 [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & Waiver



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21-52 California Legal Forms--Transaction Guide §§ 52.422-52.429

[Reserved]

§§ 52.422[Reserved]



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21-52 California Legal Forms--Transaction Guide § 52.430

§ 52.430 Retraction of Waiver of Executory Performance**[1] Comment--Use of Form**

This form is a notice of retraction of waiver. It is intended for use by a party that has waived the right to an executory performance under a sales contract by, for example, an ineffective modification [*see Com. Code § 2209(4)*; *see also* discussion in § 52.16].

A waiver of an executory portion of a contract may be retracted on reasonable notice that strict performance of any waived term will be required. However, an attempt to retract a waiver is ineffective if a retraction would be unjust because of a material change in position made in reliance on the waiver [*Com. Code § 2209(5)*].

[2] FORM**Retraction of Waiver of Executory Performance****NOTICE OF RETRACTION OF WAIVER**

_____[date]

To: _____[name]

PLEASE TAKE NOTICE that _____[name of retracting party] demands strict performance of each and every term of our contract dated _____. If _____[retracting party]'s actions of _____[date], in _____[describe retracting party's acts constituting waiver] may have amounted to a waiver of _____[specify contract provision or provisions at issue], then that waiver is hereby retracted.

[OR]

In the future the undersigned will require strict performance of _____ [*specify contract provision*] of _____ [*identify contract, e.g., our sales contract dated* _____]. To the extent that our past conduct might be considered a waiver, that waiver is hereby retracted. [This notice is intended to foreclose a possible dispute, and is not to be construed as an admission on the part of the undersigned.]

_____ [*signature of retracting party*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & Waiver



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21-52 California Legal Forms--Transaction Guide § 52.431

§ 52.431 Notice of Assignment of Rights and Delegation of Performance**[1] Comment--Use of Form**

This form is a notice of assignment of rights and delegation of performance. Whether the contract is assignable or delegable because permitted by *Com. Code* § 2210 [see § 52.356[1]] or because of specific agreement, and whether or not the agreement calls for notice, notice of an assignment or delegation is always advisable.

[2] FORM**Notice of Assignment of Rights and Delegation of Performance****NOTICE OF ASSIGNMENT**

_____[date]

TO: _____[name]

_____[address]

PLEASE TAKE NOTICE that _____ [name of assignor] has assigned all rights and delegated all duties under our contract dated _____, to _____, _____ [name of assignee], _____ [address], and that _____ [name of assignee], as assignee, is entitled to all further payments under the contract. Our records indicate that the sum of \$ _____ has been paid on account to date and the sum of \$ _____ remains due and unpaid. If the above is an accurate statement of your account, please indicate that fact on the copy of this notice and return the same in the enclosed envelope.

_____[signature of assignor]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentThird Party Contracts



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21-52 California Legal Forms--Transaction Guide §§ 52.432-52.439

[Reserved]

§§ 52.432[Reserved]



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21-52 California Legal Forms--Transaction Guide § 52.440

§ 52.440 Notice Requesting Specification or Cooperation**[1] Comment--Use of Form**

This form is a notice requesting specification or cooperation. It may be used by one party when the other has refused to specify particulars of performance or to provide other cooperation necessary to the agreed performance.

When the party responsible for specifying the assortment of goods or arrangements for shipment [*see Com. Code § 2311(2); see also §§ 52.223, 52.224, and 52.264*], or whose cooperation is necessary for performance, fails to discharge that responsibility, the other party, in addition to all other remedies, is excused for any resulting delay in performance. The other party may also either proceed to perform in any reasonable manner or, after the time for a material part of his or her own performance, treat the failure to specify or to cooperate as a breach by failure to deliver or accept goods [*Com. Code § 2311(3)*].

[2] FORM**Notice Requesting Specification or Cooperation****NOTICE REQUESTING SPECIFICATION OR COOPERATION**

_____ [date]

TO: _____ [name]

_____ [address]

PLEASE TAKE NOTICE that the undersigned requires the specifications of the colors and sizes to be shipped in accord with our contract dated _____. _____ [*Specify why cooperation is necessary to performance or state how failure to specify or cooperate will be treated, e.g., Your failure to specify the colors and sizes has resulted in a delay of shipment and will continue to cause a delay until we receive the information or If you*]

fail to advise of the colors and sizes, we will use our best judgment and ship an assortment accordingly *or* Unless we receive your specifications within _____ days, we will treat your failure to specify as a breach by failure to accept the goods].

_____ [*signature of requesting party*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseExcuse From Performance



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21-52 California Legal Forms--Transaction Guide § 52.441

§ 52.441 Demand for Assurances**[1] Comment--Use of Form**

This form consists of two alternative demands for assurances of performance pursuant to *Com. Code § 2609* [see § 52.330[1]]. The first alternative is a very general demand, usable in a wide range of circumstances. The reasons for the insecurity and the type of assurance to be demanded are left blank to be filled in as the situation requires. The second alternative is more specific. It is a demand for assurance of payment by posting collateral or a performance bond.

Each alternative includes optional bracketed language that may be used if the sales contract at issue provides specific grounds on which a party may demand assurance [see § 52.330]. For provisions specifying or negating the assignment of rights or the delegation of duties (including clauses waiving the right to demand assurance or requiring specific assurances), see § 52.356.

[2] FORM**Demand for Assurances****DEMAND FOR ASSURANCE**

_____ [date]

TO: [seller]

_____ [address]

It has come to our attention that _____ [state grounds for demanding assurance, e.g., on _____ (date) and _____ (date), you breached the exclusive dealing requirement of our contract dated _____. We consider this to be reasonable grounds for insecurity within the meaning of *Commercial Code Section 2609* [insert if appropriate, and Paragraph ____ of our contract dated

_____].

Therefore, we demand that you give us assurance of due performance of that contract. We will consider the following as adequate assurances: _____[*state what is wanted for assurance*].

Unless you comply with this demand before _____[*date*], we will suspend performance of our obligations, and if you fail to comply with this demand before _____[*date*], we will treat your refusal as a repudiation of this contract.

_____ [*signature of buyer*]
[*typed name*]

[OR]

_____ [*date*]

TO: [*buyer*]
_____ [*address*]

PLEASE TAKE NOTICE that pursuant to *Commercial Code Section 2609* [and the terms of our contract dated _____, and in particular Paragraph ____ of that contract], the undersigned hereby demands assurance that you will in the future meet your obligations of payment pursuant to our contract.

The reason for this demand is that you have consistently failed to remit timely payments on account of the goods delivered under our contract.

PLEASE TAKE FURTHER NOTICE that the undersigned hereby demands that within _____ days after receipt of this notice of demand for assurances, you post a performance bond in the sum of \$ _____, duly executed by any competent surety company, or that you place in the hands of our attorney, _____ [*name*], to be held in escrow, collateral in the form of negotiable securities, bank deposit passbook, or the like, to secure the payment of future deliveries under our contract. Your failure to comply with this demand will be deemed a repudiation of our contract.

_____ [*signature of seller*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAssurances of Performance



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21-52 California Legal Forms--Transaction Guide §§ 52.442-52.449

[Reserved]

§§ 52.442[Reserved]



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21-52 California Legal Forms--Transaction Guide § 52.450

§ 52.450 Notice by Aggrieved Party That Anticipatory Repudiation Deemed Final**[1] Comment--Use of Form**

This form consists of two alternative notices in which the aggrieved party informs the repudiating party that he or she considers the repudiation final. *Com. Code § 2611(1)* provides that until a repudiating party's next performance is due, that party can retract the repudiation unless the aggrieved party has, since the repudiation, canceled or materially changed position or otherwise indicated that he or she considers the repudiation final.

[2] FORM**Notice by Aggrieved Party That Anticipatory Repudiation Deemed Final****NOTICE THAT ANTICIPATORY REPUDIATION DEEMED FINAL**

_____[date]

TO: [buyer]

_____[address]

PLEASE TAKE NOTICE that by reason of _____[conduct amounting to anticipatory repudiation, e.g., your violation of the exclusive dealing provisions of our contract dated _____], your conduct to date constitutes an anticipatory repudiation of that contract. [Seller] hereby gives notice that this repudiation is final and that any attempted retraction of it by you will not revive our contract.

_____[signature of seller]

[typed name]

[OR]

_____ [date]

TO: [Seller]

_____ [address]

PLEASE BE ADVISED that _____ [buyer] regards _____ [describe conduct constituting anticipatory repudiation, e.g., your letter of _____ (date), advising of an indeterminate delay in future shipments] to be an anticipatory repudiation of our contract dated _____. [Describe effect of repudiation, e.g., We have made arrangements to secure similar goods from other sources] and by reason of this material change in our position we must treat the repudiation as final and not retractable.

_____ [signature of buyer]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse Anticipatory Repudiation



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21-52 California Legal Forms--Transaction Guide § 52.451

§ 52.451 Notice of Retraction of Anticipatory Repudiation**[1] Comment--Use of Form**

This form consists of two alternative notices that may be sent to the aggrieved party to retract an anticipatory repudiation. The alternatives included here provide for retraction in very specific situations. The first alternative gives notice that the anticipatory repudiation is being retracted because local authorities have consented to the use of certain premises as a warehouse. The second provides for retraction because a temporary restraining order has been lifted. These two alternatives are so fact-specific that for most transactions they will serve only as illustrations or as models that must be adapted to fit the facts of the drafter's situation.

Until the repudiating party's next performance is due, that party can retract his or her repudiation unless the aggrieved party has, since the repudiation, canceled or materially changed position or otherwise indicated that he or she considers the repudiation final [*Com. Code* § 2611(1); see § 52.450].

[2] FORM**Notice of Retraction of Anticipatory Repudiation****NOTICE OF RETRACTION OF ANTICIPATORY REPUDIATION**

_____ [date]

TO: [seller]

_____ [address]

PLEASE BE ADVISED that we hereby retract the statement made in our notice dated _____, because the municipal authorities have consented to the use of the premises located at _____ [address] as a warehouse, and all further deliveries may be accepted as provided in our contract of sale dated _____.

_____ [signature of buyer]
[typed name]

[OR] _____ [date]

TO: [buyer]
_____ [address]

PLEASE TAKE NOTICE that the litigation giving rise to the temporary restraining order has been settled and the restraining order described in our notice to you dated _____, has been lifted. We therefore retract our repudiation of the contract dated _____, and advise that future deliveries will be made as provided in that contract.

_____ [signature of seller]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse Anticipatory Repudiation



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21-52 California Legal Forms--Transaction Guide §§ 52.452-52.459

[Reserved]

§§ 52.452[Reserved]



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21-52 California Legal Forms--Transaction Guide § 52.460

§ 52.460 Notice to Buyer of Delivery**[1] Comment--Use of Form**

This form consists of alternative notices of the type that the seller is required to give the buyer in order to enable the buyer to take delivery of the goods [*Com. Code § 2503(1)*]. The agreement between the parties should be reviewed to see whether it calls for a specific form of notice or eliminates notice.

Because this statutory requirement of notification [*see Com. Code § 1202(d)* (giving notice means taking the steps reasonably required to inform in ordinary course)] may be modified or eliminated by agreement of the parties [*see Com. Code § 1302* (effect of code provisions may be varied by agreement except as otherwise provided)], the contract of sale must be reviewed to see if it requires a specific form of notice or otherwise modifies or even eliminates the notice requirement.

[2] FORM**Notice to Buyer of Delivery****NOTICE OF DELIVERY**

_____ [date]
 TO: _____ [buyer]
 _____ [address]

The goods you purchased pursuant to our contract dated _____, are ready for delivery and are being held at our showroom located at _____ [address]. Please call or write our shipping department to make arrangements to pick up the goods.

_____ [signature of seller]
 [typed name]

[OR]

_____ [date]
TO: _____ [buyer]
_____ [address]
RE: _____ [describe goods] purchased on _____ [date].

The above-described goods are ready and waiting. Please make arrangements at your earliest convenience to take delivery of these goods.

_____ [signature of seller]
[typed name]

[OR]

_____ [date]
TO: _____ [buyer]
_____ [address]

The goods purchased pursuant to our contract dated _____, have been forwarded to _____ [name of carrier] for shipment to _____ [address] according to the terms of our contract. The bill of lading is enclosed.

_____ [signature of seller]
[typed name]

[OR]

_____ [date]
TO: _____ [buyer]
_____ [address]

The following goods have been delivered to _____ [name of carrier], and are expected to arrive in _____ [place of delivery] on or about _____ [date]: _____ [list goods]

Further information as to details of delivery may be obtained from the _____ office of _____ [carrier].

_____ [signature of seller]
[typed name]

[OR]

_____ [date]

TO: _____ [buyer]
_____ [address]

Goods purchased pursuant to our contract dated _____, have arrived at the _____
Warehouse, located at _____ [address], and are ready for delivery. The warehouse receipt is enclosed.

_____ [signature of seller]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) Contract Terms General Overview Commercial Law (UCC) Sales (Article 2) Performance Tender, Shipment, Delivery & Cure



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21-52 California Legal Forms--Transaction Guide § 52.461

§ 52.461 Seller's Notice of Intent to Cure Improper Tender**[1] Comment--Use of Form**

This form is a notice of intent to cure an improper tender. It may be used when a seller, pursuant to *Com. Code § 2508*, is attempting to cure an improper tender of nonconforming goods.

When any tender or delivery by the seller is rejected as nonconforming, and the time for performance has not yet expired, the seller may seasonably notify the buyer of its intention to cure and may then make a conforming delivery within the contract time [*Com. Code § 2508(1)*]. When the buyer rejects a nonconforming tender, the seller may have a further reasonable time to substitute a conforming tender if two conditions are met [*Com. Code § 2508(2)*]:

- First, the seller must have had reasonable grounds to believe that the nonconforming tender would be acceptable (with or without a money allowance).
- Second, the seller must seasonably [*see Com. Code § 1205(b)*] (thing is done "seasonably" if it is done at or within the time agreed on, or, if no time is agreed on, at or within a reasonable time)] notify the buyer that he or she plans to substitute a conforming tender [*see Com. Code § 1202(d)*] (giving notice means taking the steps reasonably required to inform in ordinary course)].

[2] FORM**Seller's Notice of Intent to Cure Improper Tender****NOTICE OF INTENT TO CURE IMPROPER TENDER**

_____ [date]

TO: _____ [buyer]

_____ [address]

PLEASE TAKE NOTICE that _____ [seller] intends to ship additional goods in accord with your notice of rejection dated _____. These goods conform in all respects to the terms of our contract dated _____, and will satisfy the objections made in your notice of rejection. They will be shipped in accord with the terms of our contract, and will arrive within the time set forth therein.

[Add if it is advisable to disclaim any admission of flaws in tender:]

This notice of cure is being made in good faith and with the intent of avoiding a dispute and, as such, is in no way an admission that the _____ [seller] has breached our contract or has made an improper tender.

_____ [signature of seller]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) Performance Tender, Shipment, Delivery & Cure



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21-52 California Legal Forms--Transaction Guide § 52.462

§ 52.462 Notice to Rejecting Buyer of Shipping Instructions**[1] Comment--Use of Form**

This form is a notice from a seller to a buyer providing shipping instructions for the return of rejected goods.

When the seller has no agent or place of business at the market of rejection, a merchant buyer is under a duty to follow any reasonable instructions received from the seller for the shipment or disposal of rejected goods in the buyer's possession or control [*Com. Code* § 2603(1)].

[2] FORM**Notice to Rejecting Buyer of Shipping Instructions****INSTRUCTIONS FOR DISPOSITION OF REJECTED GOODS**

_____[date]
 TO: _____[buyer]
 _____[address]

Your notice of rejection and request for instructions with respect to goods delivered pursuant to our contract dated _____, was received on _____[date].

In accordance with your notice, we instruct you to _____[e.g., ship the goods to our Fresno office,
 _____(address) via _____ Freight Company, collect].

These instructions will in no way be deemed an admission of nonconformity or an acquiescence as to the propriety of your rejection, and the undersigned reserves all rights and remedies available by reason of a wrongful rejection.

_____ [signature of seller]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)PerformanceBuyer's RightsCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



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21-52 California Legal Forms--Transaction Guide §§ 52.463-52.469

[Reserved]

§§ 52.463[Reserved]



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21-52 California Legal Forms--Transaction Guide § 52.470

§ 52.470 Notice to Seller of Infringement Suit Against Buyer**[1] Comment****[a] Use of Form**

This form consists of two alternative notices to the seller of an infringement suit against the buyer. After a tender has been accepted, a buyer sued for infringement or the like [see discussion in § 52.297[1][d]] must notify the seller of the suit within a reasonable time after receiving notice of the litigation. If the buyer fails to give this notice, he or she will be barred from any remedy against the seller over the liability established by the litigation [Com. Code § 2607(3)(b)].

[b] Assumption of Control by Seller

The seller may demand in writing that the buyer turn over control of the litigation or be barred from any remedy over against the seller. If the seller agrees to bear all expense and to satisfy any adverse judgment, the buyer will be barred from any remedy if the buyer fails to surrender control after seasonable receipt of the seller's demand [Com. Code § 2607(5)(b); see Com. Code § 1205(b) (thing is done "seasonably" if done at or within the time agreed on, or, if no time is agreed on, at or within a reasonable time)]. For discussion of what it means to "receive notice," see § 52.332[1][b].

[2] FORM**Notice to Seller of Infringement Suit Against Buyer****NOTICE OF INFRINGEMENT SUIT**

_____[date]

TO: _____ [seller]

_____[address]

Pursuant to *Commercial Code Section 2607*, we give you notice that an action has been commenced against us by _____ [name of plaintiff] for infringement of their patent number _____. This action is based on our use of goods sold to us by you pursuant to our contract dated _____.

You may come in and defend this action. If you do not do so, you will be bound in any action for indemnity that we bring against you by any determination of fact made in the infringement suit against us that is also at issue in our suit against you.

A copy of the complaint in this action is enclosed.

_____ [signature of buyer]
[typed name]

[OR]

_____ [date]

TO: _____ [seller]
_____ [address]

PLEASE TAKE NOTICE that a suit was commenced against the undersigned on _____ [date], by _____ [name of plaintiff] for damages by reason of an alleged infringement of a patent right arising out of the use of goods purchased from you pursuant to our contract dated _____.

PLEASE TAKE FURTHER NOTICE that pursuant to *Commercial Code Section 2607* you have the right to serve written demand on the undersigned to take control of this litigation, and if you do not do so you will be bound by any determination of fact made in the infringement suit that is also at issue in any action by _____ [buyer] against you for recovery over. The summons and complaint in this matter must be answered on or before _____ [date], and a true copy of those pleadings is attached to this notice.

_____ [signature of buyer]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse Acceptance of Goods Notice Requirements Notice of Claim



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21-52 California Legal Forms--Transaction Guide § 52.471

§ 52.471 Notice to Seller That Suit for Breach of Warranty Has Been Commenced Against Buyer**[1] Comment--Use of Form**

This form consists of two alternative notices from the buyer to the seller that a suit for breach of warranty has been brought against the buyer. When a buyer is sued by a third party for breach of warranty or some other matter for which the seller must indemnify the buyer, the buyer may give the seller written notice of the litigation and invite the seller to join in the defense of the action [*Com. Code* § 2607]. If the seller does not respond after reasonable receipt of this notice, he or she will be bound in any action against him or her by the buyer by any determination of fact common to the two actions [*Com. Code* § 2607(5)(a); see *Com. Code* § 1205(b) (thing is done "seasonably" if done at or within the time agreed on, or, if no time is agreed on, at or within a reasonable time)]. For discussion of what it means to have "notice," see § 52.332[1][b].

[2] FORM**Notice to Seller That Suit for Breach of Warranty Has Been Commenced Against Buyer****NOTICE OF BREACH OF WARRANTY SUIT**

_____[date]

TO: _____[seller]

_____[address]

PLEASE TAKE NOTICE that an action was commenced against the undersigned on _____[date], for damages to _____[specify person or thing injured] due to an alleged breach of the warranties of merchantability and fitness for use arising out of a sale of _____[e.g., one of the model B aluminum ladders] purchased from you pursuant to our contract dated _____.

PLEASE TAKE FURTHER NOTICE that pursuant to *Commercial Code Section 2607* you have the right to defend this action. If you do not defend, you will be bound by determinations of fact that are common to this action and any action the undersigned may commence against you for damages sustained by reason of the alleged breach of warranties. A true copy of the summons and verified complaint is attached to this notice. The answer must be served on or before _____ [date].

_____ [signature of buyer]
[typed name]

[OR]

_____ [date]

TO: _____ [seller]
_____ [address]

Pursuant to *Commercial Code Section 2607* we hereby give you notice that an action for breach of warranty of fitness and merchantability was commenced against us by _____ [name of plaintiff] on _____ [date]. This action is based on alleged defects in goods that we originally bought from you pursuant to a contract for sale dated _____.

You may join in the defense of this action. If you do not do so, you will be bound in any action commenced by us against you with respect to any determination of fact common to the two litigations.

If you wish to come into this action to defend, please contact our attorney _____ [name], of _____ [law firm], _____ [address], _____ [telephone number].

Sincerely,
_____ [signature of buyer]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse Acceptance of Goods Notice Requirements Notice of Claim



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21-52 California Legal Forms--Transaction Guide § 52.472

§ 52.472 Demand by Seller That Buyer Turn Over Control of Action for Infringement**[1] Comment--Use of Form**

This form consists of alternative notices in which the seller demands that the buyer turn over control of litigation to the seller, including the right to compromise or settle the disputed claim [see *Com. Code* § 2607]. If the buyer does not turn over control of the litigation after the seller agrees to bear all expense and to satisfy any adverse judgment, the buyer will be barred from any remedy over [Com. Code § 2607(5)(b)].

[2] FORM**Demand by Seller That Buyer Turn Over Control of Action for Infringement****CONTROL OF ACTION FOR INFRINGEMENT**

_____[date]
 TO: _____[buyer]
 _____[address]

PLEASE TAKE NOTICE that pursuant to *Commercial Code Section 2607* the undersigned hereby demands that you turn over control of the suit commenced against you by _____[plaintiff] on _____[date], by reason of an alleged infringement of a patent arising out of the sale of _____[specify goods giving rise to action for infringement, e.g., a tractor, serial No. _____,] under our contract dated _____. If you have appeared by attorney, we request that you have your attorney execute a substitution of attorneys in favor of _____[name of attorney], of _____[law firm], _____[address], _____[telephone number].

PLEASE TAKE FURTHER NOTICE that the undersigned will undertake to settle this matter, and agrees to bear all expenses in the disposition of the litigation and to satisfy any adverse judgment that may be obtained by reason of this

litigation.

_____ [signature of seller]
[typed name]

[OR]

_____ [date]
TO: _____ [buyer]
_____ [address]

We have received your notice that you are being sued for patent infringement by _____ [name of plaintiff], and acknowledge receipt of a copy of the complaint in that action.

We hereby demand, under *Commercial Code Section 2607*, that you turn over to us control of this litigation, including settlement. If you do not, you will be barred from any remedy against us with respect to the alleged infringement. We agree to bear all expenses of the litigation and to satisfy any judgment against you.

Please have your attorney contact _____ [attorney], of _____ [law firm],
_____ [address], _____ [telephone number], for the purpose of turning over this litigation.

Sincerely,
_____ [signature of seller]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse Acceptance of Goods Notice
Requirements Notice of Claim



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21-52 California Legal Forms--Transaction Guide § 52.473

§ 52.473 Notice of Objection to Performance

[1] Comment--Use of Form

This form consists of alternative notices of objection to performance. They are designed to protect a party to a contract of sale by preventing a performance not in accord with the agreement from establishing a course of performance or waiver.

If the contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the agreement [*Com. Code §§ 1303(d), 2202(a)*].

[2] FORM

Notice of Objection to Performance

NOTICE OF OBJECTION TO PERFORMANCE

_____[date]

TO: _____[name]
 _____[address]

PLEASE TAKE NOTICE that _____[name of objecting party] hereby objects to, and refuses to accept or acquiesce in, the manner in which you are performing under our contract dated _____. The conduct objected to consists of _____[describe].

_____ [name of objecting party] hereby demands that you perform all of your obligations under our contract in strict compliance with its terms. This notice is not to be considered a waiver of any remedy or right that

_____ [name of objecting party] has by reason of any past event.

_____ [signature of objecting party]
[typed name]

[OR]

_____ [date]

TO: _____ [seller]
_____ [address]

The goods shipped did not conform to the specifications under our contract dated _____. Although the goods were accepted, we insist that all future deliveries comply with the contract specifications. This notice is not to be construed as a waiver of any remedy we are entitled to by reason of your breach.

_____ [signature of buyer]
[typed name]

[OR]

_____ [date]

TO: _____ [name of party]
_____ [address]

All future performance under our contract dated _____, must be carried out in strict compliance with the provisions of that contract. We will not acquiesce in any other course of performance.

_____ [signature of objecting party]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC) Sales (Article 2) Performance General Overview



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21-52 California Legal Forms--Transaction Guide § 52.474

§ 52.474 Notice of Termination of Contract**[1] Comment--Use of Form**

This form contains two alternative notices terminating a contract. A contract of indefinite duration that provides for successive performances will remain in effect for a reasonable time but may be terminated at any time by either party [*Com. Code* § 2309(2)]. However, termination of a contract by one party, except on the happening of an agreed event, requires that reasonable notification be received by the other party. In fact, an agreement dispensing with notification is invalid if its operation would be unconscionable [*Com. Code* § 2309(3)]. See § 52.402, for a form for notice of termination for use by a buyer who has the right to terminate a contract under *Com. Code* §§ 2615, 2616(1)(a) after receiving notice of a justified delay or allocation.

Before drafting a notice of termination the attorney should always consult the agreement because it may dictate the required form and procedure. For discussion of what it means to "receive" notice see § 52.332[1][b] [*see also Com. Code* § 1202(d)]. For a discussion of the common law rules regarding cancellation and termination of contracts not governed by the commercial codes, and forms that may be adapted to Commercial Code transactions, see Ch. 77, *Discharge of Obligations* .

[2] FORM**Notice of Termination of Contract****NOTICE OF TERMINATION**

_____ [date]

TO: _____ [name]

_____ [address]

PLEASE TAKE NOTICE that pursuant to the terms of our contract dated _____, and in particular Paragraph _____ of that contract, the undersigned hereby terminates the contract because _____ [*specify, e.g., the goods delivered failed to comply with your representations of quality*].

[signature]
[typed name]

[OR]

[date]

TO: _____
[name]

[address]

PLEASE TAKE NOTICE that pursuant to *Commercial Code Section 2309* the undersigned hereby terminates the contract for the sale of _____ [*specify goods*] dated _____. This termination will be effective _____ [*e.g., as of* _____ (*date*) *or* after the next shipment of goods provided for in the contract].

[signature]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) General Overview Contracts Law Performance Discharges & Terminations Contracts Law Sales of Goods Termination Notices



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21-52 California Legal Forms--Transaction Guide § 52.475

§ 52.475 Demand to Inspect Goods for Purpose of Preserving Evidence**[1] Comment--Use of Form**

This form is a notice of demand to inspect goods for the purpose of preserving evidence. It is designed to be given pursuant to *Com. Code § 2515* in order to test and sample goods for the purpose of ascertaining the facts and preserving evidence.

Either party has the right, on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence, to inspect, test, and sample goods including goods in the possession or control of the other [*Com. Code § 2515(a)*].

[2] FORM**Demand to Inspect Goods for Purpose of Preserving Evidence****INSPECTION TO PRESERVE EVIDENCE**

_____[date]

TO: _____[name]

_____[address]

PLEASE TAKE NOTICE that pursuant to *Commercial Code Section 2515*, the undersigned demands that you produce and permit inspection, testing, and sampling of the following goods which were the subject of our contract dated _____, and over which a dispute has arisen:

(1) _____

(2) _____

(3) _____

(4) _____

(5) _____

(6) _____

These goods will be inspected, tested, and sampled on _____[*date*], for the purpose of ascertaining facts and preserving evidence.

_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law
(UCC)Sales (Article 2)PerformanceGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.476

§ 52.476 Agreement to Submit Controversy to Third Party for Binding Inspection**[1] Comment--Use of Form**

This form is an agreement to submit disputed goods to a third party for a binding inspection. *Com. Code § 2515(b)* provides that the parties to a sales agreement may agree to a third-party inspection or survey to determine the conformity or condition of the goods and may agree that the findings will be binding on them in any subsequent litigation or adjustment.

For a general discussion of arbitration provisions in contracts, and sample arbitration provisions, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[2] FORM**Agreement to Submit Controversy to Third Party for Binding Inspection****AGREEMENT TO SUBMIT CONTROVERSY TO THIRD PARTY**

_____ [date]

The parties have entered into a written contract dated _____, for the sale of _____ [specify, e.g., five hundred cases of _____ brand creamery butter], and a dispute has arisen regarding whether or not _____ [specify, e.g., the butter] delivered conformed to the terms of the contract. Accordingly, the undersigned hereby agree to permit _____ [inspector], _____ [address and/or name of firm] to inspect, test and sample the goods now located at the _____ [address], and to determine the conformity or condition of the goods.

The undersigned parties agree to abide by the decision of _____ [inspector] and to be bound by that decision in any subsequent litigation or adjustment. This agreement will be binding on and inure to the benefit of the

heirs, administrators, executors, successors and assigns of the parties.

SELLER

_____ [*signature of seller*]

[*typed name*]

BUYER

_____ [*signature of buyer*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.477

§ 52.477 Seller's Demand for Return of Goods on Buyer's Insolvency**[1] Comment--Use of Form**

This form is a seller's demand for the return of goods on the insolvency of the buyer. If the seller discovers that the buyer has received goods on credit while insolvent, the seller may reclaim them on demand made within 10 days after the buyer receives the goods. If the buyer has misrepresented his or her solvency to the seller in writing within three months before delivery, the 10-day limit does not apply [*Com. Code* § 2702(2)].

[2] FORM**Seller's Demand for Return of Goods on Buyer's Insolvency****DEMAND FOR RETURN OF GOODS**

_____ [date]
 TO: _____ [buyer]
 _____ [address]

PLEASE TAKE NOTICE that pursuant to *Commercial Code Section 2702*, and by reason of your insolvency, the undersigned hereby demands the return of all goods delivered to you on _____ [date], under the terms of our contract dated _____. Unless you return the goods immediately, appropriate measures will be taken to reclaim them.

_____ [signature of seller]
 [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesGeneral OverviewCommercial Law (UCC)Sales
(Article 2)RemediesSeller's RemediesDiscovery of Buyer's Insolvency



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21-52 California Legal Forms--Transaction Guide § 52.478

§ 52.478 Notice by Seller That Goods Are Withheld Because of Buyer's Breach**[1] Comment--Use of Form**

This form consists of alternative notices which may be used by the seller to indicate that he or she is withholding delivery pursuant to *Com. Code* § 2703(a) by virtue of a breach of contract by the buyer. If the buyer wrongfully rejects or revokes acceptance of goods, fails to make a payment due on or before delivery, or repudiates with respect to a part or the whole contract, then the seller may withhold delivery of any goods directly affected and, if the breach is of the whole contract [see *Com. Code* § 2612 (breach of part of installment contract is breach of whole contract if breach substantially impairs value of whole contract); see also § 52.333[1]], may withhold delivery of the whole undelivered balance [*Com. Code* § 2703(a); see § 52.18[2]].

[2] FORM**Notice by Seller That Goods Are Withheld Because of Buyer's Breach****GOODS WITHHELD BECAUSE OF BREACH**

_____ [date]

TO: _____ [buyer]
 _____ [address]

PLEASE TAKE NOTICE that your failure to remit the sum of \$ _____ in payment for the goods described in our contract dated _____, constitutes a breach of that contract. All future deliveries called for under the contract will be withheld as a result of this breach. Any and all additional rights afforded under our contract or applicable laws are hereby reserved.

_____ [signature of seller]

[*typed name*]

[OR]

_____ [date]
TO: _____ [buyer]
_____ [address]

NOTICE IS GIVEN that deliveries pursuant to our contract dated _____ [date], are being withheld by reason of your failure to _____ [*specify, e.g., remit payment*] as required by the terms of that contract. In consequence of this breach of the contract, the undersigned intends to pursue all available remedies in addition to withholding deliveries.

_____ [*signature of seller*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law
(UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



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21-52 California Legal Forms--Transaction Guide § 52.479

§ 52.479 Seller's Notice of Cancellation by Reason of Buyer's Breach

[1] Comment

[a] Use of Form

This form is a notice of cancellation that may be used by the seller to indicate that he or she is canceling the contract pursuant to *Com. Code § 2703(f)* because the buyer has breached the contract. For discussion of the kinds of breach that give rise to this breach, see § 52.478[1].

[b] Necessity for Notice of Cancellation

The Commercial Code does not expressly require notice in order to cancel a contract for sale of goods, as it does for termination [see *Com. Code § 2309(2)*; see also § 52.332[1]]. *Com. Code § 2703(f)*, which states the seller's right to cancel, says nothing about whether notice is required, nor do any of the comments to that section. Cancellation is clearly different from termination, and the definition of "cancellation" in *Com. Code § 2106(4)* says nothing about a notice requirement [see [c], below].

Despite this lack of positive authority for a notice requirement, it could be inferred from the obligation of good faith imposed on every contract under the Commercial Code [see *Com. Code § 1304*] that notice is required as a matter of good faith performance. "Good faith" always requires honesty in fact and the observance of reasonable commercial standards of fair dealing [*Com. Code § 1201(b)(20)*].

One court has said in dictum that cancellation of a sales contract under *Com. Code § 2703(f)* does not require notice [see *Intern. Therapeutics, Inc. v. McGraw-Edison Co.* (5th Cir. 1983) 721 F.2d 488, 491-492]. Another court has said that notice of cancellation is significant in determining the validity of a cancellation [*Goldstein v. Stainless Processing Company* (7th Cir. 1972) 465 F.2d 392, 395]. It has also been suggested that the requirement in *Com. Code § 2612(3)* of seasonable notice of cancellation to avoid reinstatement of a contract on the acceptance of a nonconforming installment [see § 52.333[1]] "implies" that there must be a seasonable notice [see California UCC Sales and Leases

(Cal. CEB 2002), Ch. 17, *Prelitigation Remedies*, § 17.50(c)]. Because it is not clear whether notice is a requirement of a valid cancellation, it is advisable to assume that a notice of cancellation is required and give notice.

[c] "Termination" and "Cancellation" Distinguished

For purposes of the Commercial Code, "termination" occurs when either party (pursuant to a power created by agreement or by law) ends the contract for some reason other than the breach of that contract. On termination, all obligations that are still executory on both sides are discharged, but any right based on a prior breach or a prior performance survives the termination [*Com. Code* § 2106(3)]. "Cancellation" occurs when either party ends the contract because of a breach by the other. It has the same effect as termination except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance of the contract [*Com. Code* § 2106(4)].

The Commercial Code definitions of "cancellation" and "termination" differ from the meaning of those terms at common law. For discussion and contrast between the common law and UCC definitions, see *Ch. 77, Discharge of Obligations*, § 77.23 et seq. Ch. 77 also contains cancellation and termination forms for use with respect to contracts not subject to the Commercial Code.

[2] FORM

Seller's Notice of Cancellation by Reason of Buyer's Breach

NOTICE OF CANCELLATION

_____[date]
TO: _____[buyer]
_____[address]

PLEASE TAKE NOTICE that _____[seller] hereby cancels our contract dated _____. This cancellation is caused by your breach of the contract in that you _____[specify failure, e.g., failed to supply the necessary specifications], and the resulting _____[specify consequence, e.g., inordinate delay] has materially affected the value of the contract. Nothing in this notice of cancellation is intended to waive or preempt _____[seller] from pursuing further remedies available by reason of the breach.

_____[signature of seller]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral Overview



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21-52 California Legal Forms--Transaction Guide § 52.480

§ 52.480 Notice to Carrier by Aggrieved Seller to Stop Goods in Transit

[1] Comment

[a] Use of Form

This form consists of two alternative notices to a carrier to stop delivery of goods subject to a sales contract. These alternatives may be used by the seller, or a person in the position of a seller, [see *Com. Code* § 2707] to stop the delivery of goods in the possession of a carrier or other bailee when he or she discovers that the buyer is insolvent [see *Com. Code* §§ 2702, 2705(1)]. The seller may also stop delivery of carload, truckload, planeload, or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery, or if the seller has a right to withhold or reclaim the goods for any other reason [*Com. Code* § 2705(1)].

The first alternative notice to the carrier includes a provision that the seller will indemnify and hold the carrier harmless for any claims resulting from the nondelivery of the goods. For a discussion of indemnity, see Ch. 79, *Suretyship, Guaranty and Indemnity* .

[b] Surrender of Documents of Title

Both alternatives in this form provide for the surrender of the bill of lading under which the goods were shipped. This provision is included because a bailee need not obey a notification to stop the delivery of goods until surrender of possession or control of the document of title issued for the goods, if the document of title is negotiable [*Com. Code* § 2705(3)(c)]. Accordingly, this provision may be omitted if the bills of lading or other documents of title are nonnegotiable. For the definition of "bill of lading," see § 52.261[1][b]. For definition and discussion of "document of title" and the difference between a negotiable and nonnegotiable document of title, see § 52.251[1][b].

[c] Effect of Reshipment

If the original buyer of goods in transit sells the goods while they are in transit and orders the carrier to change the

originally issued waybills to show the original buyer as the shipper and the current buyer as the new consignee with a new destination, that order constitutes a reshipment [*see Com. Code § 2705(2)(c)*]. It also fixes the rights of the parties as of the time of the order and protects the new buyer against the original seller's right of stoppage in transit [*Butts v. Glendale Plywood Co. (9th Cir. [Ore.] 1983) 710 F.2d 504, 505*].

[2] FORM

Notice to Carrier by Aggrieved Seller to Stop Goods in Transit

NOTICE TO STOP GOODS IN TRANSIT

_____ [date]

To: _____ [carrier]

_____ [address]

I, _____ [seller], as an unpaid seller, hereby give you notice to withhold delivery of the goods described below that were consigned by me, through you, to _____ [name] at _____ [address]. I hereby agree to pay all lawful charges for storage and reshipment of the goods. This notice is sent pursuant to the right of stoppage in transit vested in me by law.

The goods in question were shipped under bill of lading No. _____, which is hereby surrendered to you, and consist of the following: _____ [insert description of goods].

I hereby agree to indemnify and hold you [and each of you] harmless against all claims and demands that may be made against you by any persons for or with respect to the goods or their nondelivery, and also against all loss, expense, costs, and attorneys' fees that you may incur by reason of this notice. I further agree, as long as the goods are in my possession or under my control, to deliver the goods to you if you are compelled to deliver them to the consignees.

_____ [signature of seller]

[typed name]

[OR]

_____ [date]

TO: _____ [carrier]

_____ [address]

The undersigned, [on behalf of _____ Company], the consignor named in bill of lading No. _____ covering a _____ [e.g., carload of oats] shipped from _____ [location] to _____ [buyer] at _____ [address] on _____ [date], hereby notifies you pursuant to *Commercial Code Section 2705* that _____ [e.g., _____ Company] hereby exercises its right to stop shipment of the _____ [e.g., carload] in transit, or of the proceeds or any part thereof, by reason of the insolvency of _____ [buyer]. _____ [e.g., _____ Company] hereby surrenders for cancellation the bill of lading issued by you covering the shipment.

_____ [signature of seller]

[*typed name*]

[*Attach bill of lading to notice or otherwise surrender bill of lading if it is negotiable.*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesGeneral OverviewCommercial Law (UCC)Sales
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21-52 California Legal Forms--Transaction Guide § 52.481

§ 52.481 Notice of Intention to Deduct Damages From Purchase Price**[1] Comment--Use of Form**

This form consists of two alternative notices which the buyer may send to the seller to indicate that the buyer is deducting his or her damages from the price still due under the contract. The buyer has this right, but must notify the seller of his or her intention [*Com. Code § 2717*]. This notice refers to a notice of breach that the buyer has sent earlier. For a form of notice of breach, see § 52.386[2].

The plain meaning of *Com. Code § 2717* is that the buyer may not set off a contractual claim against a debt on a separate contract. Moreover, the statute preempts the common law right of equitable set-off, in situations in which the statute applies [*see AmerisourceBergen Corp. v. Dialysist West, Inc. (9th Cir. 2006) 445 F.3d 1132, 1135-1136* (construing Arizona statute identical to *Com. Code § 2717*)].

[2] FORM**Notice of Intention to Deduct Damages From Purchase Price****NOTICE OF INTENTION TO DEDUCT DAMAGES FROM PURCHASE PRICE**

 [date]
 TO: _____ [seller]
 _____ [address]

PLEASE TAKE NOTICE that _____ [buyer], the undersigned, will deduct from the purchase price set forth in our contract dated _____, the sum of \$ _____, this sum being the amount of damages sustained by the undersigned by reason of your breach of the contract as set forth in the notice of breach dated _____, and _____ [delivered or mailed or given] to you on _____ [date]. The damages caused to _____ [buyer] by your breach of contract are more specifically set forth in that notice.

_____ [signature of buyer]
[typed name]

[OR]

_____ [date]
TO: _____ [seller]
_____ [address]

You are hereby given notice that we intend to deduct \$ _____ from the price owed to you under a contract of sale naming you as Seller and us as Buyer and dated _____. The amount deducted represents the damages that we suffered as a result of the nonconformity of goods you tendered and we accepted under our contract of sale.

_____ [signature of buyer]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse Acceptance of Goods Notice
Requirements Notice of Breach Commercial Law (UCC) Sales (Article 2) Remedies Buyer's Remedies Deduction From
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21-52 California Legal Forms--Transaction Guide § 52.482

§ 52.482 Notice of Resale**[1] Comment--Use of Form**

This form consists of alternative notices of the resale of goods. The seller, or a person in the position of a seller [see *Com. Code* § 2707], may resell the contract goods or the undelivered balance of those goods under the conditions described in *Com. Code* § 2703 [*Com. Code* § 2706(1); for an analysis of *Com. Code* § 2703, see the discussion in § 52.18[2]]. When a resale of goods is private as opposed to public, the buyer must be notified of the sale [*Com. Code* § 2706(3)].

For discussion of the requirements for a resale of contract goods after a breach, see § 52.351[1][b].

[2] FORM**Notice of Resale****NOTICE OF RESALE**

_____ [date]

TO: _____ [buyer]

_____ [address]

PLEASE TAKE NOTICE that pursuant to the terms of our contract dated _____, and the applicable provisions of the Commercial Code, and by reason of your breach of that contract, the undersigned will offer for resale the following goods, which constitute the undelivered balance of goods under the contract: _____ [specify].

This sale will be private and conducted at our showroom located at _____ [address], on _____ [date], at _____ [time, e.g., 10:00 A.M.]. All rights to damages by reason of a deficiency on this resale and incidental damages, and any and all other appropriate remedies are hereby reserved.

_____ [signature of seller]
[typed name]

[OR]

_____ [date]
TO: _____ [buyer]
_____ [address]

This will constitute notice that we intend to resell the goods that we sold to you under our contract dated _____, naming you as Buyer and us as Seller. The resale will be made under the rights given us by the applicable provisions of the Commercial Code and will be in accordance with the requirements of those sections and our contract. If the resale price is less than the price stated in our contract, we will hold you liable for the difference as well as for any incidental damages that we have suffered as a result of your breach.

The sale will be a public sale and will be held at _____ [address], on _____ [date].
The sale is scheduled to commence at _____ [time, e.g., 10:00 A.M.].

_____ [signature of seller]
[typed name]

[OR]

_____ [date]
TO: _____ [buyer]
_____ [address]

Notice is hereby given that the _____ [identify goods] sold by us to you by contract dated _____, will be sold for the best price obtainable. The proceeds of the sale will be credited to the purchase price, and you will be held liable for any deficiency. The goods will be sold at a public sale on _____ [date], at _____ [address], to the highest responsible bidder.

_____ [signature of seller]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesResale of Goods



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DIVISION III: COMMERCIAL TRANSACTIONS CHAPTER 53 PERSONAL PROPERTY LEASING

21-53 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers the leasing of personal property, including various kinds of property leased for either commercial or household uses. The Legal Background discusses the basic forms of personal property leases and distinguishes leases from security interests and sales. It examines personal property leasing transactions under the California Commercial Code, the Federal Consumer Leasing Act, and other applicable state and federal laws. It covers relevant federal and state tax considerations, including tax considerations relevant to sale-leaseback transactions. Although the subject matter of the chapter is primarily concerned with the chattel aspects of personal property, the chapter also includes some discussion of the real property concept of "fixtures" and "accessions."

The Transaction Guide lists considerations in choosing the appropriate type of lease. It includes a drafting guide to personal property leases and provides guidance in obtaining consents, orders, and authorizations.

Forms include a complete general commercial equipment lease form, a complete finance lease form, and numerous specific lease provisions, including provisions related to offer and acceptance, warranties, breach and remedies, and maintenance and service. Also included are disclosure and notice forms, including a federal Consumer Leasing Act Disclosure Statement (Furniture Leases), as well as a lease commitment letter, a personal guaranty, a lessor's financial survey, and a corporate resolution authorizing a lease. A provision for use in sale-leaseback transactions is also included.

For detailed coverage of automobile leases, including forms, see Ch. 47, *Automotive Financing and Vehicle Leasing* . For discussion and a form covering a lease of computer equipment, see Ch. 57, *Computer-Related Transactions* . For additional coverage of personal property transactions, including discussion of bailments, see Ch. 102, *Bailments* , and Ch. 102A, *Personal Property Liens* . For coverage of the leasing of real property, see Ch. 34B, *Residential Leases* , Ch. 34C, *Retail, Industrial, and Office Leases* , Ch. 34D, *Ground Leases* , and Ch. 37, *Farm Leases* . For discussion of the sale of goods, and the application of the Uniform Commercial Code to those transactions, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .



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[1] United States Code

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[2] Regulations

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B. Secondary Sources

21-53 California Legal Forms--Transaction Guide § 53.05

§ 53.05 Law Reviews and Periodicals

Robins, *Come Hell or High Water or Article 2A: How Legislatures and Practitioners Can Cope with Several Drafting Anomalies in Article 2A of the Uniform Commercial Code*, 101 Com. L.J. 357 (Winter 1996).

Note, *Finance Lease, Hell or High Water Clause, and Third Party Beneficiary Theory in Article 2A of the Uniform Commercial Code*, 77 Cornell L.R. 318 (Jan. 1992).

Heermann, *The Structure of Lessees' and Lessors' Remedies Regarding Finance Leases of Equipment and Personal Property Under United States and German Law*, 15 Loy. of L.A. Int'l & Comp. L.J. 307 (Feb. 1993).

Boss, *Introducing the new UCC Article 2A: Leases*, 17 ALI-ABA Course Materials Journal 37 (April 1993).

Flick, *Annual Survey--Leases of Personal Property*, 45 Bus. Law. 2331 (August 1990).

Gelb, et al. *Recent Developments in Usury Law and Personal Property Lease Recharacterization*, 45 Bus. Law. 1799 (June 1990).

Harris, *The Interface Between Articles 2A and 9 Under the Official Text and the California Amendments*, 22 U.C.C.L.J. 99, 103 (1989).

Rohwer, *Equipment Leases--Warranty Rights and Remedies of Lessees*, 21 Pac. L.J. 1 (Oct. 1989).

Legislative Note, *Division 10 of the California Commercial Code: California Personal Property Lease Law Codified*, 20 Pac. L.J. 869 (April 1989).

Bayer, *Personal Property Leasing: Article 2A of the Uniform Commercial Code*, 43 Bus. Law. 1491 (1988).

Vlasic, *Plain English in Personal Property Leasing*, 64 Mich. Bar. J. 1328 (December 1985).

Cooluris & Winn, *Consumer Leasing Developments*, 39 Bus. Law. 1163 (1984).

Comment, *Article 9 and Fixtures: A Real Fix With No Perfect Solution*, 17 Loy. of L.A. L. Rev. 977 (1984).

Comment, *Unconscionability and the Enforcement of Standardized Contracts in Commercial Transactions*, 16 Pac. L.J. 247 (1984).

Jones, *The Automatic Stay and the Creditor Who Has Leased Consumer Goods*, 88 Com. L.J. 134 (1983).



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§ 53.06 Annotations

Annot., Insurable Interest in Property of Lessee With Option to Purchase Property, 74 A.L.R.4th 883 (1989) .

Annot., Sales and Use Taxes on Leased Tangible Personal Property, 2 A.L.R.4th 859 (1980) .

Annot., Equipment Leases as Security Interest Within Uniform Commercial Code § 1-201(37), 76 A.L.R.3d 11 (1977) .

Annot., Products Liability: Application of Strict Liability in Tort Doctrine to Lessor of Personal Property, 52 A.L.R.3d 121 (1973) .

Annot., Application of Warranty Provisions of Uniform Commercial Code to Bailments, 48 A.L.R.3d 668 (1973) .

Annot., Bailee's Duty to Insure Bailed Property, 28 A.L.R.3d 513 (1969) .



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§ 53.07 Text References

[1] Matthew Bender Sources

California Forms of Pleading and Practice (Matthew Bender).

Ch. 93, *Bailments*.

Ch. 140, *Contracts*.

California Legal Forms (Matthew Bender).

Ch. 34B, *Residential Leases*.

Ch. 34C, *Commercial, Industrial, and Office Leases*.

Ch. 34D, *Ground Leases*.

Ch. 37, *Farm Leases*.

Ch. 42, *Secured Transactions*.

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Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

Ch. 78, *Creditors' Agreements: Nonbankruptcy Alternatives*.

Coogan, Hogan & Vagts, *Bender's Uniform Commercial Code Service--Secured Transactions*, vol. 1 (Matthew Bender).

Fern, Warren's Forms of Agreements, Ch. 12B, *Leases of Personal Property* (Matthew Bender).

Rabkin & Johnson, *Current Legal Forms with Tax Analysis* (Matthew Bender).

Ch. 4A, *Equipment Leasing*.

Ch. 21, *Sales and Exchanges*.

Rabkin & Johnson, Federal Income, Gift and Estate Taxation (Matthew Bender).
Ch. 1, *The Individual*.
Ch. 2, *The Corporations*.
Ch. 45, *Depreciation*.
Ch. 45A, *Investment Tax Credit*.

[2] Additional Text References

Contino, *Handbook of Equipment Leasing: A Deal Maker's Guide* (N.Y. American Management Assoc. 1989).

Fritch et al., *Equipment Leasing--Leveraged Leases* (3d ed., N.Y. Practising Law Institute 1988).

[3] Legal Encyclopedias

Witkin, Summary of California Law, vol. 13, *Personal Property*, §§ 187-194 (10th ed. 2005).



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§ 53.10 Common Forms of Personal Property Leases

[1] "Personal Property" Defined

Personal property leasing encompasses a vast number of commercial and consumer arrangements in which goods are provided on a periodic basis with minimal capital outlay by lessees. These arrangements range from fairly simple and straightforward flat-rate leases between two parties to complex leveraged leases in which many parties and large amounts of funds may be involved. However, all personal property leasing transactions that are first made or that first become effective after January 1, 1990, are commonly related by the application of the Uniform Commercial Code [*see Com. Code § 10600*; *see also § 53.285* (agreement allowing governance of existing lease contract by Commercial Code)].

"Personal property" is generally considered movable property that is not real property [*see Civ. Code §§ 657, 663*]. The term "personal property" includes money, goods, chattels, things in action, and evidences of debt [*Civ. Code § 14(3)*; *see Estate of Dodge (1971) 6 Cal. 3d 311, 319, 98 Cal. Rptr. 801, 491 P.2d 385*]. The application of Division 10 of the California Commercial Code [*Com. Code §§ 10101-10600*], however, is largely limited to leases of "goods," which are defined as movable things, fixtures [*see Com. Code § 10309(a)(1)* (when goods are fixtures)], and the unborn young of animals, but not money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or oil and gas before extraction [*see Com. Code § 10103(a)(8)*; *see also § 53.12* (personal property leasing transactions under the Commercial Code)].

[2] Finance Leases

A "finance lease" allows a lessee to directly solicit suppliers of the goods sought for lease and then obtain the goods by arranging for a lessor to obtain title to them [*see Com. Code § 10103(a)(7)*; *Com. Code § 10103(a)(7)* (California Comment); *see, e.g., § 53.201* (sample finance lease); *see also Com. Code § 10103(a)(24)* ("supplier" defined)]. Under the Commercial Code, a finance lease is one with respect to which [*Com. Code § 10103(a)(7)*]:

- The lessor does not select, manufacture, or supply the goods;
- The lessor acquires the goods or the right to possession and use of the goods in connection with the

lease; and

- One of the following occurs:

- The lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract.

- The lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract.

- The lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party (such as the manufacturer of the goods), provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods.

- The lessor, before the lessee signs the lease contract, informs the lessee in writing (1) of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person; (2) that the lessee is entitled under the Division 10 of the Commercial Code [*Com. Code § 10101 et seq.*] to the promises and warranties, including those to any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; and (3) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

Counsel involved in the drafting of finance leases should be aware of potential problems arising from the characterization of lease transactions as sales or security interests [*see Puritan Leasing Co. v. August* (1976) 16 Cal. 3d 451, 461-462, 128 Cal. Rptr. 175, 546 P.2d 679 (upholding lease as express agreement of parties, providing for lessor's right to terminate lease and repossess and resell equipment on lessee's default, contrary to lessee's contention that this action was invalid attempt to provide for liquidated damages)]. For discussion of the distinction between leases and sales or security interests, see § 53.11.

[3] Operating Leases

Operating leases are commonly used in transactions in which the rental term is far less than the useful life of the property. The lessor generally anticipates the subsequent rental of the property in order to recover the full cost of the property. The lessor may bear a significant risk of depreciation in market value of the property and therefore often makes substantial provision in the lease contract for protecting the condition of the leased property.

For example, the lessor may include a lease provision requiring the lessee to pay a deposit to offset the costs that the lessor incurs in maintaining the leased property [*see, e.g., § 53.200[2]*]. In the case of motorized vehicle or machinery leases, the lessor may include mileage limitations or a limit on the total hours of operation [*see Ch. 47, Automotive Financing and Vehicle Leasing*]. Further, the lessor may call for other provisions requiring strict maintenance and recordkeeping of the maintenance [*see, e.g., § 53.250*].

[4] Flat-Rate and Full-Service Leases

Other forms of simple leases include flat-rate and full-service leases. In a flat-rate lease arrangement, the lessor obtains a fixed sum in the form of periodic rental payments that reflect the cost of the property to the lessor minus depreciation. In this normally short-term lease arrangement the lessee generally assumes responsibility for repairs, maintenance, replacement parts, operating expenses, insurance, license fees, and taxes.

Under a full-service lease, also known as a maintenance lease, the cost of all service and repairs, replacement parts, and insurance is generally on the lessor. The lessee often assumes responsibility for operating expenses, personal property taxes (unless the term is very short), and a deductible amount chargeable for certain types of damage to the property. For further discussion and a form for a full-service lease, see § 53.250.

[5] Leveraged Leases

The leveraged lease is a more complex form of personal property leasing. A leveraged lease transaction normally involves three parties: a lessor, a lessee, and a lender to the lessor. In general, leveraged leases are net leases (leases in which lessee pays, in addition to rent, the taxes, insurance, and maintenance charges), the lease term covers a substantial part of the useful life of the leased property, and the lessee's payments to the lessor are sufficient to discharge the lessor's payments to the lender [*Rev. Proc. 75-21* , § 1, 1975-1 C.B. 715 ; see, e.g., *Rev. Rul. 82-61*, 1982-1 C.B. 13 (undivided interest in electric generating facility is property interest that can be separately leased in leveraged lease transaction)].

Leveraged leases may provide significant benefits to both the lessor and the lessee by the lessor's use of the lender's capital funds to purchase the leased goods. When properly structured, leveraged leases assist the lessor in obtaining maximum leverage (return on investment) by financing a substantial portion of the cost of the leased property. The lessor acquires tax benefits from property ownership, such as depreciation and the ability to deduct interest paid to the lender as a business expense [see *I.R.C. § 167(a)* (depreciation), *I.R.C. § 163* (interest)]. Coincidentally, a lessee reduces its net cost of the leased property by allowing the lessor to receive those same tax benefits in exchange for a lower effective cost than would be required if the lessee had purchased the leased property.

The Internal Revenue Service scrutinizes leveraged lease transactions to determine whether they constitute true leases or are merely devices that have no economic substance other than the tax benefits accruing to the lessor through its legal ownership of the leased property. To facilitate the proper use of leveraged leases, the Internal Revenue Service has issued guidelines that should be followed in formulating requests for rulings on leveraged lease transactions [see *Rev. Proc. 75-21* , § 4, 1975-1 C.B. 715 ; *Rev. Proc. 75-28* , §§ 3-5, 1975-1 C.B. 752 ; see also *Rev. Proc. 76-30*, 1976-2 C.B. 647 (advance ruling is not obtainable when property is "limited use property"); *Rev. Proc. 79-48*, 1979-2 C.B. 529 ; § 53.20[12]].

For further discussion and sample forms that may be used in completing a leveraged lease, see Fritch et al., *Equipment Leasing--Leveraged Leases* (3d ed., N.Y. Practising Law Institute 1988).

[6] Sale and Leaseback Transactions

In a sale and leaseback transaction, an asset is sold with the express intent that the buyer will immediately lease the asset back to the seller. This arrangement provides the owner of the asset with a method of raising working capital, and it may have advantages over other forms of debt or equity financing. For example, lenders typically limit the amount of available financing to a specified percentage of the value of the property used as collateral, whereas in a sale-leaseback transaction, the seller-lessee may be able to convert the full value of the property in question into working capital. Thus, the use of sale-leaseback financing to acquire needed equipment may require less capital than traditional financing. Leases typically are structured so that the initial rent payments on the leased-back property are low.

A sale and leaseback transaction also will provide income tax benefits for both parties (usually more for the seller/lessee) if it is structured with tax qualification in mind. For discussion of income tax qualification, see § 53.21. For a guide to determining whether a sale and leaseback transaction would be beneficial, see § 53.118. For general discussion of the tax consequences of personal property leases, see § 53.20.

For further discussion of sale and leaseback, see Contino, *Handbook of Equipment Leasing: A Deal Maker's Guide* (N.Y. American Management Ass'n 1989). For discussion of sale and leaseback transactions involving real property, see Ch. 23, *Real Property Sales Agreements*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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§ 53.11 Leases Distinguished From Other Transactions

[1] Security Interests

Whether a transaction creates a lease or a security interest is determined by the facts of each case [*Com. Code § 1203(a)*]. However, a transaction in the form of a lease creates a security interest if the consideration paid by the lessee to the lessor for the right to possession and use of the goods is an obligation for the term of the lease that is not subject to termination by the lessee, and any of the following conditions apply [*Com. Code § 1203(b)*; *see also Matter of Marhoefer Packing Co., Inc. (9th Cir. 1982) 674 F.2d 1139, 1141-1146*] :

- The original term of the lease is not less than the remaining economic life of the goods [*see Com. Code § 1203(e)* (determination of "remaining economic life")].
- The lessee is required to renew the lease for the remaining economic life of the goods or is required to become the owner of the goods.
- The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration on compliance with the lease [*see Com. Code § 1203(d)* (discussion of "additional consideration")].
- The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration on compliance with the lease agreement [*see Com. Code §§ 1203(d)(1), (2)* (when additional consideration is not nominal), 10103(a)(11) ("lease agreement" defined)].

A transaction does not create a security interest merely because [*Com. Code § 1203(c)*]:

- The present value of the consideration the lessee is obligated to pay for the right to possession and use of the goods is substantially equal to or greater than the fair market value of the goods at the time the lease is entered into [*see Com. Code §§ 1201(b)(28), 10103(a)(21)* ("present value" defined)].

- The lessee assumes the risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs.
- That the lessee has an option to renew the lease or become the owner of the goods.
- The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed [*see Com. Code § 1203(e)* (determination of "reasonably predictable")].
- The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed [*see Com. Code § 1203(e)* (determination of "reasonably predictable")].
- In the case of a motor vehicle or a trailer that is not used primarily for personal, family, or household purposes, that the amount of rental payments may be increased or decreased by reference to the amount realized by the lessor on sale or disposition of the vehicle or trailer [*see Veh. Code §§ 415* ("motor vehicle" defined), *630* ("trailer" defined)].

Counsel engaged in the drafting of personal property leases should be aware of potential problems in having a lease transaction subsequently characterized as a security interest. If a purported lease transaction creates a security interest, the interest is generally subject to Division 9 of the Commercial Code [*Com. Code §§ 9110, 9203(c)*; *see Com. Code § 9110* (UCC Comment) (application to Division 10); former *Com. Code § 10103(1)(j)*, renumbered without substantive change, *Com. Code § 10103(a)(10)* (California Comment)]. Failure to comply with those provisions may subject the lessor or secured party to a risk of losing the property to a subsequent claimant [*see Com. Code § 9301 et seq.* (rules of priority); *Com. Code § 9401 et seq.* (rights of third parties)]. However, to the extent that and for so long as the debtor does not have, or does not lawfully obtain, possession of the goods, no security agreement is necessary to make the security interest enforceable and no filing is required to perfect the security interest [*see Com. Code § 9110*]. Further, the rights of the secured party on default by the debtor are governed by Division 10 [*Com. Code § 10101 et seq.*] in the case of a security interest arising solely under that division, rather than under Division 9 [*Com. Code § 9110(3)*; *see Com. Code § 10303(e)(1)* (when transfer is made which results in default, party to lease contract not making transfer has rights and remedies available under *Com. Code §§ 10501-10507*; *Com. Code § 10303(e)(2)* (other available relief); *see also Com. Code § 10501(b)*; § 53.15].

The term "security interest," as used in *Com. Code § 10303*, includes the sale of a lease contract, since a lease contract constitutes chattel paper [*Com. Code § 10303(a)*; *see Com. Code § 10303(a)* (California Comment); *Com. Code § 9109(a)(3)*; *Com. Code § 9102(a)(11)* ("chattel paper" defined); *see also* [2], *below* (consequences of having purported lease characterized as sale)].

Although there is no requirement for filing a lease [*see Harris, The Interface Between Articles 2A and 9 Under the Official Text and the California Amendments*, 22 U.C.C.L.J. 99, 103 (1989)], lessors who are concerned about whether a purported lease transaction creates a lease or a security interest may file a protective informational financing statement [*see Com. Code § 10301* (California Comment); *see Com. Code § 9505* (financing statements covering leased goods)]. For discussion of financing statements and a sample form, see *Ch. 42, Secured Transactions*, § 42.211[2] (Financing Statement, Form UCC-1). For discussion of the creation and regulation of secured interests, see *Ch. 42, Secured Transactions*. For further discussion of the distinctions between leases and security interests, see Coogan and Boss, Bender's Uniform Commercial Code Service, Ch. 4.3, *Uniform Commercial Code Treatment For All Leases* (Matthew Bender).

[2] Sales

Lease transactions that are found to be sales, conditional or otherwise, may subject the parties to additional unanticipated tax liability, and also may subject the transaction to scrutiny under Division 2 of the California Commercial Code (Sales) [see *Com. Code* § 2101 *et seq.*; see also Ch. 52, *Sales of Goods Under the Uniform Commercial Code*]. The Internal Revenue Service has established guidelines for determining when an purported lease transaction will be considered a sale. The IRS will presume that a sale was intended if the total of the rental payments and any optional purchase price approximate the price for which the property could have been purchased outright plus interest and carrying charges [*Rev. Rul. 55-540* , § 4.05, 1955-2 C.B. 39]. The IRS may also presume that a sale was intended, even though there is no express passage of title, when the rent payable over a relatively short period of the expected life of the goods approximates the purchase price of the goods and the lessee may continue to use the property for the approximate remaining life of the equipment at a nominal or token rate [*Rev. Rul. 55-540* , § 4.06, 1955-2 C.B. 39].

For further discussion of the factors the IRS considers in determining when an intended lease transaction should be recharacterized as a sale, refer to § 53.20[11]. For discussion of the federal and state tax consequences of that recharacterization, see § 53.20[11] and § 53.19[1], respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)General OverviewCommercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionLeases



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§ 53.12 Personal Property Leasing Transactions Under the Commercial Code

[1] Governing Law

[a] Applicable Statutes

Division 10 of the Commercial Code [*Com. Code § 10101 et seq.*], adopted in California in 1988 [*see Stats. 1988, ch. 1359*], is the California version of UCC Article 2A governing personal property leases. Division 10 was adopted with minor changes to conform the UCC model to existing California law. For example, UCC Section 2A-108, governing remedies for unconscionable lease contracts, was not enacted in California because it duplicates protections afforded by *Civ. Code § 1670.5*.

As adopted in California, the Uniform Commercial Code division governing leases of personal property [*see Com. Code § 10101*] applies to any transaction, regardless of form, that creates a lease [*Com. Code § 10102*]. Under the California Commercial Code, a "lease" means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale (including a sale on approval or a sale on return), or retention or creation of a security interest, is not a lease. Unless the term clearly indicates otherwise, "lease" includes a sublease [*Com. Code § 10103(a)(10)*; *see Com. Code § 10103(a)(14)* (lessee means person who acquires right to possession and use of goods under lease, including sublease, unless context clearly indicates otherwise); *Com. Code § 10103(a)(16)* (lessor means person who transfers right to possession and use of goods under lease, including sublease, unless context clearly indicates otherwise)].

For all lease contracts entered into on or after January 1, 1990, for those contracts that first become effective between the parties on or after that date, and for those contracts entered into before that date and subsequently modified in writing by the parties to allow governance by the Commercial Code, Division 10 of the California Commercial Code [*Com. Code §§ 10101-10600*] governs the rights, obligations, and remedies under the lease contract [*Com. Code § 10600*; *see Com. Code § 10103(a)(12)* ("lease contract" defined); *see also* [2], *below*].

All leases governed by the provisions of the California Commercial Code are also subject to the following [*Com. Code § 10104(a)*]:

- Certificate of title statutes of California concerning motor vehicle and boat registration [*see Veh. Code §§ 4450 et seq., 9840 et seq.; Health & Safety Code § 18075 et seq.*].
- Certificate of title statutes of another jurisdiction [*see Com. Code § 10105*];
- Consumer law of California, both decisional and statutory, including, to the extent applicable to consumer lease transactions, statutes regulating unfair competition, false advertising, and obligations arising from particular transactions [*see Bus. & Prof. Code §§ 17200 et seq., 17500 et seq.; Civ. Code § 1738 et seq.*].

With limited exceptions, in the case of a conflict between Division 10 of the Commercial Code [*Com. Code §§ 10101-10600*] and any law referred to immediately above, that specified law will control [*Com. Code § 10104(b)*; *see Com. Code §§ 10105, 10304(c), 10305(c)* (exceptions)]. The failure to comply with an applicable law has only the effect specified in that law [*Com. Code § 10104(c)*].

Additional statutory regulation of personal property leasing relating to vehicles is found in the Vehicle Leasing Act [*see Civ. Code §§ 2985.7-2990*] and the Automobile Sales Finance Act [*see Civ. Code §§ 2981-2984.4*]. *Civ. Code § 1936* contains restrictions on the renting of automobiles for terms of less than 30 days. For further discussion of these statutory schemes, see Ch. 47, *Automotive Financing and Vehicle Leasing*.

[b] Inapplicable Statutes

Transactions governed by the Commercial Code division on personal property leasing are exempt from certain specified statutes insofar as those statutes pertain to leases. The following statutes exempt lease transactions governed by the UCC division on personal property leasing:

- *Civ. Code § 1624*, the California Statute of Frauds [*see Ch. 75, Formation of Contracts and Standard Contractual Provisions*].
- *Civ. Code § 3308*, governing the damages formula available to lessors on breach by a lessee [*see Ch. 34B, Residential Leases*; *Ch. 34C, Commercial, Industrial, and Office Leases*; *Ch. 34D, Ground Leases*].
- *Civ. Code §§ 3440.1 and 3440.9*, creating exclusions to the statutory chapter governing conveyances of personal property without delivery (including sales and leasebacks).
- *Code Civ. Proc. §§ 697.610, 697.730, and 697.740*, governing the survivability of judgment and execution liens.

[2] Leases Executed Before January 1, 1990

A personal property lease executed before January 1, 1990, is governed by the existing laws pertaining to a lease of personal property at the time the lease contract was executed. However, the parties to a lease contract first made or that first became effective before January 1, 1990, may specifically agree in writing that the lease contract will be governed by the provisions of Division 10 of the California Commercial Code [*Com. Code § 10600*; *see § 53.285*].

Generally, the law governing leases of personal property in existence before the enactment of the UCC provisions is found in the California Civil Code and the decisional law of California courts. *Civ. Code § 1925* defines "hiring" (leasing) as a contract by which one gives to another the temporary possession and use of property, other than money, for reward, and the party receiving the property agrees to return the property to the lessor at a future time. A lease

contract entered into before January 1, 1990, is subject to the following statutory rules:

- A lease contract binds the lessor to secure to the lessee the quiet possession of the leased property during the term of the lease [*Civ. Code* §§ 1927, 1955].
- The lessee of property must use ordinary care for its preservation in safety and in good condition [*Civ. Code* § 1928].
- The lessee must repair all deterioration or injuries caused by the failure to use ordinary care [*Civ. Code* §§ 1929, 1956].
- If the property is let for a particular purpose, the lessee is liable for all damages caused by the use of the property for other than the specified purpose; alternatively the lessor may treat the contract as rescinded [*Civ. Code* § 1930].

The lessor of property may terminate the lease and reclaim the leased property when the lessee uses, or allows the use of the property in other than the agreed manner or when the lessee does not, within a reasonable time after request, make required repairs on the leased property [*Civ. Code* § 1931]. The lessee of property may terminate the lease if the lessor fails, within a reasonable time after request, to fulfill the lessor's obligations, if any, in maintaining the lessee's quiet possession of the property or putting the leased property in good condition or repair. The lessee may also terminate when the greater part of the leased property which was the material inducement to the lessee to enter the lease perishes from any cause other than the lessee's failure to use ordinary care [*Civ. Code* § 1932].

A lease terminates at the end of the agreed term, by the mutual consent of the parties, by the lessee's acquiring title to the leased goods superior to that of the lessor, or on the destruction of the leased property [*Civ. Code* § 1933]. If the lease is terminable at the option of one of the parties, it is terminated by notice to the other of that party's death or incapacity to contract [*Civ. Code* § 1934]. At the expiration of the lease term, the lessee must return the property to the place contemplated by the parties at the time of leasing, or if no place has been designated, to the place that the property was at the time of leasing [*Civ. Code* § 1958].

[3] Importance of Commercial Code Definitions

The Commercial Code definitions are important in construing Commercial Code requirements and drafting lease contracts according to those provisions. For example, various forms of leases (e.g., "finance leases") are defined according to their purpose and are subject to different treatment under the Commercial Code. The definitions in the Commercial Code provide interpretive assistance.

In addition to the general definition of a "lease" [see § 53.12[1]], the Commercial Code includes definitions of various forms of specific leases of "goods" [see *Com. Code* §§ 10103(a)(5) ("consumer lease" means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family, or household purpose), (7) ("finance lease"), (9) ("installment lease contract"), (23) ("sublease")]. "Goods" are defined as all things that are movable at the time of "identification to the lease contract" [see *Com. Code* § 10217 (when identification occurs)], or are "fixtures," or the unborn young of animals, but not money, documents, instruments, accounts, chattel paper, general intangibles, or minerals, including oil and gas before extraction [*Com. Code* § 10103(a)(8); see *Com. Code* § 10309(a)(1) (fixtures)].

Goods are "identified to the lease contract" in the manner explicitly agreed on by the parties. In the absence of an express agreement, identification occurs as follows [*Com. Code* § 10217]:

- When the lease contract is made, if the lease contract is for a lease of goods that are existing and

identified;

- When the goods are shipped, marked, or otherwise designated by the lessor as goods to which the lease contract refers, if the lease contract is of goods that are not existing and identified; or
- When the young are conceived, if the lease contract is of the unborn young of animals.

[4] Formation and Interpretation of Lease Contracts Under the Commercial Code

The Commercial Code provisions governing formation of lease contracts, like those governing contracts for the sale of goods [*see Com. Code § 2101 et seq.*], are generally permissive. Subject to the Commercial Code statute of frauds [*see Com. Code § 10201*; [5], *below*], a lease contract may be made in any manner sufficient to show agreement, including conduct by both parties that recognizes the existence of a lease contract [*Com. Code § 10204(a)*]. Significantly, except as otherwise provided, the effect of any of the Commercial Code's provisions may be varied by an agreement between the parties [*see Com. Code § 1302*].

An agreement may be sufficient to constitute a lease contract, even if the time of formation cannot be determined [*Com. Code § 10204(b)*]. Although one or more terms are left open, a lease contract does not fail for indefiniteness if the parties have intended to make a lease contract and there is a reasonably certain basis for a court to fashion an appropriate remedy in fulfilling the parties' intent [*Com. Code § 10204(c)*; *see also Com. Code § 2204* (UCC Comment) (contract formation in general)].

Unless the language or circumstances of an offer to make a lease contract unambiguously indicate otherwise, the offer will be construed as allowing acceptance in any manner and by any means that are reasonable under the circumstances [*Com. Code § 10206(a)*]. When the beginning of the requested performance constitutes a reasonable mode of acceptance, the offeree must notify the offeror when he or she commences performance. An offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance [*Com. Code § 10206(b)*; *see § 53.267*].

A merchant's offer to lease goods to or from another person in a signed writing that by its terms gives assurance it will be held open is not revocable for lack of consideration. The offer must remain open for the time stated in the writing, or, if no time is stated, for a reasonable time not to exceed three months [*Com. Code § 10205*; *see Com. Code § 2104(1)* ("merchant" defined)]. For further discussion, and forms containing clauses governing the manner and medium of making and accepting offers, *see §§ 53.210 and 53.211*.

If the parties agree to terms in a confirmatory memorandum, or in a writing intended by the parties to be a final expression of their agreement, those terms may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement [*Com. Code § 10202*]. Those terms, however, may be explained or supplemented by either or both [*Com. Code § 10202*]:

- Course of dealing or usage of trade or by course of performance [*see Com. Code §§ 1303, 2202*; *see, e.g., Insurance Co. of No. Am. v. NNR Aircargo Service (USA), Inc. (9th Cir. 2000) 201 F.3d 1111, 1113-1115* (under former *Com. Code § 1205(1)*, now *Com. Code § 1303(a)*, receipt of 47 identical invoices for 47 separate transactions was sufficient to constitute course of dealing, modifying shipping agreement)]; and
- Evidence of consistent additional terms, unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

[5] Enforceability of Valid Lease Contracts Under the Commercial Code Statute of Frauds

A lease contract is not enforceable by way of action or defense unless, in a lease contract other than a consumer lease [see *Com. Code § 10103(a)(5)* ("consumer lease" defined); [3], *above*], the total payments to be made under the contract are less than \$1000. In calculating the total payments figure, amounts paid for options to renew or buy are excluded [Com. Code § 10201(a)(1)]. Alternatively, a lease contract is not enforceable by way of action or defense unless it is in writing and signed by the party against whom enforcement is sought, or by that party's authorized agent. The contract must contain sufficient detail to indicate that a lease contract has been made between the parties and to describe the leased goods and lease term [Com. Code § 10201(a)(2)].

A writing satisfies the sufficiency requirement [see *Com. Code § 10201(a)(2)*], whether or not it is specific, if it reasonably identifies what is described [Com. Code § 10201(b)]. A writing is not insufficient because it omits or incorrectly states an agreed-on term [Com. Code § 10201(c)]. A lease contract is not enforceable under *Com. Code § 10201(a)(2)*, however, beyond the lease term and the quantity of goods shown in the writing [Com. Code § 10201(c)].

Certain lease contracts not in compliance with either alternative under *Com. Code § 10201(a)* are enforceable if valid in other respects. These specified contracts are as follows [Com. Code § 10201(d); see *Com. Code § 10201(e)* (lease terms for these contracts)]:

- A contract for the lease of goods that are to be specially manufactured or obtained for the lessee and not suitable for lease or sale to others in the ordinary course of the lessor's business, if the lessor has substantially begun their manufacture or made commitments for their procurement, before receiving notice of repudiation and under circumstances that reasonably indicate that the goods are for the lessee;
- A lease contract under which a party against whom enforcement is sought admits in that party's pleading, testimony, or otherwise in court that a lease contract was made, but is otherwise unenforceable under *Com. Code § 10201* beyond the quantity of goods admitted; or
- A lease contract under which the lessee has received and accepted the goods.

[6] Modification or Rescission of Existing Lease Agreement

An agreement modifying a lease contract that is governed by Division 10 of the Commercial Code [Com. Code §§ 10101-10600] needs no consideration to be binding [Com. Code § 10208(a)]. A signed lease agreement that excludes modification or rescission except by a signed writing may not be otherwise modified or rescinded [Com. Code § 10208(b)]. When this requirement is included in a form lease contract provided by a merchant, the separate signature of the lessee is required on the form unless the lessee is also a merchant [Com. Code § 10208(b)].

If an attempted modification or rescission does not meet the signed writing requirement, it may still operate as waiver of the lease contract terms sought to be modified or rescinded [Com. Code § 10208(c)]. A party who has waived an executory portion of a lease contract may retract the waiver by a reasonable notification, received by the other party, that strict performance will be required of any term waived. A waiver may not be retracted, however, if the retraction would be unjust due to a material change of position in reliance on the waiver [Com. Code § 10208(d); see § 53.265].

[7] Choice of Law Governing Lease Contract

The choice of law by the parties to a consumer lease [see *Com. Code § 10103(a)(5)* ("consumer lease" defined); see also [3], *above*] is not enforceable if the law chosen is that of a jurisdiction other than one (1) in which the lessee resides at the time the lease agreement becomes enforceable or within 30 days of that date, (2) in which the goods are to be used, or (3) in which the lease is executed by the lessee [Com. Code § 10106(a); see, e.g., § 53.200[2] (provisions governing designation of jurisdiction in which lease contract is executed and choice of jurisdiction under which any disagreement

will be governed)).

Additionally, the choice of judicial forum by the parties to a consumer lease is unenforceable if it is [*Com. Code* § 10106(b)]:

- A county other than the county in which the lessee actually signed the lease;
- A county other than the county in which the lessee resides at the commencement of the judicial action;
- A county other than the county in which the lessee resided at the time the lease contract became enforceable; or
- A county other than the county in which the goods are permanently stored.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionFormationCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.13

§ 53.13 Warranties in Lease Agreement

[1] Parties' Intention May Determine Dominant Warranty

Division 10 of the Commercial Code [*Com. Code §§ 10101-10600*] provides extensive interpretive and supplemental assistance for analyzing warranty provisions in personal property lease agreements [*see Com. Code §§ 10210-10215*]. Warranties, whether express or implied, must be construed as consistent with each other and as cumulative, but if that construction is unreasonable, the intention of the parties determines which warranty is dominant [*Com. Code § 10215; see [2]-[3], below*]. The parties' intention is determined according to the following rules [*Com. Code § 10215(1)-(3)*]:

- Exact or technical specifications will prevail over an inconsistent sample or model or general language of description.
- A sample from an existing bulk displaces inconsistent general language of description.
- Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

For further discussion of warranties, and various forms providing for limitation and modification of warranties, see §§ 53.220 53.222.

[2] Creation of Express Warranties

A lessor of personal property may create express warranties by the following methods [*Com. Code § 10210(a)*]:

- Any affirmation of fact or promise made to the lessee that relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise.
- Any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods will conform to the description.

- Any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model.

The lessor does not need to use formal words, such as "warrant" or "guarantee," to create an express warranty [*Com. Code § 10210(b)*]. Furthermore, the lessor need not have a specific intention to create a warranty. An express warranty is not created, however, by an affirmation merely of the value of the goods or a statement purporting to be merely the lessor's opinion or commendation of the goods [*Com. Code § 10210(b)*].

[3] Creation of Implied Warranties

Except in a finance lease [*see § 53.10[2]*], a warranty of merchantability is implied in a lease contract if the lessor is a merchant with respect to goods of the kind leased [*Com. Code § 10212(a)*]. The minimum standard of merchantability must be met as follows [*Com. Code § 10212(b)*]:

- The goods must pass without objection in the trade under the description in the lease agreement;
- In the case of fungible goods, the goods must be of fair average quality within the description [*see Com. Code § 1201(b)(18)* ("fungible" defined)];
- The goods must be fit for the ordinary purposes for which goods of that type are used;
- The goods must run, within the variation permitted by the lease agreement, of even kind, quality, and quantity within each unit and among all units involved;
- The goods must be adequately contained, packaged, and labeled as the lease agreement may require; and
- The goods must conform to any promises or affirmations of fact made on the container or label.

Other implied warranties also may arise from course of dealing or usage of trade [*Com. Code § 10212(c)*].

Except in a finance lease [*see § 53.10[2]*], an implied warranty of fitness for a particular purpose may be found in a lease of personal property. This warranty is implied if the lessor, at the time the lease contract is entered into, has reason to know of any particular purpose for which the goods are required and that the lessee is relying on the lessor's skill or judgment to select or furnish suitable goods [*Com. Code § 10213*].

In every personal property lease contract, there is a warranty that no person holding a claim or interest that arose from an act or omission of the lessor, except for infringement or the like, will interfere with the lessee's use and enjoyment of the goods for the lease term [*Com. Code § 10211(a)*]. Except in a finance lease [*see § 53.10[2]*], a lease contract by a merchant lessor [*see Com. Code § 2104(1)* ("merchant" defined)] who regularly deals in goods of that type contains a warranty that the goods are delivered free of the rightful claim of any person by way of infringement or the like [*Com. Code § 10211(b)*].

A lessee who furnishes specifications to a lessor or a supplier must hold the lessor and the supplier harmless against any claim by way of infringement or the like that arises out of compliance with the specifications [*Com. Code § 10211(c)*; *see Com. Code § 10103(a)(24)* ("supplier" defined)].

[4] Exclusion and Modification of Warranties

Lease contracts may contain provisions limiting or modifying warranties [*see Com. Code § 10214; see, e.g., §§ 53.220-53.222*]. Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty must be construed as consistent with each other whenever reasonable [*Com. Code § 10214(a)*]. Subject to the Code rules on parol or extrinsic evidence [*see Com. Code § 10202; [3], above*], negation or limitation of a warranty is inoperative to the extent that the construction is unreasonable [*Com. Code § 10214(a)*].

Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," or "with all faults." Additionally, implied warranties are excluded by other language that in common understanding calls the lessee's attention to the exclusion of warranties and makes plain that there is no implied warranty. In either case, the exclusionary language must be in writing and must be conspicuous [*Com. Code § 10214(c)(1); see, e.g., § 53.221*].

Unless otherwise restricted by law, the implied warranty of merchantability may be excluded or modified by a conspicuous writing that mentions "merchantability" [*Com. Code § 10214(b)*]. Further, unless the law states otherwise, an exclusion or modification of the implied warranty of fitness for a particular purpose must be in a conspicuous writing. Exclusions of the implied warranty of fitness for a particular purpose are sufficient if they are written, are conspicuous, and state, for example, "There is no warranty that the goods will be fit for a particular purpose" [*Com. Code § 10214(b); see [2]-[3], above*].

To exclude or modify a warranty against interference or against infringement [*see Com. Code § 10211; [3], above*], or any part of it, the language must be specific, in writing, and conspicuous. If, however, the circumstances, including course of performance, course of dealing, or usage of trade, give the lessee reason to know that the goods are being leased subject to a claim or interest of any person, these requirements are waived [*Com. Code § 10214(d)*].

If the lessee has examined the goods, sample, or model as fully as desired, or has refused to examine the goods before entering into the lease contract, there is no implied warranty with regard to defects that an examination under the circumstances would have revealed [*Com. Code § 10214(c)(2)*].

An implied warranty may also be excluded or modified by course of dealing, course of performance, or usage of trade [*Com. Code § 10214(c)(3); see Com. Code § 1303* (when course of performance or practical construction is relevant to determine meaning of lease agreement)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionWarranties



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§ 53.14 Passage of Risk of Loss

Unless otherwise agreed by the parties [*see Com. Code § 1302* (variation by agreement)], and except in the case of a finance lease [*see § 53.10[2]*], the risk of loss is retained by the lessor and does not pass to the lessee [*Com. Code § 10219(a)*]. Subject to the rules governing the effect of default on risk of loss [*see Com. Code § 10220*], if risk of loss will pass to the lessee and the time of passage of the risk is not stated in the contract, the following rules apply:

- If the lease contract requires or authorizes the goods to be shipped by carrier and it does not require delivery at a particular destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier; but if the lease contract does require delivery at a particular destination, and the goods are tendered there while in the carrier's possession, the risk of loss passes to the lessee when the goods are made available at that destination for the lessee to take delivery [*Com. Code § 10219(b)(1)*].
- If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgment by the bailee of the lessee's right to possession of the goods [*Com. Code § 10219(b)(2)*].
- In any case not covered under *Com. Code § 10219(b)(1), (2), above*, the risk of loss passes to the lessee on the lessee's receipt of the goods if the lessor (or in the case of a finance lease, if the supplier) is a merchant; otherwise the risk passes to the lessee on tender of delivery [*Com. Code § 10219(b)(3)*].

Regarding instances of default under the lease contract, if the risk of loss is to pass to the lessee and the time of passage of the risk is not stated, the following rules apply:

- If a tender or delivery of goods fails to conform to the lease contract as to give a right of rejection, the risk of loss remains with the lessor (or in the case of a finance lease, with the supplier) until cure or acceptance [*Com. Code § 10220(a)(1)*].
- If the lessee rightfully revokes acceptance, he or she, to the extent of any deficiency in his or her effective insurance coverage, may treat the risk of loss as having remained with the lessor (or in the case

of a finance lease, with the supplier) from the beginning [*Com. Code § 10220(a)(2)*].

Whether or not risk of loss is to pass to the lessee, if the lessee repudiates conforming goods already identified to the lease contract or is otherwise in default under the lease contract, the lessor (or the supplier in the case of a finance lease), to the extent of any deficiency in his or her effective insurance coverage, may treat the risk of loss as resting on the lessee for a commercially reasonable time [*Com. Code § 10220(b)*].

If a lease contract requires goods to be identified when the lease contract is made, and the goods suffer casualty without fault of the lessee, the lessor, or the supplier before delivery, or the goods suffer casualty before the risk of loss passes to the lessee pursuant to the lease agreement or pursuant to the risk of loss rules found in *Com. Code § 10219*, then [*Com. Code § 10221*]:

- If the loss is total, the lease contract is avoided; and
- If the loss is partial or the goods have so deteriorated as to no longer conform to the lease contract, the lessee may nevertheless demand inspection and at his or her option either treat the lease contract as avoided or, except in a finance lease, accept the goods with due allowance from the rent payable for the balance of the lease term for the deterioration or the deficiency in quantity but without further right against the lessor.

For discussion of the application of the rules covering the passage of risk of loss to finance leases, see § 53.13[1].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)DefaultGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionCasualty & Risk of Loss



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§ 53.15 Default Under Personal Property Leases

[1] In General

Division 10 of the Commercial Code [*Com. Code §§ 10101-10600*] governs the instances and consequences of a default in a lease contract when the contract omits sufficient coverage of default [*see Com. Code §§ 10501-10532; see also Com. Code § 1302* (variation by agreement)]. The lease agreement and the provisions of Division 10 of the Commercial Code [*Com. Code §§ 10101-10600*] determine whether a lessee or lessor is in default under a lease contract [*Com. Code § 10501(a); see Com. Code § 10506* (statute of limitations)]. Except as otherwise restricted by the provisions of the Commercial Code governing default, a lease agreement may include rights and remedies for default in addition to or in substitution for those provided in the Commercial Code and may limit or alter the Commercial Code's measure of damages [*Com. Code § 10503(a)*].

If the lessor or lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in the Commercial Code, and except as otherwise limited by the Commercial Code, as provided in the lease agreement [*Com. Code § 10501(b)*]. In the instance of a default by either party, the party seeking enforcement may reduce that claim to judgment, or otherwise enforce the lease contract by self-help or any available judicial or nonjudicial procedure. These procedures may include administrative proceeding, arbitration, or similar methods of resolution in accordance with the Commercial Code provisions governing default [*Com. Code § 10501(c)*]. Except as otherwise provided in *Com. Code § 1305(a)* (remedies to be liberally construed), or as otherwise provided under Division 10 of the Commercial Code [*Com. Code § 10101 et seq.*], or in the lease agreement, these rights and remedies are cumulative [*Com. Code § 10501(d)*].

If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under the Commercial Code as to the goods, or under other applicable law as to both the real property and the goods in accordance with that party's rights and remedies relating to the real property [*Com. Code § 10501(e)*]. If the party seeking enforcement of the contract proceeds in the manner described above, the provisions of the Commercial Code governing default do not apply [*Com. Code § 10501(e)*]. For a discussion of the judicial remedies for a breach of contract, including forms for effecting those remedies, see *California Forms of Pleading and Practice*, Ch. 140, *Contracts* (Matthew Bender).

The provisions of Division 10 of the Commercial Code [*Com. Code §§ 10101-10600*] do not impair the rights or remedies for the breach of any obligation or promise that is collateral or ancillary to a lease contract [*Com. Code § 10503(d)*].

Any claim or right arising out of an alleged default (or breach of warranty) may be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party [*Com. Code § 10107*; see § 53.13 (warranties)].

For additional discussion of the inclusion of specific contractual provisions relating to damages [see *Com. Code §§ 10503(c)* (consequential damages), *10504* (liquidation of damages; restitution), *10507* (damages based on market rent), *10530* (lessor's incidental damages)], see §§ 53.231 and 53.232. For a discussion of the effect of default on the passage of risk of loss, see § 53.14.

[2] Lessee's Remedies

If the lessor fails to deliver the leased goods in conformity with the lease contract [see *Com. Code § 10509*] or repudiates the lease contract [see *Com. Code § 10402* (anticipatory repudiation)], or if the lessee rightfully rejects or revokes acceptance of the goods [see *Com. Code §§ 10509, 10517*], the lessor is in default under the lease contract [*Com. Code § 10508(a)*]. In the event of the lessor's default, with respect to the goods involved, and to all of the goods, if under an installment lease contract the value of the whole lease contract is substantially impaired, [see *Com. Code § 10510*], the lessee may [*Com. Code § 10508(a)*]:

- Cancel the lease contract [see *Com. Code § 10505(a)* (cancellation)].
- Recover the rent and security that has been paid and is just under the circumstances.
- Cover and recover damages as to all goods affected whether or not they have been identified to the lease contract, or recover damages for nondelivery [see *Com. Code §§ 10518-10520* (cover by lessee; damages)].
- Exercise any other rights or pursue any other remedies provided in the lease contract.

On the lessee's rightful rejection or justifiable revocation of acceptance of the goods, the lessee acquires a security interest in the goods possessed for any rent and security paid and any related reasonably incurred expenses, and may hold and dispose of them in a commercially reasonable manner [*Com. Code § 10508(e)*; see *Com. Code §§ 10509-10516* (rejection and acceptance of goods)]. The lessee must, however, account to the lessor for any excess over the amount of the lessee's security interest [*Com. Code § 10508(e)*; see *Com. Code § 10527(e)* (accounting for sale proceeds)].

In addition, if the lessor fails to deliver the goods in conformity with the lease contract, or repudiates the lease contract, the lessee may either [*Com. Code § 10508(b)*]:

- Recover the goods, if they have been identified [see *Com. Code § 10522* (recovery by lessee in case of lessor's insolvency)]; or
- If appropriate, obtain specific performance of the lease contract or replevy the goods [see *Com. Code § 10521* (specific performance and replevin)].

If the lessor is otherwise in default under a lease contract, the lessee also may exercise the rights and pursue the

remedies provided in the lease contract [*Com. Code § 10508(c)*]. These rights and remedies may include those enumerated in *Com. Code § 10519(c)* (measure of damages for nonconforming tender or delivery or other default by lessor) and the right to cancel the lease [*Com. Code § 10508(c)*].

Generally, a lessee, on notifying the lessor of his or her intention to do so, may deduct all or any part of the damages resulting from any default under the lease contract for any part of the rent still due under the same lease contract [*Com. Code § 10508(f)*; see *Com. Code § 10407(a)* (exception for finance leases)]. For further discussion and a form illustrating the proper method of notice for this purpose, see § 53.266.

If a lessor has breached an express or implied warranty, the lessee may recover damages [*Com. Code § 10508(d)*; see § 53.13 (warranties)].

[3] Lessor's Remedies

Division 10 of the Commercial Code [*Com. Code §§ 10101-10600*] includes specified instances of a lessee's default under a lease contract [see *Com. Code § 10523(a)*]. These specified acts and omissions are intended to supplement those that the parties may agree on and include in the provisions of a lease agreement [see Bayer, *Personal Property Leasing: Article 2A of the Uniform Commercial Code*, 43 Bus. Law. 1491, 1508 (1988)].

A lessee has committed a statutory default under a lease contract if he or she wrongfully rejects or revokes acceptance of the leased goods, fails to make payment when due, or repudiates with respect to a part or the whole of the lease contract. Under one of these instances of a lessee's default, with respect to any goods involved, and with respect to all of the goods if, under an installment lease contract, the value of the whole lease contract is substantially impaired, the lessor may [*Com. Code § 10523(a)*]:

- Cancel the lease contract [see *Com. Code § 10505(a)* (cancellation)].
- Proceed respecting goods not identified to the lease contract [see *Com. Code § 10524* (proceedings)].
- Withhold delivery of the goods and take possession of goods previously delivered [see *Com. Code § 10525* (taking possession of goods)].
- Stop delivery of the goods by any bailee [see *Com. Code § 10526* (stoppage of goods in possession of bailee)].
- Either dispose of the goods and recover damages, retain the goods and recover damages, or recover rent if appropriate [see *Com. Code §§ 10527-10529*].
- Exercise any other rights or pursue and any other remedies provided in the lease contract.

Additionally, after the lessee's statutory default under *Com. Code § 10523(a), (c)(1)*, or, if agreed, after other default by the lessee, the lessor may [*Com. Code § 10524(a)(1), (2)*]:

- Identify to the lease contract conforming goods previously unidentified if at the time the lessor learned of the default the goods were in the lessor's (or supplier's) possession or control; and
- Dispose of those goods that demonstrably have been intended for the particular lease contract, even if those goods are unfinished [see *Com. Code § 10527(a)* (disposal of goods); see also *Com. Code § 10524(b)* (disposal of unfinished goods)].

If the lessor does not fully exercise a right or obtain a remedy available under *Com. Code § 10523(a)*, the lessor may recover the loss resulting in the ordinary course of events from the lessee's default as determined in any reasonable manner [*Com. Code § 10523(b)*]. The lessor is also entitled to incidental damages, minus expenses saved in consequence of the lessee's default [*Com. Code § 10523(b)*].

If the lessee is otherwise in default under a lease contract, the lessor may exercise the rights and pursue the remedies provided in the lease contract [*Com. Code § 10523(c)*]. These rights and remedies may include a right to cancel the lease. In addition, unless otherwise provided in the lease contract, the lessor may [*Com. Code § 10523(c)*]:

- Exercise the rights and remedies provided in *Com. Code § 10523(a), (b)*, discussed above, if the default substantially impairs the value of the lease contract to the lessor; or
- Recover as provided in *Com. Code § 10523(b)*, discussed above, if default does not substantially impair the value of the lease contract to the lessor.

If a lessor discovers the lessee to be insolvent, the lessor may refuse to deliver the goods [*Com. Code § 10525(a)*].

The lessor has the right to take possession of the goods after the lessee's statutory default under *Com. Code § 10523(a), (c)(1)*, or, if agreed, after other default by the lessee [*Com. Code § 10525(b)*]. The lessor may require the lessee to assemble the leased goods and make them available to the lessor at a place to be designated by the lessor that is reasonably convenient to both parties, if such a provision is included in the lease contract [*Com. Code § 10525(b)*]. Without removal, the lessor may render unusable any goods employed in a trade or business, or may dispose of the goods on the lessee's premises [*Com. Code § 10525(b)*]. The lessor may take possession of the goods under *Com. Code § 10525(b)* without judicial process, as described above, if that can be done without breach of the peace, or the lessor may commence an action to recover them [*Com. Code § 10525(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)DefaultGeneral OverviewCommercial Law (UCC)Leases (Article 2A)DefaultLessee & Lessor DefaultCommercial Law (UCC)Leases (Article 2A)DefaultRemedies



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§ 53.16 Rights of Third Parties in Personal Property Lease Transactions

[1] Lease Contract Is Generally Enforceable Against Third Parties

Generally, a lease contract is effective and enforceable according to its terms between the parties, against purchasers of the goods, and against creditors of the parties [*Com. Code § 10301*]. The provisions of Division 10 of the California Commercial Code [*Com. Code §§ 10101-10600*] apply whether the lessor or a third party has title to the goods, and whether the lessor, the lessee, or a third party has possession of the goods, notwithstanding any statute or rule of law that possession or the absence of possession is fraudulent [*Com. Code § 10302*; see *Com. Code § 10531* (standing to sue third parties for injury to goods)].

[2] Transfers of Interests or Rights Under Lease

With specified exceptions [see *Com. Code § 10303(c), (d)*], a provision in a lease agreement that (1) prohibits the voluntary or involuntary transfer [see *Com. Code § 10303(f)* (transfer generally means delegation of duties by transferor to transferee)] (including a transfer by sale, sublease, creation or enforcement of a security interest [see § 53.11[1]], or attachment, levy, or other judicial process) of a party's interest under the lease contract, or of the party's residual interest in the goods, or (2) makes such a transfer an event of default, gives rise to the rights and remedies provided in *Com. Code § 10303(e)* [*Com. Code § 10303(b)*; see *Com. Code § 10303(e)*; see also § 53.15]. However, a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective [*Com. Code § 10303(b)*; see *Com. Code § 10303(h)* (language of prohibition in lease contract must be specific, by writing, and conspicuous)].

Although lease contract prohibitions on voluntary transfers generally are valid [see *Com. Code § 10303(b)*], there is an important exception in the case of transfers consisting of the grant of a security interest by the lessor [see *Com. Code § 10303(c)*; *Com. Code § 1201(b)(35)*; § 53.11[1]]. A provision in a lease agreement that (1) prohibits the creation or enforcement of a security interest in a party's interest under the lease contract (or in the lessor's residual interest in the goods), or (2) makes such a transfer an event of default, is not enforceable unless, and then only to the extent that, there is an actual transfer by the lessee of the lessee's right of possession or use of the goods in violation of the lease provision or an actual delegation of a material performance of either party to the lease contract in violation of the provision [*Com. Code § 10303(c)*].

Neither the granting nor the enforcement of a security interest in either the lessor's interest under the lease contract or the lessor's residual interest in the goods is a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the lessee with regard to the rights and remedies available under *Com. Code § 10303(e)*, unless, and then only to the extent that, there is an actual delegation of a material performance of the lessor [*Com. Code § 10303(c)*].

Additionally, a provision in a lease agreement that (1) prohibits a transfer of a right to damages for default with respect to the whole lease contract or of a right to payment arising out of the transferor's due performance of the transferor's entire obligation, or (2) makes this transfer an event of default, is not enforceable [*Com. Code § 10303(d)*]. Moreover, such a transfer is not a transfer that materially impairs the prospect of obtaining return performance by, material changes of duty of, or materially increases the burden or risk imposed on, the other party to the lease contract within the purview of the provision providing for rights and remedies on default [*Com. Code § 10303(d)*; see *Com. Code § 10303(e)* (rights and remedies when transfer is event of default)]; see also § 53.15].

[3] Creditors of Lessee or Lessor

If a person in the ordinary course of business provides services and materials with respect to goods subject to a lease contract, he or she obtains specified rights relating to liens on those goods in his or her possession. A lien given by statute or rule of law on leased goods in the possession of the service or material provider for those services or materials takes priority over any interest of the lessor or lessee under the lease contract or Division 10 of the Commercial Code [*Com. Code § 10306*; see *Com. Code § 10103(a)(18)* ("lien" defined)]. This priority may be limited by language contained in the statute or rule of law creating the lien [*Com. Code § 10306*].

Generally, a creditor of a lessee takes subject to the lease contract [*Com. Code § 10307(a)*; see *Com. Code § 10306* (exception)]; [1], above].

With limited exceptions, a creditor of a lessor takes subject to the lease contract, unless the creditor holds a lien attached to the goods before the lease contract became enforceable; [see *Com. Code § 10307(b)*].

Except as otherwise provided in *Com. Code § 9317* (persons who take priority over, or take free of, security interest), *Com. Code § 9321* (licensee under nonexclusive license and lessee in ordinary course of business take free of certain security interests), and *Com. Code § 9323* (governing future advances), a lessee takes a leasehold interest [see *Com. Code § 10103(a)(13)* ("leasehold interest" means interest of lessor or lessee under lease contract)] subject to a security interest held by the creditor of the lessor [*Com. Code § 10307(c)*].

A creditor of a lessor in possession of goods subject to a lease contract may treat the lease contract as void if, as against the creditor, retention of possession by the lessor is fraudulent or void under any statute or rule of law. Notwithstanding this rule, retention of possession in good faith and current course of trade by the lessor for a commercially reasonable time after the lease contract becomes enforceable is not fraudulent or void [*Com. Code § 10308(a)*; see *Com. Code § 10308(c)* (when retention is not fraudulent with respect to sale-leaseback transactions)]. However, no provision of Division 10 of the Commercial Code [*Com. Code § 10101 et seq.*] impairs the rights of creditors of a lessor if the lease contract is made under circumstances which, under any statute or rule of law apart from that division, would render the transaction a fraudulent transfer or voidable preference [*Com. Code § 10308(b)*; see, e.g., *Civ. Code § 3439 et seq.* (Uniform Fraudulent Transfer Act)].

The lien provision found in *Com. Code § 10306* also applies to creditors of lessors in relation to taking subject to the lease contract [*Com. Code § 10307(b)*; see [1], above].

[4] Fixtures

[a] Commercial Code Rules

Com. Code § 10309 provides special treatment for priority determinations relating to "fixtures" [see *Com. Code § 10309(c)* (Division 10 does not prevent creation of lease of fixtures pursuant to real estate law)]. Goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law [*Com. Code § 10309(a)(1)*; see *Com. Code § 10309(b)* (specifying that no lease exists under Division 10 for ordinary building materials incorporated into improvement on land)].

[b] Circumstances Under Which Lessor's Interest Takes Priority Over Encumbrancer or Owner

The interest of a lessor of fixtures takes priority over a conflicting interest of an encumbrancer or owner of the real estate if one of the following conditions is met [*Com. Code § 10309(d)*]:

- The lease is a purchase money lease [see *Com. Code § 10309(a)(3)*], the conflicting interest of the encumbrancer or the owner arises before the goods become fixtures, a fixture filing [see *Com. Code § 10309(a)(2)*] covering the fixtures is filed before the goods become fixtures or within 20 days thereafter, and the lessee has a recorded interest in the real estate or is in possession of the real estate [*Com. Code § 10309(d)(1)*]; see *Ch. 42, Secured Transactions, § 42.211[2]* (Financing Statement, Form UCC-1);
- A fixture filing [see *Com. Code § 10309(a)(2)*] covering the fixtures is filed before the interest of the encumbrancer or owner is recorded, the lessor's interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the lessee has a recorded interest in the real estate or is in possession of the real estate [*Com. Code § 10309(d)(2)*]; see *Ch. 42, Secured Transactions, § 42.211[2]* (Financing Statement, Form UCC-1);
- The fixtures are readily removable factory or office machines, readily removable equipment that is not primarily used or leased for the operation of the real estate, or readily removable replacements of domestic appliances that are goods subject to a consumer lease [*Com. Code § 10309(d)(3)*];
- The conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the lease contract is enforceable [*Com. Code § 10309(d)(4)*];
- The encumbrancer or owner has consented in writing to the lease or has disclaimed an interest in the goods as fixtures [*Com. Code § 10309(d)(5)*; see § 53.281]; or
- The lessee has a right to remove the goods as against the encumbrancer or owner. However, if the lessee's right to remove terminates, the priority of the interest of the lessor continues for a reasonable time [*Com. Code § 10309(d)(6)*].

Except for purchase money lease transactions [see *Com. Code § 10309(d)(1)*], but otherwise subject to the priority provisions of *Com. Code § 10309(d)(2)-(5)*, the interest of a lessor of fixtures, including the lessor's residual interest, is subordinate to the conflicting interest of an encumbrancer [see *Com. Code § 10309(a)(5)* ("encumbrance" defined)] of the real estate under a construction mortgage [see *Com. Code § 10309(a)(4)* ("construction mortgage" defined)] recorded before the goods become fixtures, if the goods become fixtures before the completion of the construction [*Com. Code § 10309(e)*]. To the extent given to refinance a construction mortgage, the conflicting interest of an encumbrancer of the real estate under a mortgage has this priority to the same degree as the encumbrancer of the real estate under the construction mortgage [*Com. Code § 10309(e)*]. For a detailed discussion of the priority of mortgages, *Ch. 25B, Subordination, Assumption, and Assignment, Part A*.

[c] Lessor's or Lessee's Right to Remove Fixtures

If the interest of a lessor of fixtures, including the lessor's residual interest, has priority over all conflicting interests of all owners and encumbrancers of the real estate, the lessor or the lessee, on default, expiration, termination, or cancellation of the lease agreement, but subject to the lease agreement and Division 10 of the Commercial Code [*Com. Code §§ 10101-10600*], may remove the goods from the real estate, free and clear from all conflicting interests of all owners and encumbrancers of the real estate. Further, if the lessor has this priority, a lessee or lessor may exercise this right of removal when necessary to enforce his or her other rights and remedies under Division 10 [*Com. Code § 10309(g)*].

However, the lessor or lessee must reimburse any encumbrancer or owner of the real estate who is not the lessee and who has not otherwise agreed to the cost of repair of any physical injury, but not for any diminution in the value of the real estate caused by the absence of the goods removed or by any necessity for replacing them [*Com. Code § 10309(g)*]. A party entitled to reimbursement may refuse permission to remove the goods until the party seeking removal gives adequate security for the performance of this obligation [*Com. Code § 10309(g)*].

[d] Priority in Other Cases

In cases not covered by the specific priority provisions of *Com. Code § 10309(a)-(e)*, priority between the interest of a lessor of fixtures, including the lessor's residual interest, and the conflicting interest of an encumbrancer or owner of the real estate who is not the lessee is determined by the priority rules governing conflicting interests in real estate [*Com. Code § 10309(f)*; see, e.g., *Civ. Code § 2898* (priority of mortgage or deed of trust)].

[5] Accessions

The Commercial Code provides specific rules of priority relating to goods that are deemed to be "accessions." Goods are "accessions" when they are installed in or affixed to other goods [*Com. Code § 10310(a)*]. With specified exceptions, the interest of a lessor or a lessee under a lease contract entered into before the goods became accessions is superior to all interests in the whole [*Com. Code § 10310(b)*; see *Com. Code § 10310(d)* (exceptions)]. With specified exceptions, the interest of a lessor or a lessee under a lease contract entered into at the time or after the time the goods became accessions is superior to all subsequently acquired interests in the whole, but is subordinate to interests in the whole existing at the time the lease contract was made unless the holders of those interests in the whole have in writing consented to the lease or disclaimed an interest in the goods as part of the whole [*Com. Code § 10310(c)*; see *Com. Code § 10310(d)* (exceptions)].

Under both types of transactions described above, the interest of a lessor or a lessee under a lease contract is subordinate to the interests of the following [*Com. Code § 10310(d)*]:

- A buyer in the ordinary course of business or a lessee in the ordinary course of business of any interest in the whole acquired after the goods became accessions; or
- A creditor with a security interest in the whole perfected before the lease contract was made to the extent that the creditor makes subsequent advances without knowledge of the lease contract.

If a lessor or a lessee of accessions holds an interest that is superior to all interests in the whole (as determined under *Com. Code § 10310(b)-(d)*), the lessor or the lessee may remove the goods from the whole, free and clear of all interests in the whole (1) on default, expiration, termination, or cancellation of the lease contract by the other party, but subject to the provisions of the lease contract and Division 10 of the Commercial Code [*Com. Code §§ 10101-10600*], or (2) if necessary to enforce his or her other rights and remedies under that division [*Com. Code § 10310(e)*]. However, he or she must reimburse any holder of an interest in the whole who is not the lessee and who has not otherwise agreed to the cost of repair of any physical injury, but not for any diminution in the value of the whole caused by the absence of the

goods removed or by any necessity of replacing them [*Com. Code § 10310(c)*; see *Com. Code § 10309(g)* (removal rights)]. A party entitled to reimbursement may refuse permission to remove the goods until the party seeking removal gives adequate security for the performance of this obligation [*Com. Code § 10310(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Lease
ContractsAlienability & TitleCommercial Law (UCC)Leases (Article 2A)Lease ContractsPriority & Rights in Goods



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§ 53.17 Leased Property in Bankruptcy

The implications of the initiation of a bankruptcy proceeding by or against the lessee require special consideration. Subject to approval by the court, the bankruptcy trustee may assume or reject an unexpired personal property lease [11 U.S.C. § 365(a)]. The trustee may also assume and then assign the lease if adequate assurance of future performance by the assignee is provided [11 U.S.C. § 365(f)(2)].

Assumption obligates the trustee to perform under the terms of the lease [see 11 U.S.C. § 365(b)(1)]. Rejection constitutes a breach of the lease agreement, considered to have accrued immediately before the date of the filing of the petition [11 U.S.C. § 365(g)(1)]. Rejection places the lessor in the position of a creditor of the bankruptcy estate entitled to assert a claim for damages arising from the breach [11 U.S.C. § 502(g)(1)]. Nonetheless, actual recovery depends on the presence of assets for distribution in the bankruptcy estate.

If the debtor/lessee is in default at the time of the assumption, the trustee generally must cure the default or provide adequate assurance that the default will be cured, compensate the lessor for any actual pecuniary loss resulting from the default or provide adequate assurance of compensation, and provide adequate assurance of future performance [11 U.S.C. § 365(b)(1)]. The trustee generally does *not* have to cure a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure that default by performing nonmonetary acts at and after the time of assumption. However, if that default arises from a failure to operate in accordance with a nonresidential real property lease, then that default must be cured by performance at and after the time of assumption in accordance with that lease, and pecuniary losses resulting from that default must be compensated [11 U.S.C. § 365(b)(1)(A)].

The standard contract provision (often referred to as an ipso facto clause) that declares that the lessor may automatically consider the initiation of any bankruptcy proceeding an event of default entitling the lessor to terminate the lease is expressly invalid under the federal Bankruptcy Code [11 U.S.C. § 365(e)]. Thus the lessor should be made aware that, if the lessee files for relief under the federal Bankruptcy Code, there is a real possibility that the obligation to lease property will continue.

The lessor whose agreement is subject to possible assumption has a right to a clear determination of status. In a liquidation proceeding under Chapter 7, if the trustee does not make an election to assume or reject the lease agreement within 60 days of the order for relief, the lease is deemed rejected [11 U.S.C. § 365(d)(1)]. In a business reorganization or wage earner plan under Chapters 11 and 13, the trustee may assume an unexpired lease at any time before the confirmation of a plan, but the court, on the lessor's request, may order the trustee to determine within a specified period of time whether to assume or reject the lease [11 U.S.C. § 365(d)(2)].

A lease may be assumed pursuant to a reorganization plan that later proves unsuccessful and is converted to a liquidation proceeding. If the lease is subsequently rejected, the lease is deemed breached immediately before the conversion if the lease was assumed before the conversion, or at the time of the rejection if the lease was assumed after the conversion [11 U.S.C. § 365(g)(2)]. This rejection entitles the lessor to have damages treated as an administrative expense necessary to preserve the estate [11 U.S.C. § 503(b)(1); *see also* Collier On Bankruptcy, Ch. 365 (Matthew Bender); Collier Bankruptcy Manual, Ch. 503 (Matthew Bender)].

For further discussion of insolvency and creditor's agreements as tools for resolution, see Ch. 78, *Creditors' Agreements: Nonbankruptcy Alternatives* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy LawCase AdministrationAdministrative PowersEstate Property Lease, Sale & UseGeneral
OverviewBankruptcy LawCase AdministrationAdministrative PowersExecutory Contracts & Unexpired LeasesGeneral
OverviewCommercial Law (UCC)Leases (Article 2A)General Overview



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§ 53.18 Federal Consumer Leasing Act

The federal Consumer Leasing Act ("Act") regulates specified transactions involving leases of personal property [see 15 U.S.C. §§ 1667-1667f]. "Personal property" means any property that is not real property under the laws of the state where the property is situated at the time offered or otherwise made available for lease [15 U.S.C. § 1667(4)]. The primary focus of the Act is to ensure that consumers receive meaningful disclosure of lease terms that enable them to compare lease terms with other leases, to limit the amount of balloon payments in consumer lease transactions, and to require accurate disclosure of lease terms in advertising [12 C.F.R. § 213.1(b)]. The Act applies to all leases of personal property ("consumer leases") in which all of the following are true [15 U.S.C. § 1667(1); 12 C.F.R. § 213.2(e)(1)]:

- The lessee is a natural person and not an organization [see 12 C.F.R. § 213.2(k) (natural person does not include organization)];
- The property is to be used primarily for personal, family, or household purposes (leases for agricultural, business, or commercial purposes and leases to an organization are excluded) [see 12 C.F.R. § 213.2(e)(2); see also 12 C.F.R. § 213.2(j) ("organization" defined)];
- The total contractual obligation does not exceed \$25,000, whether or not the lessee has the option to purchase or otherwise become the owner of the property on the expiration of the lease; and
- The lease term exceeds four months.

Lease transactions that meet the definition of a credit sale found in Regulation Z are exempted from the provisions of the Act [12 C.F.R. § 213.2(e)(2); see 12 C.F.R. § 226.2(a)(16) ("credit sale" defined)]. The Act also does not apply to lease transactions of personal property that are incidental to the lease of real property and which provide that [12 C.F.R. § 213.2(e)(3)]:

- The lessee has no liability for the value of the property at the end of lease term except for abnormal wear and tear; and

- The lessee has no option to purchase the leased property.

An automobile lease is the most common type of consumer lease covered by the Act. However, furniture leases are also commonly covered [see § 53.260 (disclosure statement for furniture leases)]. Automobile leases and lease forms are covered in detail in Ch. 47, *Automotive Financing and Vehicle Leasing*.

The Act preempts California law to the extent that any California law is inconsistent with the Act's provisions [see 15 U.S.C. § 1667e; 12 C.F.R. § 213.9]. The California Vehicle Leasing Act [see Civ. Code §§ 2985.7-2990] duplicates the coverage of the federal Act, as it applies to motor vehicle leases and services incidental to those leases, and requires further disclosures not inconsistent with the federal Act. For further discussion of the California Vehicle Leasing Act, refer to Ch. 47, *Automotive Financing and Vehicle Leasing*.

The purposes of the federal Act are implemented through the use of disclosure documents [see 15 U.S.C. § 1667a; 12 C.F.R. § 213.3]. The Federal Reserve System has published several model disclosure forms that may be used for specific leasing transactions, including Model Open-End or Finance Vehicle Lease Disclosures [see 12 C.F.R. pt. 213, app. A-1], Model Closed-End or Net Vehicle Lease Disclosures [see 12 C.F.R. pt. 213, app. A-2], and Model Furniture Lease Disclosures [see 12 C.F.R. pt. 213, app. A-3]. Notwithstanding the use of the model disclosure forms, the required disclosures may be made in a lease contract to be signed by the lessee [15 U.S.C. § 1667a]. For further discussion of the specific disclosures required by the Act, see § 53.260 (furniture leases). For detailed discussion of vehicle leases, including coverage of open-end and closed-end vehicle lease clauses, see Ch. 47, *Automotive Financing and Vehicle Leasing*.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Banking Law Consumer Protection Consumer Leasing General Overview



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§ 53.19 Applicability of California Sales and Use Taxes to Personal Property Leasing

[1] In General

Leases of personal property have tax consequences under the California Sales and Use Tax Law [*see Rev. & Tax. Code § 6001 et seq.*]. For state tax purposes, the term "lease" includes rental, hire, and license [*Rev. & Tax. Code § 6006.3; 18 Cal. Code Reg. § 1660(a)*]. "Lease" includes a contract under which a person secures for a consideration the temporary use of tangible personal property which, although not on the person's premises, is operated by, or under the direction and control of, the person or his or her employees [*18 Cal. Code Reg. § 1660(a); see Rev. & Tax. Code §§ 6016-6016.5* ("tangible personal property" defined)].

"Lease" does not include a use of tangible personal property for a period of less than one day for a charge of less than \$20 when the property may be used only at the premises or business location of the grantor of the use [*Rev. & Tax. Code § 6006.3; 18 Cal. Code Reg. § 1660(a); see also 18 Cal. Code Reg. § 1660(e)*]. Furthermore, a transaction is regarded as a sale under a security agreement and not a lease if an agreement designated as a lease for a fixed term (1) allows the lessee, on completion of the required payment, to obtain title to the leased property at the conclusion of the lease term; or (2) gives the purported lessee the option to purchase the property for a nominal consideration on the conclusion of the term [*Rev. & Tax. Code § 6006.3; 18 Cal. Code Reg. § 1660(a)*]. The option price is regarded as nominal if it does not exceed \$100 or one percent of the total contract price, whichever is less [*18 Cal. Code Reg. § 1660(a)*].

[2] Leases as "Sales" and "Purchases"

In general, a lease of tangible personal property is considered a taxable sale and purchase subject to taxation [*18 Cal. Code Reg. § 1660(b)(1); see Rev. & Tax. Code § 6006(g)* (sale), *Rev. & Tax. Code § 6010(e)* (purchase); *see also Preston v. State Board of Equalization* (2001) 25 Cal. 4th 197, 211, 105 Cal. Rptr. 2d 407, 19 P. 3d 1148 (temporary transfers of tangible artwork determined to be taxable transfers of tangible property; because agreements transferred artwork for use in manufacturing process performed outside taxpayer's premises, they fell within statutory definition of taxable lease)]. However, leases of the following types of tangible personal property are specifically exempt from the application of sales and use taxes [*see Rev. & Tax. Code §§ 6006(g), 6010(e)*]:

- Motion pictures or animated motion pictures, including television, film, and tapes.
- Linen supplies and similar articles, when an essential part of the lease agreement is the furnishing of recurring laundering or cleaning the articles.
- Household furnishings, if leased with the living quarters in which they are to be used.
- Certain mobile transportation equipment, including qualified mobile homes [*see Rev. & Tax. Code § 6023* ("mobile transportation equipment" defined); *see Health & Safety Code §§ 18008, 18211* ("mobilehome" defined); *see also 18 Cal. Code Reg. § 1660(d)(8)*].
- Tangible personal property leased in substantially the same form as acquired by the lessor or lessee in substantially the same form as acquired by a transferor, as to which the lessor or transferor had paid sales tax reimbursement or has paid use tax measured by the purchase price of the property [*see Rev. & Tax. Code § 6006(g)(5)* ("transferor" defined)].

Rentals or leases of video cassettes, video tapes, and video discs are considered sales and purchases for purposes of applying the sales and use taxes. This classification, however, is applicable only if these items are rented or leased for private use, and if the lessee or renter does not acquire the right to license, broadcast, exhibit, or reproduce the video cassette, video tape, or video disc [*Rev. & Tax. Code §§ 6006(g)(7), 6010(e)(7)*; *see also 18 Cal. Code Reg. § 1660(d)(2)*].

Effective for acquisition sale and leaseback arrangements executed on or after January 1, 1991 [*see Rev. & Tax. Code § 6010.65(c)*], the terms "sale" and "purchase" do not include any transfer of title to, or any lease of, tangible personal property pursuant to an acquisition sale and leaseback. An "acquisition and leaseback" is a sale by a person and leaseback to that person of tangible personal property when (1) that person has paid sales tax reimbursement or use tax with respect to that person's purchase of the property and (2) the acquisition sale and leaseback is made within 90 days of that person's first functional use of the property [*Rev. & Tax. Code § 6010.65(a)*].

[3] Applicable Tax

If a lease is deemed to be a taxable sale and purchase, the tax on the transaction is measured by the rentals payable. Generally, the applicable tax is a use tax on the use in California of the property by the lessee [*18 Cal. Code Reg. § 1660(c)(1)*; *see Rev. & Tax. Code § 6201* (imposition and rate of use tax)]. The lessor must collect the tax from the lessee at the time the rentals are paid by the lessee under the lease and must give the lessee a receipt evidencing the payment [*Rev. & Tax. Code § 6203*; *see 18 Cal. Code Reg. § 1686* (required form for receipt)]. The lessee is not relieved from the liability for the tax until given a receipt by the lessor or until the tax is paid to the state [*18 Cal. Code Reg. § 1660(c)(1)*].

When the lessee is not subject to the use tax, the sales tax applies [*18 Cal. Code Reg. § 1660(c)(1)*; *see Rev. & Tax. Code § 6051* (imposition and rate of sales tax); *see also Rev. & Tax. Code § 6390* (exemption from sales tax for rentals payable under personal property lease subject to use tax)]. The sales tax is levied on the lessor and is measured by the rentals payable [*18 Cal. Code Reg. § 1660(c)(1)*]. Neither the sales tax nor the use tax applies to leases of property to the United States and its instrumentalities, unless federal law permits the tax [*18 Cal. Code Reg. § 1660(c)(1)*; *see 18 Cal. Code Reg. § 1614* (Sales tax to United States and its instrumentalities)].

The rentals subject to the tax include any payments required by the lease, including amounts paid for personal property taxes on the leased property, whether assessed directly against the lessee or against the lessor. Amounts paid for the following, however, are excluded [*18 Cal. Code Reg. § 1660(c)(1)(A)-(G)*]:

- Collection costs, including attorneys' fees, court costs, repossession charges, and storage fees (but tax does apply to delinquent rental payments, including those collected by court action).
- Insuring, repairing, or refurbishing the leased property following a default.
- Costs incurred in defending a court action or paying a tort judgment arising out of the lessee's operation of the leased property, or any premiums paid on insurance policies covering these court actions or tort judgments.
- Costs incurred in disposing of the leased property at expiration or earlier termination of the lease.
- Late charges, including interest paid on those charges, for failing to make timely payment of the rentals.
- Separately stated optional insurance charges, maintenance or warranty contracts.
- Personal property taxes assessed against personal property when a bank or financial corporation is the lessor.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Leases (Article 2A) General Overview Tax Law State & Local Taxes Sales Tax General Overview Tax Law State & Local Taxes Sales Tax Imposition of Tax Tax Law State & Local Taxes Use Tax General Overview Tax Law State & Local Taxes Use Tax Imposition of Tax



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§ 53.20 Federal Tax Consequences for Personal Property Leasing

[1] Potential Tax Benefits

Often persons who otherwise would have no interest in entering a personal property leasing transaction may do so for tax reasons. Frequently, a lessor is willing to transfer the property to the lessee without regard to its eventual return for future use, but would like to retain the tax benefits of cost recovery [see *I.R.C. §§ 167, 168*; see also [8], below]. The lessee may also benefit from allowing the lessor to retain nominal ownership of the property. For example, the lessee may value cost recovery less than the ability to take all payments as a deduction from income in the year expended or accrued [see *I.R.C. § 162(a)(3)*; see also [2], below]. In exchange for the retained tax benefits, the lessor may be willing to lower the cost of the property or to transfer possession without a down payment. By leasing rather than purchasing the property, the lessee may also be able to show less debt obligation for accounting purposes.

Notwithstanding the parties' attempt to create a valid leasing arrangement, the Internal Revenue Service may treat the transaction as a sale for tax purposes. In this case, the lessor will be deemed to be the seller and the lessee the purchaser of the property. For discussion of the tax consequences of leasing transactions treated as sales, see [11], below.

[2] Effect on Gross Income

The inclusion of lease payments in the gross income of the lessor is expressly provided by statute. "Gross income" means all income from whatever source derived, including gains derived from dealing in property and rents [*I.R.C. § 61(a)(3), (5)*]. Generally, lease payments are taxable to a cash basis lessor on receipt and to an accrual basis lessor at the time of accrual or on receipt, whichever first occurs [*Commissioner of Internal Revenue v. Lyon* (9th Cir. [T.C.] 1938) 97 F.2d 70, 73 ; *Hyde Park Realty v. Commissioner of Internal Revenue* (2d Cir. [B.T.A.] 1954) 211 F.2d 462, 463] . However, a lessor must treat advance rent payments received and any payment received from the lessee in consideration for the lessor's cancellation of the lease as income for the year in which those payments are received, regardless of what accounting method the lessor uses [*Treas. Reg. § 1.61-8(b)*].

The lessee may take a deduction from current income for rentals or other payments required to be made as a condition to continued use or possession, for the purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title, or in which the taxpayer has no equity [*I.R.C. § 162(a)(3)*; *Alden B. Oakes v. Commissioner*

(1965) 44 T.C. 524, 530-532]. The lessee must deduct advance rent payments in the taxable year to which they apply, regardless of the lessee's accounting method. Thus the lessee must amortize the advance payments over the term of the lease and may only deduct payments attributable to the lessee's current taxable year in that year [*Rev. Rul. 55-540*, § 6.01, 1955-2 C.B. 39; *Norman Baker Smith v. Commissioner* (1968) 51 T.C. 429, 440]. Payments that are in fact installments of a purchase price are not deductible except through depreciation or cost recovery even though they are designated as rent by the parties [*Norman Baker Smith v. Commissioner* (1968) 51 T.C. 429, 438-439; see *Rev. Rul. 55-540*, § 6.02, 1955-2 C.B. 39].

[3] Payment of Lessor's Expenses by Lessee

Rental agreements often contain a provision requiring the lessee to pay taxes, insurance premiums, and similar costs to or for the benefit of the lessor [see, e.g., § 53.200[2]]. The lessee can deduct these rent-related expenses [*Treas. Reg. § 1.162-11(a)*; see *Rev. Rul. 64-327*, 1964-2 C.B. 56], provided that the lessee uses the property in a trade or business or holds it for the production of income [*I.R.C. §§ 162, 212*]. Taxes paid by the lessee for the benefit of the lessor are taxable as rental income to the lessor, who is also permitted a deduction for the payments if they would constitute deductible items if paid directly by the lessor [*Treas. Reg. § 1.162-11(a)*; see *Old Colony Trust Co. v. Commissioner* (1929) 279 U.S. 716, 729].

When property taxes are imposed on the owner of property, the year of deduction for the lessee is controlled by the terms of the lease rather than the time the owner becomes liable for the tax. However, if the lease provides that the lessee must pay taxes "charged, laid, levied or assessed during the term of the lease when due," an accrual basis lessee must take a business expense deduction only in the year the taxes become payable by the lessor, not in an earlier year when the lessor's liability becomes fixed [*Consolidated-Hammer Dry Plate & Film Co. (1967) 49 T.C. 153, 169-171*, *aff'd*, 409 F.2d 1077 (7th Cir. [T.C.] 1969)]. The lessor may deduct personal property taxes in the year when paid or accrued under the lessor's accounting method [*I.R.C. § 164(a)(2)*].

[4] Restoration of Property by Lessee

The lessee may be permitted a deduction from income for expenses incurred for the restoration of property at the termination of the lease. Likewise, the lessee may deduct any payments made to the lessor in lieu of restoration [*Frank & Seder Co. v. Commissioner of Internal Revenue* (3d Cir. [B.T.A.] 1930) 44 F.2d 147, 149; *Atlantic Coastline R.R. Co. v. Commissioner*, 31 B.T.A. 730, 739-740, *aff'd*, 81 F.2d 309 (4th Cir. [B.T.A.] 1936)].

[5] Repair and Maintenance Expense Paid by Lessee

The lessee may deduct from current income any expenses that the lessee has paid for repairs and replacement. Deductions are also allowable for recurring purchases of replacement assets with a relatively short life, provided these replacements are required by the lease [*Manger Hotel Corp. v. Commissioner* (1948) 10 T.C. 520, 522-523; see *Hotel Kingkade v. Commissioner* (1949) 12 T.C. 561, 564-565, *aff'd*, 180 F.2d 310 (10th Cir. [T.C.] 1950)]. Likewise, payments incident to a lease obligation to replace machinery and equipment are currently deductible even though additional acquisitions must be capitalized by the lessee [*Journal-Tribune Pub. Co. v. Commissioner of Int. Rev.* (8th Cir. [T.C.] 1954) 216 F.2d 138, 141-143].

[6] Payments by Lessee for Improvements to Lessor's Property

The cost to a lessee of making permanent improvements on property of the lessor is a capital investment and is not deductible as a business expense [*Treas. Reg. § 1.162-11(b)*]. In determining the amount allowable to a lessee for any taxable year for amortization under *I.R.C. §§ 167 and 179* (deduction for depreciation; election to expense certain depreciable business assets) with respect to any cost of acquiring the lease, the term of the lease is treated as including all renewal options (and any other period for which the parties reasonably expect the lease to be renewed) if less than 75 percent of that cost is attributable to the term of the lease remaining on the date the lease is acquired [*I.R.C. § 178(a)*].

Any period for which the lease may subsequently be renewed, extended, or continued pursuant to an option exercisable by the lessee is excluded from the calculation of the duration of the term of the lease remaining on the date of acquisition [I.R.C. § 178(b)].

[7] At-Risk Limitation on Losses

In the case of individuals and personal holding companies (i.e., corporations in which more than one half of the stock is owned by five or fewer individuals [see I.R.C. § 542(a)(2) (definition)]), the allowable income tax deduction for losses from certain activities is limited to the degree to which the taxpayer is "at-risk" in the activity [I.R.C. § 465(a)(1)]. Under this limitation, a taxpayer may only deduct losses from an activity equal to the amount of money and adjusted basis of other property contributed to the activity, and the amount borrowed for use in the activity which the taxpayer is personally liable to repay [I.R.C. § 465(b)]. Amounts borrowed from any person who has an interest in the activity (other than a shareholder of the borrowing corporation or a creditor) or from a related person having such an interest are not considered to be at risk [I.R.C. § 465(b)(3)].

The at-risk limitation specifically applies to the leasing of any personal property and to certain other property subject to the allowance for depreciation [I.R.C. § 465(c)(1)(C) (at-risk limitation applies to leasing Section 1245 property); see I.R.C. § 1245(a)(3) ("Section 1245 property" defined)]. Thus to the extent that a covered taxpayer's loss (the excess of allowable deductions over income) from equipment leasing for any taxable year exceeds the taxpayer's amount at risk in equipment leasing, no loss deduction will be allowed [see I.R.C. § 465(a)].

Personal holding companies actively engaged in equipment leasing are not subject to the at-risk limitation with respect to their equipment leasing losses [I.R.C. § 465(c)(4)(A)]. A personal holding company is considered to be actively engaged in equipment leasing if 50 percent or more of its gross receipts for the taxable year are attributable to equipment leasing [I.R.C. § 465(c)(4)(B)].

[8] Cost Recovery or Depreciation of Property

[a] In General

The owner of property used in a trade or business or held for the production of income is entitled to a deduction for the depreciation in value from the exhaustion and wear and tear of the property [I.R.C. § 167(a)]. The lessor of property, as its owner, is generally entitled to take this deduction. However, if the lease requires the lessee to maintain the property and return it at the end of the term, the question arises whether the lessor has really suffered any economic loss from exhaustion or wear and tear. The Internal Revenue Service has recognized that a lessor may be entitled to some depreciation on leased property even though the lessee has agreed to preserve, replace, renew, and maintain the property so that at the termination of the lease the property is in at least as good condition as at its beginning. Nonetheless, no depreciation is allowable if the lessee's obligation is to "return property or its equivalent in value" to the lessor [Rev. Rul. 62-8, 1962-1 C.B. 31].

An attorney handling a lease transaction should understand the following basic rules relating to depreciation of property. For a detailed discussion of this topic, see Rabkin & Johnson, Federal Income, Gift and Estate Taxation, Ch. 45, *Depreciation* (Matthew Bender).

[b] Modified Accelerated Cost Recovery System (MACRS) for Post-1986 Property

When the lease transaction involves property placed in service after December 31, 1986 (or, by the taxpayer's election, after July 31, 1986), the depreciation deduction for tangible personal property is determined by the Modified Accelerated Cost Recovery System (MACRS) [Pub. L. No. 99-514, § 203(a)(1)(A); see I.R.C. § 168]. MACRS mandates a three-step process. To determine the allowable depreciation deduction under MACRS for a given asset, the taxpayer must apply the applicable recovery period, the applicable depreciation method, and the applicable convention [

I.R.C. § 168(a)].

The recovery period applicable to an asset depends on the class to which the asset belongs. MACRS assigns property to one of several classes, based on the property's "class life" [*I.R.C. § 168(e)*; *see I.R.C. § 168(i)(1)* ("class life" defined)]. In most cases, the name of the class reflects the applicable recovery period [*see I.R.C. § 168(c)*]: 3-year property, 5-year property, 7-year property, 10-year property, 15-year property, 20-year property, residential rental property (27.5 years), nonresidential real property (39 years), and railroad gradings and tunnel bores (50 years). Certain specified kinds of property, however, are assigned to a class without regard to their class lives [*see I.R.C. § 168(e)(3)*]. Race horses that are two years old or younger, for example, are assigned a 3-year class life [*see I.R.C. § 168(e)(3)*]. The class to which an asset belongs determines the applicable depreciation method and the applicable convention to be used in computing the depreciation deduction.

For most classes of personal property, the applicable method is the 200 percent declining-balance method, switching to the straight-line method when that will yield a larger allowance [*I.R.C. § 168(b)(1)*]. For 15-year property, 20-year property, property used in farming, and property for which the taxpayer has so elected, the 150 percent declining balance method is used [*I.R.C. § 168(b)(2)*]. The straight-line method is applicable to nonresidential real property, residential rental property, any railroad grading or tunnel bore, property for which the taxpayer elects the application of that method, certain nut- and fruit-bearing plants, and water utility property, including any municipal sewer [*I.R.C. § 168(b)(3)*].

The applicable convention for most personal property is the half-year convention [*I.R.C. § 168(d)(1)*]. The half-year convention treats all property placed in service during any taxable year as placed in service at the midpoint of that year [*I.R.C. § 168(d)(4)(A)*]. Special rules apply, which reduce the depreciation allowed, when substantial property is placed in service during the last three months of the taxable year [*see I.R.C. § 168(d)(3)*].

MACRS does not apply to certain kinds of property. The system does not apply to any property if the taxpayer elects to exclude that property from its application and certain conditions are met [*I.R.C. § 168(f)(1)*]. In addition, MACRS does not apply to certain public utility property, films, videotapes, sound recordings, and certain property placed in service in churning transactions [*I.R.C. § 168(f)(2)-(5)*].

[c] Alternative Depreciation System (ADS) for Certain Types of Property

An alternative depreciation system (ADS) is mandated for tangible property used predominantly outside the United States, certain property leased to tax-exempt entities [*see I.R.C. § 168(h)(1)* ("tax-exempt use property" defined)], tax-exempt bond financed property, certain imported property, and for property for which the taxpayer elects to apply the alternative system [*I.R.C. § 168(g)(1)*]. This system uses the straight-line method, and applies different periods and conventions from those applicable under MACRS [*see I.R.C. § 168(g)(2)*]. The election to use ADS is irrevocable [*see I.R.C. § 168(g)(1)(E), (7)(B)*].

[d] Additional First Year Depreciation Deduction

An additional first-year depreciation deduction is available for qualified property acquired after December 31, 2007, and before January 1, 2010 [*I.R.C. § 168(k)(1), (2)(A)(iii)*]. The additional deduction is equal to 50 percent of the property's adjusted basis [*I.R.C. § 168(k)(1)(A)*]. The additional depreciation deduction is allowed for both regular tax and alternative minimum tax purposes for the taxable year in which the property is placed in service [*I.R.C. § 168(k)(1)(A), (2)(G)*]. The basis of the property and the depreciation allowances in the year of purchase and later years must be appropriately adjusted to reflect the additional first-year depreciation deduction [*I.R.C. § 168(k)(1)(B)*]. A taxpayer may elect not to have the additional first-year depreciation apply with respect to any class of property for any taxable year [*I.R.C. § 168(k)(2)(D)(iii)*; *see Rev. Proc. 2002-33, 2002-1 C.B. 963* (explanation of how to make an election not to deduct additional first-year depreciation); *see also I.R.C. § 168(k)(4)* (election to accelerate the AMT and research

credits in lieu of bonus first year depreciation)]. Depreciable property qualifies for the additional first-year depreciation deduction only if the property is one of the following [I.R.C. § 168(k)(2)(A)(i)]:

- Property with a recovery period of 20 years or less [see I.R.C. § 168(c)];
- Water utility property [see I.R.C. § 168(e)(5)];
- Computer software (as defined in I.R.C. § 167(f)(1)(B), for which a deduction is allowable under I.R.C. § 167(a), without regard to this subsection);
- Certain aircraft; or
- Qualified leasehold improvement property.

Qualified leasehold improvement property includes an improvement to an interior portion of a building that is nonresidential real property if the following requirements are met [I.R.C. § 168(k)(2)(A)(i)(IV), (3)(A)]:

- The improvement is made under or pursuant to a lease between unrelated persons by either the lessee or the lessor;
- That portion is to be occupied exclusively by the lessee (or sublessee) of that portion; and
- The improvement is placed in service more than 3 years after the date the building was first placed in service.

Certain improvements cannot qualify as qualified leasehold improvement property, including expenditures attributable to the enlargement of a building, any elevator or escalator, any structural component benefiting a common area, or the internal structural framework of the building [I.R.C. § 168(k)(3)(B)].

In order to be qualified property, the original use of the property generally must commence with the taxpayer after December 31, 2007 [I.R.C. § 168(k)(2)(A)(ii)]. A special rule applies in the case of certain leased property. In the case of any property that is originally placed in service by a person and that is sold to the taxpayer and leased back to that person by the taxpayer within three months after the date that the property was placed in service, the property is treated as originally placed in service by the taxpayer not earlier than the date that the property is used under the leaseback [I.R.C. § 168(k)(2)(E)(ii)].

In addition, property qualifies for the additional first-year deduction only if the taxpayer purchases (or begins construction of) the property (1) after December 31, 2007, and before January 1, 2010, if no written binding contract for the acquisition was in effect before January 1, 2008, or (2) pursuant to a written binding contract entered into after December 31, 2007, and before January 1, 2010 [I.R.C. § 168(k)(2)(A)(iii)]. In either case, the property must be placed in service by the taxpayer before January 1, 2009, or, in the case of certain property described I.R.C. § 168(k)(2)(B), (C) before January 1, 2011 [I.R.C. § 168(k)(2)(A)(iv)].

[e] Bonus Depreciation for Qualified Disaster Property

There is a bonus 50 percent depreciation deduction available to "qualified disaster assistance property" [I.R.C. § 168(n)(1)]. "Qualified disaster assistance property" is any property described in I.R.C. § 168(k)(2)(A)(i) [see [d], above] or nonresidential real property or residential rental property in a disaster area with respect to a federally declared disaster occurring before January 1, 2010 [I.R.C. § 168(n)(2)(A)(i)-(ii)]. To qualify, the property must (1) be used by the taxpayer in an active trade or business, (2) rehabilitate property damaged, or replace property destroyed or condemned,

as a result of the federally declared disaster, and (3) meet other specified qualifications [see *I.R.C. § 168(n)(2)(A)(iv)-(vi)*; see also *I.R.C. § 168(n)(2)(B)* (exceptions)].

[f] Treatment of Pre-1987 Property

For property placed in service after December 31, 1980 and before January 1, 1987, the depreciation deduction is governed by the Accelerated Cost Recovery System (ACRS) [see former *I.R.C. § 168*]. ACRS operates in essentially the same manner as MACRS, but recovery property is allocated into fewer classes [see former *I.R.C. § 168(b)*] and the property is depreciated by an accelerated formula [see former *I.R.C. § 168(b)(1)*] or by the straight-line method [see former *I.R.C. § 168(b)(3)*]. ACRS generally employs the half-year convention for personal property [see former *I.R.C. § 168(d)*].

Under transitional rules, certain types of property placed in service after 1986 are subject to ACRS rather than MACRS [see Pub. L. No. 99-514, § 203(b)]. The changes brought about by MACRS have no effect on transactions occurring before its enactment [Pub. L. No. 101-508, § 11821(b)].

Any property placed in service by a taxpayer before 1981 is not recovery property and cannot be depreciated under ACRS or MACRS [see former *I.R.C. § 168(c)(1)*]. The cost of that property is recovered over the useful life of the property, using one of several acceptable depreciation methods [Pub. L. No. 101-508, § 11812(c)(2), (3); see *Treas. Reg. §§ 1.167(b)-0-1.167(b)-4* (depreciation methods for other than ACRS/MACRS property)].

[9] Investment Tax Credit

The investment tax credit is calculated to determine the amount of the general business tax credit allowed for any taxable year [see *I.R.C. § 38*]. The credit may apply to some personal property transactions. For example, the investment credit includes the credit for energy property [*I.R.C. § 48(a)*]. "Energy property" means, among other categories, depreciable equipment that uses solar or geothermal energy [*I.R.C. § 48(a)(3)*]. The energy credit for any taxable year is the energy percentage of the basis of each energy property placed in service during the taxable year [*I.R.C. § 48(a)(1)*; see *I.R.C. § 48(d)(1)(B), (2)(B), (3)(B), (4)(B)* (exceptions)]. With respect to investments in personal property qualifying as energy property, the energy percentage varies, depending on the type of energy property [see *I.R.C. § 48(a)(2)(A)*].

In addition to the energy credit, the amount of the investment credit determined under *I.R.C. § 46* for any taxable year is the sum of [*I.R.C. § 46*]:

- The rehabilitation credit.
- The qualifying advanced coal project credit.
- The qualifying gasification project credit.
- The qualifying advanced energy project credit.

Under former law, whether the investment tax credit could (and should) be taken by the lessee, rather than the lessor [see former *I.R.C. § 48(d)*; *Treas. Reg. § 1.48-4*], or under what circumstances the investment tax credit was available to noncorporate lessors [see former *I.R.C. § 46(e)(3)*] were important considerations in drafting personal property leases. However, investment tax credit considerations relating to preexisting categories arise now, if at all, only as tax reporting issues (as investment tax credit carryforwards, for example), not as preliminary determinations to drafting a lease or as drafting issues. For a detailed discussion of the application of investment tax credit rules under former law, see Rabkin & Johnson, *Federal Income, Gift and Estate Taxation*, Ch. 45A, *Investment Tax Credit* (Matthew Bender).

[10] Minimum Tax for Tax Preference Items**[a] Nature and Importance of Alternative Minimum Tax**

An alternative minimum tax is imposed on both corporate and noncorporate taxpayers [*I.R.C. §§ 55-59A*]. This taxing mechanism can represent a significant burden on the taxpayer, although its impact is somewhat mitigated by allowance of a related credit. A taxpayer having a minimum tax liability that exceeds the regular tax liability may carry forward the excess (or part of it, depending on whether the taxpayer had exclusion preferences such as tax-exempt interest income [*see I.R.C. § 57* (items of tax preference)]) as a credit in a subsequent year when the taxpayer's regular tax liability exceeds the minimum tax liability [*see I.R.C. § 53*].

Alternative minimum tax considerations are important in drafting a lease because a portion of the taxpayer's (either the lessor's or lessee's) deduction for accelerated depreciation, which serves to reduce the taxpayer's regular taxable income, is added back into income in calculating any alternative minimum tax liability. Thus, a basic understanding of the alternative minimum tax is important for any attorney drafting personal property leases. However, tax computations and tax planning become quite complex when the alternative minimum tax is involved. What follows is a brief sketch of the rules, designed to alert the attorney to the existence of the alternative minimum tax, in cases in which counsel's clients have unusually large deductions or exclusions. For a detailed discussion of the alternative minimum tax, see Rabkin & Johnson, *Federal Income, Gift and Estate Taxation*, Ch. 1, *The Individual*, and Ch. 2, *The Corporation* (Matthew Bender).

[b] Computation of Tax

The alternative tax is based on the taxpayer's "alternative minimum taxable income" (AMTI), which is the regular taxable income (1) adjusted by inclusion and exclusion of various items [*see I.R.C. §§ 56, 58*] and (2) increased by "items of tax preference" [*I.R.C. § 55(b)(2)*; *see I.R.C. §§ 57* (items of tax preference), 59(h) (coordination with limitations in *I.R.C. §§ 465, 704(d), 1366(d)*, concerning at-risk limitation on deductions, partner's share of losses, and losses deductible by shareholder of S corporation)].

Adjustments in computing alternative minimum taxable income for all taxpayers relate to [*I.R.C. § 56(a)*]:

- Depreciation on property placed in service after 1986.
- Mining exploration and development costs paid or incurred after 1986 [*see I.R.C. § 59(e)* (election for 10-year write-off)].
- Long-term contracts entered into on or after March 1, 1986.
- Alternative net operating loss deduction [*see I.R.C. § 56(d)* (definition)].
- Pollution control facilities placed in service after 1986.

Additional adjustments for individuals relate to itemized deductions (certain deductions are more limited than in the case of computing regular tax liability, or are not allowed), circulation, research, and experimental expenditures, and incentive stock options [*see I.R.C. § 56(b)*; *see also I.R.C. § 59(e)* (election for three-year or 10-year write-off of circulation or research and experimental expenditures)].

The alternative minimum taxable income of any corporation must be increased by 75 percent of the excess of the corporation's adjusted current earnings over its alternative minimum taxable income, determined without regard to this requirement or the alternative tax net operating loss deduction [*I.R.C. § 56(g)*; Pub. L. No. 101-508, § 11801(c)(2)(B),

104 Stat. 1388-523; *see I.R.C. § 56(d)* (alternative tax net operating loss deduction)]. This requirement replaced the former "book income adjustment," which applied for tax years that began in 1987, 1988, or 1989 [*see former I.R.C. § 56(c)(1)(A), (f)*]. Although the book income adjustment provisions have been repealed, the former rules apply to any transaction occurring before the effective date of the repeal if that transaction affected tax liability for periods after the enactment date [Pub. L. No. 101-508, § 11821(b), 104 Stat. 1388-558].

In addition, income eligible for the "United States possessions" tax credit [*see I.R.C. § 936* (credit for tax due on portion of income earned in Puerto Rico and possessions of United States)] may be excluded in the calculation of a corporation's AMTI [*I.R.C. § 59(b)*].

There are additional adjustments relating to a noncorporate taxpayer's losses from tax-shelter farm activities and any taxpayer's other passive-activity losses [*see I.R.C. § 469*], with special rules relating to losses by insolvent taxpayers or disposition of a tax-shelter farm activity [*see I.R.C. § 58*].

Items of tax preference relate to depletion allowances, intangible drilling costs [*see I.R.C. § 59(e)* (election for 10-year write-off)], tax-exempt interest, accelerated depreciation or amortization on certain property placed in service before 1987, and exclusion for gains on sale of certain small business stock under *I.R.C. § 1202* [*see I.R.C. § 57(a)*].

After the adjustments and increases for items of tax preference, the AMTI is reduced by an exemption allowance; then the "tentative minimum tax" is calculated as 20 percent (or for most noncorporate taxpayers, 26 percent of taxable income not exceeding \$175,000, plus 28 percent of taxable income exceeding \$175,000) of the AMTI thus reduced, minus the "alternative minimum tax foreign tax credit" for the taxable year [*see I.R.C. §§ 55(a), (b)(1), 59(a)*]. If the tentative minimum tax exceeds the regular tax [*see I.R.C. § 55(c)* (definition)], the taxpayer owes the excess, in addition to the regular tax [*I.R.C. § 55(a)*].

[c] Threshold Amounts for Application of Tax

Noncorporate and corporate taxpayers are exempt from the alternative minimum tax if the total of the adjustments and increases is less than a specified threshold amount. The threshold amount depends on filing status and taxable income. The alternative minimum tax exemption changes each year [*see I.R.C. § 55(d)(1), (3)* (noncorporate taxpayers); *I.R.C. § 55(d)(2), (3), (e)* (corporations)].

[11] Leases Treated as Sales

The Internal Revenue Service may treat a leasing transaction as a sale for tax purposes. In this case, the lessor will be deemed to be the seller and the lessee the purchaser of the property. The seller will lose the right to cost recovery and will most likely have taxable gain resulting from the sale. The purchaser will be able to deduct "lease" payments only to the extent that the payments can be characterized as interest in the year they were made [*Rev. Rul. 72-408, 1972-2 C.B. 86*].

There is no single statute, regulation, ruling, procedure, or decision that clearly defines when a lease is truly a sale. However, even though each transaction turns on its own facts and circumstances, court cases and revenue rulings reveal some guidelines. The form of a transaction will not be disregarded solely because it bestows favorable tax benefits on the parties [*Frank Lyon Co. v. United States* (1978) 435 U.S. 561, 580, 98 S. Ct. 1291, 55 L. Ed. 2d 550 ; *see Peat Oil & Gas Assocs. v. Commissioner*, (1993) 100 T.C. 271, 283 (leveraged equipment leasing transactions require only nominal profit objective); *Rev. Proc. 75-21*]. However, to be treated as a lease, the transaction must have a bona fide business purpose, defined as a reasonable expectation of profits by the lessor apart from the tax benefits, and the lessor must retain substantial burdens and benefits of ownership [*Carol W. Hilton v. Commissioner* (1980) 74 T.C. 305, 364 , *aff'd*, 671 F.2d 316 (9th Cir. 1982) ; *Rev. Rul. 55-540, 1955-2 C.B. 39* (collecting cases)].

The Internal Revenue Service will use the following factors in determining whether a lease will be treated as a sale for tax purposes [*Rev. Rul. 55-540* , § 4.01, *1955-2 C.B. 39*]:

- Whether portions of the periodic payments are made specifically applicable to an equity to be acquired by the lessee;
- Whether the lessee will acquire title on the payment of a stated amount of "rentals" required under the contract;
- Whether the total amount that the lessee is required to pay for a relatively short period of use constitutes an inordinately large portion of the total sum required to be paid to secure the transfer of title;
- Whether the agreed "rental" payments materially exceed the current fair rental value, indicating that the payments include an element other than compensation for the use of the property;
- Whether the property may be acquired under a purchase option at a price that is nominal in relation to the value of the property at the time when the option may be exercised, as determined at the time of entering into the original agreement, or which is a relatively small amount when compared with the total payments that are required to be made; and
- Whether some portion of the periodic payments is specifically designated as interest or is otherwise readily recognizable as the equivalent of interest.

The fact that the lease agreement makes no provision for the transfer of title or specifically precludes the transfer of title does not, of itself, prevent the contract from being held to be a sale of an equitable interest in the property. Nor is the recording of or the failure to record the agreement controlling insofar as the essential nature of the contract is concerned for federal tax purposes [*Rev. Rul. 55-540* , § 4.02, *1955-2 C.B. 39*].

If the attempted lease transaction is treated as a sale, that sale will be deemed to have occurred when the lessee/purchaser takes possession of the goods. The time of taking possession will be used to determine the lessor/seller's holding period of the property for capital gains, recapture, and other purposes. The amounts received by the lessor/seller will be considered to be payments on the sale price to the extent that the payments are not interest or other charges. These payments will likely result in taxable gain to the lessor/seller [*Rev. Rul. 72-408*, *1972-2 C.B. 86*].

In addition, the lessee/purchaser will acquire the lessor/seller's rights to claim depreciation on the goods. To the extent the investment tax credit is applicable [see § 9], above], the lessee/purchaser may take the credit on qualification. The lessee/purchaser will not be entitled to a deduction for the rent expense, but may deduct the portion of the payment that represents interest [*Rev. Rul. 72-408*, *1972-2 C.B. 86*].

[12] Factors Considered in Making Determination of Valid Leveraged Leases

A leveraged lease is a three-party transaction in which the lessor borrows from a lender to acquire the property leased to the lessee [see § 53.10[5]]. The Internal Revenue Service has issued revenue procedures that parties to a leveraged lease may use to obtain an advance ruling regarding tax treatment of the lease [see *Rev. Proc. 75-28*, *1975-1 C.B. 752*]. The IRS will consider the lessor to be the owner of the property and the transaction a valid lease if all of the following conditions are met [*Rev. Proc. 75-21*, *1975-1 C.B. 715*]:

- The lessor must have a minimum, unconditional at-risk investment of 20 percent of the cost of the property at the beginning of the lease, at all times during the term of the lease, and at the end of the lease.

The minimum investment must be an equity investment which includes only consideration paid and personal liability incurred by the lessor to purchase the property. The net worth of the lessor must be sufficient to satisfy any such personal liability;

- The lessee must not have a right to purchase the property at a price less than the fair market value of the property when the purchase right is exercised, nor may the lessor be able to compel the purchase of the property by the lessee or any other party;
- The lessee may not provide any part of the cost of the property or any part of the cost of any improvements or additions to the property, unless the improvements are readily removable without material damage to the property and are not subject to a purchase option or contract between the lessor and lessee at a price other than their fair market value;
- The lessee may not lend to the lessor any of the funds necessary to acquire the property or guarantee any of the lessor's indebtedness created in acquisition of the property;
- The lessor must demonstrate to the IRS that the lessor expects to realize a profit from the lease aside from the tax benefits resulting by virtue of the lease. This requirement is met if the aggregate amount required to be paid by the lessee to or for the lessor over the lease term plus the value of the residual investment exceeds an amount equal to the sum of the aggregate disbursements required to be paid by or for the lessor in connection with the ownership of the property and the lessor's equity investment in the property; and
- Subject to certain general guidelines, uneven rental payments resulting in prepaid or deferred rent will not prejudice the transaction.

The IRS will not issue an advance ruling if the property is "limited use property." Limited use property is property for which there probably will be no potential buyers or lessees, other than the current lessee, at the end of the lease term [see *Rev. Proc. 76-30, 1976-2 C.B. 647*].

If the parties stay within the above guidelines, the IRS will treat the transaction as a lease for tax purposes, unless other facts and circumstances indicate a contrary intent. Failure to satisfy these guidelines, however, will not automatically disqualify the transaction as a lease, if all the facts and circumstances of the case indicate that the transaction is indeed a lease.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Income Tax ComputationGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)Accelerated Cost Recovery SystemTax LawFederal Income Tax ComputationDeductions for Business ExpensesGeneral OverviewTax LawFederal Income Tax ComputationGross Income (IRC sec. 61)



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 53 PERSONAL PROPERTY LEASING
PART II. LEGAL BACKGROUND

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§ 53.21 Income Tax Qualification of Equipment Sale and Leaseback

[1] In General

An arrangement in sale and leaseback form will be honored, for income tax purposes, when it is a genuine two-party transaction with economic substance that is compelled or encouraged by business or regulatory realities, is imbued with tax-independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached [*Frank Lyon Co. v. United States* (1978) 435 U.S. 561, 583-584, 98 S. Ct. 1291, 55 L. Ed. 2d 550 ; *Rev. Rul. 83-47, 1983-1 C.B. 63* ; see *Rev. Rul. 72-543, 1972-2 C.B. 87* (shipping corporation sold vessel under purported sale and leaseback arrangement to unrelated corporation, and beneficial ownership remained in seller while buyer held legal title, but substance of transaction when viewed in its entirety was financing arrangement, not sale and leaseback)]. The fact that equipment is sold and leased back by the seller does not of itself bar the sale from being closed for tax purposes [see, e.g., *Emershaw v. Commissioner* (1990) 59 T.C.M. 621, T.C. Memo. 1990-246 , *aff'd*, 949 F.2d 841 (6th Cir. 1991) (computer equipment was sold and leased back to seller, subject to existing end-user leases); see also *May Department Stores Co. v. Commissioner* (1951) 16 T.C. 547 (department store was sold and leased back for 20 years without renewal privilege); *Standard Envelope Mfg. Co. v. Commissioner* (1950) 15 T.C. 41 , *acq.*, 1950-2 C.B. 4 (manufacturing plant was sold and leased back for 25 years)].

Whether a transaction is a tax-qualified sale and leaseback depends, first and mainly, on the existence of a sale. Whether the purported sale is actually a sale (as opposed to either a lease or a mere financing arrangement) will depend on whether the benefits and burdens of ownership have passed to the purported buyer [*Larsen v. Commissioner* (1987) 89 T.C. 1229 , *aff'd sub nom. Casebeer v. Commissioner* (9th Cir. 1990) 909 F.2d 1360] . The Tax Court uses eight factors to determine whether the benefits and burdens of ownership have passed in a transaction, along with four additional factors to test the validity of the leaseback [see § 53.118]. Some of those factors are discussed in [2]-[6], *below*.

If the transaction is tax-qualified, the seller will have the tax status of a lessee, and the buyer will have the tax status of a lessor. For discussion of the income tax consequences for the parties, see § 53.20.

[2] Economic Substance in Transaction

A sale and leaseback transaction must have economic substance to have the intended tax effect [*Frank Lyon Co. v.*

United States (1978) 435 U.S. 561, 583-584, 98 S. Ct. 1291, 55 L. Ed. 2d 550] . The following example illustrates a situation in which the economic substance test was found to have been satisfied.

EXAMPLE:

Taxpayers bought solar water heating systems with cash payments of 20 percent of the price, along with recourse and nonrecourse notes. They leased the equipment to a third party under a seven-year lease and held an option to require the lessee to buy the equipment at the end of the seven-year term, for a price equal to the amount of their outstanding debt owed to the seller. The seller and the lessee had common officers, and the seller unconditionally guaranteed the lessee's performance under the lease. The Tax Court held that the fact that the lease was part of a package containing tax benefits and other contractual rights did not preclude a finding that a lease existed, as long as there were substantial nontax interests. Despite the put option, the taxpayers retained rights to the equipment and, at the end of the lease term, might have leased it again or used it in any other way. Moreover, the taxpayers expected energy prices to rise during the lease term, so that the taxpayers would get higher rentals after the equipment was returned to them [*Cooper v. Commissioner (1987) 88 T.C. 84*] .

The cases also provide numerous examples of transactions that failed the economic-substance test [see, e.g., *Roth v. Commissioner (9th Cir. 1963) 321 F.2d 607, 608-609* ; *Hilton v. Commissioner (1980) 74 T.C. 305* , *aff'd*, 671 F.2d 316 (9th Cir. 1982) , *cert. denied*, 459 U.S. 907 ; *Perrett v. Commissioner (1980) 74 T.C. 111* , *aff'd mem.*, 679 F.2d 900 (9th Cir. 1982) ; *Erhard v. Commissioner (1991) 62 T.C.M. 1*, T.C. Memo. 1991-290 , *supplemental opinion*, 64 T.C.M. 10, T.C. Memo. 1992-376 , *supplemental opinion*, 65 T.C.M. 1786, T.C. Memo. 1993-25 , *aff'd*, 46 F.3d 1470 (9th Cir. 1995) ; *Howard v. Commissioner (1988) 56 T.C.M. 669*, T.C. Memo. 1988-531 , *aff'd*, 931 F.2d 578 (9th Cir. 1991)] .

[3] Factors Indicating Economic Substance

[a] Price and Fair Market Value

A sale and leaseback transaction may be considered as having economic substance if the sale price approximates the fair market value at the time of the sale [*Mukerji v. Commissioner (1986) 87 T.C. 926*] .

EXAMPLE:

In a sale and leaseback of solar water heaters, which had economic substance even though it was promoted as a tax shelter, the buyer/lessor paid approximately at the middle of the range of prices for other solar water heaters that were being sold directly to homeowners at retail. Factors demonstrating that the buyer/lessor's deal had genuine economic effects, and was not a sham, were that the buyer/lessor's personal obligation to pay the price was genuine, he paid fair market value, the tax benefits would have existed for someone, either the buyer/lessor or the seller/lessee, so the transaction shifted them but did not create them from thin air, the business of putting solar water heaters on homeowners' roofs was genuine, and the business consequences of a rise or fall in energy prices and solar energy devices were genuinely shifted to the buyer/lessor by the transaction [*Sacks v. Commissioner (9th Cir. 1995) 69 F.3d 982, 988*] .

[b] Business Purpose

A valid business purpose for entering into a sale and leaseback transaction tends to indicate that the transaction has economic substance [*Frank Lyon Co. v. United States (1978) 435 U.S. 561, 583-584, 98 S. Ct. 1291, 55 L. Ed. 2d 550* ; see *Goldwasser v. Commissioner (1988) 56 T.C.M. 606*, T.C. Memo. 1988-523 (failure to investigate equipment being purchased was evidence of lack of business purpose); *accord Casebeer v. Commissioner (1987) 54 T.C.M. 1432*, T.C. Memo. 1987-628 , *aff'd*, 909 F.2d 1360 (9th Cir. 1990) (buyer/lessor failed to determine anticipated revenue from lease renewals of computer equipment or from residual sale value)]. This business-purpose test is subjective, while the

economic-substance test is objective.

EXAMPLE:

The taxpayers wanted to diversify their business investments to partially offset the cyclical nature of their oil business by means of a long-term investment outside the oil industry. They approached the decision to enter into the transaction in a businesslike manner and participated only after they were convinced that the investment had a reasonable possibility of profit. Experienced advisors thoroughly investigated the financial aspects and were convinced that the investments would provide a steady income and an opportunity for profit. The advisors turned down several offerings. In this case, diversification of investment was a valid business purpose for entering into the sale and leaseback transaction [*Levy v. Commissioner* (1988) 91 T.C. 838] .

EXAMPLE: A lawyer who was also a C.P.A. had a valid business purpose for investing in a sale and leaseback of computer equipment. Before he made the investment, he independently investigated the soundness of the investment by studying the offering memorandum and contacting an independent appraiser who concurred with the offering memorandum's prediction of profitability. The fact that some or all of the information that he received was inaccurate was irrelevant; he had reasonably attempted to ascertain the profit potential of the transaction [*Shea v. Commissioner* (1991) 62 T.C.M. 1027, T.C. Memo. 1991-518] .

[c] Business Purpose in Related-Party Transaction

A sale and leaseback transaction between an individual and a corporation of which the individual was the sole shareholder served a valid business purpose because, in one case, the transfer improved the individual's bonding capacity [*Carroll v. Commissioner* (1978) 37 T.C.M. 736, T.C. Memo. 1978-173] , and in another case, the corporation was created to provide an alternative source of income to the individual [*Peck v. Commissioner* (1982) 43 T.C.M. 291, T.C. Memo. 1982-17 , *aff'd*, 752 F.2d 469 (9th Cir. 1985)] . On the other hand, when a corporation transferred property to a partnership owned by the controlling shareholder's children, then leased the property from the partnership, the transaction was a sham because the parent controlled the partnership's affairs (even though the parent was not a partner) [*Cirelli v. Commissioner* (1984) 82 T.C. 335] .

[4] Favorable Tax Consequences

The fact that favorable tax consequences were taken into account is no reason for disallowing those consequences, if the transaction had economic substance apart from the tax consequences and was not intended solely for tax avoidance [*Frank Lyon Co. v. United States* (1978) 435 U.S. 561, 583-584, 98 S. Ct. 1291, 55 L. Ed. 2d 550] .

EXAMPLE:

A partner with a one-unit interest costing \$57,500 would have realized aggregate tax savings of \$22,700 from a computer equipment-leasing transaction if tax savings from the initial years of the transaction were invested in a sinking fund paying 7-percent interest. There was economic substance in the transaction [*Emershaw v. Commissioner* (1990) 59 T.C.M. 621, T.C. Memo. 1990-246 , *aff'd*, 949 F.2d 841 (6th Cir. 1991)] .

If the transaction has economic substance, the transaction does not become a sham merely because it is likely to be unprofitable on a pre-tax basis. If the buyer/lessor has significant risks and benefits of ownership and is the one whose capital is committed, based on cash or negotiable full-recourse promissory notes, then the possible imprudence of the investment does not disqualify the buyer/lessor from taking depreciation deductions and tax credits arising from the transaction [*Sacks v. Commissioner* (9th Cir. 1995) 69 F.3d 982, 991 (taxpayer claimed depreciation deductions and tax credits for solar heating units that he bought and leased back to seller, who rented them to homeowners; Congress intended to generate investment in alternative energy technologies that would not otherwise be made because of their

low profitability, and IRS could not use Congressional purpose in creating tax benefits as ground for denying them)].

[5] Taxpayer's Characterization of Transaction

A taxpayer's characterization of a transaction as a financing arrangement was not persuasive and a valid sale and leaseback was found, when the governing documents provided for a sale and leaseback [*Sanborn v. Commissioner* (1983) 46 T.C.M. 1435, T.C. Memo. 1983-579] . On the other hand, a power company's characterization of an agreement as a financing agreement rather than a sale and leaseback of nuclear fuels was accepted because the company presented strong proof that it retained the burdens and benefits of ownership of the fuel [*Illinois Power Co. v. Commissioner* (1986) 87 T.C. 1417, acq. in part, 1990-2 C.B. 1].

Generally, a taxpayer is bound by the form the taxpayer chooses for a transaction, in the absence of strong proof that another transaction was intended. However, the IRS privately ruled, in the case of a taxpayer asserting that a sale and leaseback transaction should be taxed in accord with its substance rather than its form (in other words, should not be treated as a sale and leaseback), that the taxpayer need not show strong proof that the other transaction was intended, except as noted below. In determining the treatment of sale and leaseback transactions for tax purposes, ownership of the property depends on who bears the balance of the benefits and burdens of ownership of the property in question [see generally § 53.118]. A taxpayer may lack one or more of those benefits and burdens (for example, legal title) yet be treated as the owner for tax purposes [*Priv. Ltr. Rul. 9748005* ; see, e.g., *Priv. Ltr. Rul. 9802002* (company properly reported its sale and leaseback of aircraft as financing transaction in which company remained owner of aircraft and received taxable payment from buyer/lessor)].

The strong-proof standard does apply, however, when a taxpayer attempts to disavow the form of a sale and leaseback transaction involving both U.S. and foreign parties. In that case, the taxpayer must produce strong proof of having the benefits and burdens of ownership as required under U.S. legal standards [*Priv. Ltr. Rul. 9748005* (taxpayer had presented adequate proof that purported sale and leaseback of four aircraft by U.S. taxpayer to foreign corporation should be treated, for tax purposes, as financing arrangement)].

[6] Buyer/Lessor's Equity Stake and Risk of Loss

The extent to which the buyer/lessor has an equity stake and risks losing it in the transaction is a factor in evaluating the economic substance of the transaction [*Mukerji v. Commissioner* (1986) 87 T.C. 926 ; *Thomas Est. v. Commissioner* (1985) 84 T.C. 412 ; *L.W. Hardy Co. v. Commissioner* (1987) 52 T.C.M. 1540, T.C. Memo. 1987-63] .

EXAMPLE:

A buyer/lessor of aircraft had purchased the aircraft with a combination of its own funds (25 percent of the price) and borrowed funds, giving it a 25-percent equity interest in the aircraft. It then leased the aircraft back to the seller/lessee, giving the seller/lessee an option to buy the aircraft at the end of the lease term. Simultaneously, the seller/lessee paid a third party to assume its payment obligations under the lease, and effectively exercised the buy option. The seller/lessee was obligated to insure the aircraft and replace them if they were destroyed. As a result, the buyer/lessor's investment shifted from the aircraft to the payment stream under the lease (to be paid by the third party). Moreover, because the buy-back option had effectively been exercised, the buyer/lessor parted with the right to realize any potential appreciation in the value of the aircraft. The buyer/lessor was thus guaranteed a stated rate of return on the aircraft and was assured that ownership of the aircraft would revert to the seller/lessee without regard to any decline in the fair market value of the aircraft. The buyer/lessor lacked any effective equity interest in the aircraft and thus had no real risk of losing the so-called investment in the aircraft. The transaction was not a sale and leaseback for tax purposes [*Priv. Ltr. Rul. 9748005*].

The cases provide numerous other examples of situations in which a taxpayer did not have sufficient benefits and

burdens of ownership [see, e.g., *Stiebling v. Commissioner* (1994) 67 T.C.M. 3006, T.C. Memo. 1994-233, *aff'd mem.*, 113 F.3d 1242 (9th Cir. 1997) (taxpayer purportedly bought mobile homes but failed to make balloon payment on note when it came due, never took title to or possession of mobile homes and had no responsibility for them, never had positive pre-tax cash flow from mobile homes, and made no interest payments after third year of seven-year term of deferred-payment obligation); *Coleman v. Commissioner* (1989) 57 T.C.M. 493, T.C. Memo. 1989-248 (taxpayer gave nonrecourse note for 92 percent of price of computer equipment having residual value less than final balloon payment due on note); *Pacific Gamble Robinson & Affiliated Cos. v. Commissioner* (1987) 54 T.C.M. 915, T.C. Memo. 1987-533 (theoretical possibility of gain that would have been minimal in relation to amounts involved in transaction did not show that transaction had economic substance)].

[7] Buyer/Lessor's Depreciation Deduction on Equipment

[a] Seller/Lessee's Right to Substitute Equipment

In equipment leasing transactions, especially computer leasing, the seller/lessee may have the option to buy back (or sell on behalf of the buyer/lessor) the equipment at the end of the lease and the right to substitute--on notice and approval by the buyer/lessor--other equipment for the leased equipment if, for example, the seller/lessee cannot maintain the equipment in operation or cannot effectively market it at the end of the lease, or an end user (sublessee) exercises an option to buy the equipment. The IRS position has been that the seller/lessee's right to substitute equipment on specified market conditions precludes the buyer/lessor from having an ownership interest in the leased equipment and, therefore, precludes the buyer/lessor from claiming the depreciation deduction with respect to the leased equipment. The Tax Court holds, however, that the substitution of equipment is not contrary to the buyer/lessor's ownership of the equipment [*L.W. Hardy Co. v. Commissioner* (1987) 52 T.C.M. 1540, T.C. Memo. 1987-63]. In fact, a substitution provision is common in the computer-leasing business, is included to protect an end user (sublessee) from obsolescence and other risks, and is subject to specified contractual conditions not under the unilateral control of the seller/lessee [*Offermann v. Commissioner* (1988) 55 T.C.M. 955, T.C. Memo. 1988-236].

[b] Requirement of Business Purpose

A sale and leaseback had the requisite business purpose when the transaction transferred the depreciable interest to the buyer/lessor in one case because projections of anticipated revenues from lease renewals were made by independent third parties, were realistic, and were based on fair market values [*Moser v. Commissioner* (1989) 56 T.C.M. 1604, T.C. Memo. 1989-142, *aff'd*, 914 F.2d 1040 (8th Cir. 1990); *Emershaw v. Commissioner* (1990) 59 T.C.M. 621, T.C. Memo. 1990-246, *aff'd*, 949 F.2d 841 (6th Cir. 1991)] .

On the other hand, no business purpose, nor any economic substance, was found in a sale and leaseback transaction when the buyer/lessor not only claimed an immoderate depreciation deduction of many times the cash investment but also had, for example, failed to determine anticipated revenues from lease renewals or from the residual sale value [*Larsen v. Commissioner* (1987) 89 T.C. 1229, *aff'd sub nom. Casebeer v. Commissioner* (9th Cir. 1990) 909 F.2d 1360; *Casebeer v. Commissioner* (1987) 54 T.C.M. 1432, T.C. Memo. 1987-628, *aff'd*, 909 F.2d 1360 (9th Cir. 1990); *Sturm v. Commissioner* (1987) 54 T.C.M. 1394, T.C. Memo. 1987-625, *aff'd sub nom. Casebeer v. Commissioner* (9th Cir. 1990) 909 F.2d 1360; *Moore v. Commissioner* (1987) 54 T.C.M. 1407, T.C. Memo. 1987-626, *aff'd sub nom. Casebeer v. Commissioner* (9th Cir. 1990) 909 F.2d 1360] or failed to perform a cost-benefit analysis [*Smoot v. Commissioner* (1991) 61 T.C.M. 2897, T.C. Memo. 1991-268] .

No depreciable interest was acquired in sale and leaseback transactions involving computer programs or equipment when the buyer/lessor had no reasonable expectation of profit from the transaction, apart from tax benefits [*Casebeer v. Commissioner* (1987) 54 T.C.M. 1432, T.C. Memo. 1987-628, *aff'd*, 909 F.2d 1360 (9th Cir. 1990); *Smoot v. Commissioner* (1991) 61 T.C.M. 2897, T.C. Memo. 1991-268; *Mele v. Commissioner* (1988) 56 T.C.M. 1, T.C. Memo. 1988-409] . No depreciable interest was acquired with the acquisition of a nonexclusive license to enhance and sell a

computer program for tax-return preparation when the nonrecourse note used to finance the acquisition was not intended to be paid and was not shown to be realistic [*Hagler v. Commissioner* (1986) 86 T.C. 598 , *aff'd mem. sub nom. Dahlmeier v. Commissioner* (11th Cir. 1987) 822 F.2d 63] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionCasualty & Risk of LossTax LawFederal Income Tax ComputationGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 53 PERSONAL PROPERTY LEASING
PART II. LEGAL BACKGROUND

21-53 California Legal Forms--Transaction Guide §§ 53.22-53.99

[Reserved]

§§ 53.22[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 53 PERSONAL PROPERTY LEASING
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

21-53 California Legal Forms--Transaction Guide § 53.100

§ 53.100 Personal Property Leases

[1] Facts

1. Basic information regarding each party to transaction:

a. Name.

b. Address.

c. Telephone number.

d. Capacity in leasing transaction:

(1) Lessor.

(2) Lessee.

(3) Supplier.

(4) Counsel or agent.

(5) Other.

e. Legal status:

(1) Individual.

(2) Corporation.

- (3) Limited partnership.
- (4) General partnership.
- (5) Limited liability company.
- (6) Unincorporated benevolent or fraternal society or association, or labor organization.
- (7) Estate or personal representative.
- (8) Guardian or conservator.
- (9) Other.

2. Purpose of personal property lease.

3. Type of personal property leased.

4. Lessee's business and financial status.

NOTE:

This information may be necessary to complete the lessor's financial survey [*see* § 53.284]. Counsel advising potential lessees may assemble this information to provide the lessor with a complete financial portrait of the client. Similarly, counsel representing lessors may use this information to determine the financial stability and reliability of a potential lessee.

a. If lessee is business entity:

- (1) Name of business.
- (2) Nature of lessee's business.
- (3) Length of time in business.
- (4) Form of business organization [*see* P (1)(e), *above*].
- (5) Bank references for business entity:

NOTE:

Counsel should obtain this information for any individuals.

- (a) Name and address of bank branch.
- (b) Type and number of account(s).
- (c) Name of account officer.

(6) Names and addresses of supplier references.

(7) Name and address of lessor or mortgagor of business premises, if any.

(8) Instances of bankruptcy or equivalent.

NOTE:

For this purpose, bankruptcy equivalents include assignments for the benefit of creditors and other creditor agreements [*see* Ch. 78, ***Creditors' Agreements: Nonbankruptcy Alternatives***].

b. If lessee is individual:

(1) Marital status.

(2) Occupation.

(3) Employer's name and address.

(4) Length of time at current place of employment.

(5) Bank references:

(a) Name and address of bank branch.

(b) Type and number of account(s).

(c) Name of account officer.

(6) Personal references' names and addresses.

(7) Instances of bankruptcy or equivalent.

NOTE:

For this purpose, bankruptcy equivalents include assignments for the benefit of creditors and other creditor agreements [*see* Ch. 78, ***Creditors' Agreements: Nonbankruptcy Alternatives***].

5. Identity of property to be leased.

NOTE:

For detailed discussion of vehicle leases, *see* Ch. 47, ***Automotive Financing and Vehicle Leasing*** .

a. Full name(s) in which legal title to property is held.

b. Type of interest held by lessor.

(1) Clear title.

(2) Lease.

NOTE:

A prospective lessor who holds title by a lease contract may be subject to restrictions in that agreement. Moreover, a sublessee of this interest may obtain any benefits of the agreement (e.g., warranty rights) between the prospective lessor and the true owner of the property.

c. Current location.

d. Description:

(1) If lease of equipment, serial and model number.

(2) If lease of furniture, type of item, color, stock number, and manufacturer.

e. If personal property is to be affixed to realty, names and addresses of owner and any mortgagee of realty.

f. Fair market value at inception and estimated fair market value at conclusion of lease term.

6. Uses of property to be leases.

a. Past and present use(s), if applicable.

b. Intended use(s).

7. Term of proposed lease.

a. Duration:

(1) Fixed:

(a) Month.

(b) Year.

(c) Term of years.

(2) Renewable.

b. Dates of commencement and termination.

8. Payment of rent.

a. Method:

(1) Even or uneven rental payment.

(2) Accelerated or decelerated rental payments.

(3) Payments based on cash flow or on property's productivity curve.

b. Place for delivery of rental payment.

9. Amount of security deposit or reservation of security interest in leased property.

10. Expenses to be borne by lessee:

- a. Maintenance.
- b. Insurance.
- c. Taxes.
- d. Fees.

11. Expenses to be borne by lessor:

- a. Maintenance.
- b. Insurance.
- c. Taxes.
- d. Fees.

12. Method of shipment and delivery of property.

13. Express or implied warranties to be given or disclaimed.

[2] Documents

- 1. Title document to property to be leased.
- 2. Any business plan for represented party.
- 3. If either party is corporation, copies of articles of incorporation and bylaws.
- 4. If either party is partnership, copy of partnership agreement.
- 5. If either party is limited liability company, copy of articles of organization and operating agreement.
- 6. Any agreements for outstanding security interests in property to be leased.
- 7. Any warranty rights lessor has received from seller and/or manufacturer.
- 8. Any personal property lease agreements client is currently involved in.

NOTE:

Any outstanding personal property lease agreements may be helpful in providing terms specifically suited to client's particular circumstances.

9. Schedule of specifications of property to be leased.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 53 PERSONAL PROPERTY LEASING
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

21-53 California Legal Forms--Transaction Guide §§ 53.101-53.109

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§§ 53.101[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 53 PERSONAL PROPERTY LEASING
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

21-53 California Legal Forms--Transaction Guide § 53.110

§ 53.110 Choice of Lease or Purchase

NOTE:

The final decision--whether to buy or lease--ordinarily is based on a comparison of the net costs of each method of acquisition. An examination of the advantages and disadvantages of leasing facilitates this decision. Although the advantages and disadvantages of each personal property lease must be evaluated in the context of the specific lessee's needs and financial circumstances, the factors enumerated below provide general guidelines for consideration. Some of the determinations listed below often are made directly by the client, or by the client and attorney in conjunction with the client's accountant or other business advisors. Even when the attorney is not the primary decision-maker, however, it is important that the attorney be aware of these factors, because they are likely to influence the structure and terms of the transaction.

In general, for a lease to be financially viable, it must offer cost savings that exceed the earning capacity of the funds that would otherwise be devoted to the purchase of the prospective leased goods.

1. Determine which of following advantages of leasing may benefit client:
 - a. Preservation of working capital, which:
 - (1) Avoids large down payments compared to conditional sales.
 - (2) Frees funds that would otherwise be tied up in low-yielding capital assets.
 - b. Preservation of existing lines of credit.
 - c. Availability of alternative source of funding when traditional financing is unavailable.

NOTE:

For a smaller business, leasing may be the only alternative to borrowing purchase price money. Apart from tax considerations, leasing may represent a cost savings by allowing the lessee to obtain a partial advantage of the lower interest rates payable by third-party lessors who have their own capital, borrow funds on favorable terms, or buy directly from the manufacturer and then lease to users.

- d. Extension of new credit line by use of master lease covering multiple transactions.

NOTE:

A "master lease" is a lease transaction in which a single agreement is entered into that controls a series of leasing arrangements. Supplementary schedules are added as the lessee requires new or different equipment [*see, e.g.,* § 53.200[2]].

- e. Avoiding risk of equipment obsolescence.

NOTE:

This risk is particularly important with computer and other electronic equipment. Manufacturers continually produce new equipment that makes older models technologically outdated. Obsolete equipment may remain serviceable for the purchaser's use, but its resale value may be reduced considerably, committing the purchaser to the equipment investment for its entire useful life. In contrast, lessees are free to acquire updated equipment at the expiration of the lease term [*see also* Ch. 57, **Computer-Related Transactions**].

- f. Availability of flexible payment plans, e.g.:

- (1) Even or uneven rental payments.
- (2) Accelerated or decelerated rental payments.
- (3) Payments based on cash flow or on property's productivity curve.

- g. Improved appearance of lessee's financial records.

NOTE:

Generally, future lease obligations are not reflected as liabilities on the lessee's balance sheet.

- h. Responsibility for maintenance may be lessor's [*see* § 53.10[4] (flat-rate and full-service leases)].

- i. Favorable tax treatment [*see* § 53.19 (applicability of California sales and use taxes to personal property leasing); § 53.20 (federal tax consequences)].

2. Determine which of the following disadvantages of leasing may harm client:

- a. Higher total expenditure than outright cash purchase.
- b. Fixed periodic payments.

c. Restricted use of property, e.g.:

NOTE:

Lease conditions often restrict a lessee's free use of leased property.

- (1) Prohibitions against subleasing.
- (2) Prohibitions against transfer of property from one location to another.
- (3) Restrictions on operation of property with respect to:
 - (a) Mileage.
 - (b) Hours of operation.

d. Imposition of severe penalties for default, e.g.:

- (1) Accelerated rental payments.
- (2) Immediately repossession of property by lessor.

e. Characterization of transaction as sale rather than lease, causing unfavorable tax treatment [*see* §§ 53.11[2] (leases distinguished from sales), 53.20[11] (tax consequences of leases characterized as sales)].

3. Determine each of the following costs of leasing:

a. Net cash outlay:

- (1) Calculate cash outlay required for leasing, minus tax savings.
- (2) Calculate cash outlay required for purchase, minus tax savings.
- (3) Compare results.

b. Lease payments:

- (1) Calculate amount of periodic payment.
- (2) Determine term of periodic payment.

c. Security deposit:

- (1) Determine whether security deposit is required.
- (2) If so, determine amount of deposit.
- (3) Determine whether additional security will be required.

NOTE:

Corporate lessees, for example, may be required to maintain a specific net worth

throughout the lease term.

d. Insurance [*see Com. Code § 10218* (insurance and proceeds)]:

(1) Determine whether one or more of parties has obligation to obtain and pay for insurance covering any leased goods.

(2) Determine beneficiary of any insurance proceeds.

e. Determine desired period of use.

f. Calculate estimated useful life of property.

g. Estimate depreciation during period of use.

h. Estimate financing cost.

i. Estimate resale value of item at end of use period.

j. Determine feasibility of financing out of current earnings.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)General OverviewCommercial Law (UCC)Leases (Article 2A)General Overview



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21-53 California Legal Forms--Transaction Guide § 53.111

§ 53.111 Appropriate Type of Lease

1. Determine whether to structure transaction as flat-rate or full-service lease [*see § 53.10[4]* (flat-rate and full-service leases)].

NOTE:

Under a flat-rate lease, the lessor obtains a fixed sum in the form of periodic rental payments that reflect the cost of the property to the lessor minus depreciation. Under this normally short-term lease the lessee generally assumes responsibility for repairs, maintenance, replacement parts, operating expenses, insurance, license fees, and taxes.

Under a full-service lease, also known as a maintenance lease, the cost of all service and repairs, replacement parts, and insurance is generally on the lessor. The lessee often assumes responsibility for operating expenses, personal property taxes (unless the term is very short), and a deductible amount chargeable for certain types of damage to the property.

a. Determine whether lessee has sufficient resources to maintain property as required under flat-rate lease:

(1) Do lessee or lessee's employees have skills required to perform maintenance and repairs?

(2) Does lessee have shop facility and tools required for maintenance and repairs?

(3) Can lessee afford cash outlay required for independent contracting for maintenance and repairs?

NOTE:

If the equipment is central to the lessee's business operation, and the lessee will require outside repair services on equipment failure, the lessee must have the immediate ability to provide payment for those services. Contrast this situation with a full-service lease, under which the lessor will assume the entire cost of the repairs.

b. Determine whether proposed full-service agreement contains incentive for lessee's acceptance:

(1) Does complexity of leased equipment requires lessor's specialized knowledge for maintenance and repair?

NOTE:

Repairs of high technology systems, including, for example, computers, copiers, and medical devices, often require skills beyond those normally held by lessees. Because the technical training required by the lessee or the lessee's employees' to repair these systems is often uneconomical, lessors of these devices ordinarily lease only on a full-service basis.

(2) Is cost savings of full-service agreement likely to be significant over full lease term?

NOTE:

If the potential for breakdown is significant and the cost of parts and repairs is high, the lessee may avoid the risk of unanticipated expenses by opting for a full-service lease.

2. Determine whether or not to structure transaction as a finance lease [*see Com. Code § 10103(a)(7)*]:

NOTE:

A finance lease allows a lessee to directly solicit suppliers of the goods sought for lease and then obtain the goods by arranging for a lessor to obtain title to them [*see Com. Code § 10103(a)(7)* (statutory definition)]. For further discussion of finance leases, see §§ 53.10[2] and 53.201[1].

a. Does lessee have specifications for property to be leased that may be filled only by supplier not engaged in leasing?

NOTE:

If a lessee has a need for specially manufactured goods and the manufacturer of those goods will not provide them on a lease basis, a finance lease arrangement will allow the lessee to obtain the goods from the manufacturer/supplier and to enter a lease agreement with the lessor.

b. Does lessor wish to limit exposure to claims with respect to goods?

c. Does lessor have capital resources to commit to purchase of property to be leased?

NOTE:

Under a finance lease, there must be a party with sufficient capital willing to pay the supplier for the goods and then lease them to the lessee.

3. Determine whether to structure transaction as leveraged lease [*see § 53.10[5]*; *see also* see Fritch et al., Equipment

Leasing--Leveraged Leases (N.Y. Practicing Law Institute 3d ed. 1988)]:

- a. Can third party lender commit funds to lessor for property acquisition, thus making leveraged lease possible?
- b. Does lessor wish to obtain tax advantages from property ownership under leveraged lease?
- c. Does lessee seek lowered net cost of leased property by foregoing ownership benefits to lessor under leveraged lease?

4. Determine whether transaction should be structured as sale and leaseback:

NOTE:

A "sale and leaseback" is a lease transaction by which an asset is sold to a party with the express intent that the purchaser immediately lease the same asset back to the seller [*see* § 53.10[6]]. For general discussion of the advantages and disadvantages of sale and leaseback transactions, see Ch. 23, ***Real Property Sales Agreements***.

- a. Does seller/lessee of property need to generate capital obtained through sale of property?
- b. Does seller/lessee seek to remain in possession of property through leaseback?
- c. Is purchaser/lessor willing to lease back property to seller/lessee?
- d. Does purchaser/lessor seek benefits of ownership of property?

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionFormationReal Property LawLandlord & TenantLease AgreementsCommercial LeasesSale-Leaseback Transactions



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21-53 California Legal Forms--Transaction Guide § 53.112

§ 53.112 Capacity of Parties to Contract

1. Determine whether parties are of sufficient age and mental capacity to enter into lease agreement [*see Civ. Code §§ 1556, 1557* (minors and persons of unsound mind); *see also Civ. Code §§ 38-41* (persons with unsound mind); *Fam. Code § 6500 et seq.* (minors)].

NOTE:

In general, a person "entirely without understanding" has no power to make a contract of any kind [*Civ. Code § 38*]. With limited exceptions, a minor (that is, a person under 18 years of age [*see Fam. Code § 6500*]) may make a contract in the same manner as an adult, subject to the power of disaffirmance [*Fam. Code § 6700; see Fam. Code §§ 302, 6701, 6710-6713* (exceptions; limitations on authority; disaffirmance)].

For a discussion of the capacity to contract, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions*** and Ch. 100B, ***Control, Custody, and Support of Minors***.

2. If lessor is a married individual:

a. Is property separate or community property?

b. If property is community property, has lessor's spouse given consent, or will he or she give consent, to lease [*see Fam. Code § 1100* (management and control of community property)]?

NOTE:

One spouse may not dispose of community personal property for less than fair and reasonable value without the written consent of the other spouse. Written consent is not

required for gifts mutually given by both spouses to third parties or for gifts given by one spouse to the other spouse [*Fam. Code § 1100(b)*]. In addition, one spouse may not convey community personal property used as the family dwelling, or the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children, without the written consent of the other spouse [*Fam. Code § 1100(c)*].

3. If either party is corporation:

- a. Do articles of incorporation limit leasing activity [*see Corp. Code § 207*]?
 - b. Has board of directors passed resolution authorizing lease arrangement [*see § 53.283*]?
 - c. Has the corporation obtained a leasehold interest in the property?

4. If either party is partnership:

- a. Does partnership agreement forbid or restrict making lease in question in course of partnership business?
 - b. Has partnership filed or recorded any statement or certificate that explicitly or implicitly forbids or restricts making lease in question in course of partnership business?
 - c. Has the partnership obtained a leasehold interest in the property?

5. If either party is limited liability company (LLC):

- a. Is leasing activity normally within scope of company's affairs [*see Corp. Code § 17002*]?
 - b. Have leases been authorized, assumed, or assigned by company [*see Corp. Code § 17002; see also Ch. 12C, Limited Liability Companies*]?
 - c. Has the LLC obtained a leasehold interest in the property?

6. If lessor is personal representative, or guardian or conservator of estate, determine whether court administering estate or supervising guardianship or conservatorship has granted order authorizing lease of estate's real property, or whether lease is within exception not requiring court authorization [*Prob. Code §§ 2553-2555, 9941, 9942*].

NOTE:

If it is to the advantage of the estate, the personal representative, guardian, or conservator may lease, as lessor, real property of the estate without authorization of the court if (1) the rental does not exceed \$5,000 a month and the term does not exceed a specified term (one year for a personal representative; two years for a guardian or conservator), or (2) the lease is from month to month, regardless of the amount of the rental [*Prob. Code §§ 2555, 9941*].

7. If agent is acting for lessor or lessee in execution of lease required to be in writing, determine whether agent has written authority to act in that capacity [*see Civ. Code § 2309; see also Ch. 34A, Prelease Forms*].

Legal Topics:

For related research and practice materials, see the following legal topics:
 Contracts Law Formation Capacity of Parties General Overview



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21-53 California Legal Forms--Transaction Guide § 53.113

§ 53.113 Applicability of Division 10 of the Commercial Code

NOTE:

In addition to the parties' capacity to contract [*see* § 53.112], the status of the party as a lessee or lessor, supplier, and merchant or consumer affects issues such as choice of governing jurisdiction, warranty rights, and firm offers [*see Com. Code* §§ 10106, 10205, 10209].

1. Determine whether party leasing goods meets Commercial Code definition of "lessee."

NOTE:

A "lessee" is a person who acquires the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessee [*Com. Code* § 10103(a)(14); *see* 12 C.F.R. § 213.2(g) (lessee means natural person who enters into or is offered consumer lease)].

2. Determine whether party leasing goods meets Commercial Code definition of "lessor."

NOTE:

A "lessor" is a person who transfers the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessor [*Com. Code* § 10103(a)(16); *see* 12 C.F.R. § 213.2(h) (lessor means person who regularly leases, offers to lease, or arranges for lease of personal property under consumer lease)].

3. Determine whether party involved in leasing goods meets Commercial Code definition of "merchant."

NOTE:

A "merchant" is a person who deals in goods of the kind, or otherwise by occupation

holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction, or by a person's employment of an agent or broker who holds himself or herself out in a similar manner [*Com. Code* § 2104(1)].

4. Determine whether party involved in leasing goods is "consumer."

NOTE:

A "consumer" is a natural person who leases goods primarily for a personal, family, or household purpose [*see Com. Code* § 10103(a)(5); 12 C.F.R. § 213.2(e)(1), (k) (definitions)].

5. Determine whether party involved in lease transaction is "supplier."

NOTE:

A "supplier" is a person from whom a lessor buys or leases goods to be leased under a finance lease [*Com. Code* § 10103(a)(24) (definition); *see Com. Code* § 10103(a)(7) ("finance lease" defined)]. For further discussion of finance leases, see §§ 53.10[2] and § 53.111, P 2]. Counsel should be aware, however, that under the Magnuson-Moss Warranty Act, the term "supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers [15 U.S.C. § 2301(4)]. Unless stated otherwise, the term "supplier" in this chapter has the meaning given in the Commercial Code.

6. Determine whether articles to be leased are "goods" by considering following factors [*see Com. Code* § 10103(a)(8) (definition); *see also* § 53.12[3]].

NOTE:

Division 10 of the Commercial Code applies only to lease transactions involving goods [*see Com. Code* §§ 10102, 10103(a)(8)].

a. Are articles to be leased things that are movable at time of identification to lease contract [*see Com. Code* § 10217 (identification); *see also* comment to § 53.252]?

b. Are articles to be leased:

NOTE:

The following articles are expressly excluded from the Commercial Code definition of "goods" [*Com. Code* § 10103(a)(8)].

(1) Money?

(2) Documents [*see Com. Code* § 9102(a)(30) (definition)]?

(3) Instruments [*see Com. Code* § 9102(a)(47) (definition)]?

(4) Accounts [*see Com. Code* § 9102(a)(2) (definition)]?

(5) Chattel paper [*see Com. Code* § 9102(a)(11) (definition)]?

(6) General intangibles [*see Com. Code § 9102(a)(42)* (definition)]?

(7) Minerals?

NOTE:

Minerals include oil and gas, before extraction [*Com. Code § 10103(a)(8)*].

c. Are articles to be leased among those specifically listed as "goods," i.e.,

(1) Fixtures [*see Com. Code § 10309(a)(1)*; *see also § 53.16[3]*].

(2) Unborn young of animals [*see Com. Code § 10103(a)(8)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationGeneral OverviewCommercial Law (UCC)Leases (Article 2A)General Overview



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21-53 California Legal Forms--Transaction Guide § 53.114

§ 53.114 Applicability of Commercial Code Rules Governing Written Contracts, Interpretation, Warranties, and Risk

1. Determine whether Commercial Code statute of frauds applies [*see* § 53.12[5]]:

NOTE:

Generally, leases subject to the statute of frauds must be in writing [*see* *Com. Code* § 10201(a)].

a. Is lease commercial lease involving total of payments greater than \$1,000, excluding payments for options to renew or buy [*Com. Code* § 10201(a)(1)]?

b. Is lease consumer lease [*see* *Com. Code* §§ 10201(a)(2), *Com. Code* § 10103(a)(5) ("consumer lease" defined); *see also* *Com. Code* § 10201 (California Comment--Report of the Assembly Committee on the Judiciary)]?

2. Determine likelihood that lease contract will be subject to interpretation, supplementation, or qualification by any of following [*see* *Com. Code* §§ 1303, 2202 (course of dealing, course of performance, usage of trade, practical construction); *see also* § 53.12[4]]:

NOTE:

The following factors are relevant to show the meaning of the lease agreement. However, the express terms of the agreement will be construed, whenever reasonable, as consistent with each other [*Com. Code* § 1303(d)]. If this construction is unreasonable, express terms control course of performance, course of performance controls both course of dealing and usage of trade, and course of dealing controls usage of trade [*Com. Code* § 1303(e)].

a. Course of performance?

b. Course of dealing [*see, e.g., Insurance Co. of No. Am. v. NNR Aircargo Service (USA), Inc. (9th Cir. 2000) 201 F.3d 1111, 1113-1115* (under former *Com. Code* § 1205(1), now *Com. Code* § 1303(a)), receipt of 47 identical invoices for 47 separate transactions was sufficient to constitute course of dealing, modifying shipping agreement)]?

c. Usage of trade?

3. Determine whether express or implied warranties will be disclaimed [*see Com. Code* § 10214; *see also* §§ 53.220-53.222].

NOTE:

The lessor may exclude or modify warranty rights for a variety of reasons. For example, in a transaction structured as a finance lease [*see Com. Code* § 10103(a)(7) (definition)], the lessee looks almost entirely to the supplier, rather than the lessor, for representations, covenants, and warranties, due to the limited function usually performed by the lessor [*see* § 53.10[2]]. A limited warranty also may be appropriate if the leased goods have been previously leased.

4. Determine whether it will be advisable to shift allocation of risk or burden of risk [*see Com. Code* §§ 10219, 10220; *see also* §§ 53.234, 53.235].

NOTE:

The parties may wish to shift the allocation or burden of risk of damage to or loss of the goods. The shift may be based on a demand for an unusual shipping method, or the fact that the destination of the leased goods is remote or hazardous.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.115

§ 53.115 Applicability of Federal Consumer Leasing Act

NOTE:

The federal Consumer Leasing Act [15 U.S.C. § 1667 *et seq.*; 12 C.F.R. § 213.1 *et seq.* (Regulation M)] is intended to ensure that consumers receive meaningful disclosure of lease terms that enable them to compare lease terms with other leases, limit the amount of balloon payments in consumer lease transactions, and require accurate disclosure of lease terms in advertising [12 C.F.R. § 213.1(b)].

For further discussion of the federal Consumer Leasing Act, see §§ 53.18 and 53.260.

The California Vehicle Leasing Act [Civ. Code §§ 2985.7-2990] parallels the coverage of the federal Consumer Leasing Act. However, it is specifically limited to leases of motor vehicles and services incidental to those leases. For further discussion of the California Vehicle Leasing Act, see Ch. 47, ***Automotive Financing and Vehicle Leasing***.

1. Determine whether all of following conditions exist [see 15 U.S.C. § 1667; 12 C.F.R. § 213.2(e)(1)].

NOTE:

Except as provided in P 2, below, the federal Consumer Leasing Act will apply if **all** of the following conditions are met [see 12 C.F.R. § 213.2(e)(1)].

- a. Does transaction involve consumer lease [see 15 U.S.C. § 1667(1), (2); 12 C.F.R. § 213.2(e)(1)], that is:

NOTE:

Transactions deemed to be "credit sales" under the federal Truth in Lending Act are

specifically exempt from the Act's coverage [*see* 15 U.S.C. §§ 1602(g), 1667(1); 12 C.F.R. §§ 213.2(e)(2), 226.2(a)(16)].

(1) Is lessee a natural person and not an organization [*see* 12 C.F.R. § 213.2(g) (definition); 12 C.F.R. § 213.2(k) (natural person does not include organization)];

(2) Is object to be leased for personal, family, or household use;

NOTE:

Leases of personal property for business, agricultural, or commercial purposes or leases to an organization are specifically exempt from the Act's coverage [*see* 15 U.S.C. § 1667(1); 12 C.F.R. § 213.2(e)(2); *see also* 12 C.F.R. § 213.2(j) ("organization" defined)].

(3) Does term of lease exceed four months; and

(4) Is total contractual obligation less than or equal to \$25,000?

b. Does lessor, in ordinary course of business, regularly lease, offer to lease, or arrange for leasing of personal property [*see* 15 U.S.C. § 1667(3); 12 C.F.R. § 213.2(h) ("lessor" defined)]?

2. Determine whether transaction otherwise subject to federal Consumer Leasing Act is exempt from Act because it involves lease of personal property incident to lease of real property [*see* 12 C.F.R. § 213.2(e)(3)]:

NOTE:

The Act does not apply to a lease of personal property incident to the lease of real property which provides that the lessee has no liability for the value of the personal property at the end of lease term except for abnormal wear and tear; and the lessee has no option to purchase leased property.

a. Does lessee have any liability for value of property at end of lease term except for abnormal wear and tear; and

b. Does lessee have option to purchase leased property?

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking Law Consumer Protection Consumer Leasing General Overview



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21-53 California Legal Forms--Transaction Guide § 53.116

§ 53.116 Treatment of Lease as Credit or Conditional Sale

NOTE:

Under some conditions, transactions structured as leases will be considered credit or conditional sales under the federal Truth in Lending Act [15 U.S.C. § 1602(g) "credit sale" defined]; *see* 15 U.S.C. § 1601 *et seq.* (Truth in Lending Act)]. In the event of that designation, the credit sale provisions of that Act will apply, and the federal Consumer Leasing Act will not apply [15 U.S.C. § 1667(1); 12 C.F.R. § 213.2(e)(2)].

Counsel should ensure careful analysis and planning to prevent characterization of a lease as a sale for federal tax purposes [*see* P 2, *below*].

1. Determine whether lease will be treated as credit sale under federal Truth in Lending Act [*see* 15 U.S.C. § 1602(g)]:

NOTE:

If the lessee's obligation conforms to the following conditions, the lease is a credit sale that must conform to the federal Truth in Lending Act requirements. For discussion of those requirements as applied to vehicle sales, see the Ch. 47, ***Automotive Financing and Vehicle Leasing***. For discussion of those requirements as applied to sales other than vehicle sales, see Ch. 45, ***Consumer Installment Loans and Credit Sales*** .

a. Is lessee required to pay, as compensation for use, sum substantially equivalent to or in excess of aggregate value of property and services involved?

b. Does lessee has option to become owner of property for no other or nominal consideration on full compliance with contractual obligations?

c. Does lessee has right to terminate lease at any time without penalty [*see* 12 C.F.R. § 226.2(a)(16)]?

NOTE:

If lessee has the right to terminate the lease at any time without penalty, the lease will not be considered a credit sale even if it complies with the requirements in (a) and (b), above [12 C.F.R. § 226.2(a)(16)].

2. Determine whether proposed lease is subject to characterization as sale for tax purposes.

NOTE:

Attempted lease transactions deemed to be sales will have serious tax consequences for the parties; for further discussion of the applicable issues, see § 53.11[2] (distinguishing leases from sales) and § 53.20[11] (federal tax consequences of leases treated as sales).

a. Does transaction have bona fide business purpose, that is:

NOTE:

Affirmative responses to both of the following implies a bona fide business purpose [*see* *Hilton v. Commissioner* (1980) 74 T.C. 305, 364 , *aff'd*, 671 F.2d 316] .

(1) Does lessor have reasonable expectation of profit apart from tax benefits?

(2) Does lessor propose to retain substantial benefits and burdens of ownership?

b. Does transaction reflect sale characteristics, including:

NOTE:

The following factors will be considered by the Internal Revenue Service in determining when a lease will be considered a sale [*see* *Rev. Rul. 55-540* , § 4.01, 1955-2 C.B. 39]. For additional factors relative to the Internal Revenue Service's characterization of leveraged leases in particular, see § 53.20[12].

(1) Will portions of periodic payments be credited to equity to be acquired by lessee?

(2) Will lessee acquire title on payment of stated amount of rentals required under contract?

(3) Is proposed sum that lessee will pay over short period an inordinately large portion of total required to transfer title?

(4) Do proposed rental payments materially exceed current fair rental value?

(5) Does proposed agreement includes purchase option in which:

(a) Property may be acquired at price that is nominal in relation to value of property; or

(b) Amount to be paid is relatively small when compared with total rental payments?

(6) Will some portion of periodic payment be credited as interest or as readily recognizable equivalent of interest.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Truth in Lending General Overview Commercial Law (UCC) Leases (Article 2A) General Overview Commercial Law (UCC) Leases (Article 2A) Formation & Construction General Overview Tax Law Federal Income Tax Computation General Overview



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21-53 California Legal Forms--Transaction Guide § 53.117

§ 53.117 Treatment of Lease as Security Interest

NOTE:

If a purported lease transaction creates a security interest [see *Com. Code* §§ 1201(b)(35), 1203], the transaction will be subject to scrutiny under Division 9 [*Com. Code* § 9101 *et seq.*] of the Commercial Code [*Com. Code* §§ 9110, 9203(c); **see** *Com. Code* § 9110 (UCC Comment) (application to Division 10); former *Com. Code* § 10103(1)(j), renumbered without substantive change, *Com. Code* § 10103(a)(10) (California Comment)]. Failure to comply with these provisions may subject the lessor/secured party to a risk of losing the property to a subsequent claimant [**see** *Com. Code* § 9301 *et seq.*]. For further discussion of security interests, see § 53.11[1].

1. Determine whether lease contains outright grant of security interest.

NOTE:

A "security interest" is an interest in personal property or fixtures that secures payment or performance of an obligation [*Com. Code* § 1201(b)(35); **see** Ch. 42, ***Secured Transactions***].

2. Determine whether lease agreement implicitly creates a security interest [*Com. Code* §§ 1201(b)(35), 1203(b); *see* *Com. Code* § 1203(c) (enumerated factors which do not necessarily create security interest); *see also* § 53.11[1]]:

a. Is consideration paid by lessee to lessor for right to possession and use of goods an obligation for term of lease that is not subject to termination by lessee?

b. If answer to (a), *above*, is yes, then do any of following conditions apply [*see* *Com. Code* § 1203(b)(1)-(4)]?

(1) Is original term of lease equal to or greater than remaining economic life of goods [see *Com. Code* § 1203(e) (determination of "remaining economic life")]?

(2) Is lessee required to renew lease for remaining economic life of goods or required to become owner of goods [see *Com. Code* § 1203(e)]?

(3) Does lessee have option to renew lease for remaining economic life of goods for no additional consideration or nominal additional consideration on compliance with lease agreement [see *Com. Code* § 1203(d) (discussion of "additional consideration")]?

(4) Does lessee have option to become owner of goods for no additional consideration or nominal additional consideration on compliance with lease agreement [see *Com. Code* § 1203(d)]?

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionFormationCommercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.118

§ 53.118 Analysis of Equipment Sale and Leaseback

[1] Determination of Benefits of Transaction

1. Determine whether equipment sale and leaseback would present needed business benefits for seller/lessee, such as:

- a. Extraction of working capital from assets, which then can be used for purposes other than equipment acquisition.
- b. Possible improvement of balance sheet, depending on circumstances and past accounting practices.
- c. Cash flow management because costs of leased equipment can be fixed and predicted.
- d. Easy and usually cost-free replacement of equipment that becomes obsolete or deteriorated (because buyer/lessor bears related risk).
- e. Possibility of hedging costs against inflation.

2. Determine whether buyer/lessor would receive benefit from equipment purchase and leaseback to seller, such as:

- a. Possibility of recovering entire investment during lease term, and receiving property with positive value after lease term; and
- b. Long-term investment, in some cases with relatively low risk of loss.

[2] Determination of Tax Qualification and Benefits

1. Determine whether sale portion of sale and leaseback transaction [see § 53.21] can present all or most of factors that Tax Court uses to conclude that benefits and burdens of ownership have passed to buyer/lessor [see *Grodt & McKay Realty, Inc. v. Commissioner* (1981) 77 T.C. 1221, 1237-1238 ; *Priv. Ltr. Rul. 9802002*]:

NOTE:

No single factor is dispositive of the issue of whether a sale has taken place. The facts and circumstances determine the importance of each factor [*Priv. Ltr. Rul. 9802002*]. Whether a transaction is a sale, a lease, or a financing arrangement is a question of fact, which must be determined from the intent of the parties as evidenced by their written agreements read in light of the attending facts and circumstances [*Haggard v. Commissioner* (1955) 24 T.C. 1124, 1129 , *aff'd*, 241 F.2d 288 (9th Cir. 1957)] .

- a. Will legal title pass?
- b. Will parties treat transaction as sale?
- c. Will buyer/lessor acquire equity interest in equipment?
- d. Will sale contract create seller/lessee's obligation to deliver equipment (along with title documents, if any), and buyer/lessor's obligation to pay price?
- e. Will buyer/lessor be vested with right of possession?
- f. Will buyer/lessor pay any property taxes due after transaction?
- g. Will buyer/lessor bears risk of economic loss or physical damage to equipment?
- h. Will buyer/lessor receive profit, if any, from operation, retention, and sale of equipment?

2. Determine whether leaseback portion of transaction can present all or most of factors that Tax Court uses to conclude that lease is genuine [see *Torres v. Commissioner* (1987) 88 T.C. 702, 720-721 ; *Estate of Thomas v. Commissioner* (1985) 84 T.C. 412 ; *Priv. Ltr. Rul. 9802002*]:

NOTE:

In addition to the eight factors listed above, the following four additional factors must be analyzed because they are specifically relevant in the context of sale-leaseback transactions [*Priv. Ltr. Rul. 9802002*].

- a. Existence of useful life of equipment in excess of leaseback term (so that something of value can be returned to buyer/lessor);

NOTE:

A rule in the financing business is that a leveraged lease [see § 53.10[5]] should be

structured so that the term-end useful life of the equipment will be at least one year and at least 20 percent of the originally projected useful life.

- b. Existence of term-end buy-back option at fair market value (instead of discounted price);

NOTE:

The seller/lessee may have a term-end option, but must not have an obligation, to buy back the equipment, at a price that should be not less than the fair market value. (For a leveraged lease [*see* § 53.10[5]], the projected term-end fair market value must be at least 20 percent of the original cost of the equipment [*see* § 53.20[12]].)

- c. Renewal rentals at term-end set at fair market value rate; and

- d. Reasonable possibility that buyer/lessor can recoup investment in equipment from income-producing potential and residual value of equipment.

3. Determine whether seller/lessee's tax benefits from equipment sale and leaseback (for example, deduction of lease payments as business expenses) [*see* § 53.20] would be more useful than tax consequences of continuing to own equipment in question (for example, depreciation deductions).

4. Determine whether buyer/lessor's tax benefits from equipment purchase and leaseback to seller (for example, depreciation deductions) would be more useful than tax consequences of some other investment.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewTax LawFederal Income Tax ComputationGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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B. Preliminary Determinations

21-53 California Legal Forms--Transaction Guide §§ 53.119-53.129

[Reserved]

§§ 53.119[Reserved]



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21-53 California Legal Forms--Transaction Guide § 53.130

§ 53.130 Establishing Basic Elements of Lease Arrangement

1. Contact party or parties who will begin lease negotiations, if appropriate.

NOTE:

Counsel may provide assistance to parties negotiating a lease agreement in a variety of ways. For example, the attorney may analyze the tax advantages and disadvantages of the proposed lease, explain the legal consequences for failing to fulfill contractual obligations, and negotiate the lease on terms that are most favorable to counsel's client.

2. Review lessee's specifications for proposed leased property, if any.

NOTE:

If the lessee has a list of particular specifications for the proposed leased property, counsel should understand those specifications before drafting the agreement.

3. Draft lease commitment letter [see § 53.280], if applicable.

NOTE:

A commitment letter in leasing transactions is used principally to hold the parties to the promise to lease the property and to set forth the main terms of the lease arrangement. A letter is frequently used when the lessor's primary function is to provide the funds to purchase the property. A letter is also used by a dealer or manufacturer if the potential lessee has requested bids from several sources. For further discussion and a form illustrating this type of letter, see § 53.280.

4. Complete or obtain completed lessor's financial survey [see § 53.284].

5. Draft or obtain personal guaranty of lessee [see § 53.282].
6. Draft or obtain consent and waiver by real property owner, landlord, or mortgagee [see § 53.281], if applicable.
7. Draft lease [see §§ 53.140-53.146; see, e.g., §§ 53.200-53.201].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionFormationContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.131

§ 53.131 Obtaining Consents, Orders, and Authorizations

1. If representing corporate party, obtain or have client obtain resolution authorizing lease [*see Corp. Code § 207*; § 53.283].

2. If lessor is guardian or conservator of estate, obtain court order authorizing lease [*see Prob. Code § 2553* (execution of leases); *see also California Forms of Pleading and Practice, Ch. 290A, Guardianship and Conservatorship: Asset Management and Investment, §§ 290A.16[2], 290A.83* (Matthew Bender)].

NOTE:

An order authorizing the execution of a lease must include the minimum rental or royalty. Additionally, the order must set out the lease term, which must be for the time authorized by the court [*Prob. Code § 2554(a)*]. The order may include other terms and conditions [*see Prob. Code § 2554(b)*].

a. Include following in petition seeking court authorization [*see Prob. Code § 2553(b)*]:

(1) General description of property to be leased.

(2) Term, rental, and general conditions of proposed lease.

(3) Advantage to estate to accrue from granting order authorizing lease.

b. If lease is for proposed term greater than 10 years, include facts showing need for longer lease and its advantage to estate [*Prob. Code § 2553(b)*].

3. If lessor is personal representative operating under Independent Administration of Estates Act, draft notice of

proposed action, including [*Prob. Code § 10585* (form and contents of notice); *see Prob. Code §§ 10532* (entrance into contracts), 10536(c) (leasing personal property), 10580 et seq. (notice procedure)]:

NOTE:

A personal representative administering estate property under the Independent Administration of Estates Act must give a notice of a proposed lease of personal property if the lease will not be fully performed within two years. However, if the personal representative has the unrestricted right under the lease to terminate the lease within two years, the notice requirement does not apply [*Prob. Code §§ 10532(b)*, 10536(c)]. The notice may be given using the most current Notice of Proposed Action form prescribed by the Judicial Council [*Prob. Code § 10585(b)*]. If that form is not used, the notice must be in substantially the same form as that prescribed by the Judicial Council [*Prob. Code §§ 10585(c)*]. For further discussion of the Independent Administration of Estates Act, see Ch. 65, **Executors** .

- a. Personal representative's name and mailing address.
 - b. Name and telephone number of person to call for more information.
 - c. Specific nature of proposed action.
 - d. Date on or after which proposed action is to be taken.
4. Draft or obtain power of attorney for agent to execute any lease that is required to be written [*see Civ. Code § 2309*; *see Ch. 34A, Prelease Forms*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.132

§ 53.132 Preparing and Executing Lease

1. Draft appropriate type of lease [*see* §§ 53.140-53.146]:

NOTE:

A complete lease agreement may be drafted and delivered as an offer [*see* *Com. Code* §§ 10205, 10206]. For discussion and alternative provisions for making an offer to lease, see § 53.210.

a. General commercial lease [*see* § 53.200].

b. Finance lease [*see* § 53.201].

NOTE:

For discussion of motor vehicle leases, including forms for closed-end and open-end vehicle leases, see Ch. 47, ***Automotive Financing and Vehicle Leasing***.

2. Have parties execute lease.

a. If property to be leased belongs to partnership, partner possessing authority to bind partnership must sign [*see* *Corp. Code* § 16301].

b. If either party is a corporation, person empowered by corporate bylaws or resolution of board of directors must sign [*see* *Corp. Code* §§ 312, 313; *see also* *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal. 4th 754, 786-787, 98 Cal. Rptr. 2d 1, 3 P.3d 286 (interpreting *Corp. Code* § 313 in context of real property lease agreement and holding that signature of one person is sufficient to bind corporation if he or she holds corporate offices in both "operational group" and "financial group")

described in that statute)].

c. If property to be leased belongs to limited liability company, member (or officer, if any) empowered by articles of organization, operating agreement, or as determined by manager or members to bind company, must sign [*see Corp. Code § 17154(a), (c)*].

3. Prepare sufficient copies of lease and any accompanying schedules:

- a. One copy each for lessee and lessor.
- b. One copy each for counsel of lessee and lessor.
- c. Additional copies, including file copies, as required.

4. If necessary, prepare and file official financing statement in connection with lease [*see Com. Code § 10301* (California Comment); *Com. Code § 10309* (leases of fixtures may require filing of financing statement to secure lessor's priority); *see also Com. Code § 9505* (financing statements covering leased goods); § 53.163].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionFormationCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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21-53 California Legal Forms--Transaction Guide §§ 53.133-53.139

[Reserved]

§§ 53.133[Reserved]



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21-53 California Legal Forms--Transaction Guide § 53.140

§ 53.140 Parties, Description of Leased Property, and Term of Lease Provisions

NOTE:

This Drafting Guide lists the basic elements of a personal property lease agreement. Counsel should carefully analyze the parties' resources and goals before drafting the lease to ensure that the final agreement reflects the particular facts and circumstances at hand.

For further discussion of the drafting of basic contracts, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions*** .

1. Draft introductory provision stating [*see, e.g., §§ 53.200[2], 53.201[2], introductory paragraph*]:

NOTE:

All contracts must contain the consent of parties with sufficient capacity to contract [*Civ. Code § 1550; see § 53.131*]. If either or both of the parties is a business entity, the contract should also include the entity's form of organization and its principal place of business.

- a. Names of parties.
- b. Legal and/or marital status.
- c. Addresses.

2. Insert description of goods sufficient to specifically identify property, including [*see, e.g., §§ 53.200, P 1.01, 53.201, P 2*]:

NOTE:

To be enforceable under the Commercial Code Statute of Frauds, a lease contract must contain a description sufficient to describe the goods [*see Com. Code § 10201(a), (b); see also § 53.12[5]*].

- a. Nature of leased property.
- b. Serial number.
- c. Model number.
- d. For lease of fixtures, include description of real property on which leased goods will be affixed [*see Com. Code § 10309*].

NOTE:

A legal description of the property to which the fixtures will be affixed may help prevent future conflicts over the ownership rights and use of the property [*see §§ 53.16[4] (fixtures), 53.281 (consent/waiver by real property owner)*].

3. Include provision stating time when identification of goods occurs [*see Com. Code § 10217 (identification); see, e.g., § 53.252*].

4. Include appropriate provision stating term of lease:

- a. Fixed nonrenewable term [*see, e.g., § 53.201[2], P 11*].
- b. Fixed term with provision for renewal [*see, e.g., §§ 53.200[2], P 2.01, Schedule A, P 6; § 53.201[2], P 13*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionFormationCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.141

§ 53.141 Payment of Rent, Taxes, Insurance, and Other Expense Provisions

1. Include appropriate provision stating amount, frequency, and place of rental payment:
 - a. General provision with reference to attached schedule [*see, e.g., §§ 53.200[2], Article 3; 53.201[2], P 12*].
 - b. Complete payment provision stating total monthly amount due.
 - c. Provision allowing for adjustment of rent [*see, e.g., § 53.201[2], P 7*].
2. Include provision for payment of security deposit [*see, e.g., § 53.200[2], P 3.02*].
3. Include appropriate provision stating amounts and parties responsible for payment of:
 - a. Insurance [*see, e.g., §§ 53.200[2], Article 12; 53.201[2], P 18*];
 - b. Taxes [*see, e.g., §§ 53.200[2], P 10.01; 53.201[2], P 19*]; and
 - c. Maintenance and repair expenses [*see, e.g., §§ 53.200[2], P 6.01; see also § 53.250*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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21-53 California Legal Forms--Transaction Guide § 53.142

§ 53.142 Use, Control, and Risk of Loss of Leased Property

1. Include provision limiting use of property, if appropriate [*see, e.g., § 53.200[2], Article 7*].
2. State provisions preserving lessor's rights in property, e.g.:
 - a. Right to label [*see, e.g., §§ 53.200[2], P 4.02; 53.201[2], P 14*].
 - b. Right to inspect [*see, e.g., § 53.200[2], P 8.01*].
3. Set forth provisions governing risk of loss of goods:
 - a. Risk of loss absent breach [*see § 53.234*].
 - b. Risk of loss in event of breach [*see § 53.235*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionCasualty & Risk of Loss



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21-53 California Legal Forms--Transaction Guide § 53.143

§ 53.143 Warranty Rights

NOTE:

For discussion and alternative provisions covering warranty rights, see §§ 53.220-53.222.
Counsel should choose among the following provisions, as appropriate.

1. Include provision assigning lessor's warranty rights [*see, e.g., § 53.200[2], P 9.01*].
2. Include provision disclaiming any and all warranty rights [*see, e.g., § 53.201[2], P 3*].
3. Include provision excluding all express warranties [*see, e.g., § 53.220[2]*].
4. Include provision limiting or modifying lessee's warranty rights, dealing with:
 - a. Implied warranties [*see, e.g., § 53.221[2]*].
 - b. Warranties against interference or infringement [*see, e.g., § 53.222[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionWarranties



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21-53 California Legal Forms--Transaction Guide § 53.144

§ 53.144 Remedial Provisions

1. Include appropriate provision stating actions constituting default [*see, e.g., §§ 53.200[2], P 16.01; 53.201[2], P 24*].
2. Include appropriate provision governing lessor's remedies [*see, e.g., §§ 53.200[2], P 17.01; 53.201[2], PP 24, 25*].
3. Include, if desired, provision allowing for lessee's election to "cover" [*see § 53.230*].

NOTE:

"Cover" refers to the remedy allowing the lessee to obtain substitute goods on the lessor's breach [*see Com. Code § 10518*].

4. Include appropriate provision governing payment of enforcement expenses [*see, e.g., §§ 53.200[2], P 17.02; 53.201[2], P 26*].

NOTE:

For discussion of provisions for payment of attorneys' fees and costs of enforcement, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

5. Include, if desired, liquidated damages provision [*see § 53.232*].
6. Include provision for indemnification of lessor [*see, e.g., §§ 53.200[2], Article 13; 53.201[2], P 21*].
7. Include provision limiting damages or remedies [*see § 53..231*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)DefaultRemediesCommercial Law (UCC)Leases (Article 2A)Formation &
ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.145

§ 53.145 Assignment of Lease Interest

NOTE:

For discussion of the assignability of contracts generally, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions*** .

1. Include provision concerning lessee's right to assign leasehold interest [*see, e.g., § 53.200[2]*, P 15.03].
2. Include provision concerning lessor's right to assign leasehold interest [*see, e.g., § 53.200[2]*, P 15.01; 53.201[2], P 22].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Lease ContractsAlienability & Title



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21-53 California Legal Forms--Transaction Guide § 53.146

§ 53.146 General Lease Provisions

1. Include provision governing service of notice [*see, e.g., §§ 53.200[2], P 20.01; 53.201[2], P 28*].

NOTE:

For discussion of the manner of giving notice between the parties, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions*** .

2. Include provision binding heirs and successors of parties to lease [*see, e.g., §§ 53.200[2], P 24.01; 53.201[2], P 32*].

NOTE:

For discussion of a provision governing the effect of the contract on successors and assigns, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions*** .

3. Include provision making time of essence [*see, e.g., §§ 53.200[2], P 25.01; 53.201[2], P 33*].

4. Include provision governing subsequent amendments to lease [*see, e.g., § 53.200[2], P 21.01*].

NOTE:

For discussion and a form illustrating an agreement for the subsequent modification of a lease, see § 53.287.

5. Include provision governing effect of invalidity of portions of lease [*see, e.g., §§ 53.200[2], P 27.01; 53.201[2], P 35*].

NOTE:

For discussion of clauses governing severability, see Ch. 75, ***Formation of Contracts and***

Standard Contractual Provisions .

6. Include provision governing waiver of breach [*see, e.g.,* § 53.200[2], P 17.04].
7. Include provision governing use of arbitration to settle disputes, if desired [*see, e.g.,* §§ 53.200[2], P 26.01; 53.201[2], P 34].

NOTE:

For general discussion of arbitration clauses, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions .***

8. Include provision stating that lease contains parties' complete agreement [*see, e.g.,* § 53.200[2], P 22.01].

NOTE:

For detailed discussion of these types of provisions, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions .***

9. Include provision stating jurisdiction of law governing lease agreement [*see, e.g.,* §§ 53.200[2], P 23.01; 53.201[2], P 31].

NOTE:

For discussion of choice of law clauses, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions .***

10. Provide space for signature of parties [*see, e.g.,* § 53.200[2]].

NOTE:

For discussion of execution and signature clauses, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions .***

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview



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21-53 California Legal Forms--Transaction Guide §§ 53.147-53.159

[Reserved]

§§ 53.147[Reserved]



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E. Related and Subsequent Procedures

21-53 California Legal Forms--Transaction Guide § 53.160

§ 53.160 General Procedures and Notices Concerning Lease

1. Give notice on parties' behalf to supplier of finance lease contract [*see* § 53.264].

NOTE:

Under *Com. Code § 10209*, any modification or rescission of a supply contract by the supplier and the lessor is effective between the supplier and the lessee unless, before the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract [*Com. Code § 10209(c)*]. For further discussion and a form for giving this notice, see § 53.264.

- a. Complete execution of finance lease transaction [*see* § 53.201].
- b. Draft notice, including:
 - (1) Name and address of supplier.
 - (2) Name of lessor.
 - (3) Date of finance lease.
 - (4) Statement that lessee has entered into finance lease with lessor.
- c. Serve notice.

2. Give lessee's notice of delivery, installation, and acceptance to lessor [*see* § 53.261].

NOTE:

Generally, under the terms of a finance lease, the lessee is required to provide the lessor with notice of his or her acceptance of the leased goods provided by the supplier [*see* § 53.10[2]].

a. Ascertain date of proper delivery, installation and acceptance.

b. Draft notice, including:

(1) Name and address of lessor and lessee.

(2) Date of delivery, installation, and acceptance.

c. Serve notice.

3. Give offeree's notice of acceptance to offeror after beginning of performance [*see* § 53.267]:

NOTE:

When the beginning of the requested performance constitutes a reasonable mode of acceptance, the offeree must notify the offeror when he or she begins performance. An offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance [*Com. Code* § 10206(b)]. For further discussion and a form for the notice, see § 53.267.

a. Determine completeness of offer.

b. Ascertain whether beginning of performance constitutes reasonable mode of acceptance.

c. Draft notice, including:

(1) Name and address of offeror.

(2) Statement of acceptance of offer.

(3) Statement of performance of acts constituting acceptance.

d. Serve notice.

4. Give party's notice of retraction of waiver of executory performance [*see* § 53.265].

NOTE:

A waiver of an executory portion of a contract may be retracted on reasonable notice that strict performance of any waived term will be required. However, an attempt to retract a waiver is ineffective if a retraction would be unjust because of a material change of position made in reliance on the waiver [*Com. Code* § 10208(d)]. For further discussion and a form for the notice, see § 53.265.

a. Ascertain whether party has waived executory portion of lease.

b. Ascertain whether nonwaiving party has made material change of position in reliance on waiver.

c. Draft notice, including:

- (1) Name and address of nonwaiving party.
- (2) Statement that strict performance of waived terms will be required.

d. Serve notice.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionFormationCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral OverviewCommercial Law (UCC)Leases (Article 2A)PerformanceContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.161

§ 53.161 Procedures and Notices Concerning Default Under Lease

1. If applicable, give party's demand for assurances [see § 53.286].

NOTE:

A lease contract imposes an obligation on each party not to impair the other's expectation of receiving due performance [Com. Code § 10401(a)]. If reasonable grounds for insecurity arise with respect to the performance of either party, the insecure party may make a written demand for adequate assurance of due performance. Until the insecure party receives that assurance, if commercially reasonable, the insecure party may suspend any performance for which he or she has not already received the agreed return [Com. Code § 10401(b)]. For further discussion and a form illustrating a demand for assurances, see § 53.286.

- a. Determine whether sufficient grounds for insecurity exist.

NOTE:

Common events creating insecurity include the death or incapacity of either party, the lessee's insolvency or equivalent, and the damage or destruction of the premises where the property is kept.

"Equivalents of bankruptcy" include assignments for the benefit of creditors and other creditors' agreements. For discussion, see Ch. 78, **Creditors' Agreements: Nonbankruptcy Alternatives** .

- b. Draft demand, including:

- (1) Name and address of party to whom demand is directed.
- (2) Grounds for demanding assurance of lease performance.
- (3) Specification of means for providing assurance to demanding party.
- (4) Date on which contract is considered repudiated.

NOTE:

A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed 30 days after receipt of a demand by the other party [*Com. Code § 10401(c)*].

c. Serve notice.

2. Give notice of lessee's intent to deduct damages [*see § 53.266*].

NOTE:

Subject to the Commercial Code provisions governing finance leases that are not consumer leases [*see Com. Code § 10407*; § 53.10[2]], a lessee has the right to deduct damages resulting from any default under the lease contract. The lessee must notify the lessor of his or her intent to do so and then may deduct all or part of the damages from any part of the rent still due under the same lease contract [*Com. Code § 10508(f)*]. For further discussion and a form for the notice, see § 53.266. For discussion of lessee's additional remedies on the lessor's default, see § 53.15[2] (lessee's remedies).

a. Ascertain whether lessor is in default for any of following reasons [*see Com. Code § 10508(a)*]:

- (1) Lessor has failed to deliver goods in conformity with lease contract [*see Com. Code § 10509*].
- (2) Lessor has repudiated lease contract [*see Com. Code § 10402*].
- (3) Lessee has rightfully rejected the goods [*see Com. Code § 10509*].
- (4) Lessee has justifiably revoked acceptance of the goods [*see Com. Code § 10517*].

b. Ascertain amount of rent still owing under lease contract.

c. Draft notice, including:

- (1) Name and address of lessor.
- (2) Statement of lessee's intent to deduct damages from outstanding rent obligation.
- (3) Amount of deduction.

d. Serve notice.

3. Give lessee's notice of default discovered after acceptance [see § 53.270].

NOTE:

In a lease other than a consumer lease [*see Com. Code § 10516(f)*], if a tender of leased goods has been accepted, within a reasonable time after the lessee discovers or should have discovered any default, the lessee must notify the lessor and the supplier, if any, of the default, or be barred from any remedy against the party not notified [*Com. Code § 10516(c)(1)*]. For further discussion and a form illustrating this notice, see § 53.270.

a. Ascertain extent of default.

b. Draft notice, including:

(1) Name and address of lessor or supplier.

(2) Cause of default [*see Com. Code § 10508(a)*; *see also* (2)(a), *above*].

(3) Statement that lessee was not aware of condition of default at time of acceptance.

c. Serve notice.

4. Give lessee's notice of rejection of goods [see § 53.268].

NOTE:

Generally, if the goods or the tender or delivery fail in any respect to conform to the lease contract, the lessee may reject or accept the goods, or accept any commercial unit or units and reject the remainder of the goods [*Com. Code § 10509(a)*; *see Com. Code § 10510* (nonconformity and default under installment lease contract)]. In order to effectively reject the goods, a lessee must do so within a reasonable time after tender or delivery of the goods. In addition, the lessee must seasonably notify the lessor [*Com. Code § 10509(b)*]. For further discussion and a form illustrating this notice, see § 53.268.

a. Determine whether goods or tender or delivery fail to conform to lease contract.

b. Determine whether to accept or reject nonconforming goods.

c. If rejecting nonconforming goods, draft notice of rejection, including:

(1) Name and address of lessor.

(2) Statement of lessee's rejection of goods.

(3) Cause for rejection.

NOTE:

In rejecting goods, a lessee's failure to state a particular defect that is ascertainable by reasonable inspection precludes the lessee from relying on the defect to justify rejection or to establish default (1) if, stated seasonably, the lessor or supplier could have cured the default [*see Com. Code § 10513* (cure; replacement)]; or (2) between merchants, if the

lessor or supplier after rejection has made a request in writing for a statement of all defects on which the lessee intends to rely [*Com. Code § 10514(a)*; **see** § 53.269].

(4) Request for return shipping or disposition instructions [*see* § 53.269; *see* (5), *below*].

d. Serve notice.

5. Give lessor's notice of request for statement of defects on which lessee intends to rely in rejecting goods [*see* § 53.288].

NOTE:

Between merchants, when the lessor or supplier makes a request in writing for a full and final written statement of all defects on which the lessee proposes to rely to justify rejection or to establish breach, the lessee must comply on penalty of waiver of the alleged unspecified defects [**see** *Com. Code § 10514(a)(2)*].

a. Determine whether lessee has rejected goods.

b. Determine whether lease transaction is between merchants [*see Com. Code § 2104(3)* ("between merchants" defined)].

c. Draft demand, including:

(1) Name and address of lessee.

(2) Statement requesting lessee's justification for rejection of goods.

d. Serve notice.

6. Give notice to rejecting lessee of lessor's shipping instructions [*see* § 53.269].

NOTE:

On receipt of a lessee's notice of rejection of leased goods, a lessor must provide disposition instructions within a reasonable time. Failure to provide instructions allows the lessee several options for disposition of the goods [**see** *Com. Code §§ 10511, 10512(a)*]. For further discussion and a form illustrating this notice, *see* § 53.269.

a. Determine appropriate manner of return shipping or disposition of rejected goods.

b. Draft notice, including:

(1) Name and address of lessee.

(2) Date of receipt of rejection notice.

(3) Specific instructions for return shipping, including:

(a) Address of return shipment location.

(b) Name or type of carrier to handle shipping.

(4) Statement that instructions do not imply admission of fault.

c. Serve notice.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)DefaultGeneral OverviewCommercial Law (UCC)Leases (Article 2A)DefaultLessee & Lessor DefaultCommercial Law (UCC)Leases (Article 2A)DefaultRemedies



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 53 PERSONAL PROPERTY LEASING
PART III. TRANSACTION GUIDE
E. Related and Subsequent Procedures

21-53 California Legal Forms--Transaction Guide § 53.162

§ 53.162 Procedures and Notices Concerning Modification of Lease Contract

1. Make modification of lease contract [see § 53.287].

NOTE:

No consideration is required to support the modification of personal property lease contracts [*Com. Code § 10208(a)*]. A signed lease agreement that forbids modification except by a signed writing may not be otherwise modified. However, except in transactions between merchants, a requirement for modification only by a signed writing on a form supplied by a merchant must be separately signed by the other party [*Com. Code § 10208(b)*]. For further discussion of modification, see § 53.12[6]. For a notice that may be used to modify a lease contract, see § 53.287.

- a. Ascertain need for modification of original lease agreement.
- b. Determine if original lease agreement restricts modification.

NOTE:

A signed lease agreement that forbids modification except by a signed writing may not be otherwise modified. However, except in transactions between merchants, a requirement for modification only by a signed writing on a form supplied by a merchant must be separately signed by the other party [*Com. Code § 10208(b)*].

- c. Draft modification agreement, including:

- (1) Names and addresses of lessee and lessor.

(2) Statement of reason(s) for modification.

(3) Modified and/or additional terms.

d. Execute and provide copies of agreement, as appropriate.

2. Give lessor's or supplier's notice of material or indefinite delay [see § 53.262].

NOTE:

Notice of a delay, nondelivery, or allocation must be given by the lessor or, in the case of a finance lease, the supplier [Com. Code § 10405(3)]. Proper compliance with the notification requirement will prevent the lessor's or supplier's default for delay or nondelivery under specified circumstances [see Com. Code § 10405(1)]. For further discussion and a form for giving notice, see § 53.262.

a. Ascertain reasons for delay or nondelivery.

(1) Occurrence of contingency, the nonoccurrence of which was basic assumption on which lease was made.

(2) Good faith compliance with applicable government regulation or order.

b. Ascertain if partial performance is possible.

NOTE:

If a lessor's or supplier's ability to perform is only partially affected, he or she must fairly and reasonably allocate production and deliveries among his or her customers and notify the customers of the allocation [Com. Code § 10405(2), (3)].

c. Draft notice, including:

(1) Name and address of lessee and/or lessor to whom notice is directed.

(2) Grounds for notice:

(a) Delay.

(b) Nondelivery.

(3) Cause for delay or nondelivery [see (a), above].

(4) If applicable, extent of allocation.

d. Serve notice [see Com. Code § 10405(3)].

(1) If finance lease, supplier must serve both lessor and lessee.

(2) If other lease, lessor must serve lessee.

3. Give lessee's notice of termination or modification [see § 53.263].

NOTE:

In response to a notice of delay, nondelivery, or allocation, a lessee may terminate the agreement as to the goods involved, or (except in a finance lease) modify the agreement by accepting the allocation [*see Com. Code § 10406*]. For further discussion and a notice complying with the statutory requirements, see § 53.263.

a. Ascertain specific purpose of notice received.

(1) Material delay or nondelivery.

(2) Allocation.

b. Determine appropriate response.

(1) Termination.

(2) Modification by acceptance of allocation.

c. Draft response notice, including:

(1) Name and address of lessor.

(2) Manner of response:

(a) Termination as to goods involved [*see Com. Code § 10505(b)*].

NOTE:

If termination is being elected under an installment lease contract, the lessee may terminate with respect to all of the goods under the contract if the the value of the whole lease contract is substantially impaired [*Com. Code § 10406(a)*].

(b) Modification by acceptance of allocation.

d. Serve notice on lessor.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.163

§ 53.163 Use of Financing Statement

NOTE:

A lessor of personal property who is concerned about whether the transaction creates a lease or a security interest may file a protective financing statement (in case the transaction is later deemed a secured transaction disguised as a lease) [*see Com. Code § 10301* (California Comment); § 53.117].

Leases of "fixtures" [*see Com. Code § 10309(a)(1)* (definition)] may require the filing of a financial statement (fixture filing) to secure the lessor's priority over a conflicting interest of an encumbrancer or owner of real estate [*see Com. Code § 10309(d)*].

For further discussion of the UCC Official Financing Statement, see *Ch. 42, Secured Transactions*, § 42.211[2] (Financing Statement, Form UCC-1). For general discussion of official financing statements and secured transactions, also see *Ch. 42, Secured Transactions* .

1. Determine whether financing statement is necessary:
 - a. To protect lessor's interest; or
 - b. Because leased goods are fixtures.
2. Obtain and complete financing statement [*see Com. Code § 9502* (formal requisites of financing statements)].
3. File financing statement with appropriate office [*see Com. Code § 9501* (place of filing)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral Overview



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21-53 California Legal Forms--Transaction Guide §§ 53.164-53.199

[Reserved]

§§ 53.164[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 53 PERSONAL PROPERTY LEASING
PART IV. FORMS
A. Complete Lease Forms

21-53 California Legal Forms--Transaction Guide § 53.200

§ 53.200 General Commercial Equipment Lease

[1] Comment

[a] Use of Form

This form includes standard lease provisions which generally apply to all types of personal property used in a commercial setting. The form is designed to be used with a separate attached schedule that contains the provisions likely to vary from transaction to transaction [*see [c], below*]. By executing additional schedules, a lessee may lease equipment on a continuing basis without having to enter into a new lease agreement. The attached schedule specifies when the lease term ends for each individual leased item.

This lease is designed to provide maximum protection for the lessor, although several lessee-oriented alternative provisions are provided [*see, e.g., P 12.01 of form*]. Counsel for the lessee should keep in mind that leases are contracts subject to negotiation. Often, commercial lessees will have significant bargaining power that can be reflected in the lease. For example, the lessee may be able to insist on meaningful warranties that will pass with the lease to any subsequent holder.

[b] Application of Commercial Code Division Governing Leases of Personal Property

All leases first made or that first become effective between the parties on or after January 1, 1990, are subject to Division 10 of the California Commercial Code [*Com. Code § 10600; see Com. Code §§ 10101-10600*]. Subject to the Commercial Code Statute of Frauds [*see Com. Code § 10201*], a lease contract may be made in any manner sufficient to show agreement, including conduct by both parties that recognizes the existence of a lease contract [*Com. Code § 10204(a)*]. The Commercial Code's provisions will serve to interpret the parties' agreement when the agreement fails to adequately establish their intent. For further discussion of Commercial Code provisions specifically applicable to personal property leasing transactions, see § 53.12.

[c] Contractual Validity of Incorporated Schedule

This form includes a separate schedule that contains specific information concerning the terms of the lease. Additional documents may be incorporated into a contract by reference. Although the incorporated document does not need to be physically attached to the contract [*King v. Larsen Realty, Inc. (1981) 121 Cal. App. 3d 349, 357, 175 Cal. Rptr. 226*], the incorporating reference must be clear and unequivocal, and the terms of the incorporated document must be known or easily available to the parties [*Williams Constr. Co. v. Standard-Pacific Corp. (1967) 254 Cal. App. 2d 442, 454, 61 Cal. Rptr. 912*]. For further discussion of incorporation by reference, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[d] Statement of Parties' Intent to Create Lease

Article 4 of this form states that the lessor is the owner of the property and the parties have no intention of effecting an installment sale of the leased property or of creating a security interest in it. Because the intent of the parties is one factor to be considered in determining whether a transaction is a lease or a sale, the inclusion of this clause is recommended [see *Rev. Rul. 55-540* , § 4.04, *1955-2 C.B. 39*]. However, if the transaction strays too far from the guidelines established under the Commercial Code or by the Internal Revenue Service, the recital will not save the lease [see § 53.11].

[e] Subordination

The subordination provision contained in Paragraph 4.03 may be required by the holder of a security interest in the property other than the lessor, usually a party who provided the financing that allowed the lessor to acquire the property. If the property is currently unencumbered in the hands of the lessor, the lessee may wish to include a provision prohibiting the lessor from creating a security interest in the property for the duration of the lease term. For further discussion of the rights of creditors and subordination of third party interests, see § 53.16.

[f] Expenses and Taxes

Articles 5 and 6 place the burden of operating expenses, repairs, and maintenance on the lessee. For a form provision allowing for the conversion of this form to a full-service lease in which the lessor assumes these obligations, see § 53.250.

Article 10 places the obligation to pay personal property taxes, sales taxes, and other fees and charges on the lessee. If that obligation will be placed on the lessor, this article should be modified accordingly.

[g] Accessions

Paragraph 6.02 contains a provision governing "accessions." Goods are "accessions" when they are installed in or affixed to other goods [*Com. Code § 10310(a)*]. For further discussion of accessions, see § 53.16[5].

[h] Warranties

Article 9 contains a provision for the assignment of any manufacturer, dealer, or supplier warranties possessed by the lessor to the lessee. The lessor may also wish to disclaim any warranties of merchantability or fitness for a particular purpose in this article [see *Com. Code § 10214*; see also § 53.221]. If the lessee selects the property to be leased from a third-party supplier, as is usually the case in a finance lease transaction, the implied warranties of merchantability and fitness for a particular purpose will not apply [see *Com. Code §§ 10212, 10213*; see also § 53.10[2]]. For discussion and an example of warranty disclaimer provisions, see §§ 53.220 and 53.221.

[i] Assignability

Article 15 provides for the free assignability of the lease by the lessor. Under this provision, the lessee agrees not to

raise any claim or defense that the lessee may have against the lessor in an action for unpaid rent by the lessor's assignee. The waiver of defenses by the lessee will enable the lessor to assign the lease more freely. In many situations, the waiver of defenses may be a requirement of the lender who advanced the funds to the lessor to purchase the leased equipment. The assignment is the lender's security for repayment of the loan by the lessor. This clause does not prevent the lessee from seeking redress directly from the lessor.

[j] Default

Article 16 specifies the acts and omissions that will constitute the lessee's default. Clause 2, making the initiation of bankruptcy or other insolvency proceedings an event of default, will not be recognized by a court under a federal bankruptcy proceeding [*see 11 U.S.C. § 365(e); see also § 53.17* (leased property in bankruptcy)]. However, these clauses continue to be used partly due to their traditional use, and also to assure protection for the lessor in the event the law is changed.

[k] Choice of Law

This form contains a clause designating the jurisdiction in which the agreement is created and under which the agreement will be interpreted [*see Article 23*]. The choice of law by the parties to a consumer lease [*see Com. Code § 10103(a)(5)* (consumer lease defined as one for personal, family, or household purpose)] is not enforceable if the law chosen is that of a jurisdiction other than one in which (1) the lessee resides at the time the lease agreement becomes enforceable or within 30 days of that date, (2) the goods are to be used, or (3) the lease is executed by the lessee [*Com. Code § 10106(a)*].

In many business lease transactions it is not unusual for the parties and leased property to be situated in different states. Although this form is drafted solely under California law and presumes the parties and leased property to be located in California, unless the Commercial Code provides otherwise, it may be modified to conform to the law of any state to which the parties agree. For further discussion of the jurisdictional rules in the Commercial Code, see § 53.12[7].

[2] FORM

General Commercial Equipment Lease

LEASE OF PERSONAL PROPERTY

_____ [name(s)] (Lessor), located at _____ [address], leases to
 _____ [name(s)] (Lessee), _____ [address], the following [*general description of equipment, e.g., machinery or furnishings*] ("the property") on the following terms and conditions:

ARTICLE 1: DESCRIPTION OF EQUIPMENT LEASED

Property Description in Schedule

1.01. The property to be leased is described in the attached Schedule A.

ARTICLE 2: TERM OF LEASE

Initial Term

2.01. The initial term of this Lease is stated in the attached Schedule A.

ARTICLE 3: PAYMENTS BY LESSEE

Rental Payments

3.01. The total amount of monthly rental payments is stated in the attached Schedule A. Lessee will make rental payments at Lessor's address as set forth above or at any other place that may be designated by Lessor or its assignees (see Paragraph 20.01 of the Lease regarding change of address). All rental payments are due and payable in advance on the [specify, e.g., first] day of each month after the execution of this Lease during the term of this Lease. Any rental payment not made by Lessee within [specify, e.g., ten] days of its due date will be subject to a late charge of [specify, e.g., five] percent of the amount due.

Security Deposit

3.02. As security for the prompt and full payment of rent and the faithful and timely performance of all provisions of this Lease, Lessee will pledge and deposit with Lessor the amount set forth in the attached Schedule A (the Security Deposit). If any default by Lessee occurs in the performance of any covenants in this Lease, Lessor will have the right, but will not be obligated, to apply the Security Deposit to the curing of the default. This application by Lessor will not be a defense to any action by Lessor arising out of the default. On demand, Lessee will restore the Security Deposit to the full amount set forth in Schedule A. On the expiration or earlier termination of this Lease, provided Lessee has paid all of the required rent and fully performed all of the other provisions of this Lease, Lessor will return to Lessee any remaining balance of the Security Deposit.

ARTICLE 4: OWNERSHIP

No Sale or Security Interest Intended

4.01. This agreement constitutes a lease or bailment of the property described and is not a sale or the creation of a security interest. Lessee will not have, or at any time acquire, any right, title, or interest in the property, except the right to possession and use as provided for in this Lease. Lessor will at all times be the sole owner of the property.

Labels

4.02. Lessor will have the right to place and maintain on the exterior or interior of each piece of property covered by this Lease the following inscription: [specify inscription showing lessor's ownership]. If this Lease is assigned by Lessor, the assignee will have the same right. Lessee will not remove, obscure, or deface the inscription or permit any other person to do so.

Subordination

4.03. The rights of Lessee under this Lease will be subject to and subordinate to certain security interests in the property held by _____ [name of any party holding prior security interest in the property].

ARTICLE 5: OPERATING EXPENSES

5.01. Lessee will be responsible for all expenses, including but not limited to [specify expenses], and all other charges in connection with the operation of the property.

ARTICLE 6: MAINTENANCE AND REPAIRS

Lessee's Responsibility

6.01. Lessee will assume all obligation and liability with respect to the possession of the property, and for its use, condition, and storage during the lease term. Lessee will, at Lessee's own expense, maintain the property in good mechanical condition and running order, allowing for reasonable wear and tear. The rent on any item will not be prorated or abated while the property is being serviced or repaired. Lessor will not be under any liability or obligation in any manner to provide service, maintenance, repairs, or parts for the leased property.

Accessions

6.02. All installations, replacements, and substitutions of parts or accessories with respect to any of the property will constitute accessions and will become part of the property and will be owned by Lessor.

ARTICLE 7: USE OF PROPERTY

Rights of Lessee

7.01. Lessee will be entitled to the absolute right to the use, operation, possession, and control of the leased property during the term of this Lease, provided Lessee is not in default of any provision of this Lease or subject to any security interest Lessor may have given or may give to any third party during the term of this Lease. Lessee will employ and have absolute control, supervision, and responsibility over any operators or users of the property.

Duties of Lessee

7.02. Lessee will use the leased property in a careful and proper manner and will not permit any leased property to be operated or used in violation of any applicable federal, state, or local statute, ordinance, rule, or regulation relating to the possession, use, or maintenance of the property. Lessee agrees to reimburse Lessor in full for all damage to the property arising from any misuse or negligent act by Lessee, its employees, and its agents. Lessee will indemnify and hold Lessor harmless from any liabilities, forfeitures, or penalties for violations of any federal, state, or local statute, rule, or regulation.

Commercial Use Limitation

7.03. Lessee warrants that the leased property will be used for commercial or business purposes only.

ARTICLE 8: LESSOR'S RIGHT OF INSPECTION AND REPAIR

Inspection and Repair

8.01. Lessor, at its discretion during Lessee's regular business hours and with _____ days [or hours] prior notice to Lessee, will have the right to enter, for the purpose of inspection, the premises where the property is located or used. If, in the sole opinion of Lessor, any property covered by this Lease is not being properly maintained, Lessor will have the right, but not the obligation, to have it repaired or maintained at a service facility at the expense of

Lessee.

ARTICLE 9: ASSIGNMENT OF LESSOR'S WARRANTIES

Warranty Assignment

9.01. Lessor will assign to Lessee all manufacturer, dealer, or supplier warranties applicable to the property to enable Lessee to obtain any warranty service available for the property. Lessor appoints Lessee as Lessor's attorney-in-fact for the purpose of enforcing any warranty. Any enforcement by Lessee will be at the expense of Lessee and will in no way render Lessor responsible to Lessee for the performance of any of the warranties.

ARTICLE 10: TAXES AND OTHER CHARGES

Taxes

10.01. Lessee will be liable for and pay on or before their due dates, all sales taxes, use taxes, personal property taxes, business personal property taxes, and assessments, or other direct taxes or governmental charges imposed on the property, levied against it, or assessed in connection with the lease. The term "direct taxes" excludes the Lessor's income taxes and franchise taxes, but includes all other taxes imposed by any governmental authority. Lessee will promptly notify Lessor and send Lessor copies of any notices, reports, or inquiries received by Lessee from taxing authorities concerning delinquent taxes or other assessments.

Other Charges

10.02. Lessee will be liable for any fees for licenses, registrations, permits, and other certificates that may be required for the lawful operation of the equipment. All certificates of title will initially be applied for in the State of California and will be issued and maintained in the name of Lessor, as owner. They will be delivered to Lessor, and Lessee will pay all expenses in relation to them.

Taxes Paid by Lessor

10.03. If any taxing authority requires that a tax, as set forth in Paragraph 10.01 of this Lease, be paid to the taxing authority directly by Lessor, Lessee will, on notice from Lessor, pay to Lessor the amount of the tax, at the time the next rent installment is due.

Contested Taxes

10.04. Lessee will have the right at Lessee's own expense to contest the validity or amount of any tax referred to in Paragraph 10.01 of this Lease. Lessee will pay the tax demanded by the taxing authority before initiating any legal proceedings. If taxes are reduced or cancelled, Lessee will be entitled to the refund for any taxes previously paid by Lessee, provided that Lessee is not in default under any of the terms and conditions of this Lease.

ARTICLE 11: LESSEE'S INSPECTION

Inspection by Lessee

11.01. Lessee will inspect the property within _____ days after its receipt. Unless Lessee within that time gives written notice to Lessor, specifying any defect in or other proper objection to the property, Lessee agrees that it will be conclusively presumed, as between Lessor and Lessee, that Lessee has fully inspected the property and acknowledged that the property is in good condition and repair, and that Lessee is satisfied with and has accepted the property in that good condition and repair.

ARTICLE 12: INSURANCE

[If lessor will obtain and maintain insurance, include the following P 12.01, and omit PP 12.02 and 12.03, below:]

Lessor's Duty to Insure

12.01. Prior to the beginning of this lease, Lessor will procure, and then maintain, sufficient property and liability insurance coverage to protect Lessor and Lessee from public liability and property damage on the leased property. Lessee will not commit or permit the commission of any acts on the leased property or use or permit the use of the leased property in any manner that will increase the existing rates for or cause the cancellation of any insurance policy on the leased property or the property's improvements. Lessee, at Lessee's own cost and expense, will comply with any requirements of Lessor's insurance carriers necessary for the continued maintenance, at reasonable rates, of reasonable fire and liability insurance on the leased premises and its crops, if any.

[Or, if lessee has duty to insure, include the following PP 12.01 through 12.03:]

Lessee's Duty to Insure

12.01. Lessee agrees at its own expense to maintain *[insert if applicable: public liability and]* property damage insurance issued by companies satisfactory to Lessor, insuring the interest of Lessor, Lessee, and their authorized agents and employees. The policy will be for primary coverage and will have limits of no less than:

\$ _____ per person.

\$ _____ per accident.

\$ _____ property damage.

[Add if appropriate: Plus excess liability umbrella coverage in the amount of \$ _____.]

For all property covered by this Lease, Lessee will also provide comprehensive, fire, theft, and additional combined insurance coverage at Lessee's own cost and expense, naming Lessor as additional insured. Coverage will be in the form and amounts directed by Lessor from time to time. Lessee is also responsible for any workers' compensation insurance that may be required under state law.

Insurance Certificate

12.02. Lessee will have insurer provide Lessor, no less than *[specify, e.g., five]* days before the date on which the property is delivered to Lessee and no less than *[specify, e.g., five]* days before the expiration date of existing insurance,

a certificate evidencing the required coverage. The policy will provide that the insurer will not cancel or materially modify the insurance except on [specify, e.g., 30] days' advanced written notice to Lessor. If Lessee fails to procure, maintain, or renew the insurance, Lessor may, but is not obligated to, obtain insurance for Lessee without prejudice to any other rights that Lessor may have.

Excess Liability Indemnity

12.03. Lessee will indemnify and hold Lessor, its agents, and employees, harmless against all loss, liability, and expense, including reasonable attorneys' fees, in excess of the provided limits of liability insurance for bodily injury (including death) or property damage caused by or arising out of the ownership, maintenance, or use of the leased property. Lessee will further indemnify and hold harmless Lessor, its agents, and employees, from loss, liability, and expense, including reasonable attorneys' fees, because of Lessee's failure to comply with any provisions of any insurance policy insuring Lessor and Lessee, or because of Lessee's failure to comply with the provisions of this article.

[Continue with following:]

ARTICLE 13: INDEMNIFICATION AND LIABILITY

All Liability Assumed by Lessee

13.01. Lessee assumes all risk and liability for the loss of or damage to the equipment, for the death of or injury to any person or property, and for all other risks and liabilities arising from the use, condition, possession, or storage of the leased property. Nothing in this Lease will authorize Lessee or any other person to operate any of the property so as to impose any liability or other obligation on Lessor.

Lessee's Duty to Indemnify

13.02. Lessee will indemnify, defend, and hold harmless Lessor, its agents, and employees from all claims, loss, or damage Lessor may sustain or suffer for any of the following reasons:

- (a) Loss of or damage to any of the leased property for any cause;
- (b) Injury to or death of any person including but not limited to agents or employees of Lessee; or
- (c) Damage to any property arising from the use, condition, possession, or storage of any leased property.

Lessee will reimburse Lessor for all expenses, losses, liabilities, and claims of any type, including reasonable attorneys' fees, imposed on or incurred by Lessor because of Lessee's use or operation of any leased property, or because of the failure by Lessee to perform any of the Lease terms. Lessee will also pay interest at the rate of [specify rate] percent per [specify, e.g., month] from the day payment is made by Lessor through the day Lessor is reimbursed by Lessee.

Obligations Survive Lease Term

13.03. The indemnities and assumptions of risk, liabilities, and obligations by Lessee arising under the Lease during the Lease's term will continue in effect after the termination of Lease, regardless of the reason for termination.

ARTICLE 14: ACCIDENT, LOSS OF PROPERTY, OR DAMAGE TO PROPERTY

Notification to Lessor

14.01. If any property covered by this Lease is damaged, lost, stolen, or destroyed, or if any person is injured or dies, or if any property is damaged as a result of its use, maintenance, or possession, Lessee will promptly notify Lessor of the occurrence, and will file all necessary accident reports, including those required by law and those required by insurers of the property.

Cooperation in Defense of Claims

14.02. Lessee, its employees, and agents will cooperate fully with Lessor and all insurers providing the insurance under this Lease in the investigation and defense of any claims. Lessee will promptly deliver to Lessor any documents served on or delivered to Lessee, its employees, or its agents in connection with any claim or proceeding at law or in equity begun or threatened against Lessee, Lessor, or both, concerning the leased property.

Stipulated Loss Value

14.03. If any property is lost, stolen, destroyed, or damaged beyond repair, Lessee will pay Lessor in cash the "Stipulated Loss Value" as set forth in Schedule A, minus any net proceeds of insurance for the property received by Lessor. On payment, this Lease will terminate with respect to that item of property and Lessee will become entitled to the property on an "as-is" basis, without warranty, express or implied, for any matter whatsoever.

ARTICLE 15: ASSIGNMENT**Assignment by Lessor**

15.01. Lessor may assign this Lease or any rights under it at any time without Lessee's consent. In the event of any assignment, Lessor's Assignee will have all the rights and remedies of Lessor set forth in this Lease.

Waiver of Defenses

15.02. Lessee agrees not to raise any claim or defense against Lessor arising out of this Lease as a defense, counterclaim, or offset to any action by any Assignee for the unpaid balance of rentals due under the Lease or for possession of the leased property.

Assignment or Subletting by Lessee

15.03. Lessee will not assign this Lease or any property described in it, or assign any interest in the Lease or property, or sublet any of the leased property without the express written consent of Lessor.

ARTICLE 16: ACTIONS CONSTITUTING DEFAULT**Lessee in Default**

16.01. Lessor, at its option, may by written notice to Lessee declare Lessee in default on the occurrence of any of the

following:

- (a) Failure by Lessee to make payments or perform any of its obligations under this Lease;
- (b) Institution by or against Lessee of any proceeding in bankruptcy or insolvency, or the reorganization of Lessee under any law, or the appointment of a receiver or trustee for the goods and chattels of Lessee, or any assignment by Lessee for the benefit of creditors;
- (c) Expiration or cancellation of any insurance policy to be paid for by Lessee as provided for under the terms of this Lease; or
- (d) Involuntary transfer of Lessee's interest in this Lease by operation of law.

ARTICLE 17: RIGHTS, REMEDIES, AND OBLIGATIONS ON DEFAULT

Lessor's Rights and Remedies

17.01. After the default of Lessee, and on notice from Lessor that Lessee is in default, Lessor will have the following options:

- (a) To terminate the Lease and Lessee's rights under the Lease;
- (b) To declare the balance of all unpaid rent and all other charges of any kind required of Lessee under the Lease to be payable immediately, in which event Lessor will be entitled to the balance due together with interest at the rate of _____ [*specify rate*] percent per _____ [*specify, e.g., month*] from the date of notification of default to the date of payment;
- (c) To repossess the property without legal process free of all rights of Lessee to the property. Lessee authorizes Lessor or Lessor's agent to enter on any premises where the property is located and repossess and remove it. Lessee specifically waives any right of action Lessee might otherwise have arising out of the entry and repossession, and releases Lessor of any claim for trespass or damage caused by reason of the entry, repossession, or removal.

Lessee's Obligation for Lessor's Costs

17.02. After default, Lessee will reimburse Lessor for all reasonable expenses of repossession and enforcement of Lessor's rights and remedies, together with interest at the rate of [*specify rate*] percent per [*specify, e.g., month*] from the date of payment. Notwithstanding any other provisions of this Lease, if Lessor places all or any part of Lessor's claim against Lessee in the hands of an attorney for collection, Lessee will pay Lessor an attorneys' fee, which Lessee acknowledges is reasonable, as follows: [*specify amount or rate of fee*].

Lessor's Remedies Are Cumulative

17.03. The remedies of Lessor will be cumulative to the extent permitted by law, and may be exercised partially, concurrently, or separately. The exercise of one remedy will not be deemed to preclude the exercise of any other remedy.

Effect of Forbearance

17.04. No failure on the part of Lessor to exercise any remedy or right and no delay in the exercise of any remedy or right will operate as a waiver. No single or partial exercise by Lessor of any remedy or right will preclude any other or further exercise of that remedy or right or the exercise of any other rights or remedies. No forbearance by Lessor to exercise any rights or privileges under this Lease will be construed as a waiver, but all rights and privileges will continue in effect as if no forbearance had occurred. Acceptance by Lessor of rent or other payments made by Lessee after default will not be deemed a waiver of Lessor's rights and remedies arising from Lessee's default.

Forfeiture of Lessee's Interest on Default

17.05. Upon default, for any reason, Lessee and Lessee's successor in interest will have no right, title or interest in the leased property, its possession, or its use. Lessor will retain all rents and other payments of any kind made by Lessee under this Lease.

ARTICLE 18: RETURN OF PROPERTY ON EXPIRATION

Lessee's Return of Property

18.01. Upon the expiration date of this Lease with respect to any or all of the property, Lessee will return the property to Lessor, together with all accessories, free from all damage and in the same condition and appearance as when received by Lessee, allowing for ordinary wear and tear. If Lessee fails or refuses to return the equipment to Lessor, Lessor will have the right to take possession of the property and for that purpose to enter any premises where the property is located without being liable in any suit, defense, or other proceedings to Lessee.

ARTICLE 19: LIENS

Encumbrances or Liens; Notice

19.01. Lessee will not pledge, encumber, create a security interest in, or permit any lien to become effective on any leased property. If any of these events takes place, Lessee will be deemed to be in default at the option of Lessor. Lessee will promptly notify Lessor of any liens or other encumbrances of which Lessee has knowledge. Lessee will promptly pay or satisfy any obligation from which any lien or encumbrance arises, and will otherwise keep the property and all title and interest free of any liens and encumbrances. Lessee will deliver to Lessor appropriate satisfactions, waivers, or evidence of payment.

ARTICLE 20: NOTICES

Service of Notice

20.01. Except as otherwise expressly provided by law, any notices or other communications required or permitted by this lease or by law to be served on or given to either party by the other party will be in writing and will be deemed duly served or given when personally delivered to [any member of or the designated agent of] the party to whom they are directed, or in lieu of personal service, when deposited in the United States mail, first-class postage prepaid, addressed to Lessee at _____[address] or to Lessor at _____[address]. Either party may change its address for the purpose of this Paragraph by giving written notice of the change to the other party in the manner provided in this Paragraph.

ARTICLE 21: AMENDMENT AND MODIFICATION**Method of Amendment or Modification**

21.01. Additional property may from time to time be added as the subject matter of this Lease as agreed on by the parties. Any additional property will be added to the attached Schedule A in an amendment describing the property, the monthly rental, the term of the leasing period, security deposit, and stipulated loss value of additional property. All amendments to any attached Schedule(s) must be in writing and signed by both parties. Other than by this amendment procedure, this Lease may not be amended, modified, or altered in any manner except in writing signed by both parties.

ARTICLE 22: ENTIRE AGREEMENT**Incorporation by Reference**

22.01. This Lease and any attached Schedule[s], which [is or are] incorporated by reference and made an integral part of the lease, constitute the entire agreement between the parties. No agreements, representations, or warranties other than those specifically set forth in this Lease or in the attached Schedule[s] will be binding on any of the parties unless set forth in writing and signed by both parties.

ARTICLE 23: GOVERNING LAW**Choice of Law**

23.01. This Lease will be deemed to be executed and delivered in [*specify jurisdiction, e.g., California*] and governed by the laws of [*specify jurisdiction, e.g., California*].

ARTICLE 24: EFFECT ON HEIRS AND SUCCESSORS**Heirs and Successors**

24.01. This Lease and each of its provisions will be binding on and will inure to the benefit of the respective heirs, executors, administrators, trustees, successors and assigns of the parties to this Lease. Nothing contained in this Paragraph will be construed as a consent by Lessor to any assignment of this Lease or any interest in this Lease by Lessee except as provided in Paragraph 15.01 of this Lease.

ARTICLE 25: TIME OF ESSENCE**Time**

25.01. Time is of the essence in this Lease.

ARTICLE 26: MANDATORY ARBITRATION**Arbitration**

26.01. Any controversy or claim, including any claim of misrepresentation, arising out of or related to this Lease or

breach of this Lease will be settled by arbitration. The arbitration will be conducted by a single arbitrator under the then current rules of the American Arbitration Association [*add, if desired:*, provided that the arbitrator will be chosen from a panel of persons knowledgeable in the business of _____ (*specify business related to leased property*)]. The decision and award of the arbitrator will be final and binding and any award may be entered in any court having jurisdiction. The arbitration will be held and the award will be deemed to be made in [*specify location*], California.

ARTICLE 27: SEVERABILITY CLAUSE

Agreement Survives Partial Invalidity

27.01. If any provision of this Lease or the application of any of its provisions to any party or circumstance is held invalid or unenforceable, the remainder of this Lease, and the application of those provisions to the other parties or circumstances, will remain valid and in full force and effect.

Dated: _____.

LESSOR

_____ [*signature of lessor*]
 _____ [*printed name*]

LESSEE

_____ [*signature of lessee*]
 _____ [*printed name*]

SCHEDULE A

Description of Property

1. The property to which this Schedule and Lease applies is as follows:

[*Describe each item of property to be leased, including manufacturer numbers and other identifying data sufficient to distinguish property from any similar item*].

Type of Item	Model Number	Serial Number
1. _____ _____	_____	_____
2. _____ _____	_____	_____
3. _____ _____	_____	_____

[*Insert additional lines for identifying property as required*].

Term

2. Unless sooner terminated as set forth in the Lease, the term of this Lease respecting each item of equipment listed on this schedule expires on _____ [date].

Rent

3. As rent for this property, Lessee will pay Lessor:

[EITHER] The sum of \$ _____ [total of rent payments].

[OR]

[If rental values are to be assigned separately to each item of property, list each item and its assigned rental value].

Type of Item	Serial Number	Rent Payments
1. _____ _____	_____	_____
2. _____ _____	_____	_____
3. _____ _____	_____	_____

[Insert additional lines for identifying rent payments for additional property, as required].

Except as otherwise provided in the Lease or in this schedule, rent will be payable in [specify number or monthly] installments of \$ _____ each, beginning on the [specify, e.g., first] day of [month and year], and continuing on the [specify, e.g., first] day of each month thereafter until the total sum has been paid in full.

Location

4. The above described property will be located at _____ [address] and will not be removed from that location without the prior written consent of Lessor.

Security Deposit

5. The amount of \$ _____ has been deposited in accordance with Paragraph 3.02 of the Lease of which this Schedule is a part.

Renewal Option

6. Lessee may renew the Lease of which this Schedule is a part, on a year to year basis, on expiration of the original term [at a total rental of \$ _____ per month or, at a monthly rent calculated as follows: e.g., at the

monthly rent for the original term, plus five percent], and otherwise on the same terms and conditions of this Lease. The option may be exercised by Lessee's written notice to that effect to Lessor not less than [*specify, e.g., 60*] days before the expiration of the term of Lease.

Stipulated Loss Value

7. The following amount will be paid, in accordance with Paragraph 14.03 of the Lease, for each item lost, stolen, destroyed, or damaged beyond repair during each year of the term:

[Repeat, as required, for each additional leased item:]

Item: _____

Stipulated Loss Value;

Year of Term:

First Year: \$ _____

Second Year: \$ _____

Third and Additional Years: \$ _____

Approved and agreed to on _____[*date*] as a Schedule to the Lease between the parties dated _____ and incorporated as an integral part of that lease.

LESSOR

_____ [*signature of lessor*]

_____ [*printed name*]

LESSEE

_____ [*signature of lessee*]

_____ [*printed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionWarrantiesCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 53 PERSONAL PROPERTY LEASING

PART IV. FORMS

A. Complete Lease Forms

21-53 California Legal Forms--Transaction Guide § 53.201

§ 53.201 Finance Lease

[1] Comment

[a] Use of Form

This form is a finance lease that provides that the lessee selects the equipment and the supplier. The equipment is ordered by the lessor, who will be the owner (or the person with the right to possession and use), and delivered by the supplier to the lessee's place of business. Although the lease begins when the lessor orders the equipment, rent is not due until the equipment is delivered to and accepted by the lessee.

The amount initially specified as rent is an estimate. The actual rent is adjusted by the lessor, based on the actual cost of the equipment. The lease provides that the lessee may cancel if the actual cost exceeds a specified percent of the estimate and that the lessor may cancel if the equipment is not delivered and accepted within a stated period after the lessor's commitment. The lessee may renew the lease on a year-to-year basis at a specified fair market rent. If the renewal option is not exercised, the lease continues on a month-to-month basis at the original rent.

This form is designed to be used with a commitment request letter, in which the lessee presents the basic structure of the transaction to the lessor and requests the lessor's commitment to the lease [see § 53.280].

[b] Finance Lease Defined

A "finance lease" allows a lessee to directly solicit suppliers of the goods sought for lease and then obtain the goods by arranging for a lessor to obtain title to them [see *Com. Code § 10103(a)(7)* and California Comment; see, e.g., § 54.201 (sample finance lease); see also *Com. Code § 10103(a)(24)* ("supplier" defined)]. Under the Commercial Code, a finance lease is one with respect to which [Com. Code § 10103(a)(7)]:

- The lessor does not select, manufacture, or supply the goods;
- The lessor acquires the goods or the right to possession and use of the goods in connection with the

lease; and

- One of the following occurs:

- The lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract.

- The lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract.

- The lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party (such as the manufacturer of the goods), provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods.

- The lessor, before the lessee signs the lease contract, informs the lessee in writing (1) of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person; (2) that the lessee is entitled under Division 10 of the Commercial Code [*Com. Code § 10101 et seq.*] to the promises and warranties, including those to any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; and (3) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

[c] Supply Contracts and Lessee's Warranty Rights

Generally, a "supply contract" is entered into coincidentally to the formation of a finance lease. "Supply contract" means a contract under which a lessor buys or leases goods to be leased [*Com. Code § 10103(a)(25)*]. The supply contract may have a significant effect on the rights, remedies, and liabilities of the lessee.

The benefits of the supplier's promises to the lessor under a supply contract and of any express or implied warranties under a supply contract, including those of any third party provided in connection with or as part of the supply contract, extend to the lessee to the extent of the lessee's leasehold interest under a finance lease related to the supply contract [*Com. Code § 10209(a)*; see *Com. Code § 10103(a)(24)* ("supplier" defined)]. However, the lessee's rights under the finance lease are subject to the terms of the warranty and of the supply contract and all defenses or claims arising from them [*Com. Code § 10209(a)*]. The extension of the benefit of a supplier's promises and warranties to the lessee does not (1) modify the rights and obligations of the parties to the supply contract, whether arising from the contract or not; nor (2) impose any duty or liability on the lessee under the supply contract [*Com. Code § 10209(b)*].

Any modification or rescission of the supply contract by the supplier and the lessor is effective between the supplier and the lessee unless, before the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract [*Com. Code § 10209(c)*; see § 53.264 (notice to supplier)]. If the modification or rescission is effective between the supplier and the lessee, the lessor is deemed to have assumed, in addition to the obligations of the lessor to the lessee under the lease contract, promises of the supplier to the lessor and

warranties that were so modified or rescinded as they existed and were available to the lessee before modification or rescission [*Com. Code § 10209(c)*].

In addition to the extension of the benefit of the supplier's promises and of warranties to the lessee under *Com. Code § 10209(a)*, the lessee retains all rights that the lessee may have against the supplier which arise from an agreement between the lessee and the supplier or under other law [*Com. Code § 10209(d)*].

[d] Passage of Risk of Loss

In the case of a finance lease, risk of loss passes to the lessee [*Com. Code § 10219(a)*; see § 53.14 (passage of risk of loss rules for other types of leases)]. Subject to the rules governing the effect of default on risk of loss [see *Com. Code § 10220*; [e], below], if the time of passage of the risk is not stated in the contract, the following rules apply [*Com. Code § 10219(b)*]:

- If the lease contract requires or authorizes the goods to be shipped by carrier, and (a) it does not require delivery at a particular destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier; but (b) if the lease contract *does* require delivery at a particular destination, the risk of loss passes to the lessee when the goods are made available at that destination for the lessee to take delivery.
- If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgment by the bailee of the lessee's right to possession of the goods [*Com. Code § 10219(b)(2)*].
- In any case not covered under the first two rules, above, the risk of loss passes to the lessee on the lessee's receipt of the goods if the supplier is a merchant. Otherwise the risk passes to the lessee on tender of delivery [*Com. Code § 10219(b)(3)*].

[e] Effect of Default on Risk of Loss

If the risk of loss is to pass to the lessee and the time of passage of the risk is not stated, the following rules apply [*Com. Code § 10220(a)*]:

- If a tender or delivery of goods fails to conform to the lease contract so as to give a right of rejection, the risk of loss remains with the supplier until cure or acceptance.
- If the lessee rightfully revokes acceptance, he or she, to the extent of any deficiency in his or her effective insurance coverage, may treat the risk of loss as having remained with the lessor from the beginning.

If the lessee, as to conforming goods already identified to the lease contract, repudiates or is otherwise in default under the lease contract, the supplier, to the extent of any deficiency in his or her effective insurance coverage, may treat the risk of loss as resting on the lessee for a commercially reasonable time [*Com. Code § 10220(b)*].

[f] Effect of Casualty to Identified Goods

If a lease contract requires the goods to be identified when the lease contract is made, and the goods suffer casualty without fault of the lessee, lessor, or supplier before delivery, or the goods suffer casualty before the risk of loss passes to the lessee in accordance with the lease agreement or the passage of risk rules contained in *Com. Code § 10219*, then [*Com. Code § 10221*]:

- If the loss is total, the lease contract is avoided; and
- If the loss is partial or the goods have so deteriorated as to no longer conform to the lease contract, the lessee may nevertheless demand inspection and at his or her option treat the lease contract as avoided.

[2] FORM

Finance Lease

EQUIPMENT LEASE

Identification of Parties

1. This Lease is made on _____[*date*], between _____[*name(s)*] (Lessor), [*status, e.g., a California corporation or a California limited liability company or a sole proprietor*], _____[*address or principal place of business in California*], and _____[*name(s)*] (Lessee), [*status, e.g., a California corporation or a California limited liability company or a sole proprietor*], _____[*address or principal place of business in California*].

Purpose of Lease

2. Under the conditions enumerated in this Lease, Lessor leases to Lessee the personal property described in the attached Schedule A (the Equipment).

No Warranties by Lessor

3. Lessee has selected both the Equipment and the Supplier from whom Lessor is to purchase the Equipment.

[*The following provision, excluding warranty rights, must be conspicuously printed (see Com. Code § 10214(b), (c)):*]
LESSOR MAKES NO WARRANTY, EXPRESS OR IMPLIED, AS TO ANY MATTER WHATSOEVER, INCLUDING THE CONDITION OF THE EQUIPMENT, ITS MERCHANTABILITY, OR ITS FITNESS FOR ANY PARTICULAR PURPOSE,

[*Continue with the following:*]

and as to Lessor, Lessee leases the Equipment "AS IS."

Claims Against Supplier

4. If the Equipment is not properly installed, does not operate as represented or warranted by Supplier, or is unsatisfactory for any reason, Lessee will make any claim solely against Supplier, but will continue to pay Lessor all rent payable under this Lease. Lessor will require, as a condition of its purchase order, Supplier's agreement that all warranties, agreements, and representations, if any, made by Supplier to Lessee or to Lessor may be enforced by Lessee in its own name. Lessor agrees to assign to Lessee, solely for the purpose of making and prosecuting any claim, all of

the rights that Lessor has against the Supplier for breach of warranty or other representation respecting the Equipment.

Supplier Is Not an Agent

5. Lessee understands and agrees that neither Supplier, nor any employee or other agent of Supplier, is an agent of Lessor. No employee or agent of Supplier is authorized to waive or alter any condition of this Lease, and no representation as to the Equipment or any other matter by Supplier will in any way affect Lessee's duty to pay the rent and perform its other obligations as set forth in this Lease.

Noncancellable Lease

6. This Lease cannot be cancelled or terminated except as expressly provided by its terms.

Adjustment of Rent

7. Lessee acknowledges that the amounts of Rent and Renewal Rent, as shown in the Commitment Request and Schedule A, are based on the total equipment cost shown in Schedule A, and that the total cost is an estimate. Lessee agrees that if the actual cost to Lessor of purchasing the Equipment, including transportation, installation, taxes, and other expenses, differs from the total equipment cost shown in Schedule A, or if there is a tax or increase in tax imposed on or measured by the Rent and Renewal Rent, then the Rent and Renewal Rent will be adjusted proportionately, and Lessor will prepare and deliver to Lessee an amended Schedule A showing the amount of the adjusted Rent and Renewal Rent.

If Lessor's actual cost of purchasing the Equipment, or any part of that cost, differs from the total equipment cost initially shown on Schedule A by more than [*specify percentage, e.g., 10*] percent, Lessee, at its option, may terminate the Lease. The option to terminate will be exercised by giving written notice to Lessor within [*specify number, e.g., 15*] days of the date the notice of the adjusted rent is given.

Ordering Equipment

8. Lessor will order the Equipment from the Supplier on the conditions of the purchase order initiated by Lessee. Lessee will arrange for the delivery of the Equipment so that it can be accepted in accordance with Paragraph 9 of this Lease within [*specify number, e.g., 90*] days after the date Lessor accepts Lessee's offer to enter into this Lease.

Lessor is authorized to enter the date Lessor accepts Lessee's offer to enter into this Lease as the "Commitment Date" in the Commitment Request.

Lessor is authorized to enter on Schedule A the serial numbers and other identification data of Equipment when they are determined by Lessor.

Acceptance

9. On Lessor's request, Lessee will give Lessor a written statement (1) acknowledging receipt of the Equipment in good condition and repair, and (2) accepting it as satisfactory in all respects for the purposes of this Lease.

The date of receipt and acceptance of the Equipment (or any later date that Lessor chooses) will be the date on which rent begins. Whether or not Lessee has given Lessor a written statement as described above, Lessee will, by making the first rent payment after delivery of the Equipment, be deemed to have acknowledged receipt and acceptance of the Equipment on the date set forth in Lessor's invoice for the first Rent payment.

Termination by Lessor

10. If after [*specify number, e.g., 90*] days following the commitment date, the Equipment has not been delivered to and accepted by Lessee as provided in Paragraph 9 of this Lease, Lessee will give written notice to Lessor of this nondelivery. Lessor may, at its option, terminate this lease and all obligations arising from it. If Lessor elects to exercise this option, Lessor will give Lessee written notice within [*specify number, e.g., 10*] days after its receipt of Lessee's notice of nondelivery.

Term

11. The term of this Lease begins on the date on which Lessor issues its purchase order for the Equipment, notwithstanding that rent payments will begin as provided in Paragraph 12 of this Lease. The term ends on the expiration of [*specify number of (years or months)*] after the date rent began, as specified in Paragraph 12, and as shown in Schedule A.

Rent

12. Lessee will make the rent payments, as shown in Schedule A. The first rent payment will be due as specified in Paragraph 9, and subsequent payments will be due on the same day of each succeeding [*month or other calendar period indicated in Schedule A*]. Rent payments will be due whether or not Lessee has received any notice that the payments are due. All rent payments will be made to Lessor at its address set forth above or as otherwise directed by Lessor in writing.

Lessor is authorized to enter the date on which rent begins on Schedule A.

Renewal

13. If at any time before the expiration of the initial term of this Lease the parties agree on an amount that represents the expected fair market rental value of the Equipment at the end of the initial term of this Lease, they will enter this amount on Schedule A as the "Renewal Rent." Lessee will then have the option to renew this Lease on the same terms and conditions from year to year for a maximum period of [*specify number*] years, including the initial term shown in Schedule A.

Lessee must give Lessor written notice of its intention to exercise this option together with payment of the renewal rent at least [*specify number, e.g., 30*] days before expiration of the initial Lease term. If Lessee fails to notify Lessor of its intent to exercise the option, or fails to return the Equipment in accordance with Paragraph 16 of this Lease, the lease term will be extended on a month-to-month basis until either Lessee returns the Equipment to Lessor, or Lessor terminates the Lease on [*specify, e.g., 30*] days' notice to Lessee. If this Lease is extended on a month-to-month basis, Lessee will continue to pay Lessor monthly rent as shown in Schedule A.

Location, Inspection, Labels

14. The Equipment will be delivered to and will not be removed from the Equipment Location shown in Schedule A, or if none is specified, from Lessee's billing address, without Lessor's prior written consent. Lessor will have the right to inspect the Equipment at any reasonable time with prior notice to Lessee. If Lessor supplies Lessee with labels stating that the Equipment is owned by Lessor, Lessee will affix the labels to the Equipment in a prominent place.

Repairs, Use, Alteration

15. Lessee, at its own expense, will keep the Equipment in good condition and working order, will use the Equipment lawfully, and will not alter the Equipment without Lessor's prior written consent.

Surrender

16. On expiration of the term of this Lease, or on demand by Lessor in accordance with Paragraph 24 of this Lease, Lessee, at its expense, will return the Equipment by delivering it to a place, or packed for shipping on board a carrier, as Lessor specifies, in the same condition as when delivered to Lessee, allowing for reasonable wear and tear.

Loss or Damage

17. Lessee will bear the entire risk of loss, theft, destruction, or damage of the Equipment from any cause whatsoever. No incident of loss or damage will relieve Lessee of the obligation to pay rent or of any other obligation under this Lease. If any loss or damage occurs, Lessor may require Lessee to perform one of the following options:

- (a) To repair and restore the Equipment in good condition;
- (b) To replace the Equipment with like equipment in good condition with clear title in Lessor; or
- (c) To pay to Lessor the total of the following amounts:
 - (1) The total rent due and owing at the time of the payment; plus
 - (2) The amount estimated by Lessor to be the present value of all rent and other amounts payable by Lessee for the Equipment from date of the payment to date of expiration of the then current term of this Lease, calculated at _____ [*specify percentage, e.g., 9*] percent per year simple interest discount; plus
 - (3) The reversionary value of the Equipment, which will be equal to _____ [*specify percentage, e.g., 15*] percent of the total rent as set forth in Paragraph 10.

After Lessee has complied with the conditions set forth above, Lessee will be entitled to receive and retain all insurance payments made because of any loss of or damage to the Equipment. Lessee, Lessee's insurer, or both will then be entitled to Lessor's interest in the Equipment for salvage purposes, AS IS in both condition and location, without warranty, express or implied.

Insurance

18. Lessee will obtain, pay for, and maintain the following: (1) insurance against the loss or theft of or damage to the Equipment, for its full replacement value, and (2) public liability and property damage insurance naming Lessor as an additional insured. All insurance will be in the form and amounts and with companies satisfactory to Lessor, and will contain the insurer's agreement to give [*specify number, e.g., 30*] days written notice to Lessor before cancellation or material change of any policy of insurance. On Lessor's request, Lessee will deliver the policies, copies of the policies, or certificates of insurance to Lessor.

Taxes and Liens

19. As directed by Lessor, Lessee will pay all charges and taxes (local, state, and federal) now owing or later imposed on the sale, purchase, ownership, leasing, possession, or use of the Equipment, excluding, however, all taxes on or measured by Lessor's net income. Lessee will keep the Equipment free and clear of all levies, liens, and encumbrances.

Lessor's Payment

20. If Lessee fails to provide or maintain insurance as required in Paragraph 18 of this Lease, or to pay any charges and taxes as required by Paragraph 19 of this Lease, or to discharge any levies, liens, and encumbrances as required by Paragraph 19 of this Lease, Lessor will have the right, but will not be obligated, to obtain insurance, pay any charges or taxes, or effect discharge of any lien or encumbrance. If Lessor exercises that right, Lessee will repay to Lessor its cost incurred with the next rent payment.

Indemnity

21. Lessee will indemnify Lessor against and hold Lessor harmless from any claim, damages, and costs, including, but not limited to, reasonable attorneys' fees and liens, (including any claim, damages, and costs arising without Lessor's fault or negligence, or under the doctrine of strict liability) arising out of the purchase, lease, use, possession, selection, delivery, or disposition of the Equipment. Lessee will assume full responsibility for the defense of any action against Lessor for any claim, damages, and costs arising as stated above. The provisions of this Paragraph will survive termination of this Lease as to any matter arising during the term of this Lease.

Assignment and Offset

22. Without Lessor's prior written consent, Lessee will not (1) assign, sublet, transfer, or otherwise dispose of this Lease, the Equipment, or any interest in the Lease or Equipment; or (2) lend the Equipment or permit it to be used by anyone other than Lessee and Lessee's employees and agents.

Lessor may assign this Lease, give a security interest in the Equipment, or both, in whole or in part, without notice to Lessee. If Lessee is given notice of any assignment, Lessee agrees to acknowledge receipt in writing. Any assignee or secured party will have all of the rights but none of the obligations of Lessor under this Lease, the obligations remaining with Lessor. Lessee will not assert against an assignee or secured party any defense, counterclaim, or offset that Lessee may have against Lessor. Notwithstanding any assignment, Lessor warrants that Lessee will quietly enjoy the use of the Equipment subject to the terms and conditions of this Lease. Subject to these conditions, this Lease inures to the benefit of and is binding on the heirs, personal representatives, successors, and assigns of the parties.

Service Charge and Interest

23. If Lessee fails to pay when due any rent or other amount required to be paid to Lessor, Lessee will pay to Lessor a service charge of [*specify percentage, e.g., 5*] percent of each delinquent amount, or \$ _____, whichever is greater, plus interest on the delinquent rent or other amount from the due date until the date of payment, at the maximum rate allowed by law.

Default

24.(a) The following are instances of default under this Lease, which rise to specific remedies as provided by this Lease or as provided under applicable law:

- (1) Lessee fails to pay when due any rent or other amount required to be paid by Lessee.
- (2) Lessee fails to perform any other required provision within _____ [*number, e.g., 10*] days of Lessor's written demand for performance.
- (3) Lessee for any reason makes a bulk transfer of furniture, furnishings, fixtures, or other equipment or inventory.
- (4) Lessee makes an assignment for the benefit of creditors, whether voluntary or involuntary.
- (5) Lessee has a petition filed by or against it under the Bankruptcy Act.
- (6) Lessee has breached any other lease or agreement between Lessor and Lessee.

(b) Upon the occurrence of any of the instances of default enumerated in Paragraph 24(a), Lessor may exercise any one or more of the following remedies:

- (1) Recover from Lessee all rent and other amounts then due and amounts that subsequently become due.
- (2) Take possession of any items of Equipment, wherever located, without demand or notice, without any court order or other process of law, and without liability to Lessee for any damage occasioned by taking of possession. Any taking of possession will not constitute a termination of this Lease.
- (3) Recover from Lessee, with respect to any items of Equipment, and with or without repossessing Equipment, the sum of (1) all rent and other amounts due and to become due, minus a prepayment credit for rent not yet due at the time of payment or judgment, whichever is earlier, equal to the product of the number of months remaining in the current term of this Lease at that time, multiplied by _____ [*specify percentage, e.g., 0.2*] percent; and (2) the reversionary value of the Equipment at the end of the current term, which for purposes of this Paragraph, will be _____ [*specify percentage, e.g., 15*] percent of the total rent as set forth in Paragraph 12 of this Lease.
- (4) Lessor may pursue any other remedy at law or in equity.

On repossession or surrender of the Equipment, Lessor may sell or otherwise dispose of the Equipment, with or without notice and on public or private bid, and apply the net proceeds (after deducting all expenses, including attorneys' fees, incurred in connection with the disposition) to the sum of Paragraphs 24(b)(1) and (b)(2), above. If Lessor is unable to sell or otherwise dispose of the Equipment within a reasonable time, Lessor may recover from Lessee an amount not less than the sum of the rent and other amounts set forth in Paragraphs 24(b)(1), as well as all expenses, including attorneys' fees, incurred in taking possession of the Equipment.

(c) No right or remedy conferred on Lessor is exclusive of any other right or remedy provided by this Lease or by law or equity.

Termination on Default

25. On the occurrence of any of the events stated in Paragraph 24 of this Lease, Lessor may elect to terminate this Lease. A termination will occur only on written notice by Lessor to Lessee and only with respect to those items of Equipment which Lessor specifically elects to terminate in the notice. This Lease will continue in full force with regard to other items that are not included in the notice of termination; and Lessee will be obligated to perform all acts and pay all rents and other amounts required under this Lease. As to any items of Equipment for which this Lease is terminated by Lessor, Lessor may recover from Lessee the excess, if any, of the amount of Rent due for the item for the balance of the term over the reasonable rental value of the item for the same period of time.

Costs and Expenses of Enforcement

26. Lessee will pay Lessor all costs, including reasonable attorneys' fees, the fees of collection agencies, and other expenses such as telephone and fax charges, incurred by Lessor in enforcing any of the provisions of this lease. If legal action is required to interpret or enforce any provision of this Lease, the prevailing party will recover from the other all costs incurred in the action, including reasonable attorneys' fees.

Ownership

27. The Equipment is, and will at all times remain, the property of Lessor, and Lessee will have no right, title, or interest in it except as expressly set forth in this Lease. The Equipment is, and will at all times remain, personal property notwithstanding that the Equipment or any part of it may be or become affixed in any manner to real property or any improvements on real property.

Notices

28. Except as otherwise expressly provided by law, any notices or other communications to either party by the other party relating to this Lease will be in writing and will be deemed duly served or given when personally delivered to [any member of or the designated agent of] the party to whom they are directed, or in lieu of that personal service, when deposited in the United States mail, first-class postage prepaid, addressed to Lessee at _____[address] or to Lessor at _____[address]. Either party may change its address for the purpose of this Paragraph by giving written notice of the change to the other party in the manner provided in this Paragraph.

Purchase Option

29. At any time during the term of this Lease, as long as Lessee is not in default, Lessee will be entitled, at its option, on written notice to Lessor at least [specify number, e.g., 30] days before the end of the initial term or any renewal term, to purchase the Equipment from Lessor. The purchase price will be equal to the then fair market sales value of the Equipment as determined by Lessor. On the date of the purchase, Lessee will pay to Lessor the purchase price for the Equipment and Lessor will sell the Equipment, AS IS, at its location at that time.

Entire Agreement

30. This Lease and the attached Schedule[s], which [is or are] incorporated by reference and made an integral part of the lease, constitute the entire agreement between the parties. The execution of the commitment request by Lessee, and its acceptance by Lessor, incorporates the terms and conditions of this Lease. No agreements, representations, or warranties other than those specifically set forth in this Lease or in the attached Schedule[s] will be binding on any of the parties unless set forth in writing and signed by both parties.

Governing Law

31. This lease will be deemed to be executed and delivered in [specify jurisdiction, e.g., California] and governed by the laws of [specify jurisdiction, e.g., California].

Effect on Heirs and Successors

32. This Lease and each of its provisions will be binding on and will inure to the benefit of the respective heirs, executors, administrators, trustees, successors and assigns of the parties to this Lease. Nothing contained in this Paragraph will be construed as a consent by Lessor to any assignment of this Lease or of any interest in this Lease by Lessee, except as provided in Paragraph 22 of this Lease.

Time of Essence

33. Time is of the essence in this Lease.

Mandatory Arbitration

34. Any controversy or claim, including any claim of misrepresentation, arising out of or related to this Lease or breach of this Lease will be settled by arbitration. The arbitration will be conducted by a single arbitrator under the then current rules of the American Arbitration Association [add, if desired:, provided that the arbitrator will be chosen from a panel of persons knowledgeable in the business of _____ (specify business related to leased property)]. The decision and award of the arbitrator will be final and binding and any award may be entered in any court having jurisdiction. The arbitration will be held and the award will be deemed to be made in [specify location], California.

Severability Clause

35. If any provision of this Lease or the application of any of its provisions to any party or circumstance is held invalid or unenforceable, the remainder of this Lease, and the application of those provisions to the other parties or circumstances, will remain valid and in full force.

Dated: _____.

LESSOR

_____ [signature of lessor]
 _____ [printed name]

LESSEE

_____ [signature of lessee]

_____ [printed name]

SCHEDULE A

Description of Equipment

[Repeat, as required, for each item of equipment being leased:]

[Describe item of property to be leased, including manufacturer numbers and other identifying data sufficient to distinguish the property from any similar item:]

Type of Item	Model Number	Serial Number
_____	_____	_____

Rent Commencement Date:

Monthly Rent:

\$ _____

—

Initial Term:

[months or years]

Renewal Rent:

\$ _____

—

Total Equipment Cost:

\$ _____

—

VENDOR: _____ [name]

_____ [street address]

_____ [city, state, zip code]

EQUIPMENT LOCATION:

_____ [name of business]

_____ [street address]

_____ [city, state, zip

code]

[Continue with the following:]

Agreed to on _____ [date], as a schedule to the Lease dated _____, between
_____ [name(s)] (Lessor) and _____ [name(s)] (Lessee) and incorporated as an
integral part of that Lease.

LESSOR

_____ [signature of lessor]
_____ [printed name]

LESSEE

_____ [signature of lessee]
_____ [printed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law
(UCC)Leases (Article 2A)Formation & ConstructionCasualty & Risk of LossCommercial Law (UCC)Leases (Article
2A)Formation & ConstructionWarrantiesCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 53 PERSONAL PROPERTY LEASING

PART IV. FORMS

A. Complete Lease Forms

21-53 California Legal Forms--Transaction Guide §§ 53.202-53.209

[Reserved]

§§ 53.202[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 53 PERSONAL PROPERTY LEASING
PART IV. FORMS
B. Specific Lease Provisions
1. Offer and Acceptance

21-53 California Legal Forms--Transaction Guide § 53.210

§ 53.210 Firm Offers, Revocable Offers, and Options

[1] Comment

[a] Use of Form

This form contains clauses that may be inserted in a lease contract to designate the transaction as an offer. This type of clause is ordinarily placed either immediately following the clause identifying the parties or immediately preceding the space for the parties' execution. Alternate provisions in [2], below, make the offer revocable, irrevocable, or an option. Whichever offer clause is used, it must be included within a complete lease agreement to be effective [see §§ 53.200 and 53.201 (complete lease agreements)].

[b] Firm Offers

The first group of alternative clauses presented in this form is intended to provide "assurance" within the meaning of *Com. Code § 10205*. In accordance with that provision, an offer by a merchant to lease goods to or from another person, in a signed writing that by its terms gives assurance that it will be held open, may not be revoked for lack of consideration during the time stated or, if no time is stated, for a reasonable time. The period of irrevocability, however, may not exceed three months. If the form containing the assurance is supplied by the offeree, the firm offer clause must be separately signed by the offeror [*Com. Code § 10205*].

[c] Revocable Offers

The second group of alternative clauses in this form protects the offeror's right to revoke, preventing the offeror from unintentionally making a firm or irrevocable offer within the meaning of *Com. Code § 10205*.

[d] Options

The third group of alternatives in this form contains clauses that may be included in offers that are irrevocable because

they are supported by consideration (that is, options) [see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*]. These clauses are designed to be used for offer periods in excess of three months [see *Com. Code § 10205*] or when actual consideration has been paid for the offer.

[2] FORM

Firm Offers, Revocable Offers, and Options

Firm Offer

[Choose one of the following:]

[EITHER]

_____ [specify paragraph number]. This is a firm offer and will not be revoked before _____ [date].

[OR]

_____ [specify paragraph number]. _____ [name of offeror] gives _____ [his or her or its] assurance that this offer is firm and will be held open until _____ [date].

[OR]

_____ [specify paragraph number]. This offer is irrevocable until _____ [date]. After this date, the rental rate will be subject to an increase of _____ percent.

Revocable Offer

[EITHER]

_____ [specify paragraph number]. Notwithstanding any other provision in this offer, this is not a firm offer, and [Lessor or Lessee] reserves the right to revoke it at any time before acceptance by the other party.

[OR]

_____ [specify paragraph number]. Rental rate, terms, and availability of the leased goods contemplated under this offer are subject to change without notice.

Option

[EITHER]

_____ [specify paragraph number]. In consideration of [specify consideration], this offer will not be revoked for

_____ days after the date of its making.

[OR]

_____ [*specify paragraph number*]. In consideration of \$ _____ and other valuable consideration, receipt of which is acknowledged by this provision, [Lessor or Lessee] will have the option to accept this offer until _____ [*date*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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B. Specific Lease Provisions
1. Offer and Acceptance

21-53 California Legal Forms--Transaction Guide § 53.211

§ 53.211 Clauses Conditioning the Acceptance of Offers

[1] Comment--Use of Form

This form contains clauses setting conditions on the manner by which an offer may be accepted. This type of clause is for use when either the lessor or lessee wants to restrict acceptance of the offer to a specified method. For example, a lessee under pressure to perform work requiring leased equipment may need to know quickly that the lessor has accepted the lessee's offer and can deliver the leased goods within the time set by the offer. Under these circumstances, the lessee might want to use the alternative below that provides for acceptance by return telegram or fax.

When the offeror wants to control the manner of indicating acceptance and the medium by which acceptance must be communicated, the offer should specify the manner and medium. Otherwise, any reasonable manner or medium of acceptance, including performance, will be effective [*Com. Code § 10206(a)*; see § 53.12[4]].

These clauses may be incorporated into either of the complete lease forms contained in this chapter [see §§ 53.200, 53.201]. This type of clause ordinarily is inserted in the lease agreement immediately following an offer clause. For discussion and a form containing alternative clauses for creating offers, see § 53.210. For a form for a notice of acceptance that may be used to satisfy the requirement for notice as provided for in the second alternative below, see § 53.261.

[2] FORM

Clauses Conditioning the Acceptance of Offers

Manner of Acceptance

[EITHER]

_____ [*specify paragraph number*]. This offer may be accepted only by a written confirmation promising to deliver the merchandise to be leased.

[OR]

_____ [*specify paragraph number*]. This offer may be accepted only by the prompt delivery of the merchandise to be leased as specified above. If accepted in this manner, notice of shipment must be sent to Lessee at the address shown above within [*specify number, e.g., 24*] hours of shipment.

[OR]

_____ [*specify paragraph number*]. This offer must be accepted by a return promise communicated by return [*specify medium, e.g., mail or fax or telegram*] within _____ hours after receipt.

[OR]

_____ [*specify paragraph number*]. This offer may be accepted only by signing one copy of the offer and returning it to [Lessee or Lessor] so that it is received by [Lessee or Lessor] no later than [A.M. or P.M.] on _____ [*date*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 53 PERSONAL PROPERTY LEASING

PART IV. FORMS

B. Specific Lease Provisions

1. Offer and Acceptance

21-53 California Legal Forms--Transaction Guide §§ 53.212-53.219

[Reserved]

§§ 53.212[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 53 PERSONAL PROPERTY LEASING
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B. Specific Lease Provisions
2. Warranties

21-53 California Legal Forms--Transaction Guide § 53.220

§ 53.220 Clauses for Exclusion of Express Warranties

[1] Comment

[a] Use of Form

This form contains two alternative clauses for the exclusion of express warranties. These clauses may be used in either of the complete lease forms in this chapter [see §§ 53.200, 53.201]. For example, either clause may be substituted for the warranty provisions in § 53.200, Article 9 or 53.201, Paragraph 3. However, if that substitution is made, counsel must be careful to remove any contradictory language, including language tending to create an express warranty [see [b], *below*; see, e.g., § 53.200, P 9.01]. Counsel should also pay careful attention to the possible need to modify or exclude any implied warranties and warranties against infringement or interference. For discussion of the creation of express and implied warranties, see § 53.13.

For discussion and form clauses relating to the exclusion and modification of implied warranties, see § 53.221. For discussion and form clauses pertaining to warranties against interference and infringement, including pertinent disclaimers of those warranties, see § 53.222.

[b] Inconsistent Exclusion of Warranties

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty must be reasonably construed as consistent with each other [*Com. Code § 10214(a)*]. However, subject to the Commercial Code provision governing parol or extrinsic evidence [see *Com. Code § 10202*; § 53.12[4]], negation or limitation of an express warranty is inoperative to the extent that the construction is unreasonable [*Com. Code § 10214(a)*].

[2] FORM

Clauses for Exclusion of Express Warranties

EXCLUSION OF EXPRESS WARRANTIES

[Choose one of the following paragraphs:]

[EITHER]

____ *[specify paragraph number]*. No agent, employee, or representative of Lessor has any authority to bind Lessor to any affirmation, representation, or warranty concerning the goods leased under this Agreement; and unless an affirmation, representation, or warranty made by an agent, employee, or representative is specifically included within this Agreement, it will not be enforceable by Lessee.

[OR]

____ *[specify paragraph number]*. It is the intent of the parties to provide in this Agreement an effective agreement of all express warranties with respect to the goods leased under this Agreement. Both parties are represented by counsel and have reduced the entire agreement to this writing. The description of the goods contained in this Agreement is the sole basis for the parties' agreement. No statement of fact, promise, representation, or other indication has been made with respect to the quality of goods outside of this Agreement. Thus, any sample or model referred to in the Agreement was not intended as a basis for the Agreement and was not relied on in arriving at its terms, but was used for purposes of illustration only. Further, any opinions or statements of Lessor as to the value or quality of the goods leased under this Agreement do not form a basis for this Agreement, and unless the statements are specifically embodied in this writing, they do not in any way constitute a warranty. Any modification of this Agreement that relates in any way to a warranty must be in writing and signed by Lessor; otherwise the purported modification will be void.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionWarrantiesCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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2. Warranties

21-53 California Legal Forms--Transaction Guide § 53.221

§ 53.221 Clauses for Exclusion or Modification of Implied Warranties

[1] Comment

[a] Use of Form

This form contains alternative clauses for the exclusion or modification of implied warranties that arise under Division 10 of the Commercial Code [*see Com. Code §§ 10212, 10213*]. These clauses may be used in either of the complete lease forms in this chapter [*see §§ 53.200, 53.201*]. For example, any of the clauses may be substituted for the warranty provisions in § 53.200, Article 9, or 53.201, Paragraph 3. However, if that substitution is made, counsel must be careful to remove any contradictory language, including language tending to create an express warranty [*see e.g., § 53.200, P 9.01*]. For discussion of the creation of express and implied warranties, see § 53.13.

For discussion and form clauses relating to the exclusion of express warranties, see § 53.220. For discussion and form clauses pertaining to warranties against interference and infringement, including pertinent disclaimers of those warranties, see § 53.222.

[b] Exclusion or Modification of Implied Warranties

Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," or "with all faults." Additionally, implied warranties are excluded by other language that in common understanding calls the lessee's attention to the exclusion of warranties and makes plain that there is no implied warranty. In either case, the exclusionary language must be in writing and must be conspicuous [*Com. Code § 10214(c)(1)*; *see, e.g., [2], below*].

If the lessee has examined the goods, sample, or model as fully as desired or has refused to examine the goods before entering into the lease contract, there is no implied warranty with regard to defects that an examination under the circumstances would have revealed [*Com. Code § 10214(c)(2)*].

An implied warranty may also be excluded or modified by course of dealing, course of performance, or usage of trade [

Com. Code § 10214(c)(3); see Com. Code § 1303(d) (when course of performance or practical construction is relevant to determine meaning of lease agreement)]. For further discussion of the exclusion or modification by conduct, or by course of dealing, course of performance, or usage of trade, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

To exclude or modify any implied warranty of fitness, the exclusion must be in writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous, and states, for example, "There is no warranty that the goods will be fit for a particular purpose." [*Com. Code § 10214(b); see Com. Code § 10213*].

To exclude or modify an implied warranty of merchantability, the exclusion or modification must be conspicuously stated in writing and must mention "merchantability" [*Com. Code § 10214(b)*].

[2] FORM

Clauses for Exclusion or Modification of Implied Warranties

EXCLUSION OF IMPLIED WARRANTIES

[Choose among the following paragraphs, as required:]

[Exclusion of implied warranty generally, use:]

____ [specify paragraph number]. THERE ARE NO WARRANTIES THAT EXTEND BEYOND THE DESCRIPTION ON THE FACE OF THIS AGREEMENT.

[Exclusion of implied warranty based on lessee's examination of goods, use:]

____ [specify paragraph number]. LESSEE AFFIRMS THAT _____ [HE or SHE] HAS HAD AMPLE OPPORTUNITY TO INSPECT AND EXAMINE THE MODEL OR SAMPLE OF THE GOODS AS FULLY AS _____ [HE or SHE] DESIRES, AND THAT _____ [HE or SHE] HAS EXAMINED THE MODEL OR SAMPLE AND FOUND NO DEFECTS. NO WARRANTY IS MADE BY LESSOR EXCEPT THAT THE GOODS TO BE DELIVERED UNDER THIS AGREEMENT WILL BE SUBSTANTIALLY IDENTICAL TO THE MODEL OR SAMPLE INSPECTED.

[Exclusion of implied warranty of fitness for particular purpose, use:]

[EITHER]

LESSEE AFFIRMS THAT _____ [HE or SHE] HAS NOT RELIED ON LESSOR'S SKILL OR JUDGMENT TO SELECT OR FURNISH GOODS FOR ANY PARTICULAR PURPOSE, AND THIS LEASE IS MADE WITHOUT ANY WARRANTY BY LESSOR THAT THE GOODS ARE SUITABLE FOR ANY PARTICULAR PURPOSE.

[OR]

____ [specify paragraph number]. LESSOR MAKES NO WARRANTY THAT THE GOODS LEASED UNDER

THIS AGREEMENT ARE FIT FOR ANY PARTICULAR PURPOSE.

[Exclusion of implied warranty of merchantability, use:]

[EITHER]

_____ *[specify paragraph number]*. LESSOR MAKES NO WARRANTY OF MERCHANTABILITY WITH RESPECT TO THE GOODS LEASED UNDER THIS AGREEMENT.

[OR]

_____ *[specify paragraph number]*. LESSOR DOES NOT WARRANT THAT THE GOODS LEASED UNDER THIS AGREEMENT ARE MERCHANTABILITY, AND THE LESSEE AGREES TO THIS BY AFFIXING _____*[HIS or HER]* INITIALS IN THE MARGIN ALONGSIDE THIS DISCLAIMER.

[Modification of implied warranty:]

_____ *[specify paragraph number]*. LESSOR ACKNOWLEDGES RECEIPT OF PLANS AND SPECIFICATIONS FOR THE GOODS TO BE LEASED UNDER THIS AGREEMENT, AND LESSOR WARRANTS THAT THE GOODS FURNISHED WILL COMPLY, WITHIN THE LIMITATIONS STATED BELOW, TO THE PLANS AND SPECIFICATIONS. LESSOR MAKES NO OTHER WARRANTY, EXPRESS OR IMPLIED, AS TO THE GOODS. THE WARRANTY OF MERCHANTABILITY IS EXPRESSLY EXCLUDED FROM THIS AGREEMENT BY THE PARTIES.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionWarrantiesCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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 2. Warranties

21-53 California Legal Forms--Transaction Guide § 53.222

§ 53.222 Clauses Governing Warranties Against Interference or Against Infringement

[1] Comment

[a] Use of Form

This form contains clauses that create, disclaim, or limit warranties against interference or warranties against infringement. If the parties do not agree on their own warranties or disclaimers, warranties against interference and warranties against infringement are governed by *Com. Code § 10211* [see *Com. Code § 10214(d)*].

This form includes a warranty against interference, a warranty against infringement, and a promise by the lessee to hold the lessor harmless against infringement claims arising out of the lessor's compliance with specifications furnished by the lessee. These clauses confirm the rights that *Com. Code § 10211* provides to the parties in the absence of an express agreement otherwise.

This form also includes additional clauses that vary the effects of *Com. Code § 10211* by agreement.

These form clauses may be used in either of the applicable complete forms in this chapter [see §§ 53.200, 53.201]. For example, any of the clauses may be substituted for the warranty provisions contained in § 53.200, Article 9 or in § 53.201, Paragraph 3. However, if that substitution is made, counsel should pay careful attention to the possible need to modify or exclude any express or implied warranties. For discussion of the creation of express and implied warranties, see § 53.13.

[b] Warranties Against Interference

In the absence of disclaimer [see *Com. Code § 10214(d)*; see [d], below], there is in a lease contract a warranty that for the duration of the lease no person holds a claim to or interest in the goods that arose from an act or omission of the lessor that will interfere with the lessee's enjoyment of the leasehold interest. However, a claim by way of infringement or the like may still be brought under this statutory warranty against interference [*Com. Code § 10211(a)*].

[c] Warranties Against Infringement

Except in a finance lease [see *Com. Code* § 10103(a)(7) (definition); see § 53.201 (form)], and unless modified or excluded by the parties [see *Com. Code* § 10214(d); see also [d], below], there is in a lease contract by a merchant lessor who regularly deals in the goods covered by the lease a warranty that the goods are delivered free of the rightful claim of any person by way of infringement or the like [*Com. Code* § 10211(b)]. For a discussion of the meaning of "infringement or the like," see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

However, a lessee who furnishes specifications to a lessor or a supplier must hold the lessor and the supplier harmless against any claim by the way of infringement or the like that arises out of compliance with those specifications [*Com. Code* § 10211(c)]. For a discussion of the issues concerning this type of indemnity, refer to Ch. 79, *Suretyship, Guaranty, and Indemnity*.

[d] Exclusion or Modification of Warranties Against Interference or Infringement

To exclude or modify a warranty against interference or against infringement or any part of it, the language of exclusion or modification must be in writing and must be specific and conspicuous. However, an exception to this requirement exists if the circumstances, including course of performance, course of dealing, or usage of trade, give the lessee reason to know that the goods are being leased subject to a claim or interest of any person [*Com. Code* § 10214(d)]. For further discussion of the exclusion and modification of warranties, see § 53.13[4].

[2] FORM**Clauses Governing Warranties Against Interference or Against Infringement**

[Choose among the following paragraphs, as required:]

[EITHER]

WARRANTY AGAINST INTERFERENCE

____ [specify paragraph number]. Lessor warrants that _____ [he or she] has title to the goods and that no person holds a claim or interest in the goods that may interfere with Lessee's quiet enjoyment of _____ [his or her] leasehold interest. However, this warranty does not extend to claims for infringement that may be brought by any person.

[OR]

DISCLAIMER OF WARRANTY AGAINST INTERFERENCE

____ [specify paragraph number]. LESSOR SPECIFICALLY EXCLUDES ANY WARRANTY THAT THE GOODS LEASED UNDER THIS AGREEMENT ARE FREE AND CLEAR OF A THIRD PARTY'S SUPERIOR INTEREST THAT MAY INTERFERE WITH LESSEE'S ENJOYMENT OF THE LEASEHOLD INTEREST. LESSEE WILL HOLD LESSOR HARMLESS FOR ANY INJURY CAUSED BY ANY THIRD PARTY'S INTERFERENCE IN LESSEE'S ENJOYMENT OF THE LEASEHOLD INTEREST.

[OR]

GOODS SUBJECT TO _____ *[specify form of claim, e.g., SECURITY INTEREST or LIEN]*

_____ *[specify paragraph number]*. THE GOODS LEASED UNDER THIS AGREEMENT ARE SUBJECT TO A _____ *[specify form of claim, e.g., SECURITY INTEREST or LIEN]* IN THE AMOUNT OF \$ _____ HELD BY _____ *[name of secured party or lienholder]*. LESSOR WILL PAY THE INDEBTEDNESS COVERED BY THE _____ *[specify, e.g., SECURITY INTEREST or LIEN]* AND WILL FURTHER INDEMNIFY LESSEE FOR ANY LOSSES INCURRED AS A RESULT OF LESSOR'S BREACH UNDER THE _____ *[specify, e.g., SECURITY INTEREST or LIEN]*.

[Continue with the following, as required:]

[EITHER]

WARRANTY AGAINST INFRINGEMENT

_____ *[specify paragraph number]*. Lessor warrants that the leased goods will be delivered free of the rightful claim of any third person by way of infringement.

[OR]

DISCLAIMER OF WARRANTY AGAINST INFRINGEMENT

_____ *[specify paragraph number]*. LESSOR MAKES NO WARRANTY THAT THE GOODS LEASED UNDER THIS AGREEMENT ARE DELIVERED FREE OF THE RIGHTFUL CLAIM OF ANY THIRD PARTY BY WAY OF INFRINGEMENT.

[OR]

_____ *[specify paragraph number]*. AS PART OF THIS AGREEMENT, LESSOR *[or SUPPLIER]* AGREES TO ASCERTAIN WHETHER GOODS MANUFACTURED IN ACCORDANCE WITH THE SPECIFICATIONS ATTACHED TO THIS AGREEMENT WILL GIVE RISE TO THE RIGHTFUL CLAIM OF ANY THIRD PERSON BY WAY OF INFRINGEMENT. LESSEE MAKES NO WARRANTY THAT THE PRODUCTION OF GOODS ACCORDING TO THE SPECIFICATIONS WILL NOT GIVE RISE TO AN INFRINGEMENT CLAIM, AND IN NO EVENT WILL LESSEE BE LIABLE TO LESSOR FOR INDEMNIFICATION IF LESSOR IS SUED ON THE GROUNDS OF INFRINGEMENT.

IF LESSOR IS OF THE OPINION THAT NO INFRINGEMENT WILL RESULT, _____ *[HE or SHE]* WILL NOTIFY LESSEE TO THIS EFFECT IN WRITING WITHIN _____ *[specify time frame, e.g., 2 WEEKS]* AFTER THE EXECUTION OF THIS AGREEMENT, AND IF LESSEE IS SUBSEQUENTLY HELD LIABLE FOR INFRINGEMENT, LESSOR WILL HOLD LESSEE HARMLESS. IF LESSOR ASCERTAINS THAT PRODUCTION OF THE GOODS IN ACCORDANCE WITH THE SPECIFICATIONS WILL RESULT IN AN

INFRINGEMENT, THIS AGREEMENT WILL BE VOID EXCEPT THAT LESSEE WILL PAY LESSOR THE REASONABLE COST OF _____[HIS or HER] SEARCH FOR INFRINGEMENTS.

[Continue with the following, as required:]

LESSEE'S PROMISE TO HOLD LESSOR [or SUPPLIER] HARMLESS FOR COMPLIANCE WITH SPECIFICATIONS

Lessee, in furnishing specifications to Lessor [or Supplier], agrees to hold Lessor [or Supplier] harmless against any claims by way of infringement that arise out of compliance with the specifications.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionWarrantiesCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 53 PERSONAL PROPERTY LEASING

PART IV. FORMS

B. Specific Lease Provisions

2. Warranties

21-53 California Legal Forms--Transaction Guide §§ 53.223-53.229

[Reserved]

§§ 53.223[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
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3. Breach and Remedies

21-53 California Legal Forms--Transaction Guide § 53.230

§ 53.230 Clauses Specifying Whether Lessee May or Must "Cover"

[1] Comment

[a] Use of Form

This form contains alternative clauses specifying the limited remedies generally available to a lessee under Division 10 of the Commercial Code as provided in *Com. Code § 10508*. These clauses are for use in either of the applicable complete lease forms in this chapter [see §§ 53.200, 53.201] by parties who want to limit the remedies otherwise available under the Commercial Code. These clauses either require or forbid the lessee to "cover" by obtaining substitute goods [see *Com. Code § 10518*; [b], below].

Com. Code § 10503 specifically permits the lease agreement to limit or modify the remedies otherwise provided under Division 10 of the Commercial Code. For discussion of that provision and for examples of form clauses that modify or limit remedies other than the right to "cover" by obtaining substitute goods, see § 53.231.

For discussion of the remedies provided under *Com. Code § 10508*, see § 53.15[2] (lessee's remedies).

[b] Lessee's Election to Cover

After the lessors' statutory default under the lease contract [see *Com. Code § 10508(a)*] or, if agreed, after other default by the lessor, the lessee may elect to "cover" by contracting to purchase or lease, or making any purchase or lease, of goods in substitution for those due from the lessor [*Com. Code § 10518(a)*; see *Com. Code § 10508(a)*].

A lessee who obtains substitute goods may recover damages from the lessor under specified circumstances. Except when the lease agreement provides for liquidated damages [see *Com. Code § 10504*; § 53.232], or when otherwise agreed to by the parties [see *Com. Code §§ 1302, 10503*], statutory damages are available if the lessee's "cover" is by a lease agreement substantially similar to the original lease. The new lease agreement must be made in good faith and in a commercially reasonable manner [*Com. Code § 10518(b)*].

When available, the lessee may recover from the lessor as damages [*Com. Code § 10518(b)*]:

- The present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term that is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement; and
- Any incidental or consequential damages minus expenses saved by the lessee as a consequence of the lessor's default.

If the lessee's "cover" is by lease agreement that for any reason does not qualify for recovery damages under *Com. Code § 10518(b)*, or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover. In this case, *Com. Code § 10519* governs [*Com. Code § 10518(c)*; see [c], below].

[c] Lessee's Alternative Remedy to Election to "Cover"

Except when the lease agreement provides for liquidated damages [*see Com. Code § 10504*; see § 53.232], or when otherwise agreed to by the parties [*see Com. Code §§ 1302, 10503*], if a lessee elects not to "cover" or elects to "cover" and the "cover" is by lease agreement, that for any reason does not qualify for treatment under *Com. Code § 10518(b)* [*see [b], above*], or is by purchase or otherwise, the measure of damages is prescribed by statute [*see Com. Code § 10519(a)*]. Under these circumstances, the measure of damages for nondelivery or repudiation by the lessor, or for rejection or revocation of acceptance by the lessee, is the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent [*Com. Code § 10519(a)*; see *Com. Code § 10519(b)* (market rent)]. This amount is computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, minus expenses saved as a consequence of the lessor's default [*Com. Code § 10519(a)*].

[2] FORM

Clauses Specifying Whether Lessee May or Must "Cover"

Remedies of Lessee

[Choose among the following paragraphs, as required:]

[If lessee's damages will be limited to costs incurred in storage rental, use:]

_____ [specify paragraph number]. The parties to this Lease Agreement acknowledge that certain materials necessary for the manufacture of the goods to be leased under this Agreement are not readily available and may be difficult to obtain. These materials include _____ [specify materials]. Accordingly, Lessee waives all rights to damages in any form whatsoever, except the costs incurred in the additional rental of suitable storage facilities from the date of the initial delivery provided for in this Agreement until Lessor notifies Lessee in writing that _____ [he or she] is unable to procure the materials after the exercise of a good faith effort. Nothing in this provision or elsewhere in this Lease will be construed as relieving the Lessor of any liability for any breach of this Agreement other than a breach occasioned by the lack of the materials specified in this paragraph.

[If lessee is entitled to damages, including incidental and consequential damages, only if lessee covers as provided in *Com. Code § 10518*, use:]

[EITHER]

_____ [specify paragraph number]. If Lessor fails to deliver goods in conformity with this contract or repudiates this contract, Lessee will not be entitled to damages unless _____ [he or she] "covers" by making the purchase or lease of or a contract to purchase or lease goods in substitution for those due from Lessor. Incidental and consequential damages are included within the meaning of "damages" as used in this Paragraph.

[OR]

_____ [specify paragraph number]. If Lessor fails to deliver goods in conformity with this contract or repudiates this contract, Lessee will be entitled to recover only incidental and consequential damages unless _____ [he or she] "covers" within the meaning of *Commercial Code Section 10518* by contracting for substitute goods.

[If lessee is entitled to damages, but will not have the right to cover as provided in Com. Code § 10518, use:]

[EITHER]

_____ [specify paragraph number]. If Lessor fails to deliver goods in conformity with this contract or repudiates this contract, Lessee's right to damages for nondelivery or repudiation by the lessor, or for rejection or revocation of acceptance by the lessee, will be limited to the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, minus expenses saved in consequence of the lessor's default, and Lessee will not have the right to "cover" within the meaning of *Commercial Code Section 10518*.

[OR]

_____ [specify paragraph number]. If Lessor fails to deliver goods in conformity with this contract or repudiates this contract, Lessee's right to damages for nondelivery or repudiation by the lessor, or for rejection or revocation of acceptance by the lessee, will be limited to the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, minus expenses saved in consequence of the lessor's default. Lessee will have no right to "cover" within the meaning of *Commercial Code Section 10518* by procuring substitute goods, and no right to incidental or consequential damages.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)DefaultGeneral OverviewCommercial Law (UCC)Leases (Article 2A)DefaultLessee & Lessor DefaultCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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3. Breach and Remedies

21-53 California Legal Forms--Transaction Guide § 53.231

§ 53.231 Clauses Limiting Damages or Remedies

[1] Comment

[a] Use of Form

This form contains alternative clauses modifying or limiting damages or remedies in accordance with *Com. Code § 10503*. These clauses may be used in the complete lease forms provided in this chapter [see §§ 53.200, 53.201]. For example, any of these clauses may be added to the remedy provisions contained in § 53.200, Article 17 or in § 53.201, Paragraph 24. For discussion and alternative form clauses pertaining to the concept of "cover," see § 53.230. For discussion of remedies in general, see § 53.15.

[b] Contractual Modification or Limitation of Remedies Generally

Except as otherwise provided in Division 10 of the Commercial Code [*Com. Code § 10101-10600*], a lease agreement may provide for remedies in addition to or in substitution for those provided in that Division. The agreement also may limit or alter the measure of damages recoverable [*Com. Code § 10503(a)*]. Resort to a remedy provided under the Commercial Code or in the lease agreement is optional unless the remedy is expressly agreed to be exclusive. If circumstances cause an exclusive or limited remedy to fail in its essential purpose, or if the provision for an exclusive remedy is unconscionable, remedy may still be had as provided in Division 10 of the Commercial Code [*Com. Code § 10503(b)*; see also Ch. 52, *Sales of Goods Under the Uniform Commercial Code*].

Division 10 of the Commercial Code does not impair any rights or remedies on default by a lessee or lessor with respect to any obligation or promise collateral or ancillary to the lease contract [*Com. Code § 10503(d)*]. Defaults with respect to obligations or promises collateral or ancillary to the lease contract are governed by other law [see *Com. Code § 10503* (California Comment)].

[c] Consequential Damages

Consequential damages arising from a lessor's default include any loss resulting from general or particular requirements and needs of which the lessor at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise [*Com. Code § 10520(b)(1)*]; see *Com. Code § 10518* (cover); see also § 53.230[1]. Additionally, personal injuries and property damage proximately resulting from any breach of warranty may be recoverable as consequential damages [*Com. Code § 10520(b)(2)*].

Consequential damages may be liquidated [see *Com. Code § 10504* (liquidation)], or may be otherwise limited, altered, or excluded unless the limitation, alteration, or exclusion is unconscionable [*Com. Code § 10503(c)*]; see § 53.232 (liquidated damages)]. The limitation, alteration, or exclusion of consequential damages for personal injury in the case of consumer goods is prima facie unconscionable. However, the limitation, alteration, or exclusion of damages in the context of a commercial loss is not prima facie unconscionable [*Com. Code § 10503(c)*].

[2] FORM

Clauses Limiting Damages or Remedies

Limitation of Damages or Remedies

[Choose among the following paragraphs, as required:]

[If lessee's remedies will be limited because raw materials required under lease are difficult to obtain, use:]

_____ [specify paragraph number]. The parties to this Agreement acknowledge that obtaining the raw materials essential to the production of the goods leased under this Agreement is difficult, and that the supply of those materials is uncertain. [These raw materials include the following: _____ (specify materials)]. Therefore, it is agreed that if the Lessor is unable after a good faith effort to obtain enough raw materials to properly manufacture _____ percent of the goods required under the terms of this Agreement, Lessee's exclusive remedy will be the return of any money paid on account of the rental amount due for the goods, including any security deposit or advance fee. Nothing in this Agreement will be construed to limit Lessee's rights to any applicable remedy or damages if Lessor fails to properly perform any other obligation under this Agreement.

[If lessee remedies for nonconforming goods or parts will be limited because leased machinery is new and its performance uncertain, use:]

_____ [specify paragraph number]. Because the machinery required in the production of the goods to be leased under this Agreement is complicated and of relatively new design, Lessee agrees to accept all nonconforming deliveries and Lessor agrees to replace or repair all defective or nonconforming goods or parts without any expense whatsoever on the part of Lessee. Replacement and repair will be the sole remedy of Lessee with respect to any nonconforming goods and parts and will be in lieu of any other remedy available under applicable law. The provisions of this Agreement with respect to limitation of remedies will not apply to a failure by Lessor to deliver the goods.

[Regarding incidental damages, choose one of the following, as required:]

[EITHER]

[If lessee will not be entitled to incidental damages, use:]

_____ [specify paragraph number]. If Lessor breaches or repudiates this Agreement, Lessee will not be entitled to recover any incidental damages as that term is defined in *Commercial Code Section 10520*.

[OR]

[If lessee will be entitled to incidental damages in addition to statutory incidental damages, use:]

_____ [specify paragraph number]. If Lessor breaches or repudiates this Agreement, Lessee will be entitled to recover as incidental damages, in addition to those provided for under Division 10 of the Commercial Code, the following:

- (a) Any finder's fee paid to anyone who procured this Agreement for Lessee.
- (b) Any expenses incurred in leasing substitute goods beyond those incurred in effectuating this Agreement.

[Regarding consequential damages, choose one of the following, as required:]

[EITHER]

[If lessee generally will not be entitled to consequential damages, use:]

_____ [specify paragraph number]. If Lessor breaches or repudiates this Agreement, Lessee will not be entitled to any consequential damages as defined in Division 10 of the Commercial Code, except that if the goods leased are "consumer goods," proven damages for personal injuries caused by the non-negligent operation or use of the leased goods by Lessee will be recoverable.

[OR]

[If lessee will be entitled to consequential damages in addition to other statutory rights, use:]

_____ [specify paragraph number]. If Lessor breaches or repudiates this Agreement, Lessee will be entitled to recover as consequential damages, in addition to all other rights granted by the Commercial Code, any profit lost on a contract to sublease the goods if Lessee is unable to recover.

[OR]

[If lessee's consequential damages generally will be limited, use:]

_____ [specify paragraph number]. If Lessor breaches or repudiates this Agreement, Lessee will not be entitled to any consequential damages in excess of \$_____. This limitation, however, will not apply to proven damages for personal injuries caused by the leased goods not involving the negligent operation or use of the leased goods by Lessee.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)DefaultRemediesCommercial Law (UCC)Leases (Article 2A)Formation &
ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.232

§ 53.232 Liquidated Damages Clauses

[1] Comment

[a] Use of Form

This form contains alternative clauses that may be used to establish liquidated damages as permitted by *Com. Code § 10504*. Any of these clauses may be used in either of the complete lease forms in this chapter [see §§ 53.200, 53.201]. For example, any of the clauses may be added to the remedy provisions contained in § 53.200, Article 17, or in § 53.201, Paragraph 24.

For discussion and form provisions pertaining to "cover" as a remedy, see § 53.230. For discussion and form clauses relating to the modification or limitation of damages and remedies other than by "cover," see § 53.231.

[b] Validity of Liquidated Damages Clauses

The parties may provide in the lease agreement that the damages payable by either party for default or "any other act or omission" may be liquidated. The phrase "any other act or omission" includes indemnity for loss or diminution of anticipated tax benefits, or loss or damage to the lessor's residual interest [*Com. Code § 10504(a)*]. The liquidated damages clause is subject to and must comply with *Civ. Code § 1671* [*Com. Code § 10504(a); but see [c], below*].

The Civil Code sets two standards for determining the validity of liquidated damages provisions [see *Civ. Code § 1671*]. A liquidated damages provision in a contract for the rental of personal property or services, primarily for personal, family, or household purposes [see *Civ. Code § 1671(c)(1)*] is void unless the parties state an amount that will be presumed to be the amount of damage sustained by a breach of the contract when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage [*Civ. Code § 1671(d)*].

In other contracts, except certain transactions relating to the leasing of real property [see *Civ. Code § 1671(c)(2)*], a liquidated damages provision for the breach of the contract is valid unless the party seeking to invalidate the provision

establishes that the provision was unreasonable under the circumstances existing at the time the contract was made [*Civ. Code* § 1671(b)].

[c] Liquidated Damages Under the Commercial Code

When a lessor justifiably withholds or stops delivery of the leased goods because of the lessee's default or insolvency [*see Com. Code* §§ 10525, 10526], the lessee is entitled to restitution of any amount by which the sum of his or her payments exceeds the amount to which the lessor is entitled as liquidated damages under an agreement in accordance with the Commercial Code [*Com. Code* § 10504(c)(1); *see Com. Code* § 10504(a) (allowing liquidated damages)]. If there are no liquidated damages provisions, then the lessee is entitled to restitution of 20 percent of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of that amount or \$500 [*Com. Code* § 10504(c)(2); *see Com. Code* § 10103(a)(5) ("consumer lease" defined)].

In either case, the lessee's right to restitution is subject to offset to the extent the lessor establishes a right to recover damages other than liquidated damages and to the extent the lessor establishes the amount or value of any benefits received by the lessee by reason of the lease contract [*Com. Code* § 10504(d)].

If the lease agreement provides for liquidation of damages and the lease provision does not comply with *Com. Code* § 10504(a) [*see* [b], *above*], the aggrieved party may seek a remedy under Division 10 of the Commercial Code [*Com. Code* § 10504(b)].

[d] Liquidated Damages Formulas

A number of common liquidated damages clauses are used in lease agreements. One formula provides that the sum of the (1) past due lease payments; (2) accelerated future lease payments; and (3) the lessor's estimated residual interest, minus the net proceeds of disposition (whether by sale or release) of the leased goods equals the lessor's damages. This formula may also include tax indemnities, costs, interest, and attorneys' fees. A second common formula uses a periodic depreciation allocation as a credit to the amount computed under the first formula, above. Other formulas include the use of a fixed number of periodic payments or of stipulated loss schedules as a means of liquidating damages [*see Com. Code* § 10504 (California Comment)]. For an example of a stipulated loss schedule, see the Schedule in § 53.200.

[2] FORM

Liquidated Damages Clauses

Liquidated Damages

[Choose among the following paragraphs, as required:]

[If lease covers goods generally available on the open market, use:]

[EITHER]

____ [specify paragraph number]. If Lessee wrongfully refuses to accept the goods, _____ [he or she] must pay to Lessor, in lieu of the enforcement of this Lease, as liquidated damages and not as a penalty, the sum of \$ _____. In addition, if shipment has been made, Lessee must also reimburse Lessor for all costs of shipment.

[OR]

_____ [specify paragraph number]. Lessee will have the right to terminate this Lease by giving notice to Lessor in accordance with Paragraph _____ of this Lease before the goods are shipped, provided that Lessee tenders to Seller _____ [e.g., one third] of the balance of rental payments due with _____ [his or her] notice of termination. The sum of _____ [e.g., one third] of the balance of rental payments will constitute liquidated damages and not a penalty, and will be the exclusive remedy of Lessor when notice of termination is properly given. The liquidated damages are assessed to cover Lessor's usual costs of processing this contract (including payment of lease commission), recordkeeping, and profit.

[OR]

_____ [specify paragraph number]. If Lessor fails to deliver leased goods conforming to this contract, _____ [he or she] will pay Lessee the sum of \$ _____ as liquidated damages and not as a penalty.

[If leased goods will be specifically manufactured by lessor for lessee, use:]

_____ [specify paragraph number]. Because the goods leased under this Lease are to be specially manufactured by Lessor and are not readily available on the open market, [add as required: and because the goods are to become part of the machinery operated by Lessee], any failure to deliver the goods as required by this Lease will delay Lessee's manufacturing operations and result in substantial damages. For this reason, and because of the difficulty of accurately proving loss and the nonfeasibility of Lessee's obtaining an adequate remedy, Lessor agrees to pay as liquidated damages and not as a penalty the following amounts:

(a) For each day's delay in delivery Lessor agrees to pay \$ _____ up to a maximum of _____ [specify number, e.g., 15] days;

(b) If at the end of _____ [specify number, e.g., 15] days subsequent to the time of delivery, Lessee has not received the goods, Lessor will pay in addition to the per diem amounts the sum of \$ _____; and

(c) If Lessor notifies Lessee in accordance with Paragraph _____ of this Lease that the goods will not be delivered as provided in this Lease, and if Lessee can obtain the goods elsewhere before the expiration of _____ [specify number] days after the time of delivery provided in this Lease, then the Lessor will pay as liquidated damages the per diem rate for the time of the resulting delay, plus the difference between the rental rate in the Lease and the amount Lessee pays to lease the goods from another source.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)DefaultRemediesCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.233

§ 53.233 Clauses Limiting Lessor's Right to Identify Goods to Lease Contract After Lessee's Default

[1] Comment

[a] Use of Form

This form contains alternative clauses limiting the lessor's right to identify goods to the lease contract after the lessee's default. Any of these clauses may be used in either of the complete lease forms contained in this chapter [see §§ 53.200, 53.201]. For example, any of the clauses may be added to the description of goods provision contained in § 53.201, Article 1. When added to one of the complete lease forms, the paragraphs following the inserted provision will require renumbering. For discussion of the identification of goods, see § 53.252[1].

[b] Lessor's Right to Identify Goods to Contract After Lessee's Default Generally

Unless otherwise agreed [see *Com. Code § 1302* (variation of Commercial Code provisions)], the lessor's right to identify goods to the lease contract after a default is governed by *Com. Code § 10524*. An aggrieved lessor may (1) identify to the lease contract conforming goods not already identified if, at the time the seller learns of the default, the goods are in the lessor's (or supplier's) possession or control; and (2) dispose of any goods that demonstrably have been intended for the particular lease contract even if the goods are unfinished [*Com. Code § 10524(a)*; see *Com. Code §§ 10523(a), (c)(1)* (statutory instances of default), 10527(a) (disposition of goods); see also § 53.15[3] (lessor's remedies)].

[c] Unfinished Goods

When a default occurs and the leased goods are unfinished, an aggrieved lessor or supplier may choose his or her remedy in identifying the goods to the contract. The parties may avoid loss and realize their intent by exercising reasonable commercial judgment when selecting the remedy. The lessor or supplier may either (1) complete manufacture and wholly identify the goods to the lease contract; (2) cease manufacture and lease, sell, or otherwise dispose of the goods for scrap or salvage value; or (3) proceed in any other reasonable manner [*Com. Code § 10524(b)*].

The effect of these rights is to allow the lessor or supplier the more ascertainable measure of damages associated with identified goods rather than a general cause of action for damages [*see Com. Code §§ 10527 (lessor's right to dispose of goods), 10528 (damages); see also Com. Code § 2704 (UCC Comment) (seller's right to salvage unfinished goods)*].

[2] FORM

Clauses Limiting Lessor's Right to Identify Goods to Lease Contract After Lessee's Default

Lessor's Right to Identify Goods After Default

[EITHER]

_____ [*specify paragraph number*]. Under no circumstance will Lessor identify goods to this Lease after the time of any default or other cause for modification or termination of this Lease, without the express written consent of Lessee.

[OR]

_____ [*specify paragraph number*]. If Lessee wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to any goods covered by this Lease, Lessor will have no right to identify any goods to this Lease after learning of the rejection, revocation, breach, or repudiation.

[OR]

_____ [*specify paragraph number*]. Lessor waives any rights _____ [he or she] may acquire to identify goods to this Lease after a default by Lessee.

[OR]

_____ [*specify paragraph number*]. If there is any dispute or grievance under the terms of this Lease, whether or not it is caused by a default, Lessor agrees not to complete unfinished goods for the purpose of identifying them to this Lease, and Lessor agrees not to sell, lease, or otherwise dispose of any unfinished goods for scrap or salvage.

[OR]

_____ [*specify paragraph number*]. If on any instance of default by Lessee, Lessor is in possession of any unfinished goods, Lessor waives any and all rights to finish or lease, sell, or otherwise dispose of those goods.

[OR]

_____ [*specify paragraph number*]. If Lessee wrongfully rejects or revokes acceptance of goods, or fails to make payment due on or before delivery, or repudiates with respect to any goods covered by this Lease, Lessor will have no right to complete or lease, sell, or otherwise dispose of those goods unfinished at the time _____ [he or she] learns of the rejection, revocation, breach, or repudiation.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law
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21-53 California Legal Forms--Transaction Guide § 53.234

§ 53.234 Clauses Specifying Risk of Loss in Absence of Breach

[1] Comment

[a] Use of Form

This form contains alternative clauses specifying when the risk of loss passes from the lessor to the lessee. It also includes a clause providing that the parties will share any loss occurring before the goods reach the lessee, to the extent not covered by applicable insurance policies. Designation of the time for the passing of the risk of loss varies under these alternatives. The earliest specified time is the time the goods are identified to the lease contract; the latest is when the lessee has actually received the goods.

The best alternative in any given transaction depends on the circumstances surrounding the transaction, and the parties' desires. In choosing an alternative, the parties should consider the value of the goods to be leased, the likelihood that a loss will occur, and whether insurance will cover any loss. For goods that are subject to increased risk of loss (such as sensitive computer equipment), the lessor may want the risk of loss to pass to the lessee as soon as possible, while the lessee may want to delay assumption of the risk until the goods are actually in his or her possession.

For discussion and alternative provisions regarding the risk of loss in the event of breach, see § 53.235. For further discussion of the passage of the risk of loss, see § 53.14.

[b] Risk of Loss Absent Breach

Unless otherwise agreed to by the parties [*see Com. Code § 1302* (variation by agreement)], the risk of loss generally remains with the lessor and does not pass to the lessee [*Com. Code § 10219(a)*]. However, in the case of a finance lease, the risk of loss passes to the lessee [*Com. Code § 10219(a)*; *see § 53.201[1]*].

If the risk of loss is to pass to the lessee and the time of passage is not set, the risk of loss passes to the lessee on his or her receipt of the goods if the lessor (or, in the case of a finance lease, the supplier) is a merchant [*Com. Code §*

10219(b)(3); see *Com. Code* §§ 2104(1) ("merchant" defined), 10103(a)(24) ("supplier" defined)]. Under those same conditions, if the lessor or supplier is not a merchant, the risk passes to the lessee on tender of delivery [*Com. Code* § 10219(b)(3)]. These rules do not apply if the transaction involves a lease contract that requires or authorizes the goods to be shipped by carrier [see *Com. Code* § 10219(b)(1); [c], below] or involves goods held by a bailee to be delivered without being moved [see *Com. Code* § 10219(b)(2); [d], below].

[c] Risk of Loss If Contract Requires or Authorizes Lessor to Ship Goods by Carrier

If the lease contract requires or authorizes the goods to be shipped by carrier, and does not require the lessor to deliver them at a particular destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier [*Com. Code* § 10219(b)(1)(A)]. If, however, the lease contract requires the lessor to deliver the goods at a particular destination, and the goods are tendered at that destination while in the carrier's possession, the risk of loss passes to the lessee when the goods are tendered there, enabling the lessee to take delivery [*Com. Code* § 10219(b)(1)(B)].

[d] Risk of Loss If Goods Are Held by Bailee

When the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgment by the bailee of the lessee's right to possession of the goods [*Com. Code* § 10219(b)(2); for discussion of bailments, see Ch. 102, *Bailments*].

[2] FORM

Clauses Specifying Risk of Loss in Absence of Breach

Risk of Loss in Absence of Breach

[If the risk of loss will pass to the lessee, choose one the following paragraphs, as required:]

[EITHER]

_____ [specify paragraph number]. The risk of loss of the goods will pass to Lessee as soon as the goods are properly loaded on the carrier designated in this Agreement.

[OR]

_____ [specify paragraph number]. The risk of loss of the goods will pass _____ [specify time of passage: e.g., as soon as or two days after the date] Lessor sends Lessee notification that the goods are ready for delivery.

[OR]

_____ [specify paragraph number]. As soon as the goods are identified to this Agreement, as provided for in Paragraph _____ of this Agreement, the risk of loss will pass to Lessee.

[OR]

_____ [specify paragraph number]. The risk of loss of the goods will pass to Lessee as soon as the goods are ready for

delivery. This risk will pass without regard to any notice that they are ready for delivery.

[OR]

_____ [*specify paragraph number*]. The risk of loss of the goods will not pass to Lessee until Lessee actually receives the goods from the warehouse company.

[*If the parties will share risk, use:*]

_____ [*specify paragraph number*]. If the goods to be leased under this Agreement are lost or destroyed, in whole or part, before Lessee takes possession of the goods, the parties agree to share equally any loss not covered by insurance.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law
(UCC)Leases (Article 2A)Formation & ConstructionCasualty & Risk of LossCommercial Law (UCC)Leases (Article
2A)Lease ContractsGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.235

§ 53.235 Clauses Specifying Risk of Loss in Event of Breach

[1] Comment--Use of Form

This form contains alternative clauses that specify the effect of breach on risk of loss. If the risk of loss is to pass to the lessee and the time of passage of the risk is not stated, the rules specified in *Com. Code § 10220* apply [*see Com. Code § 10220(a)*]. If a tender or delivery fails to conform to the contract so as to give a right of rejection, the risk of loss pertaining to the goods under the lease contract remains on the lessor (or the supplier, in the case of a finance lease) until cure or acceptance [*Com. Code § 10220(a)(1)*]. If the lessee rightfully revokes acceptance, he or she, to the extent of any deficiency in his or her effective insurance coverage, may treat the risk of loss as having remained with the lessor from the beginning [*Com. Code § 10220(a)(2)*].

Whether or not the risk of loss is to pass to the lessee, if the lessee repudiates or is otherwise in default as to conforming goods already identified to the lease contract [*see Com. Code § 10217* (identification)], the lessor (or the supplier, in the case of a finance lease) to the extent of any deficiency in his or her effective insurance coverage may treat the risk of loss as resting on the lessee for a commercially reasonable time [*Com. Code § 10220(b)*].

For discussion and alternative provisions regarding the risk of loss absent breach, see § 53.234. For further discussion of the passage of the risk of loss, see § 53.14.

[2] FORM

Clauses Specifying Risk of Loss in Event of Breach

Risk of Loss in Event of Breach

[EITHER]

_____ [*specify paragraph number*]. Lessee, at _____[his or her] own expense, will independently seek adequate insurance coverage for the goods leased under this Agreement as provided in Paragraph _____ of this Lease. The risk of loss of the goods will pass to Lessee on the signing of this Lease. Lessee will not look to Lessor for any deficiency in insurance coverage, notwithstanding the fact that Lessee may have the right of rejection, or that Lessor may be in breach of this Agreement.

[OR]

_____ [*specify paragraph number*]. Lessor will secure, at its own expense, adequate insurance coverage for the goods leased under this Lease as provided in Paragraph _____ of this Lease. If the goods are lost or damaged, the party then bearing the risk of loss under applicable law will look to the insurance proceeds for full satisfaction, regardless of the adequacy of those proceeds and without regard to a breach by either party.

[OR]

_____ [*specify paragraph number*]. Lessee, at _____[his or her] own expense, will independently seek adequate insurance coverage for the goods leased under this Lease as provided in Paragraph _____ of this Lease. The parties agree that in the event of calamity or disaster, their sole remedy will be that insurance coverage, without regard to the adequacy of the recovery of insurance proceeds.

[OR]

_____ [*specify paragraph number*]. The risk of loss will not be altered by the fact that the conduct of either party may constitute a default or breach.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionCasualty & Risk of LossCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.236

§ 53.236 Clauses Specifying Method of Disposal on Breach

[1] Comment

[a] Use of Form

This form contains alternative clauses that place limitations and specifications on the lessor's right to dispose of goods after a default by the lessee. These clauses may be used in either of the complete lease forms in this chapter [see §§ 53.200, 53.201]. For example, any of the clauses may be added to the remedy provisions contained in § 53.200, Article 17 or to the default provision contained in § 53.201, Paragraph 24. If a clause is added, the paragraphs in the lease that follow the clause will require renumbering.

[b] Right of Disposal After Breach

In the absence of agreement to the contrary [see *Com. Code § 10503*], after a default by the lessee [see *Com. Code § 10523(a), (c)(1)*], after the lessor rightfully refuses to deliver or takes possession of the goods [see *Com. Code §§ 10525, 10526*], or, if agreed, after other default by the lessee, the lessor may dispose of the goods concerned or the undelivered balance of those goods by lease, sale, or otherwise [*Com. Code § 10527(a)*].

A subsequent buyer or lessee who in good faith and for value buys or leases goods from the lessor as a result of a disposition under *Com. Code § 10527* takes the goods free of the original lease contract and any rights of the original lessee. This protection applies even though the lessor failed to comply with one or more requirements of Division 10 of the Commercial Code [*Com. Code § 10527(d)*].

The lessor is not accountable to the lessee for any profit made on any disposition [*Com. Code § 10527(e)*].

[c] Recoverable Damages

A lessor who disposes goods under *Com. Code § 10527* may recover damages from the lessee under specified

circumstances. Except when the lease agreement provides for liquidated damages [*see Com. Code § 10504* (liquidation); *see also* § 53.232], or when otherwise agreed to by the parties [*see Com. Code §§ 1302, 10503*], statutory damages are available if the lessor's disposition is by a lease agreement substantially similar to the original lease. The new lease agreement must be made in good faith and in a commercially reasonable manner [*Com. Code § 10527(b)*].

When available, the lessor may recover the following from the lessee as damages [*Com. Code § 10527(b)*]:

- Accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement.
- The present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement, minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term that is comparable to the then remaining term of the original lease agreement.
- Any incidental damages allowed under *Com. Code § 10530*, minus expenses saved by the lessor as a consequence of the lessee's default.

If the lessor's disposition is by lease agreement that for any reason does not qualify for recovery damages under *Com. Code § 10527(b)*, or is by sale or otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods [*Com. Code § 10527(c)*]. In this case, *Com. Code § 10528* (providing for lessor's measure of damages) governs [*Com. Code § 10527(c)*].

Except when the lease agreement provides for liquidated damages [*see Com. Code § 10504; see also* § 53.232], or when otherwise agreed to by the parties [*see Com. Code §§ 1302, 10503*], if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under *Com. Code § 10527(b)* (discussed above), or is by sale or otherwise, the measure of damages for a statutory default [*see Com. Code § 10523(a), (c)(1)*], or, if agreed, for other default by the lessee, is set by the Commercial Code [*see Com. Code § 10528*]. Under these circumstances, the measure of damages available to the lessor on default by the lessee is [*Com. Code § 10528(a)*]:

- Accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor;
- The present value (as of the date determined under the preceding item, *above*) of the total rent for the then remaining term of the original lease agreement, minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term; and
- Any incidental damages allowed under *Com. Code § 10530*, minus expenses saved by the lessor as a consequence of the lessee's default.

If the measure of damages provided under *Com. Code § 10528(a)* is inadequate to put the lessor in as good a position as performance would have, the lessor is entitled to an alternative damage formula. Under the alternative formula, the measure of damages is the present value of the profit (including reasonable overhead) the lessor would have made from full performance by the lessee, together with any incidental damages allowed under *Com. Code § 10530*, with allowance for costs reasonably incurred and credit for payments or proceeds of disposition [*Com. Code § 10528(b)*].

[2] FORM

Clauses Specifying Method of Disposal on Breach

Disposition of Goods on Breach

[EITHER]

____ [specify paragraph number]. On default by Lessee, or on Lessor's rightful refusal to deliver the goods or repossession of the goods, lessor may dispose of the goods in any commercially reasonable manner. Lessee will be liable to Lessor for any costs incurred in disposing of the goods in addition to any losses suffered as a result of the disposition, provided Lessor has made a good faith effort in the disposition.

[OR]

____ [specify paragraph number]. If Lessor has the right to dispose of the goods under the relevant provisions of Division 10 of the Commercial Code, the disposition must be conducted in a commercially reasonable manner and in good faith. Lessor will, ____ [specify number] days before the disposition of the goods, notify Lessee of _____ [his or her] intention to dispose of the goods and the date and manner of disposition. Lessee will have the right to reclaim the goods under the original terms of this Agreement on notice to Lessor ____ [specify number] days before the disposition and indemnification for all costs incurred by Lessor in effectuating the disposition. If the Lessee fails to reclaim the goods in accordance with this provision, _____ [he or she] will be liable for damages in accordance with the applicable provisions of Division 10 of the Commercial Code.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)DefaultGeneral OverviewCommercial Law (UCC)Leases (Article 2A)DefaultLessee & Lessor DefaultCommercial Law (UCC)Leases (Article 2A)DefaultRemediesCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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[Reserved]

§§ 53.237[Reserved]



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21-53 California Legal Forms--Transaction Guide § 53.250

§ 53.250 Maintenance and Service Provision

[1] Comment--Use of Form

This form contains an alternative provision to establish the lessor's responsibility for the maintenance and service of the leased property. It is designed to be substituted for Article 6 of the general lease *form in § 53.200[2]*. Using this provision converts that lease into a full service or maintenance lease. The lessor undertakes the duty to provide all maintenance, repairs, and parts for the leased property. The lessee agrees to properly use the property and to give notice to the lessor of any need for service. If the property requires regular maintenance services, a schedule may be attached to the lease specifying the intervals and services to be provided by the lessor.

For further discussion of full service leases, see § 53.10[4].

[2] FORM

Maintenance and Service Provision

ARTICLE 6: MAINTENANCE AND SERVICES PROVISIONS

Maintenance and Services

6.01. Lessor agrees, at its own cost and expense (unless otherwise provided in this Lease or any attached Schedule) to provide regular inspection, all required maintenance and repairs, and all replacement services and parts for the leased property. Lessor agrees to provide these services on the premises of Lessee unless otherwise agreed by the parties.

[Optional: Regular maintenance and service will be provided according to the attached Schedule

_____ (specify, e.g., B).]

Lessee's Responsibilities

6.02. Lessee agrees to provide Lessor with entry and access to any facility where the leased property is located for the purposes of providing regular service and repair. In the event any equipment for any reason becomes disabled, Lessee will immediately advise Lessor of the disability, specifying where the equipment is located, the nature of the disability, and any known cause. Lessee agrees that it will not make any repairs or adjustments to the equipment without Lessor's prior consent, and will abide by Lessor's decision concerning the time and place at which any repairs will be made.

Legal Topics:

For related research and practice materials, see the following legal topics:

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21-53 California Legal Forms--Transaction Guide § 53.251

§ 53.251 Authorization for Lessor to Obtain Insurance

[1] Comment--Use of Form

This form is an optional lease provision for use in the event that the lease term begins before the lessee is able to obtain the insurance certificate that is usually required by the lease. In this form, the lessee authorizes the lessor to insure the property at lessee's expense. If the lessor does not obtain insurance, the burden of any loss is on the lessee.

This provision is intended to be inserted as Paragraph 12.04 of the general lease *form in § 53.200[2]*. It may also be renumbered and adapted for use in § 53.201[2] [see § 53.201, P 18].

[2] FORM

Authorization for Lessor to Obtain Insurance

Insurance Authorization

12.04. In the event an acceptable Certificate of Insurance or other acceptable evidence of insurance is not received by Lessor within 10 days of delivery of the leased property to Lessee, Lessee authorizes Lessor to obtain the required insurance at Lessee's expense. Lessor is under no obligation to obtain the insurance, and any loss resulting during a period in which the property is uninsured will be borne by Lessee.

Lessee's Insurance Agent:

Name: _____
Address: _____
Telephone: _____
Policy number: _____
Effective dates: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesInsurance & Proceeds



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21-53 California Legal Forms--Transaction Guide § 53.252

§ 53.252 Clauses Establishing When Identification of Goods Occurs

[1] Comment

[a] Use of Form

This form consists of alternative clauses fixing the time at which the goods are identified to the lease contract. Any of these clauses may be used in either of the complete lease forms in this chapter [see §§ 53.200, 53.201]. For example, the appropriate clause may be added to the description of goods provision in § 53.200, Article 1. If a clause is added, the paragraphs in the lease that follow the clause will require renumbering.

Establishing the precise time at which the goods are identified to the contract is important for determining the parties' rights and liabilities. These clauses may be modified to express the specific needs and circumstances of the parties. However, the supplementing provisions of Division 10 of the Commercial Code will remedy the omission of an identification provision [see [b], *below*].

For alternative clauses that may be used to limit the right of the lessor to identify goods to the contract after a default by the lessee, see § 53.233. For discussion of remedies available to either party in the event of default, see § 53.15.

[b] Determining When Identification Occurs

Identification of goods as goods to which a lease contract refers may be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs [*Com. Code* § 10217]:

- When the lease contract is made, if it is for the lease of goods that are existing and identified;
- When the goods are shipped, marked, or otherwise designated by the lessor as goods to which the lease contract refers, if the lease contract is for a lease of goods that are not existing and identified; or

- When the young are conceived, if the lease is for the unborn young of animals.

[c] Insurable Interest as a Result of Identification

When existing goods are identified to a lease contract, a lessee obtains an insurable interest in the goods even if the identified goods are nonconforming and the lessee has an option to reject them [*Com. Code § 10218(a)*]. If a lessee has an insurable interest solely due to the lessor's identification of the goods, the lessor, until default or insolvency or notification to the lessee that the identification is final, may substitute other goods for those identified [*Com. Code § 10218(b)*].

[2] FORM

Clauses Establishing When Identification of Goods Occurs

Identification of Goods

[EITHER]

_____ [*specify paragraph number*]. Identification of the goods leased under this Lease will not occur until Lessor places the goods in the hands of the carrier for delivery as provided in Paragraph [*specify number*].

[OR]

_____ [*specify paragraph number*]. Lessor agrees to notify Lessee in writing as soon as the goods to be leased under this Lease are ready for shipment. Identification of the leased goods will not occur until Lessee receives this notice.

[OR]

_____ [*specify paragraph number*]. Identification of the goods described in this Lease will not occur until the goods are received by Lessee. Lessor agrees to bear all risk of loss and deterioration until the goods are actually received by Lessee.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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21-53 California Legal Forms--Transaction Guide §§ 53.253-53.259

[Reserved]

§§ 53.253[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
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C. Disclosure and Notice Forms

21-53 California Legal Forms--Transaction Guide § 53.260

§ 53.260 Federal Consumer Leasing Act Disclosure Statement: Furniture Leases

[1] Comment

[a] Use of Form

This form is the model form issued by the Federal Reserve System pursuant to authority found in the Truth in Lending Act [*see 15 U.S.C. § 1601 et seq.; see also 15 U.S.C. § 1667 et seq. (Consumer Leasing Act); 12 C.F.R. pt. 213 (Regulation M)*]. The Federal Reserve System has published three model disclosure forms that may be used for specific leasing transactions. This form provides for the disclosure of specific information relating to a lease of furniture by a consumer [*see 12 C.F.R. pt. 213, app. A-3 (Model Furniture Lease Disclosures); [2], below*]. Other forms include Model Open-End or Finance Vehicle Lease Disclosures [*see 12 C.F.R. pt. 213, app. A-1*] and Model Closed-End or Net Vehicle Lease Disclosures [*see 12 C.F.R. pt. 213, app. A-2*].

Although Regulation M [12 C.F.R. pt. 213] applies to leases of all types of personal property such as furniture, much of the focus of the regulation is on motor vehicle leasing. Because regulatory issues have most often arisen in that context, Regulation M limits some of its disclosure, formatting, and advertising requirements to leases for motor vehicles [*see 12 C.F.R. pt. 213, supp. I*]. Therefore, although this form may be adapted to other qualifying personal property lease transactions, it should not be used for vehicle leasing transactions. Detailed discussion of vehicle leases, including coverage of open-end and closed-end vehicle lease clauses, is contained in Ch. 47, *Automotive Financing and Vehicle Leasing*.

Notwithstanding the model disclosure form, the required disclosures may be made in a lease contract to be signed by the lessee [*15 U.S.C. § 1667a; see [d], below (general form for disclosures)*]. The form contained in § 53.200[2] may be adapted accordingly [*see 12 C.F.R. 213.4 (content of disclosures); [d], [f], [g], below*]. More commonly, however, the model form is used as a separate disclosure document, and other lease documents are used to provide *additional* information, if applicable, on such items as early termination, purchase options and maintenance responsibilities, warranties, late and default charges, and any security interest [*see 12 C.F.R. 213.3(a); see also 12 C.F.R. pt. 213, app. A-3 (Model Furniture Lease Disclosures); [2], below (Other Important Terms)*].

[b] Application of Federal Consumer Leasing Act

The federal Consumer Leasing Act (CLA) [15 U.S.C. § 1667 *et seq.*] applies to all leases of personal property ("consumer leases") for a period of greater than four months, for a total contractual obligation of not greater than \$25,000. The property leased must be primarily intended for personal, family, or household purposes. Whether or not the lessee has the option to purchase the property at the end of the lease term is not a factor. Leases for agricultural, business, or commercial purposes, or to a governmental agency or instrumentality, or to an organization, are excluded from the Act's coverage [15 U.S.C. § 1667(1); 12 C.F.R. § 213.2(e)(1)].

Lease transactions that meet the definition of a credit sale found in Regulation Z are exempted from the Act [12 C.F.R. § 213.2(e)(2); *see* 12 C.F.R. § 226.2(a)(16) ("credit sale" defined)]. The Act also is inapplicable to lease transactions of personal property that are incidental to the lease of real property and provide that (1) the lessee has no liability for the value of the property at the end of lease term except for abnormal wear and tear; and (2) the lessee has no option to purchase the leased property [12 C.F.R. § 213.2(e)(3)].

For further discussion of the application of the federal Consumer Leasing Act, *see* § 53.18.

[c] Effect of California Law

The federal Consumer Leasing Act [15 U.S.C. § 1667 *et seq.*] preempts California law to the extent that any California law is inconsistent with the Act's provisions [*see* 15 U.S.C. § 1667e; 12 C.F.R. § 213.9].

The California Vehicle Leasing Act [*see* *Civ. Code* §§ 2985.7-2990] duplicates the coverage of the federal Act, as it applies to motor vehicle leases and services incidental to those leases, and requires further disclosures not inconsistent with the federal Act. For further discussion of the California Vehicle Leasing Act, *see* Ch. 47, *Automotive Financing and Vehicle Leasing*.

All other personal property lease transactions that meet the federal definition of a consumer lease [*see* [b], *above*] must comply with the disclosure and advertising requirements of the federal Consumer Leasing Act.

[d] Form of Disclosures

A lessor must make the applicable required disclosures [*see* 12 C.F.R. § 213.4; [i], *below*] clearly and conspicuously in writing, in a form the consumer may keep [12 C.F.R. § 213.3(a)].

The required disclosures must be given to the lessee together in a dated statement that identifies the lessor and the lessee [12 C.F.R. § 213.3(a)(1)]. The disclosures may be made either in a separate statement that identifies the consumer lease transaction or in the contract or other document evidencing the lease [12 C.F.R. § 213.3(a)(1)]. Alternatively, the disclosures required to be segregated from other information [*see* 12 C.F.R. § 213.3(a)(2); [f], *below*] may be provided in a separate dated statement that identifies the lease, and the other required disclosures may be provided in the lease contract or other document evidencing the lease [12 C.F.R. § 213.3(a)(1)]. In a lease of multiple items, the property description [*see* 12 C.F.R. § 213.4(a); [f], *below*] may be given in a separate statement that is incorporated by reference in this required disclosure statement [12 C.F.R. § 213.3(a)(1)].

[e] Electronic Disclosures

The disclosures required by Regulation M [*see* 12 C.F.R. § 213.4; [1][b], [c], *above*] may be provided to the lessee in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. § 7001 *et seq.*) [12 C.F.R. § 213.3(a)]. For an advertisement accessed by the consumer in electronic form, the required disclosures [*see* 12 C.F.R. § 213.7] may be

provided to the consumer in electronic form in the advertisement, without regard to the consumer consent or other provisions of the E-Sign Act [12 C.F.R. § 213.3(a)].

The disclosures must be made clearly and conspicuously in writing in a form the consumer may keep [see 12 C.F.R. § 213.3(a)]. Electronic disclosures are subject to this requirement [see 12 C.F.R. § 213.3(a); see also 12 C.F.R. § 213.3(b)-(e) (form of disclosures, segregation of certain disclosures, timing, and language); [d], above].

[f] Segregation of Certain Disclosures

The following disclosures relating to consumer leases must be segregated from other information [12 C.F.R. § 213.3(a)(2); see [i], below (specific disclosure requirements)]:

- Amount due at lease signing [12 C.F.R. § 213.4(b)].
- Payment schedule and total amount of periodic payments [12 C.F.R. § 213.4(c)].
- Other charges [12 C.F.R. § 213.4(d)].
- Total of payments [12 C.F.R. § 213.4(e)].
- Payment calculation [12 C.F.R. § 213.4(f)].
- Early termination notice [12 C.F.R. § 213.4(g)(2)].
- Notice of wear and use standard [12 C.F.R. § 213.4(h)(3)].
- Purchase option, if any, and purchase price at end of lease term [12 C.F.R. § 213.4(i)(1)].
- Statement referencing nonsegregated disclosures [12 C.F.R. § 213.4(j)].
- Liability at end of lease term, based on residual value, of rent and other incidental charges [12 C.F.R. § 213.4(m)(1)].

In addition to being segregated, these disclosures must contain only directly related information; and their headings, content, and format must be provided in a manner substantially similar to the model form [12 C.F.R. § 213.3(a)(2); see [2], below].

[g] Timing of Disclosures

A lessor must provide the disclosures to the lessee before the consummation of the consumer lease [12 C.F.R. § 213.3(a)(3)].

[h] Language of Disclosures

The disclosures required by 12 C.F.R. § 213.4 (content of disclosures) may be made in a language other than English provided that they are made available in English on the lessee's request [12 C.F.R. § 213.3(a)(4)].

[i] Specific Disclosure Requirements

In any lease transaction subject to regulation by the federal Consumer Leasing Act [15 U.S.C. § 1667-1667f], the following items, as applicable, must be disclosed [see, e.g., [2], below (model furniture lease disclosures)]:

- A brief description or identification of the leased property [15 U.S.C. § 1667a(1); *see* 12 C.F.R. § 213.4(a)].
- The amount due at lease signing [15 U.S.C. § 1667a(2); *see* 12 C.F.R. § 213.4(b)].
- The amount paid or payable by the lessee for official fees, registration, certificate of title, license fees, or taxes [15 U.S.C. § 1667a(3); *see* 12 C.F.R. § 213.4(n)].
- The amount of other charges payable by the lessee not included in the periodic payments; a description of the charges and that the lessee will be liable for the differential, if any, between the anticipated fair market value of the leased property and its appraised actual value at the termination of the lease, if the lessee has that liability, excluding any liability between residual and realized values [15 U.S.C. § 1667a(4); 12 C.F.R. § 213.4(d); *see* 12 C.F.R. §§ 213.4(k) (liability between residual and realized values), 213.4(t) (end term liability for non-motor vehicle open-end leases); *see also* 15 U.S.C. § 1667b(a) (lessee's liability on expiration or termination of lease; presumptions)].
- A statement of the amount or method of determining the amount of any liabilities the lease imposes on the lessee at the end of the term [15 U.S.C. § 1667a(5); *see* 12 C.F.R. § 213.4(d) (other charges)], and whether or not the lessee has the option to purchase the leased property and at what price and time [15 U.S.C. § 1667a(5); *see* 12 C.F.R. § 213.4(i) (purchase option)].
- A statement identifying all express warranties and guarantees made by the manufacturer or lessor with respect to the leased property [15 U.S.C. § 1667a(6); *see* 12 C.F.R. § 213.4(p) (warranties or guarantees)], and identifying the party responsible for maintaining and servicing the leased property, together with a description of the responsibility [15 U.S.C. § 1667a(6); *see* 12 C.F.R. § 213.4(h) (maintenance responsibilities)].
- A brief identification of insurance provided or paid for by the lessor, or required of the lessee, including the types and amounts of coverages and costs [15 U.S.C. § 1667a(7); *see* 12 C.F.R. § 213.4(o) (insurance)].
- A description of any security interest held or to be retained by the lessor in connection with the lease and a clear identification of the property to which the security interest relates [15 U.S.C. § 1667a(8); *see* 12 C.F.R. § 213.4(r) (security interest)].
- The number, amount, and due dates or periods of payments scheduled under the lease and the total amount of those periodic payments [15 U.S.C. § 1667a(9); *see* 12 C.F.R. §§ 213.4(c) (payment schedule and total amount of periodic payments), 213.4(e); (total payments); *see also* 12 C.F.R. § 213.4(f); (payment calculation)].
- When the lease provides that the lessee will be liable for the anticipated fair market value of the property on expiration of the lease, the fair market value of the property at the inception of the lease, the aggregate cost of the lease on expiration, and the differential between them [15 U.S.C. § 1667a(10); *see* 12 C.F.R. § 213.4(k) (liability between residual and realized values); *see also* 12 C.F.R. §§ 213.2(m) ("realized value" defined), 213.2(n) ("residual value" defined)].
- A statement of the conditions under which the lessee or lessor may terminate the lease before the end of the term [15 U.S.C. § 1667a(11); *see* 12 C.F.R. § 213.4(g) (early termination)], and the amount or method of determining any penalty or other charge for delinquency, default, late payments, or early

termination [15 U.S.C. § 1667a(11); *see* 15 U.S.C. § 1667b(b) (penalties for early termination, default, delinquency); 12 C.F.R. §§ 213.4(g)(1) (early termination conditions and disclosure of charges), 213.4(q) (penalties and other charges for delinquency)].

- If the lessee's liability at early termination or at the end of the lease term is based on the realized value of the leased property, a statement that the lessee may obtain, at the lessee's expense, a professional appraisal, which will be final and binding, of the value that could be realized at the sale of the leased property [15 U.S.C. § 1667b(c); *see* 12 C.F.R. § 213.4(k)(1) (right of appraisal)].

- A statement referencing nonsegregated disclosures [12 C.F.R. § 213.4(j); *cf.* 12 C.F.R. § 213.3(a)(2) (segregated disclosures) and 12 C.F.R. § 213.4 (disclosures generally)].

The lessor may provide additional information with any disclosure except those required to be segregated [*see* 12 C.F.R. 213.3(a)(2); [f], *above*]. However, additional information may not be stated, used, or placed so as to mislead the lessee or contradict, obscure, or detract attention from any required disclosure [12 C.F.R. 213.3(b)]. The lessor may also use a reasonable estimate if an amount or other item needed to comply with a required disclosure is unknown or unavailable, as long as the estimate is based on the best information available to the lessor, is clearly identified as an estimate, and is not used to circumvent or evade any required disclosure [12 C.F.R. 213.3(d)].

When a transaction involves more than one lessor, only one lessor is required to make the necessary disclosures. When a lease involves more than one lessee, the disclosures may be made to any lessee who is primarily liable on the lease [12 C.F.R. § 213.3(c)].

[j] Restrictions on Advertising

The federal Consumer Leasing Act governs advertising of consumer lease transactions [*see* 15 U.S.C. § 1667c; 12 C.F.R. § 213.7; *see also* 15 U.S.C. § 1667(1); 12 C.F.R. § 213.2(e)(1) ("consumer lease" defined); [b], *above*]. The general rule is that an advertisement for a consumer lease may state that a specific lease of property at specific amounts or terms is available only if the lessor usually and customarily leases or will lease the property at those amounts or terms [12 C.F.R. § 213.7(a)].

The advertising rules related to consumer leases [12 C.F.R. § 213.7] specify the manner in which two types of disclosures may *not* be made. First, except for the statement of a periodic rate, any reference to a charge that is part of the total amount due at lease signing or delivery may not be more prominent than the disclosure of the *total* amount due at lease signing or delivery [12 C.F.R. § 213.7(b)(1)]. Second, if the lessor provides a percentage rate (lease rate) in an advertisement, the rate must not be more prominent than any of the disclosures specified in 12 C.F.R. § 213.4 [*see* [i], *above*], with the exception of the notice required to accompany the percentage rate of the lease [*see* 12 C.F.R. § 213.4(s) (notice and limitations on rate information)]. Further, the lessor must not use the term "annual percentage rate," "annual lease rate," or an equivalent term [12 C.F.R. § 213.7(b)(2)].

Additionally, the advertising rules specify certain terms that "trigger" additional disclosures [*see* 12 C.F.R. § 213.7(d)]. An advertisement that states the amount of any payment, or any capitalized cost reduction, or other payment required before or at consummation or by delivery (if delivery occurs after consummation) must also contain the following disclosures [15 U.S.C. § 1667c; 12 C.F.R. § 213.7(d); *see* 12 C.F.R. § 213.7(e), (f) (alternative disclosures for merchandise tags and television or radio advertisements)]:

- That the transaction advertised is a lease.
- The total amount due before or at consummation or delivery (if delivery occurs after consummation).

- The number, amounts, due dates or periods of scheduled payments under the lease.
- A statement of whether or not a security deposit is required.
- A statement that an extra charge may be imposed at the end of the lease term if the lessee's liability (if any) is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

Required disclosures must be made clearly and conspicuously [12 C.F.R. § 213.7(b)]. For example, very fine print in a television advertisement or detailed and rapidly stated information in a radio advertisement does not meet the clear and conspicuous requirement if consumers cannot see and read or comprehend all of the information required to be disclosed [12 C.F.R. pt. 213, supp. I].

For advertisements using electronic communication, to satisfy the prominence rule in 12 C.F.R. § 213.7(b)(1), both the triggering terms and the required disclosures must appear in the same location so that they can be viewed simultaneously [see 12 C.F.R. pt. 213, supp. I, comment 7(c)-2]. The notice required, under 12 C.F.R. § 213.7(b)(2), to accompany a percentage rate stated in an advertisement must be placed in close proximity to the rate without any other intervening language or symbols [see 12 C.F.R. pt. 213, supp. I, comment 7(b)-2]. For example, a lessor may not place an asterisk next to the rate and place the notice elsewhere in the advertisement [12 C.F.R. pt. 213, supp. I, comment 7(b)-2]. In addition, with the exception of the notice required by 12 C.F.R. § 213.4(s) (notice and limitations on rate information), the rate cannot be more prominent than any other Section 213.4 disclosure stated in the advertisement [see 12 C.F.R. pt. 213, supp. I, comment 7(b)-2; 12 C.F.R. § 213.4; see also [I], above (Section 213.4 disclosure requirements)]. For advertisements using electronic communication, to comply with proximity rule in 12 C.F.R. § 213.7(b)(2), both the rate and the accompanying notice must appear in the same location so that they can be viewed simultaneously. The prominence rule in 12 C.F.R. § 213.7(b)(2) is not met if the disclosures can be viewed only by use of a link that connects the consumer to the information appearing at another location [see 12 C.F.R. pt. 213, supp. I, comment 7(c)-2].

[2] FORM-Model Furniture Lease Disclosures [12 C.F.R. pt. 213, app. A]

Federal Consumer Leasing Act Disclosure Statement: Furniture Leases

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionConsumer LeasingGeneral OverviewBanking LawConsumer ProtectionConsumer LeasingDisclosure



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*21-53 California Legal Forms--Transaction Guide § 53.261***§ 53.261 Notice of Delivery, Installation, and Acceptance****[1] Comment--Use of Form**

This form is a notice from the lessee to the lessor that the property to be leased has been delivered, installed, and accepted. This notice is generally required in a finance lease transaction [see § 53.201]. Under the terms of most leases, the delivery of the property to the lessee by the supplier is the event that triggers the lessee's obligation to make rent payments.

[2] FORM**Notice of Delivery, Installation, and Acceptance**

CERTIFICATE OF ACCEPTANCE

Date: _____

_____ [name of lessor]

_____ [street address]

_____ [city, state, zip code]

The undersigned certifies that on _____ [date of delivery] the Equipment that is the subject of the lease entered into on _____ [date of lease] between you as lessor and the undersigned as lessee was delivered to the premises of lessee, installed, and found to be in proper working order. You are authorized to enter the above date of delivery as the Rent Commencement Date in Schedule A to the lease.

LESSEE

_____ [signature of lessee]

_____ [printed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.262

§ 53.262 Notice of Material or Indefinite Delay

[1] Comment

[a] Use of Form

This form is a notice of the material or indefinite delay of the lessor's (or in the case of a finance lease, a supplier's) performance under a personal property lease. Notice of a delay, nondelivery, or allocation [*see Com. Code § 10405(2)*] (allocation); [b], *below*] must be given by the lessor (or supplier, in a finance lease) [*Com. Code § 10405(3)*]. Proper compliance with the notification requirement will prevent the lessor's or supplier's default for delay or nondelivery under specified circumstances [*Com. Code § 10405(1)*; *see [c], below*].

For a form for a lessee's response to this notice concerning the termination or modification of the underlying lease, see § 53.263.

[b] Notification In General

Delay in delivery, nondelivery in whole or in part, or allocation by a lessor or supplier is not a default under the lease contract in certain situations. The lessor or supplier is not in default if performance as agreed has been made impracticable by the occurrence of a contingency not contemplated under the contract or by good faith compliance with any applicable foreign or domestic governmental regulation or order. However, the lessor or supplier must comply with Commercial Code requirements for allocated performance and notification [*Com. Code § 10405(1)*; *see Com. Code § 10405(2), (3)*].

The lessor must seasonably notify the lessee and, in the case of a finance lease, the supplier must seasonably notify the lessor and the lessee, if known, that there will be delay or nondelivery [*Com. Code § 10405(3)*; *see Com. Code § 1205(b)*] (actions seasonably taken)]. If the lessor's or supplier's capacity to perform is only partially affected, he or she must fairly and reasonably allocate production and deliveries among his or her customers and notify the customer of the allocation [*Com. Code § 10405(2)*].

[c] Effect of Notification on Lessee

If the lessee receives notification of a material or indefinite delay or an allocation justified under *Com. Code § 10405* (excused performance) [see [b], *above*], the lessee may pursue a number of alternative remedies. On written notice to the lessor as to any goods involved, and with respect to all of the goods if, under an installment lease contract, the value of the whole lease contract is substantially impaired [see *Com. Code § 10510* (installment lease contract defaults)], the lessee may [Com. Code § 10406(a)]:

- Terminate the lease contract [see *Com. Code § 10505(b)* (termination)]; or
- Except in a finance lease, modify the lease contract by accepting the available quota in substitution, with due allowance from the rent payable for the balance of the lease term for the deficiency but without further right against the lessor.

If, after receipt of a notification from the lessor pursuant to *Com. Code § 10405* [see [b], *above*], the lessee fails to modify the lease agreement within a reasonable time not exceeding 30 days, the lease contract lapses with respect to any deliveries affected [Com. Code § 10406(b)]. For a form for the lessee's response to a notice of delay or nondelivery, see § 53.263.

[d] Substituted Performance

The rules relating to delivery and notification of delay or allocation are subject to a provision governing substituted performance [see *Com. Code §§ 10404, 10405*]. If without fault of the lessee, the lessor, and the supplier, the agreed methods of carriage and delivery fail, become unavailable, or otherwise become commercially impracticable and a commercially reasonable substitute is available, the substitute performance must be tendered and accepted [Com. Code § 10404(a)].

[2] FORM**Notice of Material or Indefinite Delay****NOTICE TO LESSOR OR LESSEE OF MATERIAL OR INDEFINITE DELAY IN DELIVERY**

Date: _____

[Choose one of the following:]

[If lessor is undersigned, use:]

_____[name of lessee]
 _____[street address]
 _____[city, state, zip code]

[OR]

[If supplier is undersigned, use:]

_____[*name of lessor*]
 _____[*street address*]
 _____[*city, state, zip code*]

_____[*name of lessee, if known*]
 _____[*street address*]
 _____[*city, state, zip code*]

[*Continue with the following:*]

This notice is being sent to you in accordance with *Commercial Code Section 10405*.

This notice is to inform you of _____ [a delay in the delivery *or* the nondelivery] of the subject matter of our Lease Contract dated _____. Delivery as agreed in the Lease Contract has been made impracticable by _____ [the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the Lease Contract was made *or* good faith compliance with an applicable domestic (*or* foreign) governmental regulation or order]. [*If lessor or supplier is allocating production and delivery among several customers, add: Furthermore, these circumstances require the lessor to allocate production and delivery of the leased goods among several customers. The estimated quota that has been made available to the lessee under this allocation is as follows: _____ (specify quota).*]

Commercial Code Section 10406 provides you with alternative courses of action that you may taken on receipt of this notice.

[LESSOR *or* SUPPLIER]

_____ [*signature of lessor or supplier*]
 _____ [*printed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)DefaultRemediesCommercial Law (UCC)Leases (Article 2A)Performance



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21-53 California Legal Forms--Transaction Guide § 53.263

§ 53.263 Notice of Termination or Modification

[1] Comment

[a] Use of Form

This form is a notice of the lessee's intent to terminate or modify the lease under *Com. Code § 10406* (procedure on excused performance). It may be used in response to the receipt of a notice of material or indefinite delay or an allocation in the delivery of leased goods [see *Com. Code § 10405*]. For a sample form for that notice, see § 53.262.

The Commercial Code provides for different remedial treatment of installment lease contracts and other lease contracts [see *Com. Code § 10406(a)*; see also *Com. Code § 10510* (installment contracts)]. This form contains an alternative provision for termination of an installment lease contract.

[b] Termination or Modification of Lease Contract Following Notice of Allocation

On receipt of a notice of material or indefinite delay or an allocation in accordance with *Com. Code § 10405*, a lessee may terminate the lease [*Com. Code § 10406(a)(1)*]. Alternatively, except in a finance lease [see *Com. Code § 10103(a)(7)* (definition)], a lessee may modify the lease contract by accepting the available quota in substitution for the agreed delivery, with allowance for the rent payable for the balance of the lease term for the deficiency [*Com. Code § 10406(a)(2)*]. In these circumstances, however, the lessee will have no further right against the lessor [*Com. Code § 10406(a)(2)*]. The lessee must modify the lease contract within a reasonable period not exceeding 30 days after receipt of the notice of delay. Failure to modify causes the lease contract to lapse with respect to any deliveries affected [*Com. Code § 10406(b)*]. For further discussion of the lessee's rights regarding delays in delivery, see § 53.262[1].

For further discussion of the modification of lease contracts, see § 53.287[1].

[2] FORM

Notice of Termination or Modification

NOTICE OF LESSEE'S INTENT TO _____ [TERMINATE or MODIFY]

Date: _____

_____ [name of lessor]

_____ [street address]

_____ [city, state, zip code]

This notice is being sent to you in accordance with *Commercial Code Section 10406*.

This notice is to inform you of the Lessee's intent to _____ [terminate or modify] the Lease Contract dated _____.

[If terminating a lease other than an installment lease contract, use:]

In accordance with *Commercial Code Section 10406*, the Lease Contract is terminated to the extent of the deliveries described below:

_____ [Describe goods under contract to which termination applies].

[If lessee is terminating an installment lease contract, use:] In accordance with *Commercial Code Section 10406*, the Lease Contract is wholly terminated due to a substantial impairment in the value of the whole lease contract.

[Or, if lessee is modifying the lease by accepting the allocated quota, use:]

In accordance with *Commercial Code Section 10406*, the Lease Contract is being modified to the extent that I have accepted the allocated quota as delivered in substitution for the originally agreed-on amount. The rent payable for the balance of the lease term will be adjusted to reflect this deficiency.

[Continue with the following:]

[LESSEE]

_____ [signature of lessee]

_____ [printed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Performance



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21-53 California Legal Forms--Transaction Guide § 53.264

§ 53.264 Notice to Supplier of Finance Lease Contract**[1] Comment--Use of Form**

This form is a notice to a supplier that the lessee has entered into a finance lease related to a supply contract. The form may be completed by either the lessee or the lessor and delivered to the supplier. For further discussion of supply contracts and finance leases in general, see § 53.201[1].

Any modification or rescission of the supply contract by the supplier and the lessor is effective between the supplier and the lessee unless, before the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract. If the modification or rescission is effective between the supplier and the lessee, the lessor is deemed to have assumed (in addition to the lessor's obligations to the lessee under the lease contract) all the promises of the supplier to the lessor and the warranties that were so modified or rescinded as they existed and were available to the lessee before the modification or rescission [*Com. Code § 10209(c)*].

[2] FORM**Notice to Supplier of Finance Lease Contract**

NOTICE OF FINANCE LEASE

Date: _____

_____ [name of supplier]

_____ [street address]

_____ [city, state, zip code]

PLEASE TAKE NOTICE that on _____ [date], _____ [name of lessee] entered into a finance lease related to your supply contract with _____ [name of lessor], dated _____ . This notice is provided to you in accordance with *California Commercial Code Section 10209*,

which provides that any modification or rescission of the underlying supply contract after your receipt of this notice will be ineffective against _____[*name of lessee*].

[LESSOR or LESSEE]

_____ [*signature of lessor or lessee*]

_____ [*printed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Lease
ContractsGeneral Overview



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 C. Disclosure and Notice Forms

21-53 California Legal Forms--Transaction Guide § 53.265

§ 53.265 Notice of Retraction of Waiver of Executory Performance**[1] Comment--Use of Form**

This form is a notice of retraction of waiver for use by a party that has waived the right to an executory performance under a lease contract [*see Com. Code § 10208(c); see also § 53.12[6]* (modification or rescission of existing lease agreement)].

A waiver of an executory portion of a contract may be retracted on reasonable notice that strict performance of any waived term will be required. However, an attempt to retract a waiver is ineffective if a retraction would be unjust because of a material change of position made in reliance on the waiver [*Com. Code § 10208(d)*].

[2] FORM**Notice of Retraction of Waiver of Executory Performance**

NOTICE OF RETRACTION OF WAIVER

Date: _____

[party's name]_____
[street address]_____
[city, state, zip code]PLEASE TAKE NOTICE that in accordance with *California Commercial Code Section 10208*,

[name of retracting party] demands strict performance of all of the terms of our lease contract dated _____
[date]. If the actions of _____
[name of retracting party] on _____
[date] have been construed as a waiver of _____
[specify contract provision(s) at issue], the apparent waiver is retracted by this notice and complete performance as agreed in the lease contract is expected.

_____ [signature of retracting party]
_____ [printed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law
(UCC)Leases (Article 2A)Lease ContractsGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Performance



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21-53 California Legal Forms--Transaction Guide § 53.266

§ 53.266 Notice of Lessee's Intent to Deduct Damages

[1] Comment

[a] Use of Form

This form is a notice of the lessee's intent to deduct damages under *Com. Code § 10508*. It may be used in conjunction with the lessee's other remedial measures in the event of a default by the lessor. For further discussion of the lessee's remedies, see § 53.15[2].

[b] Deduction of Damages

Subject to the provisions of *Com. Code § 10407* governing finance leases that are not consumer leases [*see Com. Code § 10407* (irrevocable promises)], a lessee has the right to deduct damages resulting from any default under the lease contract from any part of the rent still due under the contract.

The lessee must notify the lessor of his or her intent to do so and then may deduct all or part of the damages from any part of the rent still due under the same lease contract [*Com. Code § 10508(f)*].

If the lease is a finance lease that is *not* also a consumer lease, the lessee's promises under the lease contract become irrevocable and independent once the lessee has accepted the goods [*Com. Code § 10407(a)*; *see Com. Code § 10103(a)(5)* ("consumer lease" defined), (7) ("finance lease" defined)]. This provision precludes the lessee from invoking the deduction remedy in this type of transaction [*see Com. Code § 10508(f)*].

For further discussion of the remedies available in personal property lease transactions, see § 53.15.

[2] FORM

Notice of Lessee's Intent to Deduct Damages

NOTICE OF LESSEE'S INTENT TO DEDUCT DAMAGES

Date: _____

[name of lessor]_____
[street address]_____
[city, state, zip code]

This notice is being sent to you in accordance with *California Commercial Code Section 10508*.

This notice is to inform you of the Lessee's intent to deduct damages incurred as a result of your default under the Lease Contract dated _____.

The sum of \$_____ will be deducted from the rent still owing under the Lease Contract.

[LESSEE]

[signature of lessee]_____
[printed name]**Legal Topics:**

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Performance



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21-53 California Legal Forms--Transaction Guide § 53.267

§ 53.267 Notice of Acceptance After Performance Has Begun**[1] Comment--Use of Form**

This form is a notice of acceptance by performance. Unless otherwise unambiguously indicated by the language or the circumstances, an offer to make a lease contract must be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances [*Com. Code § 10206(a)*]. When the beginning of the requested performance constitutes a reasonable mode of acceptance, the offeree must notify the offeror when he or she begins performance. An offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance [*Com. Code § 10206(b)*]. This form may be used to give the appropriate notice.

For further discussion of the interpretation and enforcement of lease contracts under the California Commercial Code, see § 53.12.

[2] FORM**Notice of Acceptance After Performance Has Begun****Notice That Performance Has Begun**

Date: _____

[name of offeror]_____
[street address]_____
[city, state, zip code]

On _____[date], the undersigned accepted your offer dated _____, concerning
 _____[describe nature of offer], and _____[began performance or specify type of
 performance] on that date.

_____ [signature of offeree]
_____ [printed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law
(UCC)Leases (Article 2A)Performance



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21-53 California Legal Forms--Transaction Guide § 53.268

§ 53.268 Notice of Rejection of Goods

[1] Comment

[a] Use of Form

This form provides alternative notices of rejection of leased goods by the lessee. These alternatives are for use by the lessee in order to effectively reject nonconforming goods [see [b], *below*].

For discussion of the statutory remedies available to parties involved in lease transactions, see § 53.15.

[b] Lessee's Right of Rejection Generally

If the goods or the tender or delivery fail in any respect to conform to the lease contract, the lessee may reject or accept the goods. If applicable, the lessee may accept any commercial unit or units and reject the rest of the goods [*Com. Code § 10509(a)*]. In order to effectively reject the goods, a lessee must do so within a reasonable time after tender or delivery of the goods. In addition, the lessee must seasonably [see *Com. Code § 1205(b)* (definition)] notify the lessor [*Com. Code § 10509(b)*].

In rejecting goods, a lessee's failure to state a particular defect that is ascertainable by reasonable inspection precludes the lessee from relying on the defect to justify rejection or to establish default (1) if, stated seasonably, the lessor or supplier could have cured the defect; or (2) between merchants, if the lessor or supplier after rejection has made a request in writing for a statement of all defects on which the lessee intends to rely [*Com. Code § 10514(a)*; see § 53.288].

Once accepted, leased goods generally may not be rejected by a lessee [see *Com. Code § 10516(b)*]. For discussion of a lessee's rights relating to defects discovered after acceptance of leased goods and a notice for informing the lessor or supplier of those defects, see § 53.270.

[c] Installment Lease Contracts

Under an installment lease contract, a lessee may reject any delivery that is nonconforming if the nonconformity substantially impairs the value of that delivery and cannot be cured or the nonconformity is a defect in the required documents. However, if the nonconformity does not constitute a default in the whole and the lessor or supplier gives adequate assurance of its cure, the lessee must accept that delivery [*Com. Code § 10510(a)*]. A default with respect to the whole occurs if the nonconformity or default with respect to one or more deliveries substantially impairs the value of the installment lease contract as a whole. However, if the aggrieved party accepts a nonconforming delivery without seasonably notifying the lessor of cancellation, brings an action with respect to only past deliveries, or demands performance as to future deliveries, the aggrieved party reinstates the installment lease contract as a whole [*Com. Code § 10510(b)*].

[2] FORM

Notice of Rejection of Goods

Notice of Rejection

Date: _____

_____ [*name of lessor or supplier*]

_____ [*street address*]

_____ [*city, state, zip code*]

PLEASE TAKE NOTICE that the undersigned rejects the following goods: [*describe rejected goods*]. These goods were delivered purportedly in accordance with our written lease contract dated _____.

These goods have been rejected because [*specify reason*].

Because of these [*specify, e.g., defects and omissions*], the undersigned must regard the goods as nonconforming and take the position that you have breached our contract. Please be advised that no other shipments will be accepted unless assurance is given that the goods fully conform with the specifications of the lease contract dated _____.

Please forward immediate shipping instructions for the return of these goods. If you are not heard from within [*specify time, e.g., 72 hours*], the goods will be returned to you collect.

[LESSEE]

_____ [*signature of lessee*]

_____ [*printed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.269

§ 53.269 Notice To Rejecting Lessee of Shipping Instructions

[1] Comment

[a] Use of Form

This form is a notice from a lessor or supplier to a lessee providing shipping instructions for the return of rejected leased goods. Use of this form will satisfy the requirements of *Com. Code §§ 10511 and 10512* [see [b], below]. For discussion of rejection of goods and a form for a notice of rejection, see § 53.268. For discussion of a lessee's remedies on default by the lessor, see § 53.15[2].

[b] Shipping Instructions Concerning Rejected Goods Generally

After proper rejection of leased goods in the lessee's possession, the lessee must hold them with reasonable care at the supplier's or lessor's disposition for a reasonable time after the lessee's notice of rejection [*Com. Code § 10512(a)(1)*]. When the lessor or the supplier gives no disposition instructions within a reasonable time after notification of rejection of leased goods, the lessee may store the rejected goods for the lessor's or supplier's account. In addition, the lessee may ship them to the lessor or supplier or dispose of them for the lessor's or supplier's account with reimbursement in the manner provided in the Code [*Com. Code § 10512(a)(2)*; see *Com. Code § 10511(b)* (reimbursement)]. The holding, storing, shipping, or disposing of goods [see *Com. Code § 10512(a)*] does not constitute acceptance or conversion [*Com. Code § 10511(c)*]. The lessee has no further obligations with regard to goods rightfully rejected [*Com. Code § 10512(a)(3)*].

[c] Merchant Lessees

Subject to any security interest of a lessee [see *Com. Code § 10508(e)*], if a lessor or supplier has no agent or place of business in the locale of the rejection, a merchant lessee, after rejection of goods in his or her possession or control, must comply with reasonable instructions received from the lessor or supplier pertaining to the return of the goods. In the absence of shipping instructions, a merchant lessee must make reasonable efforts to sell, lease, or otherwise dispose of the goods for the lessor's account if the goods are subject to a rapid decline in value. Shipping instructions are

deemed unreasonable if on demand the lessee is not indemnified for expenses incurred for return shipping [Com. Code § 10511(a)].

[2] FORM

Notice To Rejecting Lessee of Shipping Instructions

Instructions for Disposition of Rejected Goods

Date: _____

_____ [name of lessee]

_____ [street address]

_____ [city, state, zip code]

Your notice of rejection and request for instructions with respect to goods delivered in accordance with our lease contract of _____ [date], was received by this office on _____ [date].

In accordance with your notice, with regard to those goods you are rejecting, you are instructed to [specify shipping instructions].

These instructions are not an admission of nonconformity or an acquiescence as to the propriety of your rejection, and all statutory and contractual rights and remedies available by reason of a wrongful rejection are reserved.

[LESSOR or SUPPLIER]

_____ [signature of lessor or supplier]

_____ [printed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Performance



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21-53 California Legal Forms--Transaction Guide § 53.270

§ 53.270 Notice of Default Discovered After Acceptance

[1] Comment

[a] Use of Form

This form contains alternative notices of default discovered after acceptance of leased goods. These notices are designed to be given to the lessor and supplier, if any, under *Com. Code § 10516* by a lessee who has already accepted leased goods and discovers an instance of default [*see Com. Code § 10508(a)*].

For discussion of the remedies available to a lessee on breach by the lessor, see *§ 53.15[2]*.

[b] Lessee's Right of Rejection After Acceptance Generally

A lessee must pay rent for goods accepted in accordance with the lease contract, with due allowance for goods rightfully rejected or not delivered [*Com. Code § 10516(a)*]. A lessee's acceptance of goods precludes rejection of the goods accepted. An acceptance, if made with knowledge of a nonconformity, may not be revoked because of the nonconformity unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. Acceptance does not of itself impair any other remedy provided by Division 10 of the Commercial Code or the lease agreement for nonconformity [*Com. Code § 10516(b)*].

If a tender of leased goods has been accepted, within a reasonable time after the lessee discovers or should have discovered any default, the lessee must notify the lessor, or supplier, if any, or be barred from any remedy against the party not notified [*Com. Code § 10516(c)(1)*; *see Com. Code § 10516(c)(2)* (notice requirements after lessee receives notice of litigation for infringement); *see also Com. Code § 10211* (infringement)]. In an action against the lessor or supplier, if any, of leased goods, the burden is on the lessee to establish any default [*Com. Code § 10516(c)(3)*]. These requirements do not apply to consumer leases [*Com. Code § 10516(f)*].

[c] Finance Leases

In the case of a finance lease, other than a consumer lease in which the supplier assisted in the preparation of the lease contract or participated in negotiating the terms of the lease contract with the lessor, an acceptance of the leased goods by the lessee cannot be revoked if the lessee had knowledge of the nonconformity at the time of acceptance [*Com. Code § 10516(b)*].

If the lessee has accepted a tender of leased goods, the lessee must notify the lessor and the supplier within a reasonable time after the lessee discovers or should have discovered any default or be barred from any remedy against the party not notified [*Com. Code § 10516(c)(1)*; see *Com. Code § 10516(c)(2)* (notice requirements after lessee receives notice of litigation for infringement); see also *Com. Code § 10211* (infringement)]. In an action against the lessor or supplier of leased goods, the burden is on the lessee to establish any default [*Com. Code § 10516(c)(3)*]. These requirements do not apply to a consumer lease [*Com. Code § 10516(f)*].

[2] FORM

Notice of Default Discovered After Acceptance

Notice of Breach Discovered After Acceptance

Date: _____

_____ [*name of lessor or supplier*]

_____ [*street address*]

_____ [*city, state, zip*]

In accordance with *Commercial Code Section 10516*, you are notified that you have breached our lease contract of _____ [*date*], as result of supplying defective goods.

The leased goods consisted of [*specify goods*] and had the following defects: [*specify defects*].

This condition could not be discovered on initial inspection, and the condition arose after the first use of the leased goods.

[LESSEE]

_____ [*signature of lessee*]

_____ [*printed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)DefaultGeneral Overview



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21-53 California Legal Forms--Transaction Guide §§ 53.271-53.279

[Reserved]

§§ 53.271[Reserved]



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D. Miscellaneous Related Forms

21-53 California Legal Forms--Transaction Guide § 53.280

§ 53.280 Lease Commitment Letter

[1] Comment

[a] Use of Form

This form is a lease commitment letter. A commitment letter in leasing transactions is used principally to hold the parties to the promise to lease the property and to set forth, or to incorporate by reference, the main terms of the lease arrangement. A letter is frequently used when the lessor's primary function is to provide the funds to purchase the property. It is also used by a dealer or manufacturer if the potential lessee has requested bids from several sources. The intended lessee may require a commitment letter to allow time for budgeting or internal approvals of the lease, or for anticipated delays in the delivery of the property.

[b] Contents

The commitment letter must state the expiration date of the commitment, and the commitment fee. The letter should contain a description of the property sufficient to identify it. This description may include the property model and serial or identification number, the manufacturer, the location of the property at the time of the letter, and the purchase price. If a written lease agreement has not yet been drafted and made a part of the commitment letter, the letter should contain the significant terms of the arrangement, including, as applicable, the amount and time of payment of rent, the term of the lease, responsibility for payment of taxes, responsibility for maintenance, options to renew or purchase, and required insurance coverage.

The commitment ordinarily is conditioned on the absence of any substantial adverse changes in the proposed lessee's financial condition, and on the truth of representations contained in a specified financial statement and other documents. The commitment letter also usually specifies that any modifications must be written. Each party should sign and date the letter.

The lessee normally pays a fee, usually equal to a percentage of the cost of the leased property, at the time the commitment is issued. The fee, in this lease, is paid over the term of the lease but will be retained by the lessor, either in

whole or in part, if the lease is not executed or fully carried out. If other fee arrangements are desired, the form should be modified accordingly.

If the equipment to be leased is not delivered to and accepted by the lessee before the expiration date of the commitment, and there are no objections to the lease, the letter provides that the commitment period may be mutually extended on the same terms as those specified in the commitment letter.

[2] FORM

Lease Commitment Letter

COMMITMENT REQUEST LETTER

Date: _____

[name of lessor]

[street address]

[city, state, zip]

[name of proposed lessee], located at _____ [address], requests

[name of proposed lessor], located at _____ [address], to purchase the
equipment listed in Schedule A, attached, from _____ [name of proposed supplier], located at

[address], and to lease the equipment to the undersigned Lessee on the terms set forth below.

Cost of equipment: \$ _____.

Term of lease: _____
years.

Rent: \$ _____ per
month.

Renewal option: _____
years.

Commitment fee: \$ _____ equal
to _____ per-
cent of cost of equipment.

Security deposit: \$ _____.

Expiration date of commitment: _____.

Location where equipment will be used: _____.

Lessee will be responsible for paying sales tax, if any, and use tax on the property to be leased. Lessee will bear all expenses incurred in the maintenance, repair, or replacement of the property, and Lessee agrees to obtain and maintain insurance as provided in the proposed lease agreement.

Lessor will draft a proposed lease in conformity with the terms of this letter and present it to Lessee for consideration.

[If a corporate resolution authorizing the lease will be required, use:]

Lessee will furnish a corporate resolution authorizing the lease.

[Continue with the following:]

The form, substance, and enforceability of all documents required to complete the transaction proposed in this letter will be subject to the approval of both parties.

Lessee warrants by offering this commitment that the [previously submitted *or* accompanying] financial data reflect a true and complete statement of its financial condition and that there has been no material change to date. Lessee will inform Lessor of any material change in its financial condition that might occur before the execution of the lease based on this commitment letter. On receipt of notice of any material change, Lessor will have the option to terminate this commitment.

Lessee will receive credit for the commitment fee against rental under the lease in the amount of \$ _____ per month. The commitment fee is otherwise nonrefundable.

If you agree to enter into the leasing transaction on the terms set forth in this letter, please indicate by sending us the following within [*specify number, e.g., 10*] days from the date of this letter:

- (1) The enclosed copy of this letter executed by you with the date of execution entered as the Commitment Date; and
- (2) The original and two copies of the proposed lease executed by you.

This commitment may not be amended, extended, or terminated except by a writing signed by an authorized officer or agent of the party against whom enforcement is sought.

Sincerely,
[LESSEE]

_____ [*signature of lessee*]
_____ [*printed name*]

ACCEPTANCE

[LESSOR]

_____ [*signature of lessor*]
_____ [*printed name*]

Commitment Date: _____

[Attach Schedule A.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.281

§ 53.281 Consent and Waiver by Real Property Owner, Landlord, or Mortgagee

[1] Comment

[a] Use of Form

This form is a waiver for use to obtain the consent of an owner, landlord, or mortgagee of real property to the placement of leased goods on the property. If leased personal property is to be affixed to a building or other real property, or used by a lessee who is also a lessee of real property, the equipment lessor may want to obtain a consent and waiver from the persons with ownership or security interests in the real estate. Otherwise, the leased personal property may be deemed to be fixtures.

For discussion of fixture filings that may be made by a lessor to protect an interest in fixtures, see § 53.16[4].

[b] Leased Goods as Fixtures

In some cases, personal property affixed to a building or other real property may change its character and become a fixture [*see Com. Code § 10309(a)(1)*]. A fixture is considered part of the real property and will pass with the real property to a holder of a lien or other claim against the real property [*see Civ. Code §§ 660, 1013*]. In addition, a landlord may levy against a lessee's personal property on the leased premises if the lessee fails to pay rent or otherwise perform the real property lease [*see Civ. Code § 1861a*].

A lessor of fixtures may obtain priority over a conflicting interest of an encumbrancer or owner of real estate if the encumbrancer or owner has consented in writing to the lease or has disclaimed an interest in the leased goods as fixtures [*Com. Code § 10309(d)(5)*].

[c] Form Provisions

This form, signed by the real property owner, the landlord, or the mortgagee, includes a waiver of claims against the leased equipment and an acknowledgment that the equipment lessor's claims to the equipment are superior. In addition,

the signer consents to the equipment lessor's entry on the real property to repossess the leased equipment and acknowledges that the equipment is personal property, that is, that it does not become part of the real property. Consent is also given to any extensions in payment or performance that the equipment lessor may grant to the equipment lessee. The consent and waiver applies not only to the equipment described in the form, but to leased items that may already be on the premises or that will be leased and used there in the future.

[2] FORM

Consent and Waiver by Real Property Owner, Landlord, or Mortgagee

CONSENT AND WAIVER

THIS CONSENT AND WAIVER is made by the undersigned [Owner or Landlord or Mortgagee] of real estate (Undersigned), to _____ [name of lessor of personal property to be attached to realty] (Lessor).

The Undersigned is the [Owner or Landlord or Mortgagee] of the premises located at _____ [address] (Premises), and [has leased all or part of or holds a mortgage on] the Premises leased to _____ [name of lessee] (Lessee).

In accordance with a Lease Contract between Lessor and Lessee dated _____ (Lease), and incorporated by reference, Lessee has leased or will lease from Lessor the following property (Property):

[insert description of leased property].

To induce Lessor to enter into the Lease and for other valuable consideration, receipt of which is acknowledged, the Undersigned agrees as follows:

Superior Claim of Lessor

1. The Undersigned acknowledges that any claim that Lessor or its assignees may have with respect to the Property is superior to any lien or claim that the Undersigned has or may have with respect to the Property by law, agreement, or other cause.

Waiver

2. All rights that the Undersigned has or may have under any law, or by agreement, currently in effect or executed in the future by Undersigned or Lessee, to levy for rent, in arrears or in advance, or both, or to claim title to the Property leased by Lessor is expressly waived.

Character as Personal Property

3. The Property will remain personal property regardless of the manner of its attachment to the Premises and will not become a fixture.

Application to All Leased Property

4. This Agreement will also apply to any of the Property above described that is already on the Premises, or that, in the future, may be delivered or installed there or may become subject to the Lease.

Right of Entry

5. It is further agreed that in the event of default by the Lessee in the performance of any of the terms of the Lease, Lessor or its assignee or agents may remove the Property, or any part of it, from the Premises in accordance with the terms of the Lease. The Undersigned will make no claim whatsoever to the Property or to any interest or right in it. The Undersigned further agrees that it will allow Lessor to exercise this right of entry at any reasonable time to remove the Property from the Premises.

Extensions

6. Lessor or its assignee may, without affecting the validity of this Consent and Waiver, extend the time of payment of any obligation of the Lessee for the performance of any of the terms of the Lease without the consent of the Undersigned and without giving notice to the Undersigned.

Binding Effect

7. This agreement will inure to and will be binding on the heirs, personal representatives, successors and assigns of the Undersigned.

Date: _____

_____ [signature of owner, or landlord, or mortgagee]
 _____ [printed name]

[Optional: required only if agreement will be recorded:]

Acknowledgment

[See Ch. 27, Deeds, Conveyancing, Dedication, and Homesteads, § 27.271, for appropriate acknowledgment.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Leases (Article 2A) General Overview Contracts Law Types of Contracts Lease
 Agreements Personalty Leases General Overview Real Property Law Fixtures & Improvements General Overview



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21-53 California Legal Forms--Transaction Guide § 53.282

§ 53.282 Personal Guaranty**[1] Comment****[a] Use of Form**

This form is for use when the lessor requires the personal liability of the principal of a lessee corporation. If this form is used, the principal should also execute the lease in the capacity of corporate officer and in an individual capacity.

[b] Laws Governing Guaranties

Agreements by which one party assumes the debts of another party are governed by the California laws of suretyship [see *Civ. Code* §§ 2787-2856]. If the suretyship obligation is entered into at the same time as the original obligation, as is usually the case with guaranties such as the one illustrated in this form, no consideration is necessary [*Civ. Code* § 2792]. The agreement must be in writing [*Civ. Code* § 2793].

For further discussion of suretyship, including guaranties, see Ch. 79, *Suretyship, Guaranty, and Indemnity* .

[2] FORM**Personal Guaranty****INDIVIDUAL PERSONAL GUARANTY**

I, _____[*name of principal of lessee corporation*], residing at _____[*address*], in consideration of your entry into the lease agreement dated _____[*date lease was executed*], by which _____[*name of lessee corporation*] is obligated to make regular payments for leased property as specified in Schedule A of the lease, personally guarantee to you all payments to be made by _____[*name of lessee corporation*] under the lease. I agree to pay on demand any sum that may become due to you whenever _____[*name of lessee corporation*] fails to make timely payment. It is

understood that this guaranty will be a continuing, irrevocable guaranty and indemnity for any indebtedness of _____ *[name of lessee corporation]* under the lease. I agree that any notice provided to _____ *[name of lessee corporation]* as required by the lease will be deemed to have been provided to me personally. I further agree that my personal consent will not be required for any modification, renewal, or exercise of option by lessee under the lease, and that any of these acts by lessee will not cancel or alter this guaranty in any way.

Date: _____

_____ *[signature of guarantor]*

_____ *[printed name]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGuaranty ContractsContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.283

§ 53.283 Corporate Resolution Authorizing Lease

[1] Comment

[a] Use of Form

If the lessee is a corporation, the lessor should be certain that the persons executing the lease and other relevant documents are acting within the authority vested in them by the corporation. To be authorized by the lessee corporation, the corporation's board of directors should approve the transaction by resolution, and the lessor should receive a copy of the resolution. This form is an example of such a corporate resolution.

This form refers to a "lease commitment letter." A "lease commitment letter" usually contains the terms of the lease agreement and serves as a blueprint for the formal agreement between the parties. For further discussion and a sample of that form, see § 53.280.

[b] Corporation's Powers to Enter Into Lease Contract

A California corporation organized or subject to the General Corporation Law [*see Corp. Code § 100 et seq.*] or organized or subject to the Nonprofit Corporation Law [*see Corp. Code § 5000 et seq.*], has all the powers of a natural person in carrying out its activities, including the power to enter into contracts [*see Corp. Code §§ 207, 5140(i), 7140(i), 9140(i)*]. For further discussion of a corporation's power to enter into a lease agreement and the requirement for a resolution authorizing the arrangement, see Ch. 34A, *Prelease Forms* .

[2] FORM

Corporate Resolution Authorizing Lease

CERTIFIED COPY OF RESOLUTION

I, _____ [*name of secretary*], am the Secretary of _____ [*name of lessee corporation*].

The following is a true copy of a resolution adopted by the Board of Directors _____ [select either: by unanimous written consent dated _____ or at a meeting called pursuant to proper notice and held on _____ [date], at which time a quorum was present]. I further certify that this resolution is in effect, and has been neither revoked nor modified.

RESOLVED that _____ [name of officer], the [title of officer] ("Officer") of this Corporation, is authorized and directed to execute and deliver on behalf of this Corporation, a Lease Agreement between this Corporation and _____ [name of lessor], under substantially the same terms as set forth in the accompanying Lease Commitment Letter, presented to this meeting and approved, but subject to any modifications or additions as Officer considers appropriate. Officer is further authorized to execute and deliver from time to time, when needed or desired, additional Lease Agreements covering equipment to be used in the business of this Corporation. Officer is further authorized and directed to execute all ancillary and supporting documents, and to do everything necessary or advisable to effect the full intent of this resolution and of the Lease Agreement.

Date: _____

_____ [signature of Secretary]

_____ [printed name]

[Affix corporate seal if desired (see Civ. Code § 1628); failure to do so does not invalidate instrument (Corp. Code § 207(a))]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Corporations Directors & Officers Scope of Authority General Overview Contracts Law Types of Contracts Lease Agreements Personalty Leases General Overview



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21-53 California Legal Forms--Transaction Guide § 53.284

§ 53.284 Lessor's Financial Survey

[1] Comment--Use of Form

This form is for use by the lessor to obtain basic financial information and references from a prospective lessee. In addition to assisting the lessor in evaluating the reliability of the lessee, the information is important if the lessor intends to assign the lease, as is often the case with a finance lease.

[2] FORM

Lessor's Financial Survey

FINANCIAL SURVEY

Date: _____

To: _____ [name of lessee]
_____ [street address]
_____ [city, state, zip]

From: _____ [name of lessor]
_____ [street address]
_____ [city, state, zip]

1. Name of Lessee:

2. Doing Business As:

3. Lessee's Address:

4. Lessee's Telephone Number:

5. Business Information:

a. Type of Business:

b. Length of Time in Business:

c. Form of Business Organization, including names of individual partners, officers, shareholders, or members authorized to enter into lease contract:

6. Bank References:

a. Name of Bank and Address of Branch:

b. Accounts by Kind and Account Number:

c. Name of Account Officer, if any:

7. Personal Bank References for Individual Proprietors or Partners:

a. Name of Bank and Address of Branch:

b. Accounts by Kind and Account Number:

c. Name of Account Officer, if any:

8. Supplier References:

_____ [list name, address, and telephone for two suppliers]

a.

b.

9. Name and Address of Lessor or Mortgagor of Business Premises:

10. Has Lessee or any individual owner or partner of Lessee filed a petition for bankruptcy within the past ten years?

11. Has Lessee had a receiver appointed within the last ten years?

12. Has Lessee or any individual owner or partner of Lessee executed an assignment for the benefit of creditors within the past ten years?

13. Any other Information Relevant to Lessee's Creditworthiness:

I affirm that the information contained in this survey is correct to the best of my knowledge. I authorize Lessor to contact the persons and sources listed in this survey in order to receive and verify information relevant to my individual creditworthiness, and that of any business of which I am or have been a principal or partner within the last ten years. I further authorize Lessor to obtain credit reports on both me individually and on any business of which I am or have been a principal or partner within the last 10 years.

Dated: _____

[LESSEE]

_____ [signature of lessee]

_____ [printed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewContracts LawTypes of ContractsLease
AgreementsPersonalty LeasesGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.285

§ 53.285 Agreement That Pre-1990 Lease Will Be Governed by Provisions of Commercial Code

[1] Comment

[a] Use of Form

This form is an agreement that the Commercial Code provisions will be applicable to a pre-1990 lease contract. It is to be used when the parties agree to have their existing agreement governed by the Commercial Code provisions in effect as of January 1, 1990 [*see Com. Code §§ 10101-10600*]. Counsel preparing this form should advise the client of the effect of the Commercial Code provisions on his or her rights, liabilities, and remedies under the existing agreement. For a discussion of the effect of Division 10 of the California Commercial Code on personal property lease transactions, see § 53.12.

[b] Application of Commercial Code to Leases in Existence Before January 1, 1990

Division 10 of the California Commercial Code applies to all lease contracts that are first made or that first become effective between the parties on or after January 1, 1990. Lease contracts that are first made or that first become effective before January 1, 1990 are not governed by those provisions unless the parties to the lease contract specifically agree in writing that the lease contract will be governed by those provisions. This optional application of the Commercial Code may apply to any lease contract, including an extension, amendment, modification, renewal, or supplement of the lease contract [*Com. Code § 10600*].

[2] FORM

Agreement That Pre-1990 Lease Will Be Governed by Provisions of Commercial Code

LEASE CONTRACT TO BE GOVERNED BY DIVISION 10 OF CALIFORNIA COMMERCIAL CODE

Identification of Parties

1. This Agreement is made on _____[*date*], between _____[*name(s)*] (Lessor), [*specify form of business entity*], of _____[*address or principal place of business in California*], and _____[*name(s)*] (Lessee), [*specify form of business entity*], of _____[*address or principal place of business in California*].

Description of Existing Agreement

2. The underlying contract to which this Agreement refers is a contract for the leasing of personal property of the following nature: [*describe leased property*]. The contract was entered into between Lessor and Lessee on _____[*date*], and is recognized by Lessor and Lessee as a valid and enforceable contract.

Governance by California Commercial Code

3. In accordance with *California Commercial Code Section 10600*, Lessor and Lessee hereby agree that the provisions of Division 10 of the California Commercial Code will govern their existing lease contract described in Paragraph 2 of this Agreement. Lessor and Lessee acknowledge that this Agreement may have a significant effect on their rights, liabilities, and remedies under the contract.

Date: _____

[LESSEE]

_____[*signature of lessee*]
 _____[*printed name*]

[LESSOR]

_____[*signature of lessor*]
 _____[*printed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.286

§ 53.286 Demand for Assurances

[1] Comment

[a] Use of Form

This form consists of alternative demands for assurances of performance in accordance with *Com. Code § 10401*. The first alternative is a general demand, in which the reasons for the insecurity and the type of assurance demanded are left blank, to be filled in as the situation requires. The second alternative contains a demand for assurance of payment by the posting of collateral or a performance bond. Each alternative includes optional bracketed language that may be used if the lease contract at issue provides specific grounds on which a party may demand assurance.

[b] Right to Demand Assurance

A lease contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired [*Com. Code § 10401(a)*]. If reasonable grounds for insecurity arise with respect to the performance of either party, the insecure party may make a written demand for adequate assurance of due performance. Until the insecure party receives that assurance, if commercially reasonable, the insecure party may suspend any performance for which he or she has not already received the agreed return [*Com. Code § 10401(b)*].

A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed 30 days after receipt of a demand by the other party [*Com. Code § 10401(c)*].

Between merchants [*see Com. Code § 2104(3)* (definition)], the reasonableness of grounds for insecurity and the adequacy of any assurance offered must be determined according to commercial standards [*Com. Code § 10401(d)*].

Acceptance of any nonconforming delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance [*Com. Code § 10401(e)*].

[2] FORM**Demand for Assurances****DEMAND FOR ASSURANCE**

Date: _____

_____ [name of party to whom demand is directed]

_____ [street address]

_____ [city, state, zip code]

[Choose one of the following demands:]

[EITHER]

It has come to our attention that _____ [state grounds for demanding assurance].

We consider this to be reasonable grounds for insecurity within the meaning of *Commercial Code Section 10401* [if appropriate, add: and Paragraph _____ of our lease contract dated _____].

Therefore, we demand that you give us assurance of due performance of the lease contract. We will consider the following as adequate assurances: _____ [state terms that constitute satisfactory assurance].

[OR]

PLEASE TAKE NOTICE that in accordance with *Commercial Code Section 10401* [if appropriate, add: and the terms of our contract dated _____, specifically Paragraph _____ of that contract], the undersigned demands assurance that you will in the future meet your payment obligations in accordance with our contract.

This demand is made because you have consistently failed to remit timely rental payments on account of the goods delivered under our contract.

PLEASE TAKE FURTHER NOTICE that the undersigned demands that within _____ days after receipt of this notice of demand for assurances, you post a performance bond in the sum of \$ _____, duly executed by any competent surety company. In lieu of the performance bond, you may place in the hands of our attorney, _____ [specify attorney's name, address, and telephone number], to be held in escrow, collateral valued at \$ _____. The collateral may take the form of negotiable securities, a bank deposit passbook, or the like, to secure payment of future performance under our contract.

[Continue with the following:]

Unless you comply with this demand before _____ [date], we will suspend performance of our obligations. Further, if you fail to comply with this demand before _____ [date], we will treat your refusal as a repudiation of the lease contract.

[LESSOR or LESSEE]

_____ [*signature of lessor or lessee*]

_____ [*printed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Performance



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21-53 California Legal Forms--Transaction Guide § 53.287

§ 53.287 Modification of Lease Contract**[1] Comment--Use of Form**

This form consists of alternative agreements to modify an existing lease contract. No consideration is required to support the modification of personal property lease contracts [*Com. Code § 10208(a)*]. Nevertheless, modifications must meet the test of good faith. The demand for a "modification" without good commercial reason is ineffective because it violates this duty of good faith [*see Com. Code § 2209* (Uniform Commercial Code Comment 2)]. For this reason, a writing evidencing a modification should incorporate the commercial reasons for the making of the modification, thus negating a party's bad faith. A mere technical consideration will not support a modification made in bad faith [*see Com. Code § 2209* (Uniform Commercial Code Comment 2)].

A signed lease agreement that forbids modification except by a signed writing may not be otherwise modified. However, except in transactions between merchants [*see Com. Code § 2104(3)* (definition)], a requirement for modification by a signed writing on a form supplied by a merchant must be separately signed by the other party [*Com. Code § 10208(b)*].

For further discussion of the modification and rescission of lease contracts, see § 53.12[6]. For discussion of the common law rules governing modification of contracts, and additional forms that can be adapted for transactions governed by the Commercial Code, see Ch. 77, *Discharge of Obligations*. For a notice that may be used for the modification of a lease contract after receipt of a notice of allocation, see § 53.263.

[2] FORM**Modification of Lease Contract**

Modification Agreement

_____, (Lessor), _____ [address], and _____ (Lessee),
 _____ [address], parties to a lease contract (underlying contract) dated _____ and

attached to this Agreement, agree that it is in their mutual interests to modify that contract as stated in this Agreement. Lessor and Lessee agree that neither party exercised any duress or made any unreasonable demands in the negotiations preceding this modification, and each agrees that the other observed reasonable commercial standards of fair dealing during the negotiations leading to this modification.

This modification has become necessary because *[specify reason(s) for modification]*.

Therefore, Lessor and Lessee agree as follows: _____ *[specify elements of modification, e.g.:*

- (1) That the rental rate for the goods leased under the underlying contract will be increased by 10 percent.
- (2) That the lease term as specified in the underlying contract will be modified by cancelling the one-year lease term and substituting a month-to-month lease term.
- (3) That the leased goods will be delivered to Lessee at _____ (*address*), instead of the address indicated in the underlying contract. Costs of transportation and risk of loss will remain as in the underlying contract.]

This modification applies to all leased goods covered by the underlying contract.

All terms of the underlying contract between Lessor and Lessee that are not specifically changed by this modification will remain binding.

This modification agreement is to be governed by the Commercial Code as enacted and in force in California on the date of this Agreement.

Date: _____

[LESSEE]

_____ *[signature of lessee]*
 _____ *[printed name]*

Date: _____

[LESSOR]

_____ *[signature of lessor]*
 _____ *[printed name]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Lease ContractsGeneral Overview



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21-53 California Legal Forms--Transaction Guide § 53.288

§ 53.288 Demand by Lessor or Supplier for Final Statement of Defects on Which Lessee Relied in Rejecting Goods

[1] Comment--Use of Form

This form is a demand by the lessor for a statement of defects relied on by the lessee in rejecting leased goods. Between merchants, the lessor or supplier may request in writing a complete and final written statement of all defects on which the lessee proposes to rely to justify rejection or to establish breach. The lessee's failure to respond will result in the waiver of the alleged unspecified defects [see *Com. Code* § 10514(a)].

[2] FORM**Demand by Lessor or Supplier for Final Statement of Defects on Which Lessee Relied in Rejecting Goods**

Demand for Final Statement of Defects

Date: _____

_____[name of lessor]

_____[street address]

_____[city, state, zip]

PLEASE TAKE NOTICE that in accordance with *Commercial Code Section 10514*, the undersigned demands that you now submit a complete and final written statement of all defects that you propose to rely on to justify your rejection of the goods delivered in accordance with our contract of _____[date].

[If a warning to lessee about failure to respond is desired, add:]

Your failure to supply this statement will preclude you from relying on any alleged defect to justify rejection of those

goods.

[Continue with the following:]

[LESSOR or SUPPLIER]

_____ [signature of lessor or supplier]
_____ [printed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Performance



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21-53 California Legal Forms--Transaction Guide § 53.289

§ 53.289 Equipment Sale Contract Provision for Leaseback

[1] Comment--Use of Form

This form is a provision that may be inserted into an equipment sale contract when the sale is intended to be the first part of a sale and leaseback transaction. This provision embodies a special agreement of the parties to the sale contract that they will simultaneously execute a related lease of the equipment, under which the seller will become the lessee and the buyer to become the lessor, and that they will forthwith and faithfully carry out both agreements as parts of one transaction.

A basic sale-leaseback transaction involves two separate but interrelated parts. First, the owner of the subject property enters into an agreement to sell the property to the purchaser. The purchaser, in turn, enters into agreement to lease the property back to the original seller. The first of these two steps--the initial sale of the property--may be accomplished by means of a standard agreement for sale of the property. For sales contracts in this publication that can be adapted for use in a sale-leaseback transaction, see Ch. 47, *Automotive Financing and Vehicle Leasing*, Ch. 52, *Sales of Goods Under the Uniform Commercial Code*, and Ch. 57, *Computer-Related Transactions*. A provision such as the one in this form should be included to make the sale contingent on the subsequent leaseback of the property. The terms and conditions of the transaction obviously will vary substantially depending on the type of property involved and the ways in which the parties wish to structure the transaction. The following general principles apply:

- Usually, the seller/lessee wants, and the buyer/lessor expects, a cash sale with a single payment. However, installment payments can be arranged if the parties have a reason to do so, without jeopardizing the tax qualification of the transaction [*cf. Hudspeth v. Commissioner (9th Cir. 1975) 509 F.2d 1224, 1227* (parents sold real property to children subject to mortgage then leased it back; children received rental income to cover portion of children's mortgage payments to parents)].
- The sale contract typically will not contain a provision for actual delivery of the equipment to the buyer, since the purpose of the entire sale and leaseback transaction is to leave the seller in possession of the equipment (albeit as a lessee instead of an owner). The contract should provide, however, that the

buyer is vested with the right of possession. This right, of course, will not be exercised.

For the second part of the transaction--the lease back to the seller--an appropriate lease agreement should be used. A lease form such as the one appearing in § 53.200[2] may be used for this purpose. For additional and alternative forms and discussion, see Rabkin & Johnson, *Current Legal Forms with Tax Analysis*, ch. 4A, *Equipment Leasing* (Matthew Bender).

[2] FORM

Equipment Sale Contract Provision for Leaseback

Sale and Leaseback

_____ [*specify paragraph number*]. This sale contract is executed as part of a sale and leaseback transaction. The parties agree as follows:

- (a) At the time of executing this sale contract, the parties shall also execute the lease attached as Exhibit _____ (the Equipment Lease), under which Seller shall become the lessee, and Buyer shall become the lessor, of [the Equipment *or other reference to equipment that is being sold and leased back*].
- (b) On executing the Equipment Lease, the parties shall forthwith and in good faith carry out their obligations under this sale contract and the Equipment Lease.
- (c) With respect to each party's taxable years ending before or after or concurrently with the termination of the Equipment Lease, each party shall treat this sale contract and the Equipment Lease as part of a single sale and leaseback transaction for all purposes related to the party's income tax liability under the Internal Revenue Code and all applicable state laws.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)General OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

22-54 California Legal Forms--Transaction Guide 54.syn

§ 54.syn Synopsis to Chapter 54: SHIPMENT OF PROPERTY

§ 54.01 California Sources

[1] Constitution

[2] Statutes

[3] Regulations

§ 54.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 54.03-54.04 [Reserved]

§ 54.05 Law Reviews

§ 54.06 Annotations

§ 54.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 54.08-54.09 [Reserved]

§ 54.10 Household Goods Carriers Act

[1] Scope of Act

[2] Regulation by Public Utilities Commission

[a] Authority of Public Utilities Commission

[b] Maximum Rate Tariff 4

[3] Definitions

[a] Household Goods Carrier

[b] Motor Vehicle

[c] Public Highway

[d] Owner

§ 54.11 Household Goods Carrier Permits

[1] Permit Required

[2] Sale, Transfer, or Assignment of Permit

[3] Lapse

§ 54.12 Identification Symbol Required

§ 54.13 Insurance Requirements

[1] Liability Insurance

[2] Vehicle Insurance

[3] Proof of Insurance

[4] Penalties for Failure to Obtain or Retain Insurance

§ 54.14 Operating Requirements

[1] Records and Reports

[a] Maintenance of Records

[b] Filing Reports and Contracts

[c] Form of Accounts, Records, and Memoranda

[d] PUC Inspections

[2] Compliance With Rate Requirements

[a] PUC Must Set Rates

[b] Seeking Higher Than Maximum Rates

[c] Prohibition Against Commissions and Refunds

[d] Prohibition Against Falsification to Avoid Prescribed Rates

[3] Subhauling Agreements

§ 54.15 Delay

[1] Notification Requirements

[2] Penalty for Noncompliance With Scheduled Dates

§ 54.16 Claims Procedures

[1] Claims for Loss or Damage

[2] Limitation of Liability

§ 54.17 Lien Procedures

§ 54.18 Abandonment of Property

§ 54.19 Enforcement Mechanisms

[1] Penalties for Noncompliance

[2] Suspension, Amendment, and Revocation of Permit

[a] Request of Permit Holder

[b] Action by PUC After Notice Without Hearing

[c] Action by PUC After Notice and Hearing

[d] Effect of Suspension, Cancellation, or Revocation

§§ 54.20-54.29 [Reserved]

§ 54.30 Governing Law

[1] Division 7 of California Commercial Code

[2] Definitions

[a] Bill of Lading

[b] Related Terms

§ 54.31 Bills of Lading

[1] Issuance

[2] Contents

[a] Terms Limiting Liability for Loss or Damage

[b] Terms Specifying Claims Procedures

[3] Substitute Bills of Lading

[a] Tangible Document Superseded by Electronic Document

[b] Electronic Document Superseded by Tangible Document

[c] Control of Electronic Document

§ 54.32 Duties and Obligations of Carriers

[1] Nondiscrimination

[2] Delivery

[3] Duty of Care

§ 54.33 Liability Under Bill of Lading

[1] Carrier's Liability for Misdating, Nonreceipt, or Misdescription

[2] Shipper's Liability for Errors in Shipper's Description of Goods

§ 54.34 Carrier's Lien

[1] Scope of Lien

[2] Persons Affected

[3] Loss of Lien

[4] Enforcement

[a] Sale After Notice

[b] Alternative Procedure: Sale After Notice and Advertisement

[c] Effect of Payment Before Sale

[d] Effect of Improper Sale

§§ 54.35-54.39 [Reserved]

§ 54.40 Governing Law

[1] Federal Law

[2] California Law

§ 54.41 Definitions

[1] "Household Goods"

[2] Related Definitions

§ 54.42 Bills of Lading

§ 54.43 Insurance

§ 54.44 Shipping Rates

[1] Reasonable Rates Required; Notice to Shipper

[2] Effect of Payment

[3] Liability for Payment

[a] Consignee

[b] Beneficial Owner

§ 54.45 Liability of Carriers

§ 54.46 Resolution of Disputes Between Household Goods Shippers and Carriers

[1] Offer of Arbitration Required for C.O.D. Shipments

[2] Attorneys' Fees in Court Action Based on C.O.D. Shipments

[a] Shipper's Award

[b] Carrier's Award

§§ 54.47-54.49 [Reserved]

§ 54.50 Governing Law

[1] Federal Bills of Lading Act

[2] Definitions

[a] Nonnegotiable Bill of Lading

[b] Negotiable Bill of Lading

[c] Goods

§ 54.51 Carrier's Delivery Obligation

[1] Demand Required

[2] Carrier's Claim to Goods as Excuse for Nondelivery

[3] Effect of Adverse Claims

§ 54.52 Liability Under Bills of Lading

[1] Misdelivery

[2] Failure to Deliver

[3] Misdating, Nonreceipt, or Misdescription

§ 54.53 Additional Liability Under Negotiable Bills of Lading

[1] Bills Issued in Parts and Sets

[2] Duplicate Bills

[3] Failure to Take and Cancel Bills

[4] Lost, Stolen, or Destroyed Bills

§ 54.54 Carrier's Lien Under Negotiable Bills of Lading

§§ 54.55-54.99 [Reserved]

§ 54.100 Shipper's Facts

Scope

§ 54.101 Shipper's Documents

Scope

§§ 54.102-54.109 [Reserved]

§ 54.110 Intrastate Transportation of Used Property Under Household Goods Carriers Act

[1] General Operating Procedures

Scope

[2] Handling Claims for Loss or Damage

Scope

[3] Presentation of Claim for Loss or Damage

Scope

[4] Carrier's Lien Procedures

Scope

§§ 54.111-54.119 [Reserved]

§ 54.120 Shipping Documents for Intrastate Transportation of Used Property Under Household Goods Carriers Act

[1] Basis for Carrier's Estimate With Table of Measurements

Scope

[2] Carrier's Estimated Cost of Services

Scope

[3] Change Order

Scope

[4] Agreement for Services

Scope

[5] Shipping Order and Freight Bill

Scope

[6] Combined Agreement for Services and Shipping Order and Freight Bill

§ 54.121 Bills of Lading Used in Intrastate Commercial Transportation

Scope

§ 54.122 Shipping Documents Used in Interstate Shipment of Household Goods

[1] Estimates of Charges

[a] Non-Binding Estimates

Scope

[b] Binding Estimates

Scope

[2] Order for Service

Scope

[3] Bill of Lading

Scope

§§ 54.123-54.199 [Reserved]

§ 54.200 Basis for Carrier's Estimated Cost of Services; Table of Measurements [MAX-4 Items 112, 400, 410]

[1] Comment

[a] Use of Form

[b] Recordkeeping

[c] Table of Measurements

[2] FORM

Basis for Carrier's Estimated Cost of Services; Table of Measurements [MAX-4 Items 112, 400, 410]

§ 54.201 Estimated Cost of Services [MAX-4, Items 108, 420]

[1] Comment

[a] Use of Form

[b] Completion of Form

[c] Maximum Charges When Estimate Issued at Least 3 Days Before Move

[d] Maximum Charges When Estimate Issued Less Than 3 Days Before Move

[e] Recordkeeping

[2] FORM

Estimated Cost of Services [MAX-4, Items 108, 420]

§ 54.202 Change Order for Services [MAX-4 Items 120, 440]

[1] Comment

[a] Use of Form

[b] Contents

[c] Recordkeeping

[2] FORM

Change Order for Services [MAX-4 Items 120, 440]

§ 54.203 Agreement for Services [MAX-4 Items 128, 450]

[1] Comment

[a] Use of Form

[b] Use of Combined Agreement and Shipping Document

[c] Delivery Requirements

[d] Rate Limitations for Noncompliance

[e] Recordkeeping

[2] FORM

Agreement for Services [MAX-4 Items 128, 450]

§ 54.204 Shipping Order and Freight Bill [MAX-4 Items 132, 460]

[1] Comment

[a] Use of Form

[b] Use of Combined Agreement and Shipping Document

[c] Completion of Form

[d] "Not to Exceed" Amount

[e] Recordkeeping

[2] FORM

Shipping Order and Freight Bill [MAX-4 Items 132, 460]

§ 54.205 Agreement for Services and Shipping Order and Freight Bill [MAX-4 Items 128, 132, 450, 460]

[1] Comment

[a] Use of Form

[b] Use of Combined Agreement and Shipping Document

[c] Delivery Requirements

[d] Rate Limitations for Noncompliance

[e] Recordkeeping

[2] FORM

Agreement for Services and Shipping Order and Freight Bill [MAX-4 Items 128, 132, 450, 460]

§ 54.206 "Not to Exceed" Notice

[1] Comment

[a] Use of Form

[b] Definitions

[c] Form and Content

[2] FORM

"Not to Exceed" Notice

§ 54.207 Intrastate Check List

[1] Comment

[a] Use of Form

[b] Effect of Statement Concerning Condition of Goods

[c] Exception and Location Symbols

[d] Signatures at Point of Origin

[e] Signature of Consignee at Point of Destination

[2] FORM

Intrastate Check List

§§ 54.208-54.219 [Reserved]

§ 54.220 Claim for Loss or Damage

[1] Comment

[a] Use of Form

[b] Filing Requirements

[c] Acknowledgment of Receipt and Settlement

[d] Contents of Claim Form

[e] False Claims

[f] Effect of Statement Concerning Condition of Goods

[2] FORM

Claim for Loss or Damage

§§ 54.221-54.229 [Reserved]

§ 54.230 Straight Bill of Lading (Nonnegotiable)

[1] Comment

[a] Use of Form

[b] Completion of Form

[c] Carrier's Lien

[d] Carrier's Liability for Loss or Damage

[e] Carrier's Liability for Errors in Bill of Lading

[f] Carrier's Liability for Goods Loaded by Shipper

[2] FORM

Straight Bill of Lading

§ 54.231 Order Bill of Lading (Negotiable)

[1] Comment

[a] Use of Form

[b] Completion of Form

[c] Carrier's Lien

[d] Carrier's Liability for Loss or Damage

[e] Carrier's Liability for Errors in Bill of Lading

[f] Carrier's Liability for Goods Loaded by Shipper

[2] FORM

Order Bill of Lading

§ 54.232 Notice of Satisfaction of Carrier's Lien

[1] Comment--Use of Form

[2] FORM

Notice of Satisfaction of Carrier's Lien

§§ 54.233-54.239 [Reserved]

§ 54.240 Non-Binding Estimate of Charges

[1] Comment

[a] Use of Form

[b] Table of Measurements

[c] Two Methods of Using Estimate

[2] FORM

Non-Binding Estimate of Charges

§ 54.241 Binding Estimate of Charges

[1] Comment--Use of Form

[2] FORM

Binding Estimate of Charges

§ 54.242 Order for Service

[1] Comment

[a] Use of Form

[b] Information for Shippers

[2] FORM

Order for Service

§ 54.243 Nonnegotiable Bill of Lading (Household Goods)

[1] Comment

[a] Use of Form

[b] Contents of Bill of Lading for Household Goods

[2] FORM

Nonnegotiable Bill of Lading (Household Goods)

§§ 54.244-54.249 [Reserved]

§ 54.250 Nonnegotiable Bill of Lading (Commercial Property)

[1] Comment

[a] Use of Form

[b] Effect of Alterations and Additions

[2] FORM

Nonnegotiable Bill of Lading (Commercial Property)

§ 54.251 Negotiable Bill of Lading

[1] Comment

[a] Use of Form

[b] Effect of Alterations and Additions

[2] FORM

Negotiable Bill of Lading



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CHAPTER 54 SHIPMENT OF PROPERTY

22-54 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter is designed to aid the attorney in advising intrastate and interstate carriers with regard to shipments of property, including household goods and commercial property. The chapter also provides guidance to shippers in securing reimbursement for losses incurred as a result of the carriage of their goods.

The Legal Background and Forms are divided into four subparts:

- Intrastate shipment of used property under the Household Goods Carriers Act [*see §§ 54.10 et seq., 54.200 et seq.*].
- Intrastate shipment of commercial property--that is, goods other than those covered by the Household Goods Carriers Act [*see §§ 54.30 et seq., 54.230 et seq.*].
- Interstate shipment of household goods [*see §§ 54.40 et seq., 54.240 et seq.*].
- Interstate shipment of commercial property [*see §§ 54.50 et seq., 54.250 et seq.*].

This chapter does not cover the storage of household goods, except for the storage of these goods in transit as an incident to the transportation of the goods within California. "Permanent" storage of household goods within California is discussed in Chapter 54A, *Storage of Goods* .



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A. Primary Sources

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§ 54.01 California Sources

[1] Constitution

Legislative control through Public Utilities Commission over carriage and storage operations. *Cal. Const., art. XII, §§ 3, 4.*

[2] Statutes

"Container" defined. *Bus. & Prof. Code § 12011.6.*

"Pallet" defined. *Bus. & Prof. Code § 12011.7.*

Carriers exempted from packaging act. *Bus. & Prof. Code § 12603.*

California Self-Service Storage Facility Act. *Bus. & Prof. Code § 21700 et seq.*

Carriers of alcoholic beverages. *Bus. & Prof. Code § 23104.*

Unauthorized material alteration extinguishes written contract. *Civ. Code § 1700.*

Deposits of personal property. *Civ. Code § 1813 et seq.*

Disposition of unclaimed property. *Civ. Code § 2081 et seq.*

Kinds of carriage. *Civ. Code § 2085.*

Carriage of freight. *Civ. Code § 2110.*

Obligations of carriers. *Civ. Code § 2114 et seq.*

Freightage principles. *Civ. Code § 2136 et seq.*

Common carriers. *Civ. Code § 2168 et seq.*

Limitation of liability of carrier by special contract. *Civ. Code § 2174.*

Contractual limitation of liability not applicable to gross negligence, fraud, or willful wrong. *Civ. Code § 2175.*

Common carriage of freight. *Civ. Code § 2194 et seq.*

Liens in general.

Nature and kinds of liens. *Civ. Code § 2872 et seq.*

Creation of liens. *Civ. Code § 2881 et seq.*

Effect of liens. *Civ. Code § 2888 et seq.*

Priorities of liens. *Civ. Code § 2897 et seq.*

Redemption. *Civ. Code § 2903 et seq.*

Extinction. *Civ. Code § 2909 et seq.*

Civil Code chapter on liens inapplicable to transactions governed by Commercial Code. *Civ. Code § 2914.*

Service lien for carriage or storage. *Civ. Code § 3051.*

Carrier's lien for charges due on previous deliveries. *Civ. Code § 3051.5.*

Service of process. *Code Civ. Proc. § 410.10 et seq.*

State's authority to levy on property by warrant or notice of levy under any provision of Pub. Util. Code. *Code Civ. Proc. §§ 688.020, 688.030.*

Bill of lading defined. *Com. Code § 1201(b)(6).*

Document of title defined. *Com. Code § 1201(b)(16).*

Documents of title in general. *Com. Code § 7201 et seq.*

Bills of lading. *Com. Code § 7301 et seq.*

Obligations imposed on issuers of bills of lading. *Com. Code § 7401 et seq.*

Negotiation and transfer of bills of lading. *Com. Code § 7501 et seq.*

Lost or missing bills of lading. *Com. Code § 7601.*

Attachment of goods covered by negotiable bills of lading. *Com. Code § 7602.*

Interpleader of conflicting claimants under bills of lading. *Com. Code § 7603.*

Security interest in documents. *Com. Code § 9109(a).*

Priorities as to documents. *Com. Code § 9317.*

Protection of document transferees. *Com. Code § 9331.*

Alteration of writing. *Evid. Code § 1402.*

Carriers exempt from Hazardous Substances Labeling Act. *Health & Safety Code § 108300.*

Carriage of radioactive materials. *Health & Safety Code § 25651.*

Regulation of carriers generally.

"Transportation of property" defined. *Pub. Util. Code § 209.*

"Rates" defined. *Pub. Util. Code § 210.*

"Carriers" defined. *Pub. Util. Code §§ 211-213.*

"Public utility" defined. *Pub. Util. Code § 216.*

"Freight forwarder" defined. *Pub. Util. Code § 220*

Rates generally. *Pub. Util. Code §§ 451-462.*

Just and reasonable rates required. *Pub. Util. Code § 451.*

Lower than maximum reasonable rate. *Pub. Util. Code § 452.*

Rate discrimination prohibited. *Pub. Util. Code § 453.*

Rate increase proposals. *Pub. Util. Code § 454.*

Hearings on tariff schedules. *Pub. Util. Code § 455.*

Discrimination in rates or facilities prohibited. *Pub. Util. Code § 461.5.*

Tariffs generally. *Pub. Util. Code §§ 486-496.*

Reports required from carriers. *Pub. Util. Code §§ 581-584.*

Fixing of rates and facilities. *Pub. Util. Code §§ 728-730, 732.*

Overcharges. *Pub. Util. Code § 734.*

Regulation of equipment, practices, and facilities. *Pub. Util. Code §§ 761-774.*

Books and accounts. *Pub. Util. Code §§ 791-796.*

Regulation of stock and security transactions. *Pub. Util. Code §§ 816-830.*

Judicial review. *Pub. Util. Code § 1756 et seq.*

Interstate and Foreign Motor Carriers of Household Goods and Passengers Act. *Pub. Util. Code § 3901 et seq.*

Transportation rate fund and fees. *Pub. Util. Code § 5001 et seq.*

Household Goods Carriers Act. *Pub. Util. Code § 5101 et seq.*

Purpose of Act. *Pub. Util. Code § 5102.*

"Household goods carrier" defined. *Pub. Util. Code § 5109.*

Act inapplicable to interstate commerce. *Pub. Util. Code § 5111.*

Exclusive regulation of household goods carriers. *Pub. Util. Code § 5112.*

Compliance with Act required. *Pub. Util. Code § 5131.*
 Identification symbol. *Pub. Util. Code §§ 5132, 5140, 5282, 5311.3.*
 Permit. *Pub. Util. Code §§ 5133-5136, 5140.*
 Certification to PUC of workers' compensation coverage. *Pub. Util. Code §§ 5135.5, 5230.*
 Regulations regarding notifying shippers of delay. *Pub. Util. Code § 5138.*
 Accident liability protection. *Pub. Util. Code §§ 5140, 5161-5165.*
 Carrier's lien procedures. *Pub. Util. Code § 5142.*
 "Not to Exceed" Notice. *Pub. Util. Code § 5143.*
 Duty of commission to fix rates. *Pub. Util. Code § 5191.*
 Limited authorization for charging higher rates. *Pub. Util. Code § 5193.*
 Rate enforcement. *Pub. Util. Code § 5194.*
 Prohibition of acts resulting in unauthorized rates. *Pub. Util. Code §§ 5196-5199.*
 Reports, records, and inspections. *Pub. Util. Code § 5221-5228.*
 Penalty for failure to obtain insurance. *Pub. Util. Code § 5229.*
 Subhauling Agreements. *Pub. Util. Code § 5243.*
 Estimates. *Pub. Util. Code § 5245.*
 Proceedings before Public Utilities Commission. *Pub. Util. Code §§ 5251-5260.*
 Suspension of permit by request. *Pub. Util. Code § 5281.*
 Removal of identifying symbols. *Pub. Util. Code § 5282.*
 Restoration of permit and identifying symbols. *Pub. Util. Code § 5283.*
 Lapse and transfer of permit. *Pub. Util. Code §§ 5284-5284.5.*
 Grounds for suspension, amendment, revocation, or cancellation of permit; fines. *Pub. Util. Code §§ 5285-5285.6.*
 Effect of revocation of permit. *Pub. Util. Code § 5286.*
 Criminal offenses. *Pub. Util. Code § 5311 et seq.*
 Civil penalties. *Pub. Util. Code § 5313 et seq.*
 Each violation and portion of day as separate offenses. *Pub. Util. Code § 5315.*
 Remedies and penalties cumulative. *Pub. Util. Code § 5316.*
 Actions to recover civil penalties. *Pub. Util. Code §§ 5317, 5318, 5320.*

Household Goods Carriers Uniform Business License Tax. *Pub. Util. Code § 5325 et seq.*

Motor vehicle transportation license tax. *Rev. & Tax. Code § 9601 et seq.*

Vehicle license fee. *Rev. & Tax. Code § 10701 et seq.*

Registration and weight fees. *Veh. Code § 9250 et seq.*

Regulation of motor carriers of non-household goods. *Veh. Code § 34600 et seq.*

[3] Regulations

California Public Utilities Commission Maximum Rate Tariff 4 (maximum rates and rules, and regulations for transportation of used property).

Control of weights and measures. *4 Cal. Code Reg. § 4000 et seq.*

Rules of Practice and Procedure before Public Utilities Commission. *Cal. Code Reg., Title 20.*



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§ 54.02 Federal Sources

[1] Statutes

Bills of lading. *49 U.S.C. § 80101 et seq.*

[2] Regulations

Classification of motor carriers. *49 C.F.R. §§ 369.2, 369.3.*

Investigation and voluntary disposition of loss and damage claims *49 C.F.R. §§ 370.1 et seq., 1005 et seq.*

Bills of lading. *49 C.F.R. §§ 373.101, 373.201, 375.505, 1035.1 et seq.*

Transportation of household goods in interstate commerce. *49 C.F.R. § 375.101 et seq.*

"Household goods agents" defined. *49 C.F.R. § 375.205.*

Collection of charges. *49 C.F.R. §§ 375.215, 375.217.*

Extension of credit to shippers by motor carriers. *49 C.F.R. §§ 375.219, 375.221.*

Estimates. *49 C.F.R. § 375.401 et seq.*

Order for service. *49 C.F.R. § 375.501.*

Availability of forms. *49 C.F.R. § 1003.1.*

Advertising. 49 C.F.R. § 1056.17.

Complaint procedure. 49 C.F.R. § 1111.1 *et seq.*

Freight tariffs. 49 C.F.R. § 1310.2 *et seq.*



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§ 54.05 Law Reviews

Mair, *Unconscionability and the Enforcement of Standardized Contracts in Commercial Transactions*, 16 *Pac. L. J.* 247 (1984).

Note, *An Effort Toward Uniformity in Decisions Concerning Liability of Consignors, Shippers, and Consignees in Interstate Commercial Actions*, 16 *U. West L.A. L. Rev.* 195 (1984).

Riegert, *Documents of Title Under Article 7*, 13 *UCC L.J.* 105 (1980).

Note, *Private Carriage on Trial: Competition in the Motor Transportation Industry*, 21 *Stan. L. Rev.* 1204 (1969).



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§ 54.06 Annotations

Annot., Liability of Warehouseman or Other Bailee for Loss of Goods Stored at Other Than Agreed-upon Place, 76 A.L.R.4th 883 (1990).

Annot., Trucker as Independent Contractor or Employee Under § 2(3) of National Labor Relations Act (29 U.S.C.S. § 152(3)), 55 A.L.R. Fed. 20 (1981) .

Annot., Construction and Effect of Section 1-202 of the Uniform Commercial Code Dealing with Documents Which Are Prima Facie evidence of Their Own Authenticity and Genuineness, 72 A.L.R.3d 1243 (1976).

Annot., Allowance of Attorney's Fees in Shipper's Action Against Carrier for Loss of, or Damage to, Interstate Shipment, 37 A.L.R. 3d 1125 (1971).

Annot., Bailee's Duty to Insure Bailed Property, 28 A.L.R.3d 513 (1969).

Annot., Liability of Carrier for Delivering Goods Sent C.O.D. Without Receiving Cash Payment, 27 A.L.R.3d 1320 (1969).

Annot., Validity, Construction, and Effect of Provision in Shipping Contract or Bill of Lading that Carrier Shall Have Benefit of Shipper's Insurance Against Loss of or Damage to Shipments, 27 A.L.R.3d 984 (1969).

Annot., Construction and Effect of UCC Art. 7, Dealing With Warehouse Receipts, Bills of Lading, and Other Documents of Title, 21 A.L.R.3d 1339 (1968).

Annot., Validity and Construction of Stipulation Exempting Carrier from Liability for Loss or Damage to Property at Nonagency Station, 16 A.L.R. 3d 1111 (1967).

Annot., Liability of Carrier by Land for Damage to Goods Resulting from Improper Packing by Carrier, 7 A.L.R.3d 723 (1966).

Annot., Misdescription of Goods By Shipper As Affecting Carrier's Liability for Loss or Damage, 1 A.L.R.3d 736 (1965).



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§ 54.07 Text References

[1] Matthew Bender Sources

California Forms of Pleading and Practice (Matthew Bender).

Ch. 93, *Bailments*.

Ch. 109, *Carriers*.

Ch. 213, *Documents of Title* .

Ch. 553, *Trucks* .

California Legal Forms (Matthew Bender).

Ch. 54A, *Storage of Goods*.

Ch. 102, *Bailments*.

Ch. 102A, *Personal Property Liens*.

Hart & Willier, Forms and Procedures Under the Uniform Commercial Code (Bender's U.C.C. Serv.), §§ 22.02- 22.12 (delivery of goods); §§ 72.01- 74.08 (documents of title) (Matthew Bender).

[2] Additional Text References

Anderson on the Uniform Commercial Code (Clark, Boardman, Callaghan 3d ed. 1995).

Witkin, Summary of California Law, vol. 1, *Contracts*, § 679; vol. 4, *Secured Transactions in Personal Property*, §§ 23, 24, 36, 38-42, 44, 47; vol. 13, *Personal Property*, §§ 173 et seq. (10th ed. 2005).



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CHAPTER 54 SHIPMENT OF PROPERTY

PART II. LEGAL BACKGROUND

A. Intrastate Shipment of Used Property

22-54 California Legal Forms--Transaction Guide § 54.10

§ 54.10 Household Goods Carriers Act

[1] Scope of Act

The transportation of used property, including household goods and personal effects, by motor vehicle over California public highways is governed exclusively by the Household Goods Carriers Act [*Pub. Util. Code § 5112; see Pub. Util. Code § 5101 et seq.*]. Household goods carriers must operate in accordance with the Act [*see Pub. Util. Code §§ 5131, 5139*]. Conflicting provisions of the Public Utilities Act do not apply to a household goods carrier [*Pub. Util. Code § 5112*].

The Act does not apply to interstate or foreign commerce, except as such regulation is not prohibited by the Constitution or federal law [*Pub. Util. Code § 5111*].

[2] Regulation by Public Utilities Commission

[a] Authority of Public Utilities Commission

The administration of the Household Goods Carriers Act is vested in the California Public Utilities Commission ("PUC"). The PUC is authorized to establish rules for the performance of any service of the type furnished or supplied by household goods carriers. Every carrier must observe those rules, and the failure to do so is unlawful [*Pub. Util. Code § 5139*].

The PUC has specific statutory authority to regulate carriers of household goods [*see Pub. Util. Code §§ 5131-5140, 5245, 5281-5286*]: to require a permit for the transportation of household goods and personal effects entirely within California [*Pub. Util. Code §§ 5133(a)(1), 5140; see § 54.11*], to require the display of vehicle identification [*Pub. Util. Code §§ 5132, 5140; see § 54.12*], and to require carriers to maintain liability protection and cargo insurance [*see Pub. Util. Code §§ 5140, 5161, 5229; see also § 54.13*]. The PUC also requires carriers to complete and retain specific types of records and reports [*see Pub. Util. Code §§ 5221-5230*].

The PUC is also authorized to establish or approve rates that may be charged by household goods carriers [*see Pub.*

Util. Code § 5191]. The PUC's rules regulating the transportation of household goods are set forth in its Maximum Rate Tariff 4 (MAX-4) [*see [b], below*].

A valid operating authority issued by the Federal Motor Carrier Safety Administration is required for the transportation of household goods and personal effects into or out of California [*Pub. Util. Code § 5133(a)(2)*].

[b] Maximum Rate Tariff 4

The PUC has adopted Maximum Rate Tariff 4 (MAX-4) pursuant to its authority under the Household Goods Carriers Act. MAX-4 sets forth the maximum fixed rates that apply to the transportation of commodities by household goods carriers [MAX-4, item 8]. The definition of "commodities" covers the same used property as the Household Goods Carriers Act [*see [3][a], below*], but the definition is more detailed. MAX-4 applies to the following types of used property [MAX-4, items 8, 12(1)]:

- Household goods; that is, household or personal effects such as furniture, furnishings, clothing, radios, musical instruments, stoves, and refrigerators.
- Office and store fixtures and equipment; that is, furniture, furnishings, and equipment as are used in an office, store, hospital, library, museum, place of learning, or other institution.

By its own terms, MAX-4 does not apply to the following types of property [MAX-4, items 8, 12(2)]:

- Property transported from, to, or between the place or places of business of a dealer in or auctioneer of property otherwise covered by the tariff.
- Property of the United States, state, county, or municipal governments, or property transported under an agreement between the governmental entity and a carrier.
- Baggage, except when transported in mixed shipments [*see MAX-4, item 56*].
- Property shipped to or from producers of motion pictures or television programs when transported subject to specified rates, rules, and regulations [*see MAX-4, item 12(2)(d)*].
- Property transported for a displaced person when a public entity bears the cost of transportation [*see Gov. Code § 7262*].
- Disaster supplies.
- The contents of trailer coaches and campers, or furniture and other personal effects for use outside of a trailer coach when transported in conjunction with the vehicle.

MAX-4 is also inapplicable to transportation by independent contractor subhaulers when they perform the service for other carriers. "Independent contractor subhaulers" are carriers that render services for a principal carrier, for specific compensation, a specific result, under the control of the principal carrier as to the result of the work only and not the means by which the services are accomplished. However, this exception does not exempt from the tariff the carriers for whom the independent contractors perform services [MAX-4, item 8(2)].

[3] Definitions

[a] Household Goods Carrier

The term "household goods carrier" includes every corporation or person, their lessees, trustee, receivers or trustees appointed by a court, engaged in the transportation for compensation or hire as a business by means of a motor vehicle or motor vehicles used in the transportation of used household goods and personal effects over any public highway within California [*Pub. Util. Code § 5109; see MAX-4*]. "Corporation" is broadly defined to include a corporation, company, association, and joint stock association [*Pub. Util. Code § 5105*]. "Person" is broadly defined as an individual, firm, or partnership [*Pub. Util. Code § 5109*].

[b] Motor Vehicle

The term "motor vehicle" means every motor truck, tractor, or other self-propelled vehicle used for transportation of property over the public highways, other than on fixed rails or tracks. The term includes any trailer, semitrailer, dolly, or other vehicle drawn by a motor vehicle [*Pub. Util. Code § 5108*].

[c] Public Highway

The term "public highway" includes every highway in California, as well as every public street and road in the state [*Pub. Util. Code § 5108*].

[d] Owner

With respect to a motor vehicle used in the transportation of property for compensation by a household goods carrier, "owner" means the corporation or person who is registered with the Department of Motor Vehicles as the owner of the vehicle, or who has a legal right to possession of the vehicle pursuant to a lease or rental agreement. [*Pub. Util. Code § 5110.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local Regulation



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PART II. LEGAL BACKGROUND

A. Intrastate Shipment of Used Property

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§ 54.11 Household Goods Carrier Permits

[1] Permit Required

Household goods carriers must be licensed. A permit issued by the PUC is required for the transportation of household goods and personal effects entirely within California [*Pub. Util. Code § 5133(a)(1)*]. A valid operating authority issued by the Federal Motor Carrier Safety Administration is required for the transportation of household goods and personal effects into or out of California [*Pub. Util. Code § 5133(a)(2)*].

Without a permit from the PUC or a valid operating authority issued by the Federal Motor Carrier Safety Administration, a household goods carrier may not engage, or attempt to engage, in the business of transporting used household goods and personal effects, by motor vehicle over any public highway in California, including advertising, soliciting, offering, or entering into an agreement [*Pub. Util. Code § 5133(a)*]. A household goods carrier without a permit or a valid operating authority may not enforce any security interest or bring an action to recover any money, property, or other relief from any consignor, consignee, or owner of household goods or personal effects for services rendered [*Pub. Util. Code § 5133(b)*]. A person using the services of an unpermitted and unauthorized household goods carrier may bring an action to recover all compensation paid to the household goods carrier [*Pub. Util. Code § 5133(b)*].

The operation of a motor vehicle without a permit or authorization constitutes a public nuisance [*see Pub. Util. Code § 5133(c)*]. Any person having possession or control of used household goods or personal effects, who knows, or through the exercise of reasonable care should know, that a household goods carrier transported those household goods or personal effects in violation of that permit or valid operating authority requirement must release the household goods and personal effects on the request of the consignor or consignee [*Pub. Util. Code § 5133(d)*; *see Pub. Util. Code § 5142(k)(1), (2)* ("consignor," "consignee" defined)]. If the person in possession or control fails to release the household goods and personal effects, a peace officer is authorized to take custody of the household goods and personal effects and release them to the consignor or consignee [*Pub. Util. Code § 5133(d)*; *see Pub. Util. Code § 5133(c)*; *Penal Code § 830 et seq.* ("peace officer" defined)]. In addition, any carrier that operates without a valid household goods carrier permit and willfully and knowingly advertises that it operates as a household goods carrier is guilty of a misdemeanor punishable by a fine [*Pub. Util. Code § 5314.5*]. After a hearing, carriers operating or holding themselves out as

household goods carriers without a valid permit are subject to a significantly more substantial fine [*Pub. Util. Code* § 5313.5; *see Pub. Util. Code* § 5314.5; *see* § 54.19].

In addition, it is unlawful for the owner of a household goods-carrier motor vehicle who employs or otherwise directs the driver of the vehicle to permit the operation of the vehicle on any public highway for compensation without a valid permit, or without satisfying vehicle identification requirements [*see Pub. Util. Code* § 5132; *see* § 54.12] and liability insurance requirements [*Pub. Util. Code* § 5140; *see Pub. Util. Code* § 5161; *see also* § 54.13]. Applicants must meet financial responsibility and competence requirements [*see Pub. Util. Code* § 5135; *see also* [2], *below*]. The PUC may only issue a permit to those applicants that the PUC finds to have demonstrated sufficient knowledge, ability, integrity, and financial resources and responsibility to perform the service within the scope of the application [*Pub. Util. Code* § 5135(g)].

Applicants for a household goods carrier permit must meet three basic qualification:

- Ability to operate as a household goods carrier [*Pub. Util. Code* § 5135(a)].
- Reasonable financial responsibility [*Pub. Util. Code* § 5135(a); *see Pub. Util. Code* § 5135.6].
- California residency [*Pub. Util. Code* § 5135(h)].

As a precondition to issuing a permit, the applicant may be required to procure a performance bond sufficient to facilitate the collection of fines, penalties, and restitution related to enforcement actions that can be taken against the applicant [*Pub. Util. Code* 5135(e)].

[2] Sale, Transfer, or Assignment of Permit

In general, a household goods carrier permit may be transferred to another qualified applicant under an order from the PUC and payment of the transfer fee [*see Pub. Util. Code* §§ 5136, 5284; *see Pub. Util. Code* § 5136]. However, no permit may be sold, leased, assigned, or otherwise transferred or encumbered by its holder without first securing an order authorizing the transfer or encumbrance from the PUC [*Pub. Util. Code* § 5284]. The PUC will only authorize a sale, lease, assignment or other transfer of a valid permit to a transferee who is qualified as a household goods carrier [*Pub. Util. Code* § 5284.5; *see Pub. Util. Code* §§ 5135, 5284; *see also* § 54.11].

[3] Lapse

A permit remains in effect until suspended [*see* § 54.19] or terminated. Any permit that is not exercised for a period of one year, including all periods of suspension, lapses and terminates [*Pub. Util. Code* § 5284].

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local Regulation



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§ 54.12 Identification Symbol Required

Every household goods carrier must display on each vehicle operated by it an identification symbol in the form and in accordance with rules and regulations prescribed by the PUC. For motor vehicles first registered in California on or after January 1, 1985, the identifying symbol must be displayed on both the left and right doors of the cab of the vehicle [*Pub. Util. Code § 5132; see Pub. Util. Code § 5140*]. When a permit is suspended [*see § 54.19*], the identifying symbols must be removed [*Pub. Util. Code § 5282*] until the permit is restored [*Pub. Util. Code § 5283*]. Failure to comply with these requirements is punishable by a fine, imprisonment, or both [*Pub. Util. Code § 5311.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-54 California Legal Forms--Transaction Guide § 54.13

§ 54.13 Insurance Requirements

[1] Liability Insurance

Household goods carriers must maintain adequate protection against liability imposed by law on carriers for the payment of damages for personal bodily injuries, including death, and property damage. The recovery of each person for bodily injury or death is subject to the limitations specified by statute [*Pub. Util. Code § 5161(a)*]. An applicant must procure, and continue in effect during the life of the permit, protection against liability for bodily injuries and death in the following amounts [*Pub. Util. Code § 5161(a)*]:

- At least \$250,000 on account of bodily injuries to or death of one person.
- At least \$500,000 on account of bodily injuries to or death of more than one person as a result of any one accident.
- At least \$100,000 for one accident resulting in damage to or destruction of property, other than property being transported by the carrier for any shipper or consignee, whether it is the property of one or more than one claimant.
- At least \$600,000 on account of bodily injuries to, or death of, one or more persons and damage to or destruction of property, other than property being transported by the carrier for any shipper or consignee, whether it is the property of one or more than one claimant, in any one accident.

The PUC may increase these levels of liability if necessary to provide adequate protection [*Pub. Util. Code § 5161(b)*].

The applicant also must procure and continue in effect cargo insurance in the amount of at least \$20,000. However, the PUC may authorize a lesser amount if it finds that a lesser amount adequately protects the public [*Pub. Util. Code § 5161(c)*].

It is unlawful for the owner of a household goods carrier motor vehicle who employs or otherwise directs the driver of the vehicle to permit the operation of the vehicle on any public highway for compensation without satisfying these liability insurance requirements [*Pub. Util. Code* § 5140; *see Pub. Util. Code* § 5161].

[2] Vehicle Insurance

All household goods carriers must maintain insurance on all vehicles that are used in transportation for compensation during the preceding year [*see Pub. Util. Code* § 5229]. If, after the filing and transmittal of the annual vehicle report [*see* § 54.14[1][b]], the household goods carrier's insurer informs the PUC that the carrier has failed to obtain insurance coverage for any vehicle reported on the list, the PUC may, in addition to any other applicable penalty, for a first occurrence, suspend the carrier's permit or impose a fine, or both, and for a second or subsequent occurrence may suspend or revoke the permit or impose a fine, or both. [*Pub. Util. Code* § 5229(b); *see* § 54.18].

[3] Proof of Insurance

Carriers must prove the requisite insurance coverage by depositing any of the following with the PUC covering each vehicle [*Pub. Util. Code* § 5162]:

- An insurance policy issued by a company licensed to write such insurance in California, or by nonadmitted insurers subject to *Ins. Code* § 1763, if the policies satisfy PUC requirements.
- A bond of a surety company licensed to write surety bonds in California.
- Any other evidence of the qualification of the household goods carrier as a self-insurer authorized by the PUC [*Pub. Util. Code* § 5162].

[4] Penalties for Failure to Obtain or Retain Insurance

If a carrier fails to obtain insurance, the PUC may impose fines and/or suspensions, and may revoke the carrier's permit for a second or subsequent failure to obtain insurance [*Pub. Util. Code* § 5229(b); *see* § 54.19].

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance LawMotor Vehicle InsuranceGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local Regulation



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22-54 California Legal Forms--Transaction Guide § 54.14

§ 54.14 Operating Requirements

[1] Records and Reports

[a] Maintenance of Records

Household goods carriers that maintain an office or place of business in California and offer intrastate service must maintain all books, accounts, papers, and records required by the PUC in California [*Pub. Util. Code § 5221*]. Carriers performing intrastate services that do *not* maintain an office or place of business within California must maintain all books, accounts, papers, and records pertaining to that intrastate service available to the PUC at its request at a place designated in California for examination by the PUC or, alternatively, reimburse the PUC for the actual expense of examining the books, accounts, papers, or records at the place outside of California where the records are kept [*Pub. Util. Code § 5221*]. The rules reports, records, and inspections [*see Pub. Util. Code §§ 5221-5226; see also [b]-[d], below*] apply, to the extent necessary to the PUC, to persons having direct or indirect control over, or affiliated with, any household goods carrier [*Pub. Util. Code § 5227*].

[b] Filing Reports and Contracts

Household goods carriers must file annual, periodic, or special reports as prescribed by the PUC [*Pub. Util. Code § 5221; see Pub. Util. Code § 5222*]. For example, every household goods carrier must annually furnish the PUC a list, prepared under oath, of all vehicles used in transportation for compensation during the preceding year [*Pub. Util. Code § 5229(a)*]. Every household goods carrier earning over \$350,000 in annual gross operating revenue must annually file, under oath, a report stating the number, classification, and compensation of all employees and owner-operator drivers hired or engaged during the reporting period [*Pub. Util. Code § 5230*].

[c] Form of Accounts, Records, and Memoranda

Accounts, records, and memoranda, including those pertaining to the movement of traffic and the receipt or expenditure of money, required by the PUC must be kept in the prescribed form [*Pub. Util. Code §§ 5223, 5224*]. Most of the rules regarding the form and content of shipping documents and the duration of record maintenance requirements are set forth

in MAX-4 [see §§ 54.120 (drafting guide for forms), 54.200-54.205].

[d] PUC Inspections

PUC employees, representatives, and inspectors may inspect and examine any land, buildings, equipment, accounts, books, records, and memoranda, including all documents, papers, and correspondence kept or required to be kept by household goods carriers [*Pub. Util. Code § 5226*; see *Pub. Util. Code § 5225*].

[2] Compliance With Rate Requirements

[a] PUC Must Set Rates

The PUC is required by statute to establish or approve just, reasonable, and nondiscriminatory maximum or minimum or maximum and minimum rates to be charged by household goods carriers for the transportation of used household goods and seasonal effects and related accessorial services [*Pub. Util. Code § 5191(a)*]. A minimum rate may not be established or approved if that rate is not sufficient to allow safe operation of the carrier on California highways and accounts for the cost of trained drivers and other reasonable operation expenses [*Pub. Util. Code § 5191(c)*]. When the PUC establishes or approves maximum rates [see § 54.10[2][b]], the PUC must adjust the rates at least annually based on the market, and may adjust the maximum rates when deemed reasonable to allow for extraordinary changes in household goods carrier costs [*Pub. Util. Code § 5191(d)*].

Currently, the PUC prescribes only maximum rates in MAX-4 [see [c], *below*].

A household goods carrier may not advertise, quote, or charge a rate or an amount for the transportation of used household goods and personal effects that is based on the amount of cubic feet or other volumetric unit measurement of those household goods and effects [*Pub. Util. Code § 5192*]. In addition to any other remedy, a household goods carrier that violates this rule will not be entitled to any compensation for the transportation of the household goods and effects and must make restitution to the shipper of any compensation collected [*Pub. Util. Code § 5192*].

[b] Seeking Higher Than Maximum Rates

Under specific procedures approved by the PUC in its Decision 92-05-028, any household goods carrier may charge or collect a greater rate than the maximum rate established in MAX-4 [*Pub. Util. Code § 5193*; see also 20 *Cal. Code Reg. § 3.2* (authority to increase rates)]. Any person or entity may file a protest opposing an application for a rate deviation [see 20 *Cal. Code Reg. § 2.6* (protests)].

[c] Prohibition Against Commissions and Refunds

No household goods carrier may directly or indirectly pay any commission to a shipper, consignee, or an employee of either, or to the payer of the transportation charges, or refund, or remit to those persons, in any manner or by any device any portion of the rates or charges specified in the shipping documents in accordance with MAX-4, except under the authority of the PUC [*Pub. Util. Code § 5196*].

[d] Prohibition Against Falsification to Avoid Prescribed Rates

Household goods carriers (or their officers, agents, or employees) may not knowingly use any false billing, classification system, false weight reports, or other devices to permit any shipper to obtain transportation of property at less than the authorized minimum rates or more than the authorized maximum rates [*Pub. Util. Code § 5197*]. Other parties are similarly prohibited from obtaining or seeking to obtain transportation at rates other than those established by the PUC [see *Pub. Util. Code §§ 5198, 5199*].

[3] Subhauling Agreements

No household goods carrier may transport household goods under a subhauling agreement unless [*Pub. Util. Code* § 5243]:

- The subhauler is licensed by the PUC to transport household goods and complies with the requirements of the Household Goods Carriers Act [*Pub. Util. Code* § 5101 *et seq.*].
- The household goods carrier and subhauler are jointly and severally liable for any loss or damage caused by the subhauler.

These provisions do not apply to a subhauling agreement when the subhauler is not otherwise subject to the Household Goods Carrier Act [*Pub. Util. Code* § 5101 *et seq.*] for activity related to the subhauling agreement [*Pub. Util. Code* § 5244.5].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 54.15 Delay

[1] Notification Requirements

When a carrier agrees with a shipper to pick up a shipment on a specified date and/or time, and the carrier is unable to fulfill that commitment, the carrier must notify the shipper or the shipper's designee by telegram, telephone, or fax, at carrier's expense. This notice must be given as soon as it becomes apparent that the commitment will not be met [MAX-4, item 100(1); *see Pub. Util. Code § 5138*].

Similarly, if a carrier agrees with a shipper to make delivery on a specified date or during a specified period, the carrier must notify the shipper or the shipper's designee by telegram, telephone, or fax, at the carrier's expense. This notice ordinarily must be given at least 24 hours before the delivery date or period originally promised. However, if the circumstances causing the delay occur during that 24-hour period, the notice must be given as soon as possible, but in no event more than 24 hours after the delay causing occurrence. In any event, if the carrier is unable to obtain an address or telephone number from the shipper, the carrier need not give notice of the delay [MAX-4, item 100(2); *see Pub. Util. Code § 5138*].

When delays in pick up or delivery occur due to the carrier's negligence, the shipper may file a written claim for reimbursement for damages [*see* MAX-4, item 100(3)]. On receipt of a written claim, the carrier must acknowledge receipt of the claim in writing within 30 days after receipt of the claim [MAX-4, item 92(15)] and follow the loss and damage claims procedures [*see* MAX-4, item 92; *see also* § 54.16].

[2] Penalty for Noncompliance With Scheduled Dates

When a carrier agrees, on written request by a shipper, to pick up shipment on an agreed date and to deliver within a span of two consecutive agreed dates, the carrier must pay penalty of \$100 per day for each day of delay. The shipper must make a written claim for payment of the delay penalty within 30 days of delivery [MAX-4, item 100(4)]. This penalty is in addition to the reimbursement requirement discussed above [*see* MAX-4, items 92(15), 100(3)]. However, this penalty does not apply to shipments weighing less than 5,000 pounds, or shipments that are transported less than 75 constructive miles [MAX-4, item 100(4); *see Pub. Util. Code § 5138*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 54.16 Claims Procedures

[1] Claims for Loss or Damage

Whenever a claimant (often the shipper) asserts a claim for loss or damage to shipped goods, the claimant must file a written claim with the carrier [MAX-4, item 92(1); *see* MAX-4, item 92(2) (contents of claim)] within nine months after delivery or, if no delivery has been made, within nine months after a reasonable time for delivery elapses, unless the claimant and the carrier agree to a shorter period [MAX-4, item 92(1); *see* § 54.120[3]]. Suit must be instituted within two years and one day from the date that notice of disallowance of the claim is given by the carrier to the claimant [MAX-4, item 92(14)].

On receipt of a written claim for loss or damage, the carrier must acknowledge receipt of the claim in writing to the claimant within 30 calendar days after receipt. The carrier must also record the date of receipt at the time that the claim is received [MAX-4, item 92(15)].

Within 60 days after receipt of the claim, the carrier must, in writing, pay the claim, decline to pay, or make a firm settlement offer to the claimant. If the carrier declines to pay or offers less than the amount sought, the carrier must state, in writing, the basis for the denial or reduction. However, if the claim cannot be processed and disposed of within the 60-day period for reasons beyond the carrier's control, the carrier must, at the end of that period and at the expiration of each 30-day period while the claim remains pending, advise the claimant in writing of the status of the claim and the reasons for the delay. The carrier must send a copy of the letter to the California Public Utilities Commission, Compliance and Enforcement Branch, 505 Van Ness Avenue, San Francisco, California 94102 [MAX-4, item 92(15)].

The claims procedures that the carrier must follow for lost or damaged goods are outlined in § 54.110[2]. The claims procedures that the shipper must follow to seek reimbursement for loss or damage are outlined in § 54.110[3]. However, it is important to note that no claim against a household goods carrier for loss or damage of goods may be denied solely because the lost or damaged goods were not noted at the time of delivery. Whenever a household goods carrier requires a signed statement acknowledging delivery and receipt of goods, the statement may not include any representation that the goods were delivered in satisfactory condition; rather, the statement must include a notice that

the shipper may file a claim with the carrier for lost or damaged goods [*Pub. Util. Code* § 5241].

[2] Limitation of Liability

In general, the extent of the carrier's liability is determined by the agreement for services [*see* MAX-4, item 136]. However, if a claim for loss or damage is not properly filed (or suit is not instituted within the prescribed time) [*see* [1], *above*; *see also* § 54.110[3]], the carrier is not liable for the loss or damage [MAX-4, item 92(14)].

In general, the risk of loss or damage shifts away from the carrier as of proper delivery. Stated differently, carriers are not liable for any loss or damage that occurs after the property is delivered to or receipted for by the consignee or the shipper or their agent [MAX-4, item 92(10)]. However, when a carrier is directed to unload or deliver property or to render services at the place where the consignee or his or her agent is not present, the risk shifts to the property owner after unloading or delivery [MAX-4, item 92(10)]. When the carrier is directed to load property from, or render services at, a place where the consignor or agent is not present, property is at the risk of owner before packing and loading [MAX-4, item 34(11)].

Whenever damage occurs to one or more of a pair or matched set of goods, the carrier's liability is limited to the repair or replacement of the lost or damaged piece or pieces only. Liability does not extend to the repair, replacement, or recovery of the entire set [MAX-4, item 92(12)].

For further discussion of the limitations applicable to the carrier's liability for loss or damage, *see* § 54.110[2].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 54.17 Lien Procedures

With specified exceptions, a household goods carrier has a lien on used household goods and personal effects to secure payment for transportation and additional services ordered by the consignor [*Pub. Util. Code § 5142(a)*; see *Pub. Util. Code § 5142(k)(1)* ("consignor" defined)]. No lien attaches to food, medicine, or medical devices, items used to treat or assist an individual with a disability, or items used for the care of a minor child [*Pub. Util. Code § 5142(a)*].

The existence and amount of the lien are conditioned on providing the consignor with a specified notice that clearly and conspicuously specifies the dollar amount for transportation and additional services [see *Pub. Util. Code § 5142(b)(1)*]. This dollar amount may not be preprinted on any form [*Pub. Util. Code § 5142(b)(2)*]. Rather, it must be estimated in good faith based on the specific circumstances and must be just and reasonable [*Pub. Util. Code § 5142(b)(2)*]. On tender to the household goods carrier of the amount specified in the notice, the lien is extinguished and the household goods carrier must release all household goods and personal effects to the consignee [*Pub. Util. Code § 5142(c)*; see *Pub. Util. Code § 5142(f)* (release of goods based on reasonable knowledge); see also *Pub. Util. Code § 5142(k)(2)* ("consignee" defined)].

A household goods carrier may enforce a lien on household goods and personal effects (except with regard to any goods the carrier voluntarily delivers or unjustifiably refuses to deliver) in accordance with *Pub. Util. Code § 5142* and *Com. Code § 9601 et seq.*, governing secured transactions [*Pub. Util. Code § 5142(d)*; see *Ch. 42, Secured Transactions*]. Every act required in connection with enforcing the lien must be performed in good faith and in a commercially reasonable manner [*Com. Code § 5142(d)*]. A household goods carrier must provide notification of disposition to each consignor and consignee at least 30 days before any disposition [*Com. Code § 5142(e)*; see *Pub. Util. Code § 5142(k)(1), (2)* ("consignor," "consignee" defined)]. Notification methods are prescribed by statute [see *Com. Code § 5142(e)*]. The carrier must provide to the consignors any surplus funds from the disposition and an accounting, without charge, of the proceeds of the disposition, within 14 days after disposition [*Com. Code § 5142(e)*].

These provisions do not affect any rights of a household goods carrier to claim additional amounts, on an unsecured basis, or of a consignor or consignee to make or contest any claim [*Pub. Util. Code § 5142(g)*]. Tender of payment of the amount specified in the lien notice [see *Pub. Util. Code § 5142(b)(1)* (amount secured by lien)] is not a waiver of

claims by the consignor or consignee [*Pub. Util. Code § 5142(g)*].

Any person injured by a violation of these requirements may bring an action for recovery of the greater of \$1,000 or actual damages, injunctive or other equitable relief, reasonable attorney's fees and costs, and exemplary damages of not less than three times the amount of actual damages for a willful violation [*Pub. Util. Code § 5142(h)*].

For further discussion of lien procedures, see § 54.110[4].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 54.18 Abandonment of Property

If the PUC determines that a household goods carrier (or any officer, director, or agent) has abandoned, or is abandoning stored household goods or property of any shipper under contract with the carrier, the PUC may commence proceedings to have a court appoint a receiver or PUC staff to identify the property, take possession, and to arrange its return to the proper owners [*Pub. Util. Code § 5259.5(a)*; see *Pub. Util. Code § 5259.5(b)* (filing procedure)]. The court may also appoint a receiver to manage the business of the carrier and return stored goods on a satisfactory showing that the real or threatened abandonment jeopardizes the property or funds of others in the custody or control of the carrier [*Pub. Util. Code § 5259.5(c)*; see *Pub. Util. Code § 5259.5(d)* (PUC contracting requirements)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 54.19 Enforcement Mechanisms

[1] Penalties for Noncompliance

Extensive penalty provisions in the Household Goods Carrier Act permit the PUC to regulate household goods carriers and ensure compliance with all statutory requirements [see, e.g., *Pub. Util. Code* §§ 5229, 5311-5313.5, 5314.5, 5315]. Every violation of the Act, or of any PUC requirement, by any corporation or person is a separate and distinct offense; for continuing violations each day's continued violation is a separate and distinct offense [*Pub. Util. Code* § 5315]. The act, omission, or failure of any officer, agent, or employee of any person or corporation, acting within the scope of his or her official duties or employment, constitutes the act, omission, or failure of the employing person or corporation [*Pub. Util. Code* § 5104].

All remedies and penalties accruing under the Act are cumulative to each other and to the remedies and penalties available under any other law, and a suit for the recovery of one remedy or penalty does not bar or affect the recovery of any other remedy or penalty or forfeiture or bar any criminal prosecution against any person or corporation, or any officer, director, agent, or employee, or any other corporation or person, or bar the exercise by the PUC of its power to punish for contempt [*Pub. Util. Code* § 5316; see *Pub. Util. Code* § 5318].

[2] Suspension, Amendment, and Revocation of Permit

[a] Request of Permit Holder

Any household goods carrier may request that the PUC suspend the operating permit. The permit may be suspended, without a hearing, for a definite period of time during which it is unlawful for the carrier to conduct any operations as a household goods carrier [*Pub. Util. Code* § 5281]. Further, a permit holder may apply to have the permit amended or revoked, in whole or in part [*Pub. Util. Code* § 5285(b)].

[b] Action by PUC After Notice Without Hearing

The PUC may suspend the right to operate under any household goods carrier permit, on reasonable notice of not less

than 15 days to the holder, without hearing or other proceedings, for failure to comply, and until compliance, with insurance requirements [see *Pub. Util. Code* § 5161; see also § 54.13[1]], or with any PUC order, rule, or regulation [*Pub. Util. Code* § 5285(b)].

[c] Action by PUC After Notice and Hearing

After notice and an opportunity to be heard, the PUC may suspend, change, or revoke, in whole or in part, any household goods carrier permit, on complaint or on the PUC's own initiative, for providing false or misleading information on an application for a permit or for failure to comply with the Household Goods Carrier Act, or any PUC order, rule, or regulation, or with any term, condition, or limitation of the permit [*Pub. Util. Code* § 5285(b); see *Pub. Util. Code* §§ 5281, 5285, 5285.6]. A household goods carrier that requests a hearing within 30 days after the date of receiving the notice and opportunity to be heard must be granted a hearing [*Pub. Util. Code* § 5285(b)]. As an alternative to cancellation, revocation, or suspension, the PUC may impose a fine of not more than \$30,000 on the permit holder [*Pub. Util. Code* § 5285(c)].

Grounds for cancellation, suspension, or revocation include:

- A carrier's knowing and willful filing of a false report that understates revenues and fees is [*Pub. Util. Code* § 5285(a)].
- A carrier's misdemeanor conviction under the Act, or a felony conviction, as specified, of the carrier or any officer [*Pub. Util. Code* § 5285(d)]. For these purposes, felony convictions are limited to robbery, burglary, any form of theft, any form of fraud, extortion, embezzlement, money laundering, forgery, false statements, an attempt to commit any of the offenses described in the Household Goods Carrier Act, aiding and abetting or conspiring to commit any of the offenses described in the Household Goods Carrier Act, or intentional dishonesty for personal gain [*Pub. Util. Code* § 5285(d); see *Pub. Util. Code* § 5285(e) ("convicted of a prescribed felony" defined)].
- Filing a false statement regarding the workers' compensation insurance that the carrier is required to carry, or for failing to comply with applicable safety standards [see *Pub. Util. Code* §§ 5285.5, 5285.6; see also *Labor Code* §§ 3616.2, 3710.1, 3716.2, 3717].
- Written recommendation from the Department of the California Highway Patrol to suspend the permit pending a hearing [*Pub. Util. Code* § 5285.6(a)].

[d] Effect of Suspension, Cancellation, or Revocation

During the period of suspension, and after the cancellation or revocation of a permit, a household goods carrier may not conduct any operations as such a carrier. The PUC may either grant or deny an application for a new permit whenever it appears that a prior permit of the applicant has been canceled or revoked [see *Pub. Util. Code* § 5285], or whenever it appears, after hearing, that as a prior permit holder, the applicant engaged in any of the unlawful activities [see *Pub. Util. Code* § 5285] for which the permit might have been canceled or revoked [*Pub. Util. Code* § 5286].

When a permit is suspended, the vehicle identification symbols must be removed [*Pub. Util. Code* § 5282]. After the end of the period of suspension, the PUC will restore the carrier's operating permit. The carrier must again place on all vehicles the identifying symbols removed pursuant to the suspension [*Pub. Util. Code* § 5283].

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState
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[Reserved]

§§ 54.20[Reserved]



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B. Intrastate Commercial Transportation

22-54 California Legal Forms--Transaction Guide § 54.30

§ 54.30 Governing Law

[1] Division 7 of California Commercial Code

The transportation of property within California, other than property subject to the Household Goods Carriers Act [see § 54.10 et seq.], is governed by Division 7 of the Commercial Code [see *Com. Code* §§ 7101 et seq.] and by provisions of the Civil Code [see, e.g., *Civ. Code* § 2174 et seq.]. The document of title used in the carriage of these "commercial goods" is termed a "bill of lading" [see [2], below].

Bills of lading used in the *interstate* transportation of commercial goods are governed by the Federal Bills of Lading Act [see 49 U.S.C. § 801 et seq.; see also § 54.50 et seq.].

[2] Definitions

[a] Bill of Lading

A bill of lading is a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods and which, by its terms, evidences the intention of the issuer that the person entitled under the document has the right to receive, hold, and dispose of the document and the goods it covers. Designation of the document by the issuer as a "bill of lading" is conclusive evidence of that intention. "Bill of lading" includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation; the term includes an air consignment note or air waybill [*Com. Code* § 1201(b)(6)].

A bill of lading is negotiable if:

- By its terms, the goods covered by it are to be delivered to the bearer or to the order of a named person [*Com. Code* § 7104(a)]; and
- When it was issued, it did not have a conspicuous legend, however expressed, that it is nonnegotiable [*Com. Code* § 7104(c)].

Any other bill of lading is nonnegotiable [*Com. Code § 7104(b)*].

A nonnegotiable bill of lading may be called a "straight" bill of lading in the transportation industry. For a form for a straight bill of lading, see § 54.230. A negotiable bill of lading may be known as an "order" bill of lading; for a form for an order bill of lading, see § 54.231.

A nonnegotiable bill of lading is transferable, subject to outstanding equities [*Com. Code § 7504*]. The failure to mark a nonnegotiable bill conspicuously as "nonnegotiable," on the other hand, may allow a holder to treat it as negotiable [*Com. Code § 7104(c)*; see, e.g., *BII Finance Co. v. U States Forwarding Services Corp.* (2002) 95 Cal. App. 4th 111, 121-123, 115 Cal. Rptr. 2d 312 (shipper's assignee purchased bills of lading for value and elected to treat them as negotiable; thus, carrier had same liabilities as if bills of lading had been negotiable)]. Furthermore, the insertion in negotiable bill of the name of a person to be notified of arrival of the goods does not limit its negotiability or constitute notice of the listed person's rights in the goods [*Com. Code § 7501(d)*].

[b] Related Terms

To be a document of title, a bill of lading must purport to be issued by or addressed to a "bailee" and purport to cover goods in the bailee's possession that either are identified or are fungible portions of an identified mass [*Com. Code § 1201(b)(16)*]. With respect to a bill of lading, the bailee is the person who, by the bill of lading, acknowledges possession of the goods and contracts to deliver them. The person who issues the bill of lading is the "carrier" [*Com. Code § 7102(a)(1), (2)*].

The person who enters into the contract of transportation with the carrier is the "shipper" [*Com. Code § 7102(a)(12)*]. The "consignee" is the person named in the bill of lading to whom, or to whose order, the bill of lading promises delivery. The "consignor" is the person named in the bill of lading as the person from whom the goods have been received for shipment [*Com. Code § 7102(a)(3), (4)*].

A "person entitled under the document"--a term used in various sections of Division 7--is [*Com. Code § 7102(a)(9)*]:

- The holder, in the case of a negotiable document of title; or
- The person to whom delivery of the goods is to be made by the terms of, or pursuant to instructions in a record under, a nonnegotiable document of title.

The "record" is information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form [*Com. Code § 7102(a)(10)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Bills of Lading Transportation Law Carrier Duties & Liabilities Bills of Lading



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§ 54.31 Bills of Lading

[1] Issuance

The carrier usually issues a bill of lading to the consignor at the place of shipment. Instead of issuing a bill of lading to the consignor at the place of shipment, a carrier, at the request of the consignor, may procure the bill to be issued at the destination or at any other place designated in the request [*Com. Code § 7305(a)*]. On the request of any person entitled as against the carrier to control the goods while in transit, and on surrender of possession or control of any outstanding bill of lading or other receipt covering the goods, the issuer, subject to controlling provisions of Division 7 [*see [3], below*], may procure a substitute bill to be issued at any place designated in the request [*Com. Code § 7305(b)*].

For a detailed discussion of the contents of bills of lading, see § 54.121.

[2] Contents

[a] Terms Limiting Liability for Loss or Damage

Damages may be limited by a term in the bill of lading (or in a transportation agreement) that the carrier's liability may not exceed a value stated in the bill of lading or agreement if all of the following conditions have been satisfied [*Com. Code § 7309(b)*]; *but see Dictor v. David & Simon, Inc. (2003) 106 Cal. App. 4th 238, 249-250, 130 Cal. Rptr. 2d 588* (plaintiff's claim under *Com. Code § 7309* is preempted by 49 U.S.C. § 14706 when case arises out of interstate shipment)]:

- The carrier's rates are dependent on value;
- The consignor is afforded an opportunity to declare a higher value; and
- The consignor is advised of the opportunity.

However, such a limitation is not effective with respect to the carrier's liability for conversion to its own use [*Com.*

Code § 7309(b)].

This rule applies equally to the carrier's liability as an insurer and the carrier's liability based on negligence [*see Com. Code § 7309, U.C.C. Comment; see also Civil Code §§ 2174-2178* (contractual limitations), 2194 (strict liability for loss or damage to freight)].

[b] Terms Specifying Claims Procedures

Reasonable provisions as to the time and manner of presenting claims and commencing actions based on the shipment may be included in the bill of lading (or in a transportation agreement) [*Com. Code § 7309(c)*].

[3] Substitute Bills of Lading

[a] Tangible Document Superseded by Electronic Document

On request of a person entitled under a tangible bill of lading, the issuer may issue an electronic bill of lading as a substitute for the tangible document if the following conditions are satisfied [*Com. Code § 7105(c)*]:

- The person entitled under the tangible document surrenders possession of the document to the issuer; and
- The electronic document when issued contains a statement that it is issued in substitution for the tangible document.

On issuance of an electronic bill of lading in substitution for a tangible bill of lading [*Com. Code § 7105(d)*]:

- The tangible document ceases to have any effect or validity.
- The person that procured issuance of the electronic document warrants to all subsequent persons entitled under the electronic document that the warrantor was a person entitled under the tangible document when the warrantor surrendered possession of the tangible document to the issuer.

[b] Electronic Document Superseded by Tangible Document

On request of a person entitled under an electronic bill of lading, the issuer may issue a tangible bill of lading as a substitute for the electronic document if the following conditions are satisfied [*Com. Code § 7105(a)*]:

- The person entitled under the electronic document surrenders control of the document to the issuer; and
- The tangible document when issued contains a statement that it is issued in substitution for the electronic document.

On issuance of a tangible bill of lading in substitution for an electronic bill of lading [*Com. Code § 7105(b)*]:

- The electronic document ceases to have any effect or validity; and
- The person that procured issuance of the tangible document warrants to all subsequent persons entitled under the tangible document that the warrantor was a person entitled under the electronic document when the warrantor surrendered control of the electronic document to the issuer.

[c] Control of Electronic Document

A person has control of an electronic bill of lading if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to whom the electronic document was issued or transferred [*Com. Code § 7106(a)*]. A system meets that requirement, and a person is deemed to have control of an electronic bill of lading, if the document is created, stored, and assigned in such a manner that all of the following conditions are satisfied [*Com. Code § 7106(b)*]:

- A single authoritative copy of the document exists which is unique and identifiable.
- The authoritative copy identifies the person asserting control as either the person to whom the document was issued or, if the authoritative copy indicates that the document has been transferred, the person to whom the document was most recently transferred.
- The authoritative copy is communicated to and maintained by the person asserting control or that person's designated custodian.
- The authoritative copy is unalterable, except as otherwise allowed by the conditions stated below.
- Copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control.
- Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy.
- Any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Documents of Title (Article 7)General OverviewCommercial Law (UCC)Documents of Title (Article 7)Bills of Lading



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§ 54.32 Duties and Obligations of Carriers

[1] Nondiscrimination

A common carrier must, if able, accept and carry whatever is offered to it at a reasonable time and place, provided that the property is the kind of property that the carrier undertakes or is accustomed to carry [*Civ. Code § 2169*]. No common carrier may give any preference in time, price, or in any other way, to any shipper other than the state or federal government [*Civ. Code §§ 2170, 2171*].

[2] Delivery

In general, a carrier is required to make delivery to the consignee or the consignee's agent in accordance with the bill of lading [*see Com. Code § 7303(a)*; *see also Civ. Code §§ 2118, 2119*]. Unless the bill of lading provides to the contrary, the carrier may deliver the goods to a person or destination other than that stated in the bill, or may otherwise dispose of the goods, without liability for misdelivery, on instructions from any of the following [*Com. Code § 7303(a)*; *see Civ. Code § 2115*]:

- The holder of a negotiable bill.
- The consignor on a nonnegotiable bill, notwithstanding contrary instructions from the consignee.
- The consignee on a nonnegotiable bill, absent contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the tangible bill or in control of the electronic bill.
- The consignee on a nonnegotiable bill, if the consignee is entitled as against the consignor to dispose of the goods.

However, in the case of a negotiable bill of lading, the holder in due course can hold the carrier to the original terms unless these instructions are noted on the bill [*Com. Code § 7303(b)*].

If, for any reason, the carrier does not deliver freight to the consignee or its agent personally [*see Civ. Code § 2119*], the carrier must notify the consignee of the arrival of the freight and maintain the goods in safety with the responsibilities of a warehouse [*see Ch. 54A, Storage of Goods*] until the consignee has had a reasonable time to remove them. If the consignee refuses to accept and remove the freight within a reasonable time after the carrier has made delivery or offered to do so, the carrier may exonerate itself from further liability by storing it in a suitable warehouse on the account of the consignee and giving notice to the consignee [*Civ. Code § 2121*].

[3] Duty of Care

A carrier, after issuing a bill of lading, whether negotiable or nonnegotiable, must exercise the degree of care in relation to the goods that a reasonably careful person would exercise under similar circumstances. However, this duty does not affect any statute, regulation, or rule of law that imposes liability on a common carrier for damages not caused by its negligence [*Com. Code § 7309(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Bills of Lading Transportation Law Carrier Duties & Liabilities Bills of Lading Transportation Law Carrier Duties & Liabilities Duty to Provide Service



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§ 54.33 Liability Under Bill of Lading

[1] Carrier's Liability for Misdating, Nonreceipt, or Misdescription

A consignee of a nonnegotiable bill of lading who has given value in good faith, or a holder to whom a negotiable bill of lading has been duly negotiated, relying on the description of the goods in the bill or on the date shown in the bill, may recover from the issuer damages caused by the misdating of the bill or the nonreceipt or misdescription of the goods, except to the extent that the bill indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, such as when the description is in terms of marks or labels or kind, quantity, or condition, or the receipt or description is qualified by "contents or condition of contents of packages unknown," "said to contain," "shipper's weight, load, and count," or words of similar import, if that indication is true [*Com. Code § 7301(a)*].

When goods are loaded by the issuer of a bill of lading, the issuer must count the packages of goods if shipped in packages and ascertain the kind and quantity if shipped in bulk. Words in a bill of lading such as "shipper's weight, load, and count," or words of similar import indicating that the description was made by the shipper, are ineffective except as to goods concealed in packages [*Com. Code § 7301(b)*].

If bulk goods are loaded by a shipper who makes available to the issuer of a bill of lading adequate facilities for weighing those goods, the issuer must ascertain the kind and quantity within a reasonable time after receiving the shipper's request in a record to do so [*see Com. Code § 7102(a)(10)* (definition of "record"); § 54.30[2][b]]. In that case, "shipper's weight" or words of similar import are ineffective in a bill of lading [*Com. Code § 7301(c)*]. The issuer of a bill of lading, by including in the bill the words "shipper's weight, load, and count," or words of similar import, may indicate that the goods were loaded by the shipper; and if that statement is true, the issuer is not liable for damages caused by the improper loading. However, omission of such words does not imply liability for damages caused by improper loading [*Com. Code § 7301(d)*].

[2] Shipper's Liability for Errors in Shipper's Description of Goods

The shipper guarantees, to the issuer of the bill of lading, the accuracy, at the time of shipment, of the description,

marks, labels, number, kind, quantity, condition, and weight, as furnished by the shipper. The shipper must indemnify the issuer against damage caused by inaccuracies in those particulars. This right of indemnity does not limit the issuer's responsibility or liability under the contract of carriage to any person other than the shipper [*Com. Code § 7301(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Documents of Title (Article 7)General OverviewCommercial Law (UCC)Documents of Title (Article 7)Bills of LadingCommercial Law (UCC)Documents of Title (Article 7)Obligations



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22-54 California Legal Forms--Transaction Guide § 54.34

§ 54.34 Carrier's Lien

[1] Scope of Lien

The carrier has a lien on the goods covered by the bill of lading (or on the proceeds in the carrier's possession) for charges after the date of the carrier's receipt of the goods for storage or transportation, including demurrage and terminal charges, and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. However, against a purchaser for value of a negotiable bill of lading, the carrier's lien is limited to charges stated in the bill or the applicable tariffs or, if no charges are stated, a reasonable charge [*Com. Code § 7307(a)*].

The carrier may satisfy the lien from the proceeds of any lien enforcement sale [*see [4], below*] but must hold the balance, if any, for delivery on demand to any person to whom the carrier would have been bound to deliver the goods [*Com. Code § 7308(e)*].

[2] Persons Affected

The carrier's lien on goods that the carrier was required by law to receive for transportation is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to those charges and expenses. In any other case, the carrier's lien is effective against the consignor and any person who permitted the bailor to have control or possession of the goods, unless the carrier had notice that the bailor lacked authority [*Com. Code § 7307(b)*].

[3] Loss of Lien

The lien is lost if the carrier voluntarily delivers the goods or unjustifiably refuses to deliver them [*Com. Code § 7307(c)*].

[4] Enforcement

[a] Sale After Notice

The carrier's lien on goods may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after the carrier has notified all persons known to claim an interest in the goods [*see Com. Code § 1202(d)* (what constitutes notification)]. The notification must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale [*Com. Code § 7308(a)*].

The carrier sells goods in a commercially reasonable manner if the carrier sells the goods in the usual manner in any recognized market for the goods, sells at the price current in that market at the time of the sale, or otherwise sells in conformity with commercially reasonable practices among dealers in the type of goods sold [*Com. Code § 7308(a)*].

Unless the carrier proceeds as described above, a sale of more goods than apparently should be necessary to be offered so as to ensure satisfaction of the obligation is not commercially reasonable [*Com. Code § 7308(a)*].

The fact that a better price could have been obtained by a sale at a different time or in a method different from that selected by the carrier is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner [*Com. Code § 7308(a)*].

The carrier may buy at any public sale [*Com. Code § 7308(c)*].

The carrier's rights provided by *Com. Code § 7308* are in addition to all other rights allowed by law to a creditor against a debtor [*Com. Code § 7308(f)*].

[b] Alternative Procedure: Sale After Notice and Advertisement

As an alternative to the procedure described in [a], *above*, the carrier may enforce the lien by the procedure prescribed for enforcement of a warehouse's lien [*Com. Code § 7308(g)*]. A procedural guide to enforcement of a warehouse's lien by sale following notice and advertisement [*see Com. Code § 7210(b)*] is provided in Ch. 54A, *Storage of Goods*, § 54A.130.

[c] Effect of Payment Before Sale

Before the lien enforcement sale, any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred in complying with the lien enforcement procedure. In that event, the goods may not be sold but must be retained by the carrier, subject to the terms of the bill of lading and Division 7 [*Com. Code § 7308(b)*].

[d] Effect of Improper Sale

A purchaser in good faith of goods sold to enforce the carrier's lien takes the goods free of any rights of persons against which the lien was valid, despite the carrier's noncompliance with the lien enforcement procedure [*Com. Code § 7308(d)*]. The carrier is liable for damages caused by failure to comply with the requirements for sale under *Com. Code § 7308* and, in case of willful violation, is liable for conversion [*Com. Code § 7308(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) General Overview Commercial Law (UCC) Documents of Title (Article 7) Bills of Lading Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liens



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[Reserved]

§§ 54.35[Reserved]



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C. Interstate Shipment of Household Goods

22-54 California Legal Forms--Transaction Guide § 54.40

§ 54.40 Governing Law

[1] Federal Law

The federal Department of Transportation and the Surface Transportation Board are charged with regulating the operations of household goods carriers in interstate commerce [*see 49 U.S.C. §§ 13101, 13102, 14104(a)*]. The general purpose of this regulatory authority is to promote reasonable rates, safe transportation of property, satisfy the needs of shippers, receivers, and consumers, and enable carriers to earn adequate profits [*49 U.S.C. § 13101(a)(2)*].

The Secretary and Board have jurisdiction over the transportation by motor carrier to the extent that property is transported [*49 U.S.C. § 13501; but see 49 U.S.C. §§ 13502-13506 (exemptions), 13507, 13508 (limited exemptions)*]:

- Between two states.
- Between one state and another place in that state through another state.
- Between two places in the United States through another country [*see 49 U.S.C. § 13502*].
- Between places in United States territories or possessions.
- Between the United States and a place in another country to the extent the transportation is within the United States.
- On a reservation under the exclusive jurisdiction of the United States or on a public highway.

The Secretary and Board also have similar jurisdiction over freight forwarders [*49 U.S.C. § 13531*].

[2] California Law

Under the Interstate and Foreign Motor Carriers of Household Goods and Passengers Act [*see Pub. Util. Code § 3901 et*

seq.], household goods carriers [*see* Pub. Util. Code § 3509; *see also* § 54.10[3]] must register with the PUC, or the carrier's base registration state, before operating on California public highways [*see* Pub. Util. Code § 3902; *but see* Pub. Util. Code § 3903 (effect of prior registration with ICC)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesState & Local RegulationTransportation LawInterstate
CommerceGeneral Overview



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22-54 California Legal Forms--Transaction Guide § 54.41

§ 54.41 Definitions

[1] "Household Goods"

The term "household goods," includes the following [49 U.S.C. § 13102(10); 49 C.F.R. § 375.103(4)]:

- Personal effects.
- Property used or to be used in a dwelling when those items are a part of the equipment or supply of the dwelling.
- Similar property if the transportation is arranged and paid for by the householder, including transportation of property from a factory or store when the property is purchased by the householder with intent to use in his or her dwelling, or by another party.

Only these types of goods are covered by the regulations governing the interstate transportation of household goods [49 C.F.R. § 375.103]. Other property, such as the effects of stores, offices, museums, institutions, hospitals, or other establishments when the items are part of their stock, equipment, or supply [see former 49 U.S.C. § 10102(11)(B)], and objects of art, displays, and exhibits that, because of their unusual nature of value, require specialized handling and equipment of the type usually employed in moving household goods [see former 49 U.S.C. § 10102(11)(C)] are not covered [49 C.F.R. § 375.103].

Under California law, specifically the California Household Goods Carriers Act, the term "used property" covers used household goods and personal effects [Pub. Util. Code § 5109; see MAX-4; see also § 54.10[3][a]].

[2] Related Definitions

A "motor carrier" is a person providing commercial motor vehicle transportation for compensation [49 U.S.C. § 13102(14)]. "Freight forwarders" are persons who hold themselves out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and who, in the ordinary course of

business, (1) assemble and consolidate, or provide for the assembly or consolidation of, shipments and perform or provide for break bulk and distribution operations of the shipments; (2) assume responsibility for transportation of shipments; and (3) use a carrier covered by the Act [49 U.S.C. § 13102(8)]. "Household goods freight forwarders" are freight forwarders who transport household goods, unaccompanied baggage, or used automobiles [49 U.S.C. § 13102(11)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesFreight Brokers & ForwardersTransportation LawCarrier Duties & LiabilitiesState & Local Regulation



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C. Interstate Shipment of Household Goods

22-54 California Legal Forms--Transaction Guide § 54.42

§ 54.42 Bills of Lading

Every motor common carrier engaged in the transportation of household goods must issue a receipt or bill of lading [49 U.S.C. § 14706(a)]. The carrier must provide a partially complete copy of the bill of lading before beginning to load the shipment [49 C.F.R. § 375.505(a)]. For a list of the required contents of a bill of lading, see § 54.122[3]; for a nonnegotiable bill of lading form, see § 54.243. The duties, obligations, and liabilities under bills of lading are discussed in § 54.50 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesBills of Lading



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22-54 California Legal Forms--Transaction Guide § 54.43

§ 54.43 Insurance

Motor carriers must maintain liability insurance to cover personal injury damages resulting from their negligent operation, maintenance, or use of their vehicles, and loss or damage to property [49 U.S.C. § 13906(a)(1); *see* 49 U.S.C. § 13907 (agents); *see also* 49 U.S.C. § 13906(c)(1) (freight forwarders)]. Further, motor carrier may be required to file sufficient security to cover damages to property placed in the carrier's possession for shipment [49 U.S.C. § 13906(a)(1), (3); *see* 49 U.S.C. § 13906(c)(2) (freight forwarders)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance LawGeneral Liability InsuranceGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral Overview



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22-54 California Legal Forms--Transaction Guide § 54.44

§ 54.44 Shipping Rates

[1] Reasonable Rates Required; Notice to Shipper

Motor carriers of household goods must charge reasonable rates [49 U.S.C. § 13701; *see* 49 U.S.C. § 13704], which must be set forth in a published tariff [49 U.S.C. § 13702(a)(2)]. The tariff must be held available for inspection by the shipper on reasonable request [49 U.S.C. § 13702(c)(1)], and the carrier must notify the shipper that the tariff is available for inspection or otherwise give actual notice that the shipper's shipment is subject to a tariff [49 U.S.C. § 13702(c)(2)]. Absent publication and notification of the tariff, the tariff cannot be enforced against an individual shipper [49 U.S.C. § 13702(c)(3)].

When presenting a document for payment to the person responsible for payment [*see* [3], *below*], the carrier or agent must disclose the actual rates, charges, or allowances for the transportation service, as well as whether and to whom any allowance or reduction is made [49 U.S.C. § 13708; *see* 49 U.S.C. § 13710(a)].

[2] Effect of Payment

In general, the carrier must surrender possession of the goods at the destination on payment for the transportation [49 U.S.C. § 13707(a); *see* 49 U.S.C. § 13707(b)].

[3] Liability for Payment

[a] Consignee

When a shipper or consignor instructs the motor carrier to deliver the goods to a consignee that is an agent that does not hold beneficial title to the goods, the consignee is liable for the payment of rates billed at the time of delivery. The consignee is not liable for additional rates that may be found to be owing after delivery if the consignee gives written notice to the delivering carrier before delivery of the following [49 U.S.C. § 13706(a); *see* *C.A.R. Transportation v. Darden Restaurants, Inc.* (9th Cir. 2000) 213 F.3d 474 (transportation broker sued shipper under § 13706 to recover freight charges)]:

- The fact of the agency and the lack of beneficial title.
- The name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than that specified in the original bill of lading.

However, the consignee will be liable for the additional rates if the consignee incorrectly identifies the beneficial owner of the property [49 U.S.C. § 13706(b)].

[b] Beneficial Owner

The beneficial owner is liable for payment of all rates when the property is reconsigned or diverted by an agent but is refused or abandoned at the ultimate destination, provided that the agent notified the carrier of the agency and the name and address of the beneficial owner in the reconsignment or diversion order. The beneficial owner also is liable for any additional rates incurred when the consignee is only liable for rates assessed at the time of delivery and the property is reconsigned or diverted. If the property was not reconsigned or diverted, the consignor or shipper is liable for these extra charges [49 U.S.C. § 13706(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesRates & Tariffs



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22-54 California Legal Forms--Transaction Guide § 54.45

§ 54.45 Liability of Carriers

Motor carriers are liable for any actual loss or injury to the shipped goods [*see* 49 U.S.C. § 14706(a)(1)]. Although carriers engaged in the transportation of household goods are required to issue a receipt or bill of lading [49 U.S.C. § 14706(a); *see* § 54.42], the carrier remains liable for actual loss or injury to the shipped goods, regardless of whether or not the carrier issued a receipt or bill of lading [49 U.S.C. § 14706(a)(1)].

Carriers may limit liability to a declared value established by the written declaration of the shipper or by written agreement [*see* 49 U.S.C. § 14706(f)].

The Carmack Amendment [49 U.S.C. § 14706] provides the exclusive cause of action for interstate shipping contract claims, and it completely preempts state law claims alleging delay, loss, failure to deliver, and damage to property. The Carmack Amendment also preempts a claim for intentional infliction of emotional distress to the extent that it arises from the same conduct as the claims for delay, loss, or damage to shipped property [*White v. Mayflower Transit, L.L.C.* (9th Cir. 2008) 543 F.3d 581, 2008 U.S. App. LEXIS 19350, at *3, *8] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesDamages



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22-54 California Legal Forms--Transaction Guide § 54.46

§ 54.46 Resolution of Disputes Between Household Goods Shippers and Carriers

[1] Offer of Arbitration Required for C.O.D. Shipments

In the case of C.O.D. shipments of household goods, carriers must agree to offer neutral arbitration as a means of settling disputes between carrier and shippers concerning loss or damage to the shipped household goods [49 U.S.C. § 14708(a), (b)(1); see 49 U.S.C. § 14708(b)(4); see also 49 U.S.C. §§ 13092, 13903 (registration)]. Carriers must provide adequate notice of the availability of arbitration before the goods are tendered for transport [49 U.S.C. § 14708(b)(2)]; however, the carrier may not require the shipper to agree to use arbitration before a dispute arises [49 U.S.C. § 14708(b)(6)]. The notice must contain a concise, easy-to-read, accurate summary of the arbitration procedure, any applicable costs [see 49 U.S.C. § 14708(b)(5)], and disclosure of the legal effects of an election to use arbitration [49 U.S.C. § 14708(b)(2)]. In addition, a carrier, on request of a shipper, must promptly provide forms and any information necessary to initiate an arbitration action [49 U.S.C. § 14708(b)(3)].

[2] Attorneys' Fees in Court Action Based on C.O.D. Shipments

[a] Shipper's Award

A shipper may bring a court action to resolve a dispute over the shipment of the shipper's household goods. If the shipper prevails in the action, reasonable attorneys' fees will be awarded under the following circumstances [49 U.S.C. § 14708(d); *Campbell v. Allied Van Lines, Inc.* (9th Cir. 2005) 410 F.3d 618, 623 ("Congress unambiguously authorized the awarding of attorney's fees to shippers of household goods who meet three express conditions. None of those conditions require a shipper to first invoke arbitration.")]:

- The shipper submits the claim to the carrier within 120 days after the later of (1) the date on which the shipment is delivered or (2) the date that delivery was scheduled.
- No decision was rendered through arbitration within the prescribed 60-day period and any extensions, or the court proceeding is a suit to enforce an arbitration decision filed after time for compliance with the arbiter's decision has elapsed.

[b] Carrier's Award

In a suit to resolve a dispute between a shipper and a carrier, the carrier may be awarded reasonable attorneys' fees only when the shipper brought the action in bad faith in either of the following situations [49 U.S.C. § 14708(e)]:

- The suit was brought after the resolution of the dispute through arbitration under an existing dispute settlement program.
- The suit was brought after the institution of an arbitration proceeding by the shipper but before a decision is rendered or before the end of the 30-day time period for a decision (including any applicable extensions) [49 U.S.C. § 14708(e)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesDamages



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22-54 California Legal Forms--Transaction Guide §§ 54.47-54.49

[Reserved]

§§ 54.47[Reserved]



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22-54 California Legal Forms--Transaction Guide § 54.50

§ 54.50 Governing Law

[1] Federal Bills of Lading Act

The interstate transportation of property other than household goods [*see* § 54.40 et seq.] is governed by the Federal Bills of Lading Act [*see* 49 U.S.C. § 80101 et seq.]. The document of title used in the carriage of these "commercial goods" is termed a bill of lading. The contents of bills of lading are prescribed by 49 C.F.R. pt. 1035.

The Act applies to bills of lading issued by a common carrier for the transportation of goods [49 U.S.C. § 80102]:

- Between a place in the District of Columbia and another place in the District of Columbia.
- Between places in United States territories or possessions.
- Between two states.
- Between one state and another place in that state through another state.
- Between two places in the United States through another country [*see* 49 U.S.C. § 13502].
- Between the United States and a place in a foreign country.

[2] Definitions

[a] Nonnegotiable Bill of Lading

A "nonnegotiable bill of lading," formerly referred to as a straight bill of lading, is one that states that the goods are consigned to a specific person, the consignee [49 U.S.C. § 80103(b)(1); *see* 49 U.S.C. § 80101(1); *see also* C.A.R. *Transportation v. Darden Restaurants, Inc.* (9th Cir. 2000) 213 F.3d 474 (parties adapted straight bill of lading for their use; transportation broker sued shipper to recover freight charges)]. An indorsement on a nonnegotiable bill of lading

neither makes the bill negotiable [*see* [b], *below*], nor confers additional rights to the transferee. As a nonnegotiable bill, a household goods bill of lading must have placed plainly on its face the wording "not negotiable" or "nonnegotiable" [49 U.S.C. § 80103(b)(2)].

[b] Negotiable Bill of Lading

A "negotiable bill of lading," formerly referred to as an "order bill of lading" is a bill that states that the goods are consigned to the order of a person named in the bill and does not contain an agreement on the face of the bill that the bill is not negotiable [49 U.S.C. § 80103(a)(1)]. Inserting the name of a person to be notified on the arrival of the goods does not limit the negotiability of the bill and does not constitute notice to the purchaser of the goods of any right of the named person to the goods [49 U.S.C. § 80103(a)(2)].

[c] Goods

The term "goods" means merchandise or personal property that is or will be transported under a bill of lading [49 U.S.C. § 80103(a)(1)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesBills of LadingTransportation LawCommercial VehiclesGeneral Overview



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22-54 California Legal Forms--Transaction Guide § 54.51

§ 54.51 Carrier's Delivery Obligation

[1] Demand Required

In general, a common carrier must deliver goods covered by a bill of lading on demand of the consignee named in a nonnegotiable bill or the holder of a negotiable bill when the consignee or holder [49 U.S.C. § 80110(a)]:

- Offers in good faith to satisfy the carrier's lien on the goods [see § 54.54].
- Has possession of the bill and, if negotiable, offers to indorse and give the bill to the carrier.
- Agrees to sign a receipt for delivery, if requested by the carrier.

Ordinarily, a common carrier may deliver the goods to any of the following [49 U.S.C. § 80110(b); but see 49 U.S.C. § 80111; see also [2], below]:

- A person entitled to possession of the goods.
- The consignee named in a nonnegotiable bill.
- A person in possession of a negotiable bill if the goods are deliverable to the order of that person, or the bill has been properly indorsed to that person or in blank by the consignee or other indorsee.

The assertion of title or right to the goods by a third person is not a defense to an action brought by the consignee named in a nonnegotiable bill or the holder of a negotiable bill against the carrier for failure to deliver the goods on demand unless enforced by legal process [49 U.S.C. § 80110(f); but see [3], below].

[2] Carrier's Claim to Goods as Excuse for Nondelivery

When a common carrier claims title to the goods or their right of possession, that claim is an excuse for nondelivery

only when the claim is derived from a transfer by the consignor or consignee after the shipment, or the carrier's lien [49 U.S.C. § 80110(c); see § 54.54].

[3] Effect of Adverse Claims

If anyone other than the consignee or person holding a bill of lading claims title to or possession of the goods, and the carrier knows of the claim, the carrier need not deliver the goods to the claimant until the carrier has had a reasonable time to either decide the validity of the adverse claim or institute an interpleader action [49 U.S.C. § 80110(d); see 49 U.S.C. § 80110(e) (interpleader)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesGeneral Overview



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D. Interstate Shipment of Commercial Property

22-54 California Legal Forms--Transaction Guide § 54.52

§ 54.52 Liability Under Bills of Lading

[1] Misdelivery

A common carrier is liable for damages to a person having title to, or the right to possess, the goods under the following circumstances [49 U.S.C. § 80111(a)]:

- The carrier delivers the goods to a person not entitled to possession [*but see* 49 U.S.C. § 80110(b)(2), (3); *see* § 54.51].
- The carrier delivers to the consignee or holder of a negotiable bill after being requested by the person having title to, or the right to possess, the goods not to deliver the goods.
- The carrier has information the time of delivery that the carrier is delivering the goods to someone who is not entitled to possession.

In the latter two situations, the request or information is only effective if an officer or agent of the carrier (whose acting or apparent authority includes taking this action) receives the request or information and has had time, exercising reasonable diligence, to stop delivery [49 U.S.C. § 80111(b)].

[2] Failure to Deliver

A common carrier ordinarily is liable for refusing to deliver the goods on demand [*see* 49 U.S.C. § 80110; *see also* § 54.51]. However, the carrier is not liable for failing to deliver the goods to the consignee or owner of the goods or a holder of a negotiable bill in any of the following circumstances [49 U.S.C. § 80111(d)]:

- The carrier delivers the goods under a negotiable bill without taking and canceling the bill [*see* § 54.53[3]] when the delivery was compelled by legal process.
- The goods are lawfully sold to satisfy the carrier's lien.

- The goods have not been claimed.
- The goods are perishable or hazardous.

[3] Misdating, Nonreceipt, or Misdescription

In general, a common carrier issuing a bill of lading is liable for damages caused by nonreceipt by the carrier of any part of the goods by the delivery date shown in the bill or by the failure of the goods to correspond to the description in the bill. The carrier is liable to the owner of the goods under a nonnegotiable bill (subject to the right to stop transit), or to the holder of a negotiable bill if the holder gave value in good faith reliance on the description in the bill or on the shipment being delivered on the delivery date [49 U.S.C. § 80113(a)]. However, the carrier is not liable under this rule when all of the following apply [49 U.S.C. § 80113(b)]:

- When the shipper loads the goods;
- When the bill describes the goods in terms of marks or labels or kind, quantity, or condition, or the receipt or description is qualified by "contents or condition of contents of packages unknown," "said to contain," "shipper's weight, load and count" or the like.
- To the extent that the carrier does not know whether any part of the goods were received or conform to the description.

When the shipper loads the goods, the carrier is not liable for damages caused by improper loading if the bill contains the words "shipper's weight, load and count" or other words of similar import [49 U.S.C. § 80113(c)].

When bulk freight is loaded by a shipper who provides adequate facilities to the carrier for weighing the freight, the carrier must ascertain the kind and quantity of the freight within a reasonable time after receiving the written request of the shipper to do so. In this situation, "shipper's weight" or similar language are ineffective [49 U.S.C. § 80113(d)(1)].

When goods are loaded by a common carrier, the carrier must count the packages of goods if package freight, and ascertain the kind and quantity if bulk freight. In these cases, "shipper's weight, load and count" or other words indicating that the shipper described or loaded the goods are ineffective except as to freight concealed by packages [49 U.S.C. § 80113(d)(2)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesBills of Lading



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22-54 California Legal Forms--Transaction Guide § 54.53

§ 54.53 Additional Liability Under Negotiable Bills of Lading

[1] Bills Issued in Parts and Sets

Negotiable bills of lading issued in one state for transport to another state other than Alaska, Hawaii, or the District of Columbia, may not be issued in parts or sets. A carrier issuing a bill in violation of this prohibition is liable for failure to deliver the goods to a purchaser of one part for value in good faith, even if the purchase occurs after the carrier delivered the goods to a holder of one of the other parts [49 U.S.C. § 80112(a)].

[2] Duplicate Bills

When two or more negotiable bills of lading are issued in one state to transport the same goods to another state other than Alaska, Hawaii, or the District of Columbia, the word "duplicate" (or other word indicating that the bill is not an original) must appear plainly on the face of each bill other than the original. A carrier issuing a bill in violation of this requirement is liable for damages to a purchaser of the bill for value in good faith as an original bill, even though the purchase occurs after the carrier delivered the goods to a holder of the original bill [49 U.S.C. § 80112(b)].

[3] Failure to Take and Cancel Bills

If a common carrier delivers goods under a negotiable bill of lading without taking and canceling the bill, the carrier is liable in damages for that failure to the person purchasing the bill for value in good faith. The carrier is liable regardless of whether the purchase was made before or after delivery, and even if delivery is made to the person entitled to the goods. The carrier is similarly liable for partial deliveries without taking or canceling the bill, or plainly noting the partial delivery and generally describing the goods kept by the carrier on the bill [49 U.S.C. § 80111(c)]. However, the carrier is not liable for delivering the goods under a negotiable bill without taking and canceling the bill when the delivery was compelled by legal process [49 U.S.C. § 80111(d)(1); see 49 U.S.C. § 80115 (limitations on judicial process)].

[4] Lost, Stolen, or Destroyed Bills

When a negotiable bill is lost, stolen, or destroyed, a court may order the carrier to deliver the goods to the person claiming them if that person gives a surety bond to indemnify the carrier or any person injured by delivery under the original bill. The court may also order the payment of reasonable costs and attorneys's fees to the carrier [49 U.S.C. § 80114(a)]. However, delivery under court order does not relieve a common carrier from liability to the person to whom the negotiable bill has been or is negotiated for value without notice of the court proceeding or of the delivery of the goods [49 U.S.C. § 80114(b); *see* 49 U.S.C. §§ 80104, 80105(a)].

A voluntary bond executed without court order binds the parties to the bond [49 U.S.C. § 80114(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesBills of Lading



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22-54 California Legal Forms--Transaction Guide § 54.54

§ 54.54 Carrier's Lien Under Negotiable Bills of Lading

A common carrier issuing a negotiable bill of lading has a lien on the goods covered by the bill for the following [49 U.S.C. § 80109]:

- Charges for storage, transportation, and delivery (including demurrage and terminal charges).
- Any expenses necessary to preserve the goods.
- Any expenses that are incidental to transportation after the date of the bill.
- Any other charges for which the bill expressly specifies a lien, to the extent that the charges are allowable by law and provided for by the agreement between the consignor and the carrier.

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesBills of Lading



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[Reserved]

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A. Client Interview--Facts and Documents

22-54 California Legal Forms--Transaction Guide § 54.100

§ 54.100 Shipper's Facts

1. Name, address, and telephone number of shipper.
2. Address where goods will be shipped.

NOTE:

The law governing the proposed shipment depends on whether the shipment will cross state lines. Intrastate shipments are discussed in §§ 54.10 *et seq.* and 54.30 *et seq.* Interstate shipments are discussed in §§ 54.40 *et seq.* and 54.50 *et seq.*

3. Nature of goods being shipped.

NOTE:

The law governing the proposed shipment depends on whether the goods are household goods or non-household goods. The shipment of used property under the Household Goods Carriers Act is *covered in § 54.10 et seq.*; the interstate shipment of household goods is discussed in §§ 54.40 *et seq.* Intrastate shipments of commercial property, that is, the intrastate carriage of goods other than those covered by the Household Goods Carriers Act, are *covered in § 54.30 et seq.*; interstate shipments of commercial property are discussed in § 54.50 *et seq.*

4. Whether shipper will require guaranteed pickup and/or delivery dates or periods.
5. Identification, nature, and appraised value of all extraordinarily valuable items.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesGeneral Overview



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22-54 California Legal Forms--Transaction Guide § 54.101

§ 54.101 Shipper's Documents

1. Any documents of title covering goods being shipped.
2. Any written documentation of value covering valuable items, such as appraisals of jewelry or works of art.

NOTE:

Items of extraordinary value are ordinarily separately identified and listed in the applicable shipping document for reimbursement purposes in the event of damage or loss.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesGeneral Overview



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A. Client Interview--Facts and Documents

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[Reserved]

§§ 54.102[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
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PART III. TRANSACTION GUIDE
B. Procedural Guide

22-54 California Legal Forms--Transaction Guide § 54.110

§ 54.110 Intrastate Transportation of Used Property Under Household Goods Carriers Act

[1] General Operating Procedures

1. Before engaging in business of transporting household goods and personal effects, by motor vehicle over any public highway in California, including advertising, soliciting, offering, or entering into agreement regarding transportation of these goods, do both of following:

- a. Obtain permit from PUC for transportation of household goods and personal effects entirely within California [*Pub. Util. Code § 5133(a)(1); see § 54.11*].
- b. Obtain valid operating authority issued by the Federal Motor Carrier Safety Administration, for interstate transportation [*Pub. Util. Code § 5133(a)(2); see § 54.11*].

2. If carrier will do business under one or more fictitious names:

- a. File fictitious business name statement with clerk of the county in which carrier has principal place of business [*see Bus. & Prof. Code § 17915*].
- b. File certified copies of fictitious business name statements and any required affidavits of publication with PUC [MAX-4, item 88(1)].
- c. On abandonment of fictitious business name, file statement of abandonment with PUC [MAX-4, item 88(2)].

3. Advise carrier to show following on all stationary, shipping documents, and related forms [MAX-4, item 88(3)]:

- a. All real and fictitious names used by carrier in conducting operations.
- b. Address of principal place of business (designated as such) and of any local office that conducts business with public.
- c. When more than one name is listed, identification of name under which particular transportation is performed.
- d. Carrier's T file number issued by PUC, as follows: ".U.C. T-_____."

NOTE:

The carrier's T file number must also be included in all advertising [MAX-4, item 88(7); *see* P 4, *below*].

4. With respect to advertising, advise carrier that:

- a. Listing more than one name in classified section of telephone directory requires cross-referencing each name to all others listed [MAX-4, item 88(5)].
- b. Rates may not be advertised in telephone directory [MAX-4, item 88(6)].
- c. All printed advertising matter, including handbills, newspaper advertisements, and telephone book listings, must show carrier's "T file number," as follows: ".U.C. T-_____" [MAX-4, item 88(7)].
- d. Carrier may not misrepresent rates or scope of services to public [MAX-4, item 88(8)]:

(1) Carrier may not advertise or otherwise represent itself under name that is different from that on its PUC permit.

NOTE:

Carriers who are duly authorized agents for highway common carriers [*see Pub. Util. Code §§ 201-2115*] (intrastate commerce), or for motor carriers acting under the jurisdiction of the U.S. Department of Transportation (interstate commerce), may advertise and represent themselves as such agents [MAX-4, item 88(8)(a)].

(2) Carrier must clarify to customer whether carrier is acting on its own authority or as agent for another carrier.

(3) Carrier may not advertise or otherwise represent that operations are conducted at addresses or locations at which carrier or its duly authorized agent does not maintain place of business.

NOTE:

A telephone answering service does not constitute a place of business [MAX-4, item 88(8)(c)].

- (4) Advertising may not contain any misleading descriptions or displays of nonexistent facilities or equipment.
- (5) Carrier may not willfully quote or estimate lower rates or charges while knowing that actual rates or charges will exceed quote or estimate.

5. Advise carrier to maintain books of account in form that will show separately revenues derived from operations conducted under each name used by carrier [MAX-4, item 88(4)].

6. Advise carrier to furnish to each prospective shipper of household goods a copy of information specified in MAX-4, item 470, a booklet entitled *Important Information for Shippers (Within California)*, as follows [see MAX-4, item 88(9)]:

NOTE:

The individual carrier may select the most convenient format in which to transmit this information, provided that all specified information is included in readable form. If the prospective shipper receives this information, from any source, this requirement is satisfied. For these purposes, the prospective shipper is the owner of the tendered goods, regardless of who actually pays the freight charges [MAX-4, item 88(9)].

If a carrier transporting used goods [see MAX-4, item 12] fails to comply with these requirements in their entirety, the carrier must pay the shipper \$100 on completion of the move [MAX-4, item 88(9)(e)].

a. Furnish informational material to prospective shipper at time of first in-person contact between carrier's personnel and shipper or shipper's representative.

b. If move is arranged and confirmed by mail or telephone (and no in-person contact with prospective shipper occurs before day of move, mail copy to prospective shipper before moving day if sufficient time remains by registered mail, return receipt requested.

c. Obtain shipper's signature on agreement for service [see §§ 54.203, 54.205] before move begins that shipper received informational material from carrier or other source.

d. Retain this receipt for information for three-year period.

NOTE:

All receipts must include the name of the shipper, the bill of lading number, date, and signature of the shipper [MAX-4, item 88(9)(d)]. These requirements are met by the agreement for service.

7. If requested by shipper or desired by carrier, provide shipper with Estimated Cost of Services [see MAX-4, items 108, 420; see also § 54.201].

NOTE:

The issuing carrier must retain the original of this form, subject to inspection by the PUC, for at least three years from either (1) the date of the freight bill and shipping order; or (2) the date of this estimate if the carrier does not perform the transportation and shipment [MAX-4, item 108(1)(f)].

8. Advise carrier to complete Basis for Carrier's Estimate Cost of Services (with Table of Measurements on reverse) [see § 54.200] after visual inspection of goods by its estimator and before determining estimated cost of services [see MAX-4, items 112, 400, 410].

NOTE:

This form must be signed by the shipper or the shipper's representative and a duplicate must be given to the shipper [MAX-4, item 112(1)]. The issuing carrier must retain the original of this form and preserve it, subject to inspection by the PUC, for at least three years from either (1) the date of the freight bill and

shipping order; or (2) the date of this basis for estimate if the carrier does not perform the transportation and shipment [MAX-4, item 112(3)].

9. If shipper requests additional services, or adds articles to shipment, not covered in Basis for Carrier's Estimated Cost of Services [see P 8, *above*] or "not to exceed price" on Agreement for Services [see § 54.203; see also P 10, *below*], advise carrier to issue change order [see MAX-4, items 120, 440; see also § 54.202].

NOTE:

A duplicate of all change orders must be retained and preserved by the issuing carrier, subject to inspection, for at least three years from the date delivered [MAX-4, item 120(2)].

10. Complete agreement for services [see MAX-4 Items 128, 450; see also § 54.203] and shipping order and freight bill [see § 54.204] and have shipper sign documents.

NOTE:

The agreement for services and the shipping order may be combined into a single document [see MAX-4, items 128(3), 132(2); see also §§ 54.203[1][b], 54.204[1][b]]. A combined document is set forth in § 54.205[2]. These documents must be signed by the carrier and the shipper or the shipper's representative before the move.

The issuing carrier must retain and preserve the original or duplicate of the agreement for services, including any master agreement, for PUC inspection, for at least three years from the date of issuance [MAX-4, item 128(4)].

The issuing carrier must retain and preserve a duplicate of each shipping document, freight bill, accessorial service document, weighmaster's certificate, written instructions, written agreement, written request, master agreement, or any other document supporting the assessed rates and charges that the carrier is required to issue, receive, or retain under Maximum Rate Tariff 4 for any transportation or accessorial service. These documents must be retained in California, for PUC inspection, for at least three years from the date of issuance. The carrier must also give a copy of each document to the shipper when the charges are collected [MAX-4, item 132(3)].

11. Advise carrier to adhere to quoted rates [see MAX-4, item 28]:

a. If carrier issued estimated cost of services, observe rates quoted in estimate, basis for carrier's estimate, table of measurements, and any change order [MAX-4, item 28(1)].

b. If carrier did not issue estimate, assess maximum charge as lower of following [MAX-4, item 28(2)]:

(1) "Not to exceed price" set forth in agreement [see §§ 54.203, 54.205], plus any charges noted on change order [see § 54.202] completed after agreement is signed.

(2) Charges as calculated based on rate and charges specified in agreement [see §§ 54.203, 54.205], plus any charges for service noted on change order [see § 54.202] completed after agreement is signed.

c. If carrier did not issue agreement, or if agreement fails to describe transportation and accessorial services or quoted rates for those services, assess charges no greater than 45 percent below maximum rate published in Maximum Rate Tariff 4 [MAX-4, item 28(3)].

d. If carrier issued agreement, but agreement fails to include not to exceed price, carrier's signature, or shipper's signature, assess charges no greater than lowest of following [MAX-4, item 28(3)]:

- (1) 45 percent below maximum rates published in Maximum Rate Tariff 4.
- (2) Rates quoted in estimate.
- (3) Rates quoted in agreement.

12. If carrier is unable to make delivery, advise carrier to:

a. When carrier is unable to locate consignee [MAX-4, item 96(1)]:

- (1) Notify consignee, consignor, or owner, in writing by mail, telegraph, or fax, or personally deliver written notice at premises where actual delivery was to be effected or to other notifying address.
- (2) Place shipment in nearest warehouse of carrier, or, at carrier's option, in public warehouse.

NOTE:

On placement of the goods in a warehouse, the carrier's liability ceases; thereafter, liability will be that of the warehouser in possession [MAX-4, item 96(1)].

b. When consignee is unable to take delivery, or declines to accept delivery, or when shipment remains in carrier's possession under instructions from shipper or consignee and is not stored in transit [see MAX-4, item 160], place shipment in nearest warehouse of carrier, or, at carrier's option, in public warehouse [MAX-4, item 96(2)].

NOTE:

On placement of the goods in a warehouse, the carrier's liability ceases; thereafter, liability will be that of the warehouser in possession [MAX-4, item 96(2)].

c. When subsequent delivery is made, assess charges for that delivery based on rates applicable from carrier's warehouse, or public warehouse, to point of destination [MAX-4, item 96(3)].

13. If carrier agrees with shipper to pick up shipment on specified date and/or time and is unable to fulfill that commitment, advise carrier to:

- a. Notify shipper or shipper's designee by telegram, telephone, or fax, at carrier's expense, as soon as it becomes apparent that promise will not be met [MAX-4, item 100(1)].
- b. Respond to claims for damages from shipper [MAX-4, item 100(3); see MAX-4, item 92(15); see also § 54.15[1]].
- c. Record date of receipt of written claim from shipper [MAX-4, item 92(15); see § 54.15[2]].

14. If carrier agrees to make delivery on specified date or during specified period, advise carrier to:

- a. Notify shipper or shipper's designee by telegram, telephone, or fax, at carrier's expense, of new delivery date [MAX-4, item 100(2)].

NOTE:

This notice must be given not less than 24 hours before originally promised date or period except when circumstances causing delay occur during that 24-hour period. In the latter situation, notice must be given as soon as possible, but in no event more than 24 hours after the occurrence that caused the delay. However, no notice need be given when the carrier is unable to obtain an address or telephone number from the shipper for that notification [MAX-4, item 100(2)].

b. Respond to claims for damages for delay from shipper [MAX-4, item 100(3); *see* MAX-4, item 92(15); *see also* § 54.15[1]].

c. Record date of receipt of written claim from shipper [MAX-4, item 92(15); *see* § 54.15[2]; *see also* [2], *below*].

15. Advise carrier that when, on written request by shipper, carrier agrees to pick up shipment on agreed date and deliver within span of two consecutive agreed dates, carrier must pay penalty of \$100 per day for each day of delay [MAX-4, item 100(4)].

NOTE:

The shipper must make a written claim for payment of the delay penalty within 30 days of delivery [MAX-4, item 100(4)]. This penalty is in addition to the reimbursement requirement [*see* MAX-4, items 92(15), 100(3)]. However, this penalty does not apply to shipments weighing less than 5,000 pounds or that are transported less than 75 constructive miles [MAX-4, item 100(4)].

16. Advise carrier that split pickup may be provided but charge for composite shipment must be paid by one party [MAX-4, item 148(1)].

17. Advise carrier that split delivery may be accorded, but charge for composite shipment must be paid by one party [MAX-4, item 152(1)].

18. Advise carrier that split pickup and split delivery may be accorded if [MAX-4, item 156(1), (2)]:

a. Entire shipment must be picked up within 24 hours and be comprised of at least 4 component parts.

b. Charge for composite shipment must be paid by one party.

19. Advise carrier that shipments may be stored in transit once for period not to exceed 90 days from date of unloading at storage point [MAX-4, item 160].

20. Advise carrier that it may transport household goods under subhauling agreement only if [*Pub. Util. Code* § 5243]:

a. Subhauler is licensed by PUC to transport household goods and complies with the requirements of Household Goods Carriers Act [*Pub. Util. Code* § 5101 *et seq.*]; and

b. Carrier and subhauler are jointly and severally liable for any loss or damage caused by the subhauler.

NOTE:

These restrictions do not apply to a subhauling agreement when the subhauler is not otherwise subject to the Household Goods Carrier Act [*Pub. Util. Code* § 5101 *et seq.*] for activity related to the subhauling agreement [*Pub. Util. Code* § 5244.5].

[2] Handling Claims for Loss or Damage**NOTE:**

Regardless of the procedures for handling claims for loss or damage [*see* MAX-4, item 92; *see also* § 54.15[2]], no claim against a household goods carrier may be denied solely because the lost or damaged goods were not noted at the time of delivery [*Pub. Util. Code* § 5241]. Whenever a household goods carrier requires a signed statement acknowledging delivery and receipt of goods, the statement may not include any representation that the goods were delivered in satisfactory condition. Rather, the statement must include a notice that the shipper may file a claim with the carrier for lost or damaged goods [*Pub. Util. Code* § 5241].

1. Advise household goods carrier to establish and maintain claim register for each written claim for cargo loss or damage received, showing following [MAX-4, item 92(16)]:

NOTE:

The carrier must enter each claim received in the register. Each claim should be supported by the complete file of claim papers. However, if the original claim papers are retained by insurers, connecting carriers, or others, the carrier must place copies of all documents in the file, together with an acknowledgment from the party retaining the claim file that the original papers are in its possession [MAX-4, item 92(16)].

- a. Claim number.
- b. Date claim received [*see* MAX-4, item 92(15)].
- c. Amount claimed.
- d. Shipping order or freight bill number and date.
- e. Claimant's name.
- f. Kind of commodity.
- g. Date claim was paid and total amount paid.
- h. Date claim was disallowed and the reasons for denial.
- i. Amount of any salvage recovered [*see* MAX-4, item 92(17)].
- j. Amounts reimbursed by insurers, connecting carriers, or others.
- k. Amount absorbed by the carriers.

2. Advise carrier that it need not voluntarily pay claim for loss or damage unless claim is filed in writing [MAX-4, item 92(1); *see* § 54.220]:

NOTE:

The suit must be instituted within two years and one day from the date that the carrier gives written notice that the claim is disallowed. In the absence of a filed claim or suit following a disallowed claim, the carrier is not liable and the claim will not be paid [MAX-4, item 92(1)].

a. With receiving or delivering carrier, carrier issuing shipping document, or carrier on whose line alleged loss or damage occurred.

b. Within following time limits [MAX-4, item 92(14)]:

(1) Within nine months after delivery to consignee as shown on delivery document.

(2) Within nine months after reasonable time for delivery elapses when no delivery occurs.

3. Advise carrier of minimum requirements applicable to contents of claim for loss or damage [MAX-4, item 92(2)]:

NOTE:

Bad order reports, appraisal reports of damage, notations of shortage and/or damage on freight bills, delivery receipts, or inspection reports issued by carriers or their inspection agencies, may not be filed in lieu of a written claim. This rule is true regardless of whether or not the document indicates the extent of the loss or damage in dollars. However, these document may be used to support a written claim [MAX-4, item 92(3)].

a. Facts sufficient to identify shipment or shipments involved.

b. Assertion of liability for alleged loss or damage.

c. Claim for payment of specified or determinable amount of money.

4. When claim is filed for uncertain amount, such as "\$100, more or less," advise carrier to determine condition of shipment at time of delivery and ascertain as nearly as possible extent of loss or damage for which it may be responsible [MAX-4, item 92(4)].

NOTE:

Carrier need not voluntarily pay a claim stating an uncertain amount unless and until a proper written claim for a specified or determinable amount of money is filed [MAX-4, item 92(4); *see* PP (3), (4), *above*].

5. If claim investigation reveals multiple claims on same shipment, made against other carriers, advise investigating carrier to communicate with other carriers and, before settlement [MAX-4, item 92(5)]:

a. Notify all claimants of receipt of conflicting or overlapping claims.

b. Require further substantiation on part of each claimant as to claimant's title to property or right as to claim.

6. If carrier is notified of concealed damage or shortage promptly after discovery and afforded reasonable opportunity to inspect shipment and packing, advise carrier to promptly and thoroughly investigate claim and establish claim file

[MAX-4, item 92(6); *see* P 1, *above*].

7. Advise carrier that on receipt of claim, carrier must:

- a. Record date of receipt on claim [MAX-4, item 92(1)].
- b. Acknowledge receipt of claim, in writing, to claimant within 30 calendar days after its receipt by carrier or its agent [MAX-4, item 92(15)].
- c. Enter claim in claim register [MAX-4, item 92(16); *see* P (1), *above*].

8. When necessary for an investigation, advise carrier that each claim must be supported by [MAX-4, item 92(7)]:

- a. Duplicate shipping document.
- b. Either original paid bill for transportation services or a copy.
- c. For each article claimed:
 - (1) Description of nature and extent of damage.
 - (2) Statement of basis for amount claimed (i.e., date on which article was purchased, its original cost, amount of depreciation, actual cash value at time of loss or damage, and, in case of damage, repair estimate).

9. When claim for loss of entire package or entire shipment cannot be otherwise authenticated by investigation, advise carrier to obtain from consignee certified written statement that property has not been received from any other source [MAX-4, item 92(8)].

10. Advise carrier to adhere to the following settlement procedures:

- a. Pay, decline, or make firm compromise settlement in writing to claimant within 60 days after receipt of claim by carrier or its agent [MAX-4, item 92(15)].
- b. If carrier declines to pay, or offers less than amount sought, carrier must state basis for denial or reduction in writing.
- c. If, for reasons beyond carrier's control, claim cannot be processed or disposed of within 60-day period, carrier must, at that time and at expiration of each succeeding 30-day period while the claim remains pending, [MAX-4, item 92(15)]:
 - (1) Advise claimant in writing of status of claim and reasons for delay in making final disposition.
 - (2) Send copy of letter to the California Public Utilities Commission, Compliance and Enforcement Branch, 505 Van Ness Avenue, San Francisco, California 94102.
- d. Carrier may satisfy claim by repairing or replacing property lost or damaged with materials of like kind, quality, and condition as of the time accepted for transportation [MAX-4, item 92(9)].

11. Advise carrier of following rules of liability:

- a. Carrier is not liable for loss or damage that occurs after property is delivered or receipted for by consignee or shipper or their agent [MAX-4, item 92(10)].
- b. When carrier is directed to unload or deliver property or render services at place at which consignee or agent is not present, risk shifts to owner after unloading or delivery [MAX-4, item 92(10)].
- c. When carrier is directed to load property from, or render services at, place at which consignor or agent is not present, property is at risk of owner before packing and loading [MAX-4, item 34(11)].
- d. Liability for pairs or sets is limited to repair or replacement of lost or damaged piece or pieces only, may not extend to repair, replacement, or recovery of entire set, and may not exceed limits of liability set forth in MAX-4, item 136 [MAX-4, item 92(12)].
- e. When liability is to be measured by weight and article involved is packed in interior shipping container, absent specific evidence to contrary, container is deemed to have weight set forth in MAX-4 [see MAX-4, item 92(13)].

[3] Presentation of Claim for Loss or Damage

1. Advise claimant to inspect shipped goods within reasonable time after delivery.

NOTE:

No claim against a household goods carrier may be denied solely because the lost or damaged goods were not noted at the time of delivery [*Pub. Util. Code* § 5241]. A signed statement acknowledging delivery and receipt of goods may not include any representation that the goods were delivered in satisfactory condition. Rather, the statement must notify the shipper of his or her rights to file a claim with the carrier for lost or damaged goods [*Pub. Util. Code* § 5241].

- a. Note any damage to individual items.
- b. If damage is discovered, request claim form from carrier.

NOTE:

Most carriers require claimants to file claims on their printed forms. These forms ordinarily include "instructions" for completing the form [see § 54.220], which must be carefully followed.

- c. If damage is concealed and delay is feasible, afford carrier reasonable opportunity to inspect shipment and packing.

2. Complete claim form, including following information [see § 54.220]:

NOTE:

A carrier is not required to pay a claim for loss or damage unless the claim is filed in writing [MAX-4, item 92(1)]. Bad-order reports, damage appraisal reports, notations of shortage or damage on freight

bills, delivery receipts, or other documents, or inspection reports, standing alone, are not sufficient to comply with the claim filing requirements [MAX-4, item 92(3)].

a. Facts sufficient to identify shipment of property involved, e.g.,:

- (1) Claimant's name, address, and telephone number.
- (2) Shipper's name, address, and telephone number.
- (3) Bill of lading number.
- (4) Shipping order or freight bill number and date.
- (5) Date shipment loaded and unloaded.
- (6) Address where shipment loaded and unloaded.

b. Assertion of liability for loss or damage:

- (1) State that carrier is liable for specified amount of loss or damage.
- (2) State that claimant owns lost or damaged property.
- (3) State that claimant did not cause or contribute to loss or damage.
- (4) If claim is for breakage, state following if known:
 - (a) Identify by name packer and unpacker.
 - (b) Date shipment unpacked and/or date loss or damage discovered.
 - (c) Identify person who discovered damage.

c. Demand payment of claim, stating specified or determinable amount of money [*see Pub. Util. Code § 5199* (prohibition against false claims)].

NOTE:

The carrier is not required to pay a claim stating an uncertain amount unless and until a proper written claim for a specified or determinable amount of money is filed [MAX-4, item 92(4); *see* PP(3), (4), *above*].

(1) State amount of loss or damage to individual items, based on:

NOTE:

If the claim is for damage to one of a pair or a set, recovery is limited to the repair or replacement of the lost or damaged piece or pieces only. The carrier is not liable for the repair, replacement, or recovery of an entire set [MAX-4, item 92(12)].

(a) Month and year of purchase.

(b) Original cost.

(c) Depreciation.

(d) Present value.

(e) Repair estimate.

(2) State total amount claimed for loss or damage.

3. File claim as follows:

NOTE:

If a claim is not filed or suit is not instituted in accordance with these requirements, the carrier is not liable [MAX-4, item 92(14)].

a. With receiving or delivering carrier, carrier that issued shipping document, or carrier on whose line loss or damage occurred [MAX-4, item 92(1)].

b. Within time limit specified in MAX-4, by law, terms of shipping document or other contract of carriage, and all applicable tariff provisions [MAX-4, item 92(1)].

NOTE:

Under MAX-4, a claim for loss or damage must be filed within nine months after delivery of the property to the consignee or, if delivery is not made, within nine months after a reasonable time for delivery has elapsed [MAX-4, item 92(14)].

c. Include following documentation:

(1) Duplicate shipping document.

(2) Either original paid bill for transportation services or a copy.

(3) Copy of any repair estimates.

4. Advise claimant that carrier must acknowledge receipt of the claim in writing to claimant within 30 calendar days after receipt, and must respond in writing within 60 days after receipt of the claim:

a. Carrier may pay claim.

b. Carrier may decline to pay claim.

c. Carrier may make firm settlement offer to shipper.

5. If necessary, institute suit within two years and one day from date that carrier notified shipper of disallowance of claim [MAX-4, item 92(14)].

[4] Carrier's Lien Procedures**NOTE:**

Notwithstanding any other law, *Pub. Util. Code § 5142* exclusively establishes and provides for a household goods carrier's lien on used household goods and personal effects to secure payment for transportation and additional services ordered by the consignor [*Pub. Util. Code § 5142(j)*].

1. Advise carrier that it has lien on used household goods and personal effects to secure payment for transportation and additional services ordered by consignor [*see Pub. Util. Code § 5142(a)*].

NOTE:

No lien attaches to food, medicine, or medical devices, items used to treat or assist an individual with a disability, or items used for the care of a minor child [*Pub. Util. Code § 5142(a)*].

2. Advise carrier that amount secured by lien is maximum total dollar amount for transportation of household goods and personal effects and any additional services (including any bona fide change order permitted under PUC's tariffs) that is [*see Pub. Util. Code § 5142(b)(1)*]:

- a. Set forth clearly and conspicuously in writing adjacent to space reserved for consignor's signature [*see § 54.110[1] P 10*]; and

- b. Agreed to by consignor before any goods or personal effects are moved from their location or any additional services are performed.

3. Advise carrier that dollar amount for transportation of household goods and personal effects and additional services [*see Pub. Util. Code § 5142(b)(2)*]:

- a. May not be preprinted on any form.

- b. Must be just and reasonable.

- c. Must be established in good faith by the household goods carrier based on specific circumstances of services to be performed.

4. Advise carrier that it may enforce lien (except with regard to any goods that carrier voluntarily delivers or unjustifiably refuses to deliver), in accordance with *Pub. Util. Code § 5142* and *Com. Code § 9601 et seq.* [*see Pub. Util. Code § 5142(d)*; *see also § 54.17* and *Ch. 42, Secured Transactions*].

NOTE:

To the extent of any conflict between *Pub. Util. Code § 5142* and *Com. Code § 9601 et seq.*, *Pub. Util. Code § 5142* prevails [*Pub. Util. Code § 5142(d)*].

5. Advise carrier that every act required to enforce lien must be performed in good faith and in commercially reasonable manner [*see Com. Code § 5142(d)*].
6. Advise carrier that it must provide notification of disposition to each consignor and consignee at least 30 days before any disposition [*Com. Code § 5142(e)*; *see Pub. Util. Code § 5142(k)(1), (2)*]

("consignor," "consignee" defined)].

NOTE:

Notification methods are specified by statute [*see Pub. Util Code § 5142(e)*].

7. Advise carrier that, within 14 days after disposition, it must provide to consignors [Com. Code § 5142(e)]:

- a. Any surplus funds from disposition; and
- b. Accounting, without charge, of proceeds of disposition.

8. Advise carrier that on tender of amount specified in P 3, *above*, lien is extinguished, and carrier must release all household goods and personal effects to consignee [*see Pub. Util. Code § 5142(c)*; *see also Pub. Util. Code § 5142(f)* (release of goods based on reasonable knowledge)].

9. Advise carrier that these lien provisions [*see Pub. Util. Code § 5142(g)*]:

- a. Do not affect carrier's rights, if any, to claim additional amounts, on unsecured basis.
- b. Do not affect consignor's or consignee's right to make or contest any claim.

10. Advise carrier that tender of payment of the amount specified in P 3, *above*, is not a waiver of claims by consignor or consignee [*Pub. Util. Code § 5142(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesDamagesTransportation LawCarrier Duties & LiabilitiesState & Local Regulation



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART III. TRANSACTION GUIDE

B. Procedural Guide

22-54 California Legal Forms--Transaction Guide §§ 54.111-54.119

[Reserved]

§§ 54.111[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART III. TRANSACTION GUIDE

C. Drafting Guide

22-54 California Legal Forms--Transaction Guide § 54.120

§ 54.120 Shipping Documents for Intrastate Transportation of Used Property Under Household Goods Carriers Act

[1] Basis for Carrier's Estimate With Table of Measurements

NOTE:

A duplicate of this form must be given to the shipper [MAX-4, item 112(1)]. The issuing carrier must retain the original of this form and preserve it, subject to inspection by the PUC, for at least three years from either (1) the date of the freight bill and shipping order; or (2) the date of this basis for estimate if the carrier does not perform the transportation and shipment [MAX-4, item 112(3)].

1. Prepare basis for estimate:

a. Include all of the following [MAX-4, item 88(3)]:

(1) All real and fictitious names used by carrier in conducting operations.

(2) Address of principal place of business (designated as such) and of any local office that conducts business with public.

(3) When more than one name is listed, identification of name under which particular transportation is performed.

(4) Carrier's T file number issued by PUC, as follows: U.C. T-_____.

b. Include all information required by Maximum Rate Tariff 4 [see MAX-4, items 112(2), 116, 400; see also § 54.200].

NOTE:

The form must contain two shipper statements [*see* MAX-4, item 400; *see also* § 54.200], imprinted in letters at least 10-point bold, universe or Gothic [MAX-4, item 112(2)].

2. Unless goods being shipped are used office equipment, used store fixtures, and equipment used in offices, stores, hospitals, libraries, museums, places of learning, and other institutions, include table of measurements and estimate on reverse side of basis for carrier's estimated cost of services [MAX-4, items 12(1)(b), 116, 410; *see* § 54.200].
3. Imprint words "Basis for Carrier's Estimated Cost of Services" across top of form in red letters at least one-eighth inch high [MAX-4, item 112(2)].
4. Complete form only after visual inspection of goods.
5. Have shipper or shipper's representative sign form [MAX-4, item 112(1)].

[2] Carrier's Estimated Cost of Services

1. Prepare estimate [*see* § 54.201].

NOTE:

A carrier of household goods may, but is not required to, give an estimate of costs for proposed services to the shipper [MAX-4, item 108(1)(a)]. When issued, the carrier must give a duplicate copy to the shipper [*see* MAX-4, item 108(1)(d)] and retain the original, subject to inspection by the PUC, for at least three years from either (1) the date of the freight bill and shipping order; or (2) the date of this estimate if the carrier does not perform the transportation and shipment [MAX-4, item 108(1)(f)].

- a. Include all of following [MAX-4, item 88(3)]:

(1) All real and fictitious names used by carrier in conducting operations.

(2) Address of principal place of business (designated as such) and of any local office that conducts business with public.

(3) When more than one name is listed, identification of name under which particular transportation is performed.

(4) Carrier's T file number issued by PUC, as follows: U.C. T-_____.

- b. Include all information required by Maximum Rate Tariff 4 [*see* MAX-4, items 108, 420; *see also* § 54.201].

NOTE:

The form must contain an important notice [*see* MAX-4, item 420; *see also* § 54.201], imprinted in letters at least 10-point bold, universe or Gothic [MAX-4, item 108(1)(b)].

2. Imprint words "Estimated Cost of Services" across top of form in red letters at least one-eighth inch high [MAX-4, item 108(1)(b)].

3. Have carrier's estimator sign form [MAX-4, item 108(1)].

[3] Change Order

NOTE:

The carrier must deliver the signed original to the shipper before or at the time that service begins [MAX-4, item 120(1)]. A carrier issuing a change order must retain a duplicate of all change orders, subject to inspection, for at least three years from the date delivered [MAX-4, item 120(2)].

1. Draft change order to include all of following information [MAX-4, items 88(3), 120(1); *see* § 54.202]:

- a. All real and fictitious names used by carrier in conducting operations.
- b. Address of principal place of business (designated as such) and of any local office that conducts business with public.
- c. When more than one name is listed, identification of name under which particular transportation is performed.
- d. Carrier's T file number issued by PUC, as follows: U.C. T-_____.
- e. Date.
- f. Shipping Order/bill of lading number.
- g. Name, address, and T number of the carrier or carriers.
- h. Description of additions to shipment, itemizing only additional articles.
- i. Description of additional transportation and accessorial services to be performed, including number of helpers and number of packers to be provided.
- j. Rates to be applied to additional articles or services.
- k. Valuation of shipment, if it differs from that provided in agreement [*see* MAX-4, item 136; *see also* § 54.203].
- l. Specified disclosures and acknowledgments of those disclosures, placed in appropriate areas of form [*see* MAX-4, item 120(1)(h), (i)].

2. Have carrier and shipper or shipper's representative sign change order [MAX-4, item 120(1)(j)].

[4] Agreement for Services

NOTE:

An agreement for services may be combined with a shipping document [*see* § 54.204] into a single document if (1) the single document and its issuance satisfies the requirements applicable to both agreements and shipping orders; (2) the single document is properly identified as to what it purports to be; and (3) the carrier maintains a copy of the signed combined agreement separate from the shipping document [MAX-4, item 128(3)].

The issuing carrier must retain and preserve the original or a duplicate of this agreement, including any master agreement, subject to inspection by the PUC, for at least three years from the date that the agreement is issued [MAX-4, item 128(4)]. Delivery requirements are discussed in § 54.203[1][c].

1. Draft agreement to include all of following information [MAX-4, items 88(3), 128(2); *see* § 54.203]:

- a. All real and fictitious names used by carrier in conducting operations.
- b. Address of principal place of business (designated as such) and of any local office that conducts business with public.
- c. When more than one name is listed, identification of name under which particular transportation is performed.
- d. Carrier's T file number issued by PUC, as follows: U.C. T-_____.
- e. Date move is tendered.
- f. Date agreement is issued.
- g. Date and time of requested pickup or other arrangement.
- h. Name of each shipper and consignee.
- i. Name, address, or telephone number of person to be notified.

NOTE:

The carrier must request that the shipper provide a notification address or telephone number. When the shipper cannot furnish this information, or declines to do so, that fact must be noted on the agreement [MAX-4, item 128].

- j. Description of notification and delivery arrangements.
- k. Points of origin and destination.
- l. Description of shipment, sufficiently detailed to determine property and services included in "not to exceed price."
- m. Description of transportation and accessorial services to be performed, including number of helpers and packers.
- n. Rates and charges quoted for described services, including any minimum hours, weights, packing materials, and per pound valuation requirements.

NOTE:

Notices relating to maximum rates, the "not to exceed price," and the availability of Maximum Rate Tariff 4 must be included in the agreement [MAX-4, item 128(2)(k)].

o. Valuation of shipment.

NOTE:

Notices relating to limitations of damages, valuations, and the carrier's obligation to comply with all laws, rules, and regulations must be included in the agreement [MAX-4, item 128(2)(l)].

p. Signatures of carrier and shipper.

q. Name, address, and telephone number of a person to whom notification of delay is to be given, except when this cannot be obtained from the shipper [see MAX-4, item 100].

r. Preferred delivery date or time period within which delivery may be expected at destination.

s. Whether payment is to be made in cash, check, or by credit card.

t. "Not to exceed price" showing maximum amount that may be charged for listed services.

NOTE:

The "not to exceed price" is the total amount shown on the estimated cost of services plus the total amount shown on any change order [see § 54.202] issued before the agreement is signed. Change orders issued after the agreement is signed affect the "not to exceed price" directly [MAX-4, item 128(2)(q)].

u. Consumer protections and waiver section covering following elements [MAX-4, item 128(2)(r)]:

(1) Explanation of carrier's obligation to provide booklet, "Important Information for Persons Moving Household Goods."

(2) Explanation of requirements to exceed maximum fixed rates.

(3) Explanation of all loss and damage protection options and valuation declaration.

(4) Explanation of carrier's obligation to ensure that shipper has agreement at least three days before moving day.

(5) Shipper's signature.

v. Consumer protection notice [*Pub. Util. Code* § 5143; see § 54.206]:

(1) Containing "Not to Exceed" amount.

NOTE:

The "Not To Exceed" amount set forth in this notice and the agreement for services between the household goods carrier and the consignor is the maximum total dollar amount for which the consignor may be liable for the transportation of household goods and personal effects and any additional services ordered by the consignor (including any bona fide change order permitted under the PUC's rules and tariffs) and agreed to by the consignor, before any goods or personal effects are moved from their

location or any other services are performed [*Pub. Util. Code § 5143(d)*].

(2) In form prescribed by statute [*see Pub. Util. Code § 5143(f); see § 54.206[2]*].

(3) Set forth either as separate document or as centerfold of informational booklet entitled "Important Information for Persons Moving Household Goods" [*Pub. Util. Code § 5143(e); see P u(1), above, §§ 54.203[2], 54.205[2]* (informational booklet)].

[5] Shipping Order and Freight Bill

1. Draft order to include all of following information [MAX-4, items 88(3), 132(1); *see § 54.204*]:

- a. All real and fictitious names used by carrier in conducting operations.
- b. Address of principal place of business (designated as such) and of any local office that conducts business with public.
- c. When more than one name is listed, identification of name under which particular transportation is performed.
- d. Carrier's T file number issued by PUC, as follows: U.C. T-_____.
- e. Date order is issued.
- f. Name of each shipper and consignee.
- g. Points of origin and destination.
- h. Description of shipment.
- i. Unit of measurement on which charges are based.
 - (1) Actual time and minimum number of hours;
 - (2) Actual number of pieces;
 - (3) Actual and minimum weight; or
 - (4) Minimum per pound valuations.
- j. Deductions in time, if any, and reasons for deductions.
- k. Number of helpers and packers.
- l. Rates and charges assessed.
- m. Description of accessorial services performed, if any, and each separate charge for those services.
- n. Signature of carrier or its agent.

- o. Such other information as may be necessary to make accurate determination of applicable rate and charge.
- p. Name, address, and telephone number of person to whom notification of delay is to be given, except when this cannot be obtained from shipper [*see* MAX-4, item 100].
- q. Preferred delivery date or period of time within which delivery of shipment may be expected to be made at destination.
- r. "Not to exceed price."
- s. Total charges on estimated cost of services and any change order.
- t. Whether payment is to be made by credit card.
- u. Notice requesting that shipper promptly inspect goods and requirement that claims for loss or damage be made in writing.

[6] Combined Agreement for Services and Shipping Order and Freight Bill

NOTE:

Provided that the document is properly identified and contains all the information required for an agreement for services and a shipping order and freight bill, the two documents may be combined. These requirements are set forth in [5], and [6], *above*. A form for a combined agreement and shipping order and freight bill is *set forth in* § 54.205.

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesRates & Tariffs



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 54 SHIPMENT OF PROPERTY
PART III. TRANSACTION GUIDE
C. Drafting Guide

22-54 California Legal Forms--Transaction Guide § 54.121

§ 54.121 Bills of Lading Used in Intrastate Commercial Transportation

1. On top of face of bill, indicate whether bill of lading is either:

- a. Order or straight bill.
- b. Negotiable or nonnegotiable.

NOTE:

If the bill of lading is an order bill and therefore negotiable, including and provisions regarding procedures and restrictions on negotiability.

2. Draft bill of lading to include following information:

- a. Date of issuance of instrument.
- b. Name, address, telephone number, and identifying number of issuing carrier.
- c. Name, address, and telephone number of shipper or consignor.
- d. Name, address, and telephone number of consignee.
- e. Description of property.
 - (1) General description.
 - (2) Quantity or number of packages.

(3) Nature of goods.

(4) Weight.

f. Point of shipment or origin of goods.

g. Destination of goods.

h. Delivery provisions:

(1) Time or period of time for delivery.

(2) Surrender of bill of lading required for delivery.

(3) Whether or not payment is required for delivery.

(4) Whether delivery to consignee is with or without recourse to consignor.

i. Amount of and requirements for payment of charges, including whether any charges will be paid in advance by carrier.

j. Provision for carrier's lien.

k. Provision establishing parameters of carrier's liability for shipment.

l. Declared value clause.

3. Have issuing carrier or agent and shipper sign bill of lading.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesBills of Lading



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

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C. Drafting Guide

22-54 California Legal Forms--Transaction Guide § 54.122

§ 54.122 Shipping Documents Used in Interstate Shipment of Household Goods

[1] Estimates of Charges

[a] Non-Binding Estimates

NOTE:

Carriers of household goods must provide estimates of the approximate costs that will be charged to prospective shippers [49 U.S.C. § 14104(b)(1)(A)]. The estimate may be either binding or non-binding. The estimate must be submitted in writing, and must indicate whether it is binding or non-binding [49 U.S.C. § 14104(b)(1)(C)(i)]. Carriers that do not provide a binding estimate [see § 54.122[1][b]] must provide a non-binding written estimate to the individual shipper [49 C.F.R. § 375.405(a)].

1. Include carrier's reasonably accurate estimate of approximate costs that individual shipper should expect to pay for transportation and services of shipment, as follows [49 C.F.R. § 375.405(b)(1)]:

- a. Provide reasonably accurate non-binding estimates based on estimated weight or volume of shipment and services required.
- b. If estimate is based on volume that will later be converted to a weight based rate, provide written explanation of formula used to calculate conversion to weight.

2. Clearly describe on face of estimate [49 C.F.R. § 375.405(b)(6)]:

- a. The entire shipment.
- b. All services that carrier is providing.

3. Clearly indicate on face of estimate that [49 C.F.R. § 375.405(b)(5)]:
 - a. Estimate is not binding on carrier.
 - b. Charges shown are approximate charges to be assessed for the services identified in estimate.
 - c. Shipper may not be required to pay more than 110 percent of estimate at time of delivery.
4. Explain to individual shipper that [49 C.F.R. § 375.405(b)(2); see 49 U.S.C. § 14104(b)(1)(C)(iii)]:
 - a. Final charges calculated for shipments moved on non-binding estimates will be those appearing in carrier's tariffs applicable to transportation.
 - b. Final charges may exceed the approximate costs appearing in estimate.
5. Furnish estimate in writing to individual shipper or other person responsible for payment of freight charges [49 C.F.R. § 375.405(b)(3)].
6. Do not impose a charge for providing a non-binding estimate [49 C.F.R. § 375.405(b)(3); see 49 U.S.C. § 14104(b)(1)(C)(iii)].
7. Provide shipper with following informational publications [49 U.S.C. § 14104(b)(2)]:
 - a. At time of providing estimate, provide shipper with copy of Department of Transportation publication FMCSA-ESA-03-005 (or its successor publication) entitled "Ready to Move?"
 - b. Before execution of contract for service, provide shipper with copy of Department of Transportation publication OCE 100, entitled "Your Rights and Responsibilities When You Move" [see 49 C.F.R. § 375.213].
8. Retain a copy of each non-binding estimate as an attachment to be made an integral part of the bill of lading contract [49 C.F.R. § 375.405(b)(3)].
9. Enter the estimated charges on order for service and on bill of lading [49 C.F.R. § 375.405(c)].
10. If it appears shipper has tendered additional household goods or requires additional services not identified in estimate [49 C.F.R. § 375.405(b)(7)]:
 - a. Carrier is not required to honor estimate.
 - b. If agreement cannot be reached as to price or service requirements for the additional goods or services, carrier is not required to service shipment.
 - c. If carrier elects to service shipment, carrier must do either of following before loading shipment:
 - (1) Reaffirm carrier's non-binding estimate; or

(2) Negotiate a revised written non-binding estimate listing any additional household goods or services.

NOTE:

Once the carrier loads a shipment, failure to execute a new non-binding estimate signifies that the carrier has reaffirmed the original non-binding estimate. The carrier then may not collect more than 110 percent of the amount of the original non-binding estimate at the destination [49 C.F.R. § 375.405(b)(8)].

11. If carrier believes additional services are necessary to properly service shipment after household goods are in transit, carrier must [49 C.F.R. § 375.405(b)(9)]:

- a. Inform individual shipper what additional services are before performing those services.
- b. Allow shipper at least one hour to determine whether he or she wants the additional services performed.
- c. If individual shipper agrees to pay for the additional services:
 - (1) Execute written attachment to be made an integral part of bill of lading contract; and
 - (2) Have individual shipper sign written attachment via fax transmissions, e mail, overnight courier, or certified mail with return receipt requested.
 - (3) Bill individual shipper for the additional services after 30 days from delivery.
- d. If individual shipper does not agree to pay for additional services:
 - (1) Perform only those additional services that are required to complete the delivery; and
 - (2) Bill individual shipper for those additional services after 30 days from delivery.

12. If individual shipper requests additional services after household goods are in transit [49 C.F.R. § 375.405(b)(10)]:

- a. Inform individual shipper additional charges will be billed.
- b. Require full payment at destination of no more than 110 percent of original non-binding estimate.
- c. Bill shipper for balance of any remaining charges after 30 days after delivery.

13. Retain copy of non-binding estimate for at least one year from the date carrier made estimate, and keep it as an attachment to be made an integral part of the bill of lading contract [49 C.F.R. § 375.405(d)].

[b] Binding Estimates

NOTE:

Carriers of household goods may discharge their obligation to provide estimates of the approximate costs that will be charged to prospective shippers [49 U.S.C. § 14104(b)(1)(A)] by providing a guaranteed binding estimate of the total shipment charges to the individual shipper, as long as it is provided for in

the carrier's tariff [49 C.F.R. § 375.403(a)]. The estimate must be submitted in writing in writing to the individual shipper or other person responsible for payment of the freight charges [49 C.F.R. § 375.403(b)(1), and must indicate whether it is binding or non-binding [49 U.S.C. § 14104(b)(1)(C)(i)]. Carriers that do not provide a binding estimate must provide a non-binding written estimate to the individual shipper [49 C.F.R. §§ 375.403(b); 375.405(a); see § 54.122[1][a]].

1. Clearly describe binding estimate shipments and all services carrier is providing [49 C.F.R. § 375.403(b)(4)].
2. Clearly indicate on face of binding estimate that [49 C.F.R. § 375.403(a)(3)]:
 - a. Estimate is binding upon carrier and individual shipper [see 49 U.S.C. § 14104(b)(1)(C)(ii)].
 - b. Charges shown are charges being assessed for only those services specifically identified in estimate.
3. Fee may be imposed for providing binding estimate [49 U.S.C. § 14104(b)(1)(C)(ii)].
4. Provide shipper with following informational publications [49 U.S.C. § 14104(b)(2)]:
 - a. At time of providing estimate, provide shipper with copy of Department of Transportation publication FMCSA-ESA-03-005 (or its successor publication) entitled "Ready to Move?"
 - b. Before execution of contract for service, provide shipper with copy of Department of Transportation publication OCE 100, entitled "Your Rights and Responsibilities When You Move" [see 49 C.F.R. § 375.213].
5. Retain a copy of each binding estimate as an attachment to be made an integral part of bill of lading contract [49 C.F.R. § 375.403(b)(2)].
6. If it appears an individual shipper has tendered additional household goods or requires additional services not identified in binding estimate [49 C.F.R. § 375.403(b)(5)]:
 - a. Carrier is not required to honor estimate.
 - b. If agreement cannot be reached as to price or service requirements for the additional goods or services, carrier is not required to service shipment.
 - c. If carrier elects to service shipment, it must do one of following before loading shipment:

NOTE:

Once a carrier loads a shipment, failure to execute a new binding estimate or a non-binding estimate signifies that the carrier has reaffirmed the original binding estimate. The carrier may not collect more than the amount of the original binding estimate [49 C.F.R. § 375.403(b)(6)].

(1) Reaffirm carrier's binding estimate; or

(2) Negotiate revised written binding estimate listing additional household goods or services.

(3) Agree with individual shipper, in writing, that both carrier and shipper will consider original binding estimate as a non-binding estimate [see § 54.122[1][a]].

7. If carrier believes that additional services are necessary to properly service a shipment after household goods are in transit, carrier must [49 C.F.R. § 375.403(b)(7)]:

a. Inform individual shipper what the additional services are before performing those services.

b. Allow shipper at least one hour to determine whether shipper wants the additional services performed.

c. If individual shipper agrees to pay for the additional services:

(1) Execute written attachment to be made an integral part of bill of lading contract.

(2) Have individual shipper sign the written attachment via fax transmission, e mail, overnight courier, or certified mail with return receipt requested.

(3) Bill individual shipper for the additional services after 30 days from delivery.

d. If individual shipper does not agree to pay for additional services:

(1) Carrier should perform only those additional services that are required to complete the delivery; and

(2) Bill individual shipper for the additional services after 30 days from delivery.

8. If individual shipper requests additional services after household goods are in transit, carrier must [49 C.F.R. § 375.403(b)(8)]:

a. Inform shipper of additional charges that will be billed.

b. Require full payment at destination of original binding estimate only.

c. Bill for payment of balance of any remaining charges for additional services no sooner than 30 days after date of delivery.

9. Relinquish possession of shipment upon shipper's offer to pay amount of binding estimate [49 C.F.R. § 375.403(b)(9)].

NOTE:

Failure to relinquish possession of a shipment upon an individual shipper's offer to pay the binding estimate amount constitutes a failure to transport a shipment with "reasonable dispatch" and subjects the shipper to cargo delay claims under 49 C.F.R. Part 370 [49 C.F.R. § 375.403(b)(9)].

10. Retain copy of estimate for at least one year from date carrier made estimate, and keep it as an attachment to be made an integral part of the bill of lading contract [49 C.F.R. § 375.403(c)].

[2] Order for Service

NOTE:

Every carrier must prepare an order for service before receipt of the household goods from an individual shipper [49 C.F.R. 375.501(a)]. A copy of the completed order for service must be furnished to the shipper when the order is executed [49 C.F.R. § 375.501(c)].

1. Draft order for service [see § 54.243] containing following minimum information [49 C.F.R. § 375.501(a)]:

- a. Name, address, and FMCSA U.S. DOT number assigned to mover responsible for performing service.
- b. Shipper's name, address, and, if available, telephone number.
- c. Name, address, and telephone number of delivering carrier's office or agent located at or nearest to destination point.
- d. Telephone number at which shipper or consignee may contact carrier or its designated agent.
- e. Agreed pickup and delivery dates [see § 54.243[2], P9]:
 - (1) Agreed pickup and delivery dates;
 - (2) Agreed period or periods within which pickup, delivery, or entire move will be accomplished.
 - (3) If shipment is to be transported on guaranteed service basis, guaranteed dates or periods for pickup, transportation, and delivery, and any penalty or per diem requirements of agreement.
- f. Names and addresses of any other motor carriers, when known, that will participate in interline transportation of shipment.
- g. Form of payment carrier and carrier's agents will honor at delivery.

NOTE:

The payment information must be the same that was entered on the estimate [49 C.F.R. § 375.501[(a)(7)]].

- h. Terms and conditions for payment of total charges, including notice of any minimum charges.
- i. Maximum amount carrier will demand at time of delivery to obtain possession of shipment, when shippers transports on a collect-on-delivery basis.

j. Surface Transportation Board's required released rates valuation statement, and the charges, if any, for optional valuation coverage.

NOTE:

The released rates may be increased annually by the carrier based on the Department of Commerce's Cost of Living Adjustment [49 C.F.R. § 375.501[(a)(10)].

k. Complete description of any special or accessorial services ordered and minimum weight or volume charges applicable to shipment, subject to following conditions:

(1) Carrier that provides service for individual shippers on rates based on transportation of a minimum weight or volume must indicate on order for service minimum weight- or volume-based rates and minimum charges applicable to the shipment.

(2) If carrier fails to indicate minimum rates and charges, carrier's tariff must provide that it will compute final charges relating to such a shipment based upon actual weight or volume of shipment.

l. Any identification or registration number carrier assigns to shipment.

m. If non-binding estimate was given, following information in accordance with estimate [see § 54.243[2], P 12]:

(1) Amount of estimated charges.

(2) Method of payment.

(3) Maximum amount required to be paid at delivery to secure possession of goods.

n. If binding estimate was given, following information in accordance with estimate [see § 54.243[2], P 12]:

(1) Amount of charges required to be paid under estimate.

(2) Terms of payment.

o. Whether shipper requests notification of charges before delivery, and if so, telephone number or address at which this notice will be received.

2. Provision that parties may agree in writing to amend order before loading [49 C.F.R. § 375.501(f); see § 54.243[2], P 14].

3. Have order signed by shipper who ordered service [49 C.F.R. § 375.501(c)].

4. Have order signed by carrier or carrier's agent [49 C.F.R. § 375.501(c)].

5. Provide dated copy of order for service to individual shipper at time carrier signs order [49 C.F.R. § 375.501(c)].

[3] Bill of Lading

1. Draft bill of lading or receipt for interstate shipment of household goods to include following

minimum information [*see* 49 C.F.R. 375.505(b); *see also* § 54.244[2], pt. I]:

- a. Name and address of motor carrier issuing bill of lading.
- b. Names and addresses of any other motor carrier, if known, that will participate through interline in transportation.
- c. Name, address, and telephone number of carrier's office that should be contacted in relation to shipment.
- d. Form of payment carrier and carrier's agents will honor at delivery.

NOTE:

The payment information must be the same that was entered on the estimate and order for service [49 C.F.R. § 375.505(b)(4)].

e. If transportation is on C.O.D. basis:

- (1) Name, address, and, if furnished, telephone number, fax number, or e-mail address of person to whom notification of charges should be given [*see* 49 C.F.R. 375.505(b)(5)].
- (2) Maximum amount carrier will demand at time of delivery to obtain possession of shipment [49 C.F.R. § 375.505(b)(11)].

f. For non-guaranteed service:

NOTE:

These date or periods entered on the bill of lading must conform to the dates or periods on the order for service [49 C.F.R. 375.505(b)(1); *see* § 54.243].

Unless accepted for shipment on guaranteed basis, the shipment must be transported with reasonable dispatch [49 C.F.R. 375.601]. "Reasonable dispatch" means transportation (other than transportation under tariff provisions requiring guaranteed delivery) in a timely manner. If the carrier cannot deliver the goods with reasonable dispatch, the carrier must notify the shipper as soon as it becomes apparent that the service cannot comply with the order for service [*see* 49 C.F.R. 375.605(a)].

- (1) Agreed date or period of time for pickup.
- (2) Agreed date or period of time for delivery.

g. For guaranteed service, subject to tariff provision, the following:

- (1) Date for pickup.
- (2) Date for delivery.
- (3) Any penalty or per diem entitlements due shipper for noncompliance.

h. Actual date of pickup.

- i. Company or carrier identification number of vehicle on which shipment is loaded.
- j. Terms and conditions for payment of total charges, including notice of any minimum charge.
- k. Required released rates valuation statement.
- l. Evidence of any insurance coverage sold to or procured for shipper by carrier, including amount of premium [*see* 49 C.F.R. § 375.505(b)(13)].
- m. Each attachment to the bill of lading, specifically including the following if not provided elsewhere by shipper [49 C.F.R. § 375.505(b)(13)]:

- (1) The binding or non-binding estimate.
- (2) The order for service.
- (3) The inventory.

2. Set forth terms and conditions of contract between carrier and shipper [49 C.F.R. § 375.505(a) (bill of lading must contain terms and conditions of the contract and may be combined with order for service)], e.g.:

NOTE:

The bill of lading contains on its back side certain general provisions that apply to the document. These provisions will be titled "Contract Terms and Conditions" or similar wording. The Contract Terms and Conditions stated in the various bill of lading forms used by the various carriers are all substantially the same, although format and wording differ.

- a. Specify shipper's obligation to pay all charges applicable under carrier's tariff or bill of lading [*see* § 54.244[2], pt. II(A)(1)].
- b. State shipper's promise to indemnify carrier against loss or damage caused by inclusion of explosives or dangerous articles in shipment [*see* § 54.244[2], pt. II(A)(2)].
- c. State scope of carrier's liability for loss or damage [*see* § 54.244[2], pt. II(B)]:

- (1) Carrier is not liable for certain specified types of loss or damages.
- (2) Carrier's maximum liability is determined by shipper's release value declaration.

NOTE:

This maximum liability may be \$.60 per pound of the weight of the lost or damaged article or \$1.25 times the weight in pounds of the entire shipment or the lump sum released value [*see* 49 C.F.R. §§ 375.201(b)].

- d. Describe carrier's liability for delay in delivering shipment [*see* § 54.244[2], pt. II(C)].
- e. Specify that if carrier is unable for reasons outside carrier's control to deliver shipment at address shown on bill, at any changed address of which carrier has been notified, carrier may store goods in warehouse at shipper's expense,

subject to lien for all accrued charges [see § 54.244[2], pt. II(D)].

f. Specify that if shipper or consignee of shipment fails or refuses to accept delivery, carrier has right to sell goods to pay accrued charges [see § 54.244[2], pt. II(E)].

g. Provide that for claims for loss or damage [see § 54.244[2], pt. II(F)]:

(1) Shipper or consignee must immediately notify carrier of all claims.

(2) Shipper must give carrier reasonable opportunity to inspect damage.

(3) All claims must be in writing.

NOTE:

For a claim of loss form to be completed by the shipper, see § 54.220.

(4) State that carrier's liability for damaged article cannot exceed cost of repair or replacement.

(5) Provide that carrier is not liable for loss or damage occurring after delivery.

(6) When carrier is directed to unload property where consignee or agent is not present, provide that risk of loss shifts to owner after unloading.

(7) If carrier is directed to load property where shipper or agent is not present, provide that shipper bears risk of loss before loading.

(8) Limit liability for loss or damage of one article of set or matched pieces to value of that individual article.

h. Limit time within which claims can be filed and suits instituted.

3. Ensure that carrier or carrier's agent and shipper sign and date bill of lading.

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesRates & Tariffs



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22-54 California Legal Forms--Transaction Guide §§ 54.123-54.199

[Reserved]

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

A. Intrastate Shipment of Household Goods

1. Shipping Documents

22-54 California Legal Forms--Transaction Guide § 54.200

§ 54.200 Basis for Carrier's Estimated Cost of Services; Table of Measurements [MAX-4 Items 112, 400, 410]

[1] Comment

[a] Use of Form

This form is a Basis for Carrier's Estimated Cost of Services, and includes the table of measurements [MAX-4, item 400; *see* [c], *below*]. Carriers may use this form to indicate to prospective shippers of household goods the types of services available, and to have prospective shippers indicate the services requested or not requested. Use of this form is not required, and some carriers may simply use a written estimate [*see* § 54.201]. When this form is used, the information provided in the completed form will be used in preparing the written estimate.

The carrier must complete this basis for estimate only after the person giving the estimate visually inspects the goods prior to determining the estimated cost of the requested services. The form must be signed by the shipper or the shipper's representative, and a duplicate must be given to the shipper [MAX-4, item 112(1)].

This form contains all the information required by the Public Utilities Commission [*see* MAX-4, items 112(2), 400]. The words "Basis for Carrier's Estimated Cost of Services" must be printed across the top of the form in red letters at least one-eighth of an inch high [MAX-4, item 112(2)]. The form must also contain two shipper statements [*see* MAX-4, item 400], imprinted in letters at least 10-point bold, universe or Gothic [MAX-4, item 112(2)].

Household goods carriers must observe all rules and regulations controlling the estimates to be given to shippers of the rates and charges assessed for services. Noncompliance is unlawful [*Pub. Util. Code* § 5245].

[b] Recordkeeping

The issuing carrier must retain the original of this form and preserve it, subject to inspection by the PUC, for at least three years from either (1) the date of the freight bill and shipping order; or (2) the date of this basis for estimate if the carrier does not perform the transportation and shipment [MAX-4, item 112(3)].

[c] Table of Measurements

The Table of Measurements and Estimate illustrated in this form is set forth as prescribed by the Public Utilities Commission [see MAX-4, items 116(2), 410]. The table indicates the articles to be shipped, the cubic footage assigned to each type of article by the Public Utilities Commission, the number of pieces of each type of article, the total cubic footage, and the estimated total weight of the proposed shipment. The reverse side of this basis for carrier's estimated cost of services must include this table [MAX-4, item 116(3)] unless the goods being shipped are used office equipment, used store fixtures, and equipment used in offices, stores, hospitals, libraries, museums, places of learning, and other institutions [MAX-4, items 12(1)(b), 116].

The carrier must complete this table when estimating charges on any shipment that includes service for which rates in MAX-4 are based on weight or cubic feet [MAX-4, item 116(1)]. The table must be in the prescribed form, or on an electronic form containing all of the required information [see MAX-4, items 116(2), 410]. When determining the total approximate weight in pounds, the total cubic footage determined under the table must be multiplied by seven [MAX-4, item 116(4)].

[2] FORM**Basis for Carrier's Estimated Cost of Services; Table of Measurements [MAX-4 Items 112, 400, 410]**

This is not a contract

BASIS FOR CARRIER'S ESTIMATED COST OF SERVICES

[name of carrier]

[T number of carrier]

[address of carrier]

[telephone number]

Carrier has conducted business using the following names: _____ [specify all real and fictitious business names used by carrier to conduct operations].

Carrier's principal place of business is: _____.

[Optional: add, if desired:]

Carrier also conducts business with the public at the following local address(es): [specify].

[Continue with the following:]

[If more than one name is listed above, add:]

The transportation of goods under this Basis for Carrier's Estimated Cost of Services will be performed by: _____ [name of carrier under which transportation is to be performed].

[Continue with the following:]

Name	Phone No.	Date				
Moving from	Moving to					
SERVICES REQUESTED:	Distance Move	Hourly Move	Piece Move			
SERVICE	SR	SNR	SERVICE	SR	SNR	CNK
Additional helpers (No.)		Overtime packing labor				
Appliance Servicing		SIT monthly storage charge				
Elevator at origin		SIT moving into warehouse				
Elevator at destination		SIT moving out of warehouse				
Flights at origin (No.)		SIT warehouse handling				
Flights at destination (No.)		SIT warehouse wrapping or fumigating				
Hoisting or lowering at origin (No.)		Shuttle service at origin				
Hoisting or lowering at destination (No.)		Shuttle service at destination				
Long carry at origin (No.)		Disassembly of items				
Long carry at destination (No.)		Assembly of items				
Split delivery		Van & 1 person				

Split pickup	Van & 2 persons
Packing material delivery/pickup	Overtime or premium labor
Packing material	Expedited service
Packing labor: Hourly By Unit	Bulky Article(s) (No.)
Unpacking labor: Hourly By Unit	Additional equipment required

Shipment is valued at actual cash value up to \$20,000, or as declared by the shipper.

Shipment valuation \$_____

TRANSPORTATION VALUATION OPTIONS:

SR : Service Requested

60 cents/lb/article _____ @ no additional charge

SNR : Service Not Requested

Actual cash value _____ @ \$_____ per \$100 of declared value

CNK : Condition Not Known

Full value* _____ @ \$_____ per \$100 of declared value

SIT : Storage-in-Transit

STORAGE-IN-TRANSIT VALUATION OPTIONS

Actual cash value _____ @ \$_____ per \$100 of declared value

Full value _____ @ \$_____ per \$100 of declared value

(* Deductible options may be available under full protection plan.)

CHARGES TO BE PAID BY:

Cash ☐ Certified Check ☐ Money Order ☐
☐ Credit Card ☐ Personal Check ☐

Number of Articles to be moved ☐

Number of rooms to be moved ☐

Total number of Packing Containers to be Supplied by Carrier ☐

I AM IN NO WAY OBLIGATED TO HAVE THE ABOVE-NAMED CARRIER PERFORM ANY SERVICES. I REQUEST ONLY THE SERVICES AND ITEMS LISTED ON THIS DOCUMENT BE CONSIDERED IN DETERMINING THE ESTIMATED COST. I UNDERSTAND THAT ADDITIONAL CHARGES WILL BE MADE FOR ANY ADDITIONAL SERVICES REQUESTED AT A LATER DATE.

I hereby acknowledge that I have received a copy of the informational material "IMPORTANT INFORMATION FOR PERSONS MOVING HOUSEHOLD GOODS."

Signature of Shipper or Shipper's Representative..... Date

NOTE:

If moving conditions change between now and moving date, call the carrier.

[The following table must be printed on the reverse side of the basis for carrier's estimated cost for services (MAX-4, item 116(3):]

TABLE OF MEASUREMENTS AND ESTIMATE

COLUMN 1

COLUMN 2

Articles Not to be Shipped	ARTICLE	Cu. ft. per Pc.	No. of Pc.	Cu. ft.	Articles Not to be Shipped	ARTICLE	Cu. ft. per Pc.	No. of Pc.	Cu. ft.

LIVING & FAMILY ROOMS

LIVING & FAMILY ROOMS (Cont.)

Bar, Portable	15				Rug, Small Roll or Pad	3			
Bench, Fireside or Piano	5				Sofa, 2 Cush- ions	35			
Bookcase	20				Sofa, 3 Cush- ions	50			
Bookshelves, Sectional	5				Sofa, 4 Cush- ions	60			
Chair, Arm	10				Sofa, Sect., per Sect.	30			
Chair, Occa- sional	15				Studio, Couch or Hideabed	50			
Chair, Over- stuffed	25				Tables, Cof- fee	5			
Chair, Rock- er	12				Table, Dropleaf	12			
Chair, Straight	5				Tables, Nest- ing	2			
Clock, Grandfather	20				Television, Big Screen	40			

Day Bed	30	Television Combination	25
Desk, Small or Winthrop	22	Television or Radio Console	15
DINING ROOM			
Desk, Secretary	35	Bench, Harvest	10
Fireplace Equipment	5	Buffet	30
Foot Stool	2	Cabinet, China	25
Lamp, Floor or Pole	3	Cabinet, Corner	20
Magazine Rack	2	Chair, Dining	5
Music Cabinet	10	Rug, Large Roll or Pad	10
Piano, Baby Grand or Upright	70	Rug, Small Roll or Pad	3
Piano, Parlor Grand	80	Server	15
Piano, Spinnet	60	Table, Dining	30
Rug, Large Roll or Pad	10	Tea Cart	10
Subtotal Col. 1		Subtotal Col. 2	

TABLE OF MEASUREMENTS AND ESTIMATE

COLUMN 3

COLUMN 4

Articles Not to be Shipped	ARTICLE	Cu. ft. per Pc.	No. of Pc.	Cu. ft.	Articles Not to be Shipped	ARTICLE	Cu. ft. per Pc.	No. of Pc.	Cu. ft.
BEDROOM					KITCHEN (Continued)				
	Bed, including Spring & Mattress:					Waterbed		20	
	Double	60				Waterbed		20	
	King Size	70				Bed, Youth		30	

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Single or Hollywood	40	Chair, Child's	3
Rollaway	20	Chair, Rock-er	12
Bunk (Set of 2)	70	Chest	12
Bookshelves, Sectional	5	Chest, Toy	5
Bureau, Dresser, Chest or Drawers, Chiffonier or Chiffonier	25	Crib, Baby	10
Cedar Chest	15	Pen, Play	10
Chair, Bou- doir	10	Rug, Large Roll or Pad	10
Chair, Straight or Rocker	5	Rug, Small Roll or Pad	3
Chaise Lounge	25	Table, Child's	5
DINING ROOM			
KITCHEN			
Desk, Small or Winthrop	22	Baker's Rack	20
Dresser or Vanity Bench	3	Breakfast Suite Chairs	5
Dresser, Double (Mr. & Mrs.)	50	Breakfast Table	10
Exercise Bike	10	Butcher Block	10
Night Table	5	Chair, High	5
Rug, Large Roll or Pad	10	Ironing Board	2
Rug, Small Roll or Pad	3	Kitchen Cabinet	30
Vanity Dresser	20	Microwave	5
Wardrobe, Small	20	Serving Cart	15
Wardrobe, Large	40		

	Stool	3
	Table	5
Subtotal Col.	Subtotal Col.	
3	4	

TABLE OF MEASUREMENTS AND ESTIMATE

COLUMN 5				COLUMN 6			
Articles Not to be Shipped	ARTICLE	Cu. ft. of per Pc.	No. of Pc.	Articles Not to be Shipped	ARTICLE	Cu. ft. of per Pc.	No. of Pc.
KITCHEN (Continued)				PORCH, OUTDOOR FURNITURE AND EQUIP- MENT (Continued)			
	Utility Cabin- et	10					
	APPLI- ANCES (LARGE) Air Condi- tion, Window	30			Clothes Dry- er Rack	5	
	Dishwasher	20			Garden Hose and Tools	10	
	Dryer, Elec- tric or Gas	25			Glider or Settee	20	
	Freezer: (Cu. Capacity in feet)				Ladder, Ex- tension	10	
	10 or less	10			Lawn Mower (Hand)	5	
	11 to 15	45			Lawn Mower (Power)	15	
KITCHEN (Continued)				PORCH, OUTDOOR FURNITURE, AND EQUIP- MENT (Continued)			
	16 and over	60			Lawn Mower (Riding)	35	
	Range, Elec- tric or Gas	30			Leaf Sweeper	5	
	Refrigerator: (Cu. Capacity in Feet)				Outdoor Child's Slide	10	
	6 or less	30			Outdoor	20	

7 to 10	45	Child's Gym	
		Outdoor Swings	30
11 and over	60	Picnic Bench	5
Sewing Machine, Portable	5	Picnic Table	20
Sewing Machine, Cabinet	10	Roller, Lawn	15
Trash Compactor	10	Sand Box	10
Vacuum Cleaner	5	Spreader	1
Washing Machine	25	Table	10
		Umbrella	5
Barbecue or Portable Grill	10	Wheelbarrow	8
Chairs, Lawn	5	GARAGE	7
		Ash or Trash Can	
Chairs, Porch	10	Basket (Clothes)	5
Subtotal Col. 5		Subtotal Col. 6	

TABLE OF MEASUREMENTS AND ESTIMATE

COLUMN 7

COLUMN 8

Articles Not to be Shipped	ARTICLE	Cu. ft. per Pc.	No. of Pc.	Cu. ft.	Articles Not to be Shipped	ARTICLE	Cu. ft. per Pc.	No. of Pc.	Cu. ft.

GARAGE (Continued)

Bicycle	10
Card Table	1
Cabinet, Filing	20
Carriage, Baby	20

GARAGE (Continued)

Table, Utility	5
Tackle Box	1
Tires	5
Tool Chest	10

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Chairs, Fold- ing	1	Tricycle	5
Child's Car Seat	2	Truck	10
Clothes Hamper	5	Vacuum Cleaner	5
Cot, Folding	10	Wagon, Child's	5
Desk, Office	30	Waste Paper Basket	2
Fan	5	Work Bench	20
Fernery or Plant Stands	10	OTHER ITEMS (Specify)	
Fishing Poles	1		
Foot Lockers	5		
Golf Bag	2		
Heater, Gas or Electric	5		
Metal Shelves	5		
Ping Pong Table	20		
Pool Table	40		
Power Tools	20		
Sled	2		
Step Ladder	5		
Suitcase	5		
Subtotal Col. 7		Subtotal Col. 8	

TABLE OF MEASUREMENTS AND ESTIMATE (Concluded)

COLUMN 9

COLUMN 10

Articles Not to be Shipped	ARTICLE	Cu. ft. per Pc.	No. of Pc.	Cu. ft.	Articles Not to be Shipped	ARTICLE	Cu. ft. per Pc.	No. of Pc.	Cu. ft.

CONTAINERS
(To Be Packed by Shipper)

Dish Pack 10

CONTAINERS (Continued)
(To Be Packed by Carrier)Mirror/Pic-
ture 5

Carton		Wardrobe	15
1 1/2 cu. ft.		Crates:	
3 cu. ft.		x x x	
4 1/2 cu. ft.		x x x	
6 cu. ft.		x x x	
6 1/2 cu. ft.		x x x	
Lamps	5	Subtotal Col.	
		10	
Mirror/Pic- ture	5		
Wardrobe	15	Total Col. 1	
CONTAINERS		Total Col. 2	
(To Be Packed by Carrier)			
Dish Pack	10	Total Col. 3	
Carton		Total Col. 4	
1 1/2 cu. ft.		Total Col. 5	
3 cu. ft.		Total Col. 6	
4 1/2 cu. ft.		Total Col. 7	
6 cu. ft.		Total Col. 8	
6 1/2 cu. ft.		Total Col. 9	
Lamp	5	Total Col. 10	
Subtotal Col.		GRAND	
9		TOTAL	

Explanation of Abbreviations:

@ = at Col. = Column Cu. Ft. = Cubic Feet Lbs. = Pounds Mi = Miles No. = Number Pc. = Piece Wt. = Weight

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesRates
& Tariffs



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

A. Intrastate Shipment of Household Goods

1. Shipping Documents

22-54 California Legal Forms--Transaction Guide § 54.201

§ 54.201 Estimated Cost of Services [MAX-4, Items 108, 420]

[1] Comment

[a] Use of Form

This form is the carrier's Estimated Cost of Services. It is drafted to satisfy the requirements of Maximum Rate Tariff 4 [see MAX-4, items 108, 420]. A carrier of household goods may give an estimate of costs for proposed services to the shipper, but is not required to do so [MAX-4, item 108(1)(a)]. When given, however, the estimate *must* be in writing, and may be given only after a visual inspection of the goods to be moved [MAX-4, item 108(1)(a)].

This form is set forth as prescribed by the Public Utilities Commission [see MAX-4, items 108, 420] and contains all the required information [see MAX-4, item 108(1)(b)]. The words "Estimated Cost of Services" must be printed across the top of the form in red letters at least one-eighth of an inch high [MAX-4, item 108(1)(b)]. The form must also contain an important notice [see MAX-4, item 420], imprinted in letters at least 10-point bold, universe or Gothic [MAX-4, item 108(1)(b)].

The form must be signed by the carrier's estimator, and a duplicate must be given to the shipper [see MAX-4, item 108(1)(d)].

Household goods carriers must observe all rules and regulations controlling the estimates to be given to shippers of the rates and charges assessed for services. Noncompliance is unlawful [*Pub. Util. Code* § 5245].

[b] Completion of Form

The carrier's estimator must base the estimated cost of services on the information, including the articles listed and the services requested, in the basis for carrier's estimated cost of services and, if the charges are based on weight, the table of measurements and estimate [MAX-4, item 108(1)(c)(1); see § 54.200]. All factors that affect the move at the point of origin, such as the number of flights of stairs, the existence of any long carries, the presence of elevators, and the

amount of hoisting and lowering, must be considered [MAX-4, item 108(1)(c)(2)]. In arriving at an estimate, the estimator must use cubic measurements no less than those shown for each article involved on the table of measurements and estimate [MAX-4, item 108(1)(c)(4); *see* § 54.200]. When determining the total approximate weight of the shipment in pounds, the total cubic footage determined under the table must be multiplied by seven [MAX-4, item 108(1)(c)(4)]. If the total charges calculated in the estimate exceed the total charges calculated using the maximum fixed rate, the estimator must note the difference in total charges on the estimate [MAX-4, item 108(1)(e)].

[c] Maximum Charges When Estimate Issued at Least 3 Days Before Move

When an estimate is issued at least three days before the day of the move, the maximum charge is ordinarily the lesser of the following [MAX-4, item 108(2)(a)]:

- The amount of the estimate, plus any charges on a change order, which may exceed the charges calculated using the maximum fixed rate.
- The charges calculated using the rates quoted in the agreement for services, multiplied by the actual units of measurement.

However, if the carrier and the shipper agree that the amount of the estimate is both the maximum and minimum amount due for the services described in the estimate, then the amount charged is the amount of the estimate. Such an agreement must be noted on both the estimate and the agreement by the carrier applying minimum weights, hours, or dollar amounts producing a price equal to the total estimated cost of services. In this case, weighing the load or recording hours is not required [MAX-4, item 108(2)(a)].

In addition, rates quoted on a change order may exceed maximum fixed rates when both the change order and the estimate are issued at least three days before the day of the move [MAX-4, item 108(2)(a)].

"At least three days before the move" means on or before the third day before the move. For example, if Saturday is the day of the move, the estimate (and any change order) must be given on or before Wednesday in order to exceed the maximum fixed rates [*see* MAX-4, item 108(2)].

[d] Maximum Charges When Estimate Issued Less Than 3 Days Before Move

When an estimate is issued less than three days before the day of the move, the maximum charge is the lesser of the following [MAX-4, item 108(2)(b)]:

- The amount of the estimate, plus any charges on a change order, which may not exceed the charges calculated using the maximum fixed rate.
- The charges calculated using the rates quoted in the agreement for services, multiplied by the actual units of measurement.

"At least three days before the move" means on or before the third day before the move. For example, if Saturday is the day of the move, the estimate (and any change order) must be given on or before Wednesday in order to exceed the maximum fixed rates [*see* MAX-4, item 108(2)].

[e] Recordkeeping

The issuing carrier must retain the original of this form, subject to inspection by the PUC, for at least three years from either (1) the date of the freight bill and shipping order; or (2) the date of this estimate if the carrier does not perform the

transportation and shipment [MAX-4, item 108(1)(f)].

[2] FORM

Estimated Cost of Services [MAX-4, Items 108, 420]

This is not a contract

ESTIMATED COST OF SERVICES

[name of carrier]

[T number of carrier]

[address of carrier]

[telephone number]

Carrier has conducted business using the following names: _____ [specify all real and fictitious business names used by carrier to conduct operations].

Carrier's principal place of business is: _____.

[Optional: add, if desired:]

Carrier also conducts business with the public at the following local address(es): [specify].

[Continue with the following:]

[If more than one name is listed above, add:]

The transportation of goods under this Estimate will be performed by: _____ [name of carrier under which transportation is to be performed].

[Continue with the following:]

NAME _____ PHONE NO. _____ DATE _____

MOVING FROM _____ REGION _____ DATE OF MOVING _____

MOVING TO _____ REGION _____ DATE OF DELIVERY _____

Charge to (Corporation or Individual)

SERVICES REQUESTED: Distance Move

_____ Hourly Move
 _____ Piece Move
 _____ No. of Art-

icles to be Moved

_____ No. of Rooms to be Moved

_____ Total No. of
 Packing Containers to be supplied by Carrier

CHARGES TO BE PAID BY: Cash

_____ Certified
 Check _____ Money
 Order _____ Credit
 Card _____ Personal
 Check _____

APPROXIMATE WEIGHT: Total Cubic Feet (from Table of Measurements)

_____ cu. ft. at 7 lbs.
 per cu. ft. _____ lbs.

Click here to view image.

LOCAL MOVING

Loading

_____ hrs.

Dbl Driving

_____ hrs

Unload

_____ hrs

TOTAL

_____ hrs

Estimated

_____ hrs. for

_____ van and

_____ persons

at \$ _____ per

hour--straight time

Estimated

_____ hrs. for

_____ van and

_____ persons

at \$ _____ per

hour--overtime

Moving charge

\$ _____

Piano, Type _____ No. Flights _____	\$ _____

Bridge or Ferry Tolls (Estimated) _____	\$ _____
Hoisting/Lowering _____	\$ _____
Valuation Charge (see Basis for Carrier's Estimated Cost of Services)	\$ _____
Other Services _____	\$ _____
ESTIMATED COST	\$ _____

PACKING AND UNPACKING CHARGES MAY BE MADE EITHER ON AN HOURLY BASIS OR A UNIT BASIS.

PACKING AND UNPACKING

Hourly Labor

Pack at Residence, Estimated _____ hrs. for Pack-
ers, at \$ _____ per
hour--straight time

Pack at Residence, Estimated _____ hrs. for
Packers, at
\$ _____ per hour-
-overtime

Packing Charge \$ _____

Unpack at Residence, Estimated _____ hrs. for Un-
packers, at \$ _____
per hour--straight time

Unpack at Residence, Estimated _____ hrs. for
Unpackers, at
\$ _____ per hour-
-overtime

Unpacking Charge \$ _____

Hourly Packing Labor Costs \$ _____

MATERIAL AND UNIT PACKAGING

Charge Per Unit

Quantity	Pack.....Unpack

	 Material	
Dish Packs or Barrels		\$
		-
Cartons over 1 1/2 cu. ft.		\$
		-
Cartons over 3 cu. ft.		\$
		-
Cartons over 4 1/2 cu. ft.		\$
		-
Cartons over 6 cu. ft.		\$
		-
Cartons over 6 1/2 cu. ft.		\$
		-
Wardrobes		\$
		-
Mattress Ctn. Single		\$
		-
Mattress Ctn. Double		\$
		-
Mattress Ctn. King		\$
		-
Mattress Ctn. Crib		\$
		-
		\$
		-
Glass Packs		\$
		-
Crate, Size		\$
		-
Crate, Size		\$

	—
Materials and/or Unit Packing Costs	\$ _____

	—
Total (Hourly or Unit) Packing and Materials Costs	\$ _____

	—
DELIVERY OF PACKING MATERIAL	\$ _____
_____	_____
	—

REMARKS

_____ (Specify any remarks, including minimums such as weight, hours, per pound valuation, etc.)

LOCAL MOVING _____	\$ _____
STORAGE _____	\$ _____
LONG DISTANCE MOVING _____	\$ _____
PACKING AND/OR UNPACKING _____	\$ _____
MISCELLANEOUS _____	\$ _____
TOTAL COST	\$ _____
Amount total cost EXCEEDS charges under maximum fixed rate	\$ _____

IMPORTANT NOTICE: This estimated cost document covers only the articles and services listed on the Basis for Carrier's Estimated Cost of Services. ACTUAL CHARGES FOR THOSE SERVICES WILL NOT EXCEED THE AMOUNT OF THE ESTIMATED COST. No guarantee can be made as to specific dates of pickup or delivery of your shipment, unless you make special arrangements with the carrier.

NOTICE TO ESTIMATOR: It is mandatory to use cubic footage for each article at not less than that shown on the Table of Measurements and Estimate and the total cubic footage be multiplied by seven to determine the total approximate weight for determining the charge under maximum fixed rate.

ESTIMATOR'S SIGNATURE: _____ DATE: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesRates
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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

A. Intrastate Shipment of Household Goods

1. Shipping Documents

22-54 California Legal Forms--Transaction Guide § 54.202

§ 54.202 Change Order for Services [MAX-4 Items 120, 440]

[1] Comment

[a] Use of Form

This form is a Change Order for Services. The carrier must prepare this form in duplicate whenever a shipper requests additional services, or adds additional articles to the shipment, that are not covered in the Basis for Carrier's Estimated Cost of Services or the "not to exceed price" on the Agreement for Services [MAX-4, items 120, 440]. The change order must be signed by the carrier and the shipper before performing any specified service, and the signed original must be delivered to the shipper before or at the time that service begins [MAX-4, item 120(1)].

[b] Contents

A change order for services must contain the following information [MAX-4, item 120(1)]:

- Date.
- Shipping Order/bill of lading number.
- Name, address, and T number of the carrier or carriers.
- A description of the additions to the shipment, itemizing only the additional articles.
- A description of the additional transportation and accessorial services to be performed, including the number of helpers and the number of packers to be provided.
- The rates to be applied to additional articles or services.

- The valuation of the shipment, if it differs from that provided on the agreement [see MAX-4, item 136; see also § 54.203].

In addition, the change order must contain specified disclosures and acknowledgments of those disclosures, placed in an appropriate areas of the document [see MAX-4, item 120(1)(h), (i)].

The change order must be signed by the carrier and the shipper or the shipper's representative [MAX-4, item 120(1)(j)].

[c] Recordkeeping

A duplicate of all change orders must be retained and preserved by the issuing carrier, subject to inspection, for at least three years from the date delivered [MAX-4, item 120(2)].

[2] FORM

Change Order for Services [MAX-4 Items 120, 440]

CHANGE ORDER FOR SERVICES

[name of carrier]

[T number of carrier]

[address of carrier]

[telephone number]

Carrier has conducted business using the following names: _____ [specify all real and fictitious business names used by carrier to conduct operations].

Carrier's principal place of business is: _____.

[Optional: add, if desired:]

Carrier also conducts business with the public at the following local address(es): [specify].

[Continue with the following:]

[If more than one name is listed above, add:]

The transportation of goods under this Change Order will be performed by: _____ [name of carrier under which transportation is to be performed].

[Continue with the following:]

THIS WILL CERTIFY AND ATTEST THAT SHIPPER OR SHIPPER'S REPRESENTATIVE AS SHOWN ON ORDER FOR SERVICES NO. _____ DATED _____ WITH _____ [name of carrier] REQUESTS ADDITIONAL SERVICES AT CHARGES AS INDICATED ON THE REVERSE OF THIS FORM.

Document issued at:	Date Service Req'd	A.M. P.M.
	Pack Date	A.M. P.M.
	Delivery Date Req'd	A.M. P.M.
	Order taken by:	

FROM: _____ Floor
 _____ Apt. No.
 _____ Phone

TO: _____ Floor
 _____ Apt.
 No. _____
 Phone _____

van & _____	van & _____	_____
_____ persons	_____ sons	person
\$_____ per hr.	\$_____ per hr.	@ \$_____ per hr.

PACKING INSTRUCTIONS: pack

LONG DISTANCE RATES (Rate per 100 lbs. between points named)

Miles	500 lbs.	1000 lbs.	2000 lbs.	5000 lbs.	9000 lbs.	12000 lbs.	16000 lbs.
	\$	\$	\$	\$	\$	\$	\$

Additional charge for pickup or delivery at other than ground floor per piece or cwt. per flight
\$ _____

Split pickup and/or delivery per stop @
\$ _____

STORAGE-IN-TRANSIT (max. 90 days)

First day @ _____ c/
cwt.

Additional days
@ _____ c/cwt./day

Warehouse hand-
ling _____ lbs.
@ _____ c/cwt.

PIECE MOVING (NOT OVER 5 PIECES)

1st Article	Add'l articles	Miles
\$ _____	\$ _____	_____

PACKING/
UNPACKING
(Either hourly
or by contain-
er)

RATES FOR
HOURLY
PACKING
LABOR (if ap-
plicable)

PACKING/CRATING @
\$ _____ per person
per hour plus all materials used on job.

UNPACKING/UNCRATING @
\$ _____ per person
per hour plus all materials used on job.

RATES & CHARGES PER UNIT
(CONTAINER)

	MAT- ERIALS	PACK- ING	UN- PAC KIN G
CONTAINER/ MATERIAL		RATE/ AMOU NT	RA TE/ AM OU NT
EST.			

NO. USED

dishpacks (not less than 5 cu. ft.)	\$	\$	\$

Cartons: 1 1/2 cu. ft.	\$	\$	\$

3 cu. ft.	\$	\$	\$

4 1/2 cu. ft.	\$	\$	\$

6 1/2 cu. ft.	\$	\$	\$

Mattress: Single size	\$	\$	\$

Double size	\$	\$	\$

King size	\$	\$	\$

Queen size	\$	\$	\$

Crib size	\$	\$	\$

Mirror Car- tons:	\$	\$	\$

Wardrobes	\$	\$	\$

Crates	\$	\$	\$

\$	\$	\$

\$	\$	\$

\$	\$	\$

TOTAL MATERIALS CHARGE

\$ _____

TOTAL UNIT PACKING CHARGE

\$ _____

TOTAL UNIT UNPACKING CHARGE

\$ _____

Driver	Loading		Delivery/Pickup of Containers		
Helper	Dbl Driving	Hrs.	TOTAL PACKING/UNPACKING HOURS @		
			\$ _____ PER		
			HR.		
Helper	Upload	Hrs.			
Van No.	TOTAL	HOURS	CHARGE	@\$_ per hr	\$ _____
				_____	_____
				_____	_____
				_____	_____

Overtime	@\$ _ per hr	\$ _____
Hours	_____	_____
	_____	—

Extra Person ()	@\$ _ per hr	\$ _____
.....Hours	_____	_____
	_____	—

Gross Wt. Lbs.	Tare Lbs.	\$ _____
	Wt.	_____
		—
Net	@\$ _ Per Cwt.	\$ _____
Weight.....Lbs.	_____	_____
	_____	—

Flight/Long Carry	@\$ _ Per Cwt.	\$ _____
	_____	_____
	_____	—

Extra Pickup or Deliv-	@\$ _	\$ _____
ery	_____	_____
	_____	—

TOTAL PACKING MA-		\$ _____

TERIAL CHARGES

—

TAX

\$ _____

—

TOTAL HOURLY PACK-
ING Hrs.

@\$_ or

\$ _____

—

TOTAL UNIT PACKING/
UNPACKING

\$ _____

—

APPLIANCES to be serviced. If none,
write "NONE"

\$ _____

—

\$ _____

—

THE ARTICLES LISTED WILL BE INCLUDED
IN THE VALUATION DECLARED IN THE
AGREEMENT FOR SERVICE UNLESS A
CHANGE IS REQUESTED.

Shipper requests a change in the valuation listed in
the agreement for service and declares shipment
value to be:

\$ _____.

The level of protection (actual cash value or full
value) indicated on the agreement will apply at
carrier's stated rate per \$100 of declared value, un-
less otherwise indicated here.

TRANSPORTATION
VALUATION OP-
TIONS

60 cents/lb/article _____ no additional charge

Actual cash value _____ \$ _____ per

_____ @ \$100 of declared value

Full value _____ \$ _____ per

_____ @ \$100 of declared value

STORAGE-
IN-TRANSIT VALU-
ATION OPTIONS

Actual cash value _____ \$ _____ per
_____ @ \$100 of declared value

Full value _____ \$ _____ per
_____ @ \$100 of declared value

HOW PAID: Cash _____ Certified Check _____ Money Order _____
_____ Credit Card _____ Personal Check _____

TOTAL \$ _____

PREPAID \$ _____

BALANCE \$ _____

I UNDERSTAND THAT THE COST FOR SERVICES RENDERED WILL _____
"NOT EXCEED" _____ [total price].
_____ [initial].

I UNDERSTAND THAT I HAVE THE RIGHT TO REFUSE TO SIGN _____
THIS CHANGE ORDER. _____ [initial].

I UNDERSTAND THAT I MAY BE REQUIRED TO PAY FOR THE SERVICES REQUESTED
ABOVE AT TIME OF DELIVERY. THESE CHARGES ARE IN ADDITION TO THOSE
CHARGES SET FORTH IN THE ESTIMATED COST OF SERVICES. CARRIER IS NOT RE-
QUIRED TO EXTEND CREDIT IN THE AMOUNT OF THE CHARGES ACCRUED FOR THE
ABOVE ADDITIONAL SERVICES. I HAVE READ THIS CONTRACT AND AGREE WITH
THE PROVISIONS HEREIN, AND HAVE RECEIVED A COPY.

Date _____.

Carrier's Representative Shipper or Shipper's Representative

[Place following on reverse side of Change Order for Services.]

ADDITIONAL SERVICES REQUESTED

SERVICE	AMOUNT	SERVICE	AMOUNT
Additional helpers(No.)		Overtime packing labor	
Appliance Servicing		SIT storage charge	
Elevator at origin		SIT move to warehouse	



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

A. Intrastate Shipment of Household Goods

1. Shipping Documents

22-54 California Legal Forms--Transaction Guide § 54.203

§ 54.203 Agreement for Services [MAX-4 Items 128, 450]

[1] Comment

[a] Use of Form

This form is an Agreement for Services between a carrier and a shipper. It is drafted in accordance with Maximum Rate Tariff 4 [see MAX-4, items 128(3), 450]. For a guide to the prescribed contents of the form, see § 54.120[4]. The carrier may select the most convenient format for the agreement [MAX-4, item 128(3)]; thus, the format of this form has been modified to some extent from the one appearing in MAX-4.

The carrier must prepare an agreement for services for all shippers who provide information in sufficient detail for the carrier to complete the agreement, regardless of whether or not the shipper commits to engage the carrier's services [MAX-4, item 128(1)]. The agreement must be complete in all details, including the carrier's initial signature binding the carrier to the quoted rates [MAX-4, item 128(1)]. The agreement must be signed by the shipper and the carrier before beginning any services specified under the agreement [MAX-4, item 128(2)]. The "not to exceed price" and the carrier's final signature must be added no later than the day of the move, but before the performance of any service in the commencement of the move [MAX-4, item 128(1)].

[b] Use of Combined Agreement and Shipping Document

The agreement for services may also be combined with the shipping document [see § 54.204] into a single document if [MAX-4, item 128(3)]:

- The single document and its issuance satisfies the requirements applicable to both agreements and shipping orders.
- The single document is properly identified as to what the document purports to be.

- The carrier maintains a copy of the signed agreement separate from the shipping document.

This agreement and the shipping order and freight bill [see § 54.204] may be combined into a single document if the above requirements are satisfied.

[c] Delivery Requirements

The carrier must deliver an original or copy of this agreement to the shipper, by mail or other convenient means, at least three days before the move, regardless of whether or not the shipper commits to engage the carrier's services [MAX-4, item 128(1)]. "At least three days before the move" means on or before the third day before the move. For example, if Saturday is the day of the move, the estimate (and any change order) must be given on or before Wednesday in order to exceed the maximum fixed rates [see MAX-4, item 128(1)].

This rule is subject to three exceptions. First, if the shipper's first contact with the carrier is less than three days before the move, the agreement may be completed on the day of the move. Second, shippers may waive the three-day advance notice at any time before the move; however, in this situation, the carrier must still complete the agreement before the move begins even though the shipper has waived delivery. Third, for multiple or repeat shippers, the carrier may use a master agreement to cover all moves for that shipper [MAX-4, item 128(1)].

Finally, the carrier must deliver a signed original or duplicate of this agreement to the shipper at or before the time service is begun [MAX-4, item 128(2)].

[d] Rate Limitations for Noncompliance

If the carrier fails to properly issue and deliver the agreement, then the rates used in determining charges for services not described or for rates not quoted must be 45 percent below the maximum fixed rates published in Maximum Rate Tariff 4 [MAX-4, items 28(3), 128(1)].

If the carrier fails to complete the agreement by omitting the description of the transportation and accessorial services to be provided under the agreement or the rates quoted for the service, then the rates used in determining charges for services not described or for rates not quoted must be 45 percent below the maximum fixed rates published in Maximum Rate Tariff 4 [MAX-4, items 28(3), 128(1)].

If the carrier fails to complete the agreement by omitting the description of the "not to exceed price," or the signatures of either the carrier or the shipper, then the rates used in determining charges for all transportation and accessorial services performed is the lowest of (1) 45 percent below the maximum fixed rates published in Maximum Rate Tariff 4, (2) rates quoted in the estimate, or (3) rates quoted in the agreement [see MAX-4, items 28(3), 128(1)].

The "Not To Exceed" amount is the maximum total dollar amount for which the consignor may be liable for the transportation of household goods and personal effects and any additional services ordered by the consignor (including any bona fide change order permitted under the PUC's rules and tariffs) and agreed to by the consignor, before any goods or personal effects are moved from their location or any other services are performed [*Pub. Util. Code* § 5143(d); see § 54.206].

[e] Recordkeeping

The issuing carrier must retain and preserve the original or a duplicate of this agreement, including any master agreement [see [c], above], subject to inspection by the PUC, for at least three years from the date that the agreement is issued [MAX-4, item 128(4)].

[2] FORM

Agreement for Services [MAX-4 Items 128, 450]

AGREEMENT FOR SERVICE

[name of carrier]

[T number of carrier]

[address of carrier]

[telephone number]

Carrier has conducted business using the following names: _____ [specify all real and fictitious business names used by carrier to conduct operations].

Carrier's principal place of business is: _____.

[Optional: add, if desired:]

Carrier also conducts business with the public at the following local address(es): _____ [specify].

[Continue with the following:]

[If more than one name is listed above, add:]

The transportation of goods under this Agreement will be performed by: _____ [name of carrier under which transportation is to be performed].

[Continue with the following:]

(Serial number of document)

(Place document is issued)

(Date move is tendered)

(Date issued)

THE SHIPPER IS REQUESTED to read this document carefully before signing it and to ask for an explanation of anything that is not clear or is inconsistent with any previous representation made by the carrier.

This Agreement confirms instructions received from *[person placing instructions]* to:

- Transport a consignment of _____ *[used household goods or other sufficient description to determine articles included in Not to Exceed Price]* from _____ *[location from which goods are shipped]* to _____ *[location at which goods are to be delivered]*;
- Receive the consignment for transportation on _____ *[specify date and time or other arrangement]*;
- Perform the accessorial services of _____ *[specify services such as packing, crating, etc., with sufficient specificity to determine services included/not included in Not to Exceed Price]* in connection with the receipt, transportation, or delivery of the consignment;

NOTIFICATION OF DELIVERY:

_____ Carrier will notify _____ *[name]* at _____ *[address where notification is to be made]* by _____ *[describe time and manner of notification, anticipated delivery date, manner of delivery]*.

or

_____ The shipper was asked to but failed to supply notification address and/or delivery arrangements.

The rate(s) for the services described above *[is or are]* *[identify rates, number of persons provided for transportation and accessorial services ordered, designating particular services for which different rates are quoted and circumstances that may result in extra charges, e.g., shipper orders additional services or fails to accept delivery pursuant to agreement, or if carrier imposes any minimums or charges overtime]*. The charge will include a minimum of *[list any minimum hours, weights, rates, per pound valuation, etc.]*.

The carrier agrees to perform the stated services at the stated rates *[signature]*.

IMPORTANT NOTICE

NO RATES HIGHER THAN THE MAXIMUM FIXED RATES PROMULGATED IN THE CALIFORNIA PUBLIC UTILITIES COMMISSION'S MAXIMUM RATE TARIFF 4 MAY BE QUOTED OR CHARGED, UNLESS AN ESTIMATED COST OF SERVICES HAS BEEN ISSUED THREE (3) DAYS OR MORE BEFORE THE DAY OF THE MOVE.

THE NOT TO EXCEED PRICE SHALL BE NO HIGHER THAN THE ESTIMATED COST OF SERVICES PLUS

ANY CHANGE ORDER FOR SERVICES ISSUED PRIOR TO SIGNING THIS AGREEMENT. THE MAXIMUM CHARGE SHALL BE THE QUOTED RATES APPLIED TO: THE NUMBER OF HOURS, WEIGHT, OR NUMBER OF OTHER UNITS OF MEASUREMENT, BUT NO HIGHER THAN THE NOT TO EXCEED PRICE.

COPIES OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION'S MAXIMUM RATE TARIFF 4 ARE OPEN FOR PUBLIC INSPECTION AT THE COMMISSION'S OFFICE IN SAN FRANCISCO AND LOS ANGELES AND AT THE CARRIER'S OFFICE: *[designate location]*.

NOT TO EXCEED PRICE (for all services and articles specified herein):

THE MAXIMUM CHARGE THAT MAY BE ASSESSED FOR THIS SHIPMENT (subject to any Change Orders for Service) IS \$_____.

Shipper must pay these charges [in cash or by check or by authorized credit card].

_____ *[name of shipper]* _____ *[name of carrier]*

[signature of shipper or agent] _____ *[name of carrier's representative]*

_____ *[address of shipper or agent]* *[signature of carrier's representative]*

_____ *[date]* _____ *[date]*

EXECUTION OF THIS AGREEMENT DOES NOT EXEMPT CARRIER FROM COMPLIANCE WITH ANY PROVISION OF LAW OR PUBLIC UTILITIES COMMISSION RULES OR REGULATIONS, EVEN THOUGH NOT EXPRESSLY SET FORTH IN THE AGREEMENT.

CONSUMER PROTECTIONS AND/OR WAIVERS

1. IMPORTANT INFORMATION BOOKLET

In accordance with the rules of the California Public Utilities Commission (CPUC), before your move, the carrier (the moving company) is required to ensure you (the shipper) have been given a booklet, IMPORTANT INFORMATION FOR PERSONS MOVING HOUSEHOLD GOODS. You may choose not to receive a booklet from this carrier if you previously received one from another source. By initialing below, the shipper acknowledges receipt of the booklet either before or on the day of the move.

I have received the booklet *[initial]*. Date _____.

2. MAXIMUM RATES

The CPUC has set the maximum rates a carrier may charge for a move. The carrier may exceed these rates only if a written estimate of cost for the move is provided more than three days before the move occurs and the estimate indicates that maximum rates are to be exceeded.

- Have you received a written estimate?

Yes _____ No _____

- Does the estimate indicate that maximum rates are to be exceeded?

Yes _____ No _____

■ If maximum rates are to be exceeded, have you been informed of the amount of charges to be assessed over the maximum rates?

Yes _____ No _____

■ Do you consent to the amount of charges to be assessed over the maximum rates?

Yes _____ No _____

3. COVERAGE FOR LOSS AND DAMAGE

As explained in the "Important Information" booklet, there are options available to cover loss or damage to your goods. These options are:

(1) 60 cents per pound per article. This option provides for recovery for lost or damaged item(s) based on 60 cents times the weight of the item(s). This coverage is provided at no additional cost.

(2) Actual cash value. This option provides for recovery for lost or damaged item(s) based on actual cash value (depreciated value) at the time of loss or damage, up to the total dollar amount of value declared by you. You may be charged for coverage under this option.

(3) Full value protection. This option provides for recovery for lost or damaged item(s) based on current replacement value at the time of loss or damage, up to the total dollar amount of valuation declared by the shipper. You may be charged for coverage under this option.

VALUATION DECLARATION

NOTICE:

COVERAGE FOR LOSS AND DAMAGE IS LIMITED TO THE ACTUAL CASH VALUE OF LOSSES UP TO THE AMOUNT OF \$20,000 UNLESS THE SHIPPER SIGNING THIS CONTRACT INSERTS IN THE SPACE BELOW, IN HIS OR HER OWN HANDWRITING, ANOTHER VALUE. YOU MAY BE CHARGED FOR COVERAGE PROVIDED OTHER THAN \$.60 PER POUND PER ARTICLE.

SHIPPER HEREBY RELEASES THE ENTIRE SHIPMENT TO A VALUE NOT EXCEEDING \$[amount inserted by shipper signing below].

[Select one of the following alternatives:]

[If carrier does not apply a minimum per pound valuation level, use:]

VALUATION OPTIONS	INITIAL CHOICE	VALUATION CHARGE
Basic: 60 cents/lb/article, per \$100 of declared value		no additional charge
Actual cash value		\$ _____
Full value		\$ _____

[If carrier elects to apply a minimum per pound valuation level, use:]

VALUATION OPTIONS	INITIAL CHOICE	VALUATION CHARGE	PER POUND VALU- ATION MINIMUMS
Basic: 60 cents/ lb/article, per \$100 of declared value		no additional charge	not applicable
Actual cash value		\$_____	\$_____ per pound
Full value		\$_____	\$_____ per pound

[Continue with the following:]

Shipper's signature _____

Date _____

4. ISSUANCE OF AGREEMENT FOR SERVICE

The CPUC requires that an "Agreement for Service" be issued to you by the carrier three days or more in advance of the move. An exception to this requirement is where the arrangement to move occurs on short notice (less than three days). You may also choose to waive this requirement entirely, at any time prior to the move.

● Did you choose to waive this requirement entirely?

Yes _____ No _____

● Was the moving date agreed to between you and the carrier less than three days prior to the day of the move?

Yes _____ No _____

Please print shipper's name: _____

Shipper's signature: _____

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesRates & Tariffs



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

A. Intrastate Shipment of Household Goods

1. Shipping Documents

22-54 California Legal Forms--Transaction Guide § 54.204

§ 54.204 Shipping Order and Freight Bill [MAX-4 Items 132, 460]

[1] Comment

[a] Use of Form

This form is a shipping order and freight bill for use in the shipment of used household goods and related articles. The form is substantially the same as that set forth in MAX-4, item 460.

[b] Use of Combined Agreement and Shipping Document

The shipping order and freight bill may also be combined with the agreement for service [*see* § 54.203] into a single document if [MAX-4, items 128(3), 132(2)]:

- The single document and its issuance satisfies the requirements applicable to both agreements and shipping orders.
- The single document is properly identified as to what the document purports to be.
- The carrier maintains a copy of the signed agreement separate from the shipping document.

The agreement for services [*see* § 54.203] and this shipping order and freight bill may be combined into a single document if these requirements are satisfied.

[c] Completion of Form

When filling in the description of shipment table, the deductions noted should show any time that is not chargeable, such as for time for meals [MAX-4 Item 460]. When completing the space for computing charges for driving time, the driving time should be doubled unless more than one shipment is transported on a single unit of equipment; in the latter

situation, the driving time must be not less than the actual number of minutes used [MAX-4, item 460]. When completing the space for "Other Services and Charges," each charge should be identified and explained separately [MAX-4, item 460].

[d] "Not to Exceed" Amount

The "Not To Exceed" amount set forth and the agreement for services between the household goods carrier and the consignor is the maximum total dollar amount for which the consignor may be liable for the transportation of household goods and personal effects and any additional services ordered by the consignor (including any bona fide change order permitted under the PUC's rules and tariffs) and agreed to by the consignor, before any goods or personal effects are moved from their location or any other services are performed [*Pub. Util. Code § 5143(d)*; see § 54.206].

[e] Recordkeeping

The issuing carrier must retain and preserve a duplicate of each shipping document, freight bill, accessorial service document, weighmaster's certificate, written instructions, written agreement, written request, master agreement, or any other document supporting the assessed rates and charges that the carrier is required to issue, receive, or retain under Maximum Rate Tariff 4 for any transportation or accessorial service. The carrier must retain these documents at a location within California, subject to inspection by the PUC, for at least three years from the date issued. The carrier must also give a copy of each document to the shipper when the charges are collected [MAX-4, item 132(3)].

[2] FORM

Shipping Order and Freight Bill [MAX-4 Items 132, 460]

SHIPPING ORDER AND FREIGHT BILL

[*name of carrier*]

[*T number of carrier*]

[*address of carrier*]

[*telephone number*]

Carrier has conducted business using the following names: _____ [*specify all real and fictitious business names used by carrier to conduct operations*].

Carrier's principal place of business is: _____.

[*Optional: add, if desired:*]

Carrier also conducts business with the public at the following local address(es): [*specify*].

[*Continue with the following:*]

[*If more than one name is listed above, add:*]

The transportation of goods under this Shipping Order and Freight Bill will be performed by:
 _____[name of carrier under which transportation is to be performed].

[Continue with the following:]

Name of Carrier _____	No. _____
Address _____	Number of Carrier _____
Date Issued _____	
Shipper _____	Consignee _____
Street Address _____	Street Address _____
City _____	City _____
Credit Card of Shipper: Name _____	Number _____

Destination telephone number and notification address, if different than delivery address:

Description of Shipment

AT RATES IN DOLLARS PER HOUR

Units of Equipment:			Driver and Helper			
Driver Only						
Service	Time Started	Time Completed	Deductions (1)	Time for Computing Charges	Rate	Charges
Loading						\$
Driving				(2)		\$
Unloading						\$
Total						

Number of
Additional
Helpers

Service	Time Started	Time Completed	Deductions	Time for Computing Charges	Rate	Charges
Loading						\$
Driving						\$
Unloading						\$
Total						

AT RATES IN DOLLARS PER PIECE (5 Pieces or Less)

Number of Pieces	Rate for First Piece	Rate for Each Addition-	Charges

		al Piece	
			\$
			\$
		Total	\$
AT RATES IN DOLLARS PER 100 POUNDS			
Weight	Miles	Tariff Rate Item Rate	Charges
			\$
			\$
OTHER SERVICES (inc. no. of packers)(3) AND CHARGES			\$
Valuation Charge (see Agreement for Services)			\$
Total to Collect			\$
NOT TO EXCEED PRICE			\$
Description of Shipment:			

Shipper's preferred delivery date:			

Received by Carrier in good condition on			
_____ [date],			
except as noted			
_____.			
Received by Consignee: Name			Date
_____			_____

(1) Show time not chargeable, such as time for meals.

(2) Show double the driving time, except when more than one shipment transported on a single unit of equipment, show not less than _____ minutes actual time.

(3) Show each charge separately and what it represents.

Description of Shipment: _____

Shipper's preferred delivery date: _____

Received by carrier in good condition on _____ [date], except as noted: _____

Received by consignee: Name _____ Date: _____

NOTICE: PLEASE INSPECT YOUR GOODS PROMPTLY. CLAIMS FOR LOST OR DAMAGED GOODS MUST BE FILED WITH THE CARRIER IN WRITING.

Computation of Amount Payable When
Estimated Cost of Services was Given:

The amount of Estimated Cost of Service (1) \$ _____

Total charge on Change Order for Ser- (2) \$ _____
vices

Maximum charge shipper shall pay: (total \$ _____
of (1) and (2))

I hereby authorize carrier to assign freight
charges to my credit card account (as
named above).

Signature of shipper or shipper's repres- Date
entative

Signature of carrier or carrier's represent- Date
ative

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesRates
& Tariffs



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

A. Intrastate Shipment of Household Goods

1. Shipping Documents

22-54 California Legal Forms--Transaction Guide § 54.205

§ 54.205 Agreement for Services and Shipping Order and Freight Bill [MAX-4 Items 128, 132, 450, 460]

[1] Comment

[a] Use of Form

This form is a combined Agreement for Services and Shipping Order and Freight Bill to be signed by the carrier and the shipper. This form is drafted in accordance with Maximum Rate Tariff 4 [see MAX-4, items 128(3), 132, 450, 460]. For a guide to the prescribed contents of the form, see § 54.120[5], [6]. The carrier may select the most convenient format for the agreement [MAX-4, item 128(3); see also [b], below].

The carrier must prepare an agreement for services for all shippers who provide information in sufficient detail for the carrier to complete the agreement, regardless of whether or not the shipper commits to engage the carrier's services [MAX-4, item 128(1)]. The agreement must be complete in all details, including the carrier's initial signature binding the carrier to the quoted rates [MAX-4, item 128(1)]. The agreement must be signed by the shipper and the carrier before beginning any services specified under the agreement [MAX-4, item 128(2)]. The "not to exceed price" and the carrier's final signature must be added no later than the day of the move, but before the performance of any service in the commencement of the move [MAX-4, item 128(1)].

[b] Use of Combined Agreement and Shipping Document

The agreement for service [see § 54.203] may be combined with the shipping document [see § 54.204] into a single document under the following circumstances [MAX-4, items 128(3), 132(2)]:

- The single document and its issuance satisfies the requirements applicable to both agreements and shipping orders.
- The single document is properly identified as to what the document purports to be.

- The carrier maintains a copy of the signed agreement separate from the shipping document.

This combined agreement and shipping order and freight bill satisfies the first two of these requirements.

[c] Delivery Requirements

The carrier must deliver an original or copy of this agreement to the shipper, by mail or other convenient means, at least three days before the move, regardless of whether or not the shipper commits to engage the carrier's services [MAX-4, item 128(1)]. "At least three days before the move" means on or before the third day before the move. For example, if Saturday is the day of the move, the estimate (and any change order) must be given on or before Wednesday in order to exceed the maximum fixed rates [see MAX-4, item 128(1)].

This rule is subject to three exceptions. First, if the shipper's first contact with the carrier is less than three days before the move, the agreement may be completed on the day of the move. Second, shippers may waive the three-day advance notice at any time before the move; however, in this situation, the carrier must still complete the agreement before the move begins even though the shipper has waived delivery. Third, for multiple or repeat shippers, the carrier may use a master agreement to cover all moves for that shipper [MAX-4, item 128(1)].

Finally, the carrier must deliver a signed original or duplicate of this agreement to the shipper at or before the time service is begun [MAX-4, item 128(2)].

[d] Rate Limitations for Noncompliance

If the carrier fails to properly issue and deliver the agreement, then the rates used in determining charges for services not described or for rates not quoted must be 45 percent below the maximum fixed rates published in Maximum Rate Tariff 4 [MAX-4, items 28(3), 128(1)].

If the carrier fails to complete the agreement by omitting the description of the transportation and accessorial services to be provided under the agreement or the rates quoted for the service, then the rates used in determining charges for services not described or for rates not quoted must be 45 percent below the maximum fixed rates published in Maximum Rate Tariff 4 [MAX-4, items 28(3), 128(1)].

If the carrier fails to complete the agreement by omitting the description of the "not to exceed price," or the signatures of either the carrier or the shipper, then the rates used in determining charges for all transportation and accessorial services performed is the lowest of (1) 45 percent below the maximum fixed rates published in Maximum Rate Tariff 4; (2) rates quoted in the estimate; or (3) rates quoted in the agreement [see MAX-4, items 28(3), 128(1)].

The "Not To Exceed" amount is the maximum total dollar amount for which the consignor may be liable for the transportation of household goods and personal effects and any additional services ordered by the consignor (including any bona fide change order permitted under the PUC's rules and tariffs) and agreed to by the consignor, before any goods or personal effects are moved from their location or any other services are performed [*Pub. Util. Code* § 5143(d); see § 54.206].

[e] Recordkeeping

The issuing carrier must retain and preserve the original or duplicate of the agreement for services, including any master agreement [MAX-4, item 128(4)]. The issuing carrier must retain and preserve a duplicate of each shipping document, freight bill, accessorial service document, weighmaster's certificate, written instructions, written agreement, written request, master agreement, or any other document supporting the assessed rates and charges that the carrier is required to issue, receive, or retain under Maximum Rate Tariff 4 for any transportation or accessorial service [MAX-4, item

132(3)]. The carrier must retain these documents at a location within California, subject to inspection by the PUC, for at least three years from the date issued [MAX-4, items 128(4), 132(3)]. However, the carrier must maintain a copy of the signed combined agreement separate from the shipping document. [MAX-4, items 128(3), 132(2)]. The carrier must also give a copy of each document to the shipper when the charges are collected [MAX-4, items 128(4), 132(3)].

[2] FORM

Agreement for Services and Shipping Order and Freight Bill [MAX-4 Items 128, 132, 450, 460]

AGREEMENT FOR SERVICES
AND
SHIPPING ORDER AND FREIGHT BILL

[name of carrier]

[T number of carrier]

[address of carrier]

[telephone number]

(Serial number of document)

(Place document is issued)

(Date move is tendered)

(Date issued)

Carrier has conducted business using the following names: _____[specify all real and fictitious business names used by carrier to conduct operations].

Carrier's principal place of business is: _____.

[Optional: add, if desired:]

Carrier also conducts business with the public at the following local address(es): [specify].

[Continue with the following:]

[If more than one name is listed above, add:]

The transportation of goods under this Agreement will be performed by: _____[name of carrier under which transportation is to be performed].

[Continue with the following:]

THE SHIPPER IS REQUESTED to read this document carefully before signing it and to ask for an explanation of anything that is not clear or is inconsistent with any previous representation made by the carrier.

INSTRUCTIONS

1. This Agreement confirms instructions received from the shipper, _____ [name of person placing instructions] to:

- Transport a consignment of _____ [used household goods or other sufficient description to determine articles included in Not to Exceed Price] from _____ [location from which goods are shipped] to _____ [location at which goods are to be delivered];
- Receive the consignment for transportation on _____ [specify date and time or other arrangement];
- Perform the accessorial services of _____ [specify services such as packing, crating, etc., with sufficient specificity to determine services included/not included in Not to Exceed Price] in connection with the receipt, transportation, or delivery of the consignment;
- Make delivery to the consignee, _____ [name], as follows: _____ [describe how delivery is to be accomplished after notification, e.g., delivery date, manner of delivery].

NOTIFICATION OF DELIVERY: (check one)

_____ Carrier will notify _____ [name] at _____ [address where notification is to be made] by [describe time and manner of notification].

or

_____ The shipper was asked to but failed to supply notification address and/or delivery arrangements.

RATES

The rate(s) for the services described above _____
[is or are] _____

AT RATES IN DOLLARS PER HOUR

Units of Equipment:

Driver and Helper

Driver Only

Service	Time Started	Time Completed	Deductions	Time for Computing Charges	Rate	Charges
Loading						\$
Driving						\$
Unloading						\$

Total						
Number of Additional Helpers						
Service	Time Started	Time Com- pleted	Deductions (1)	Time for Computing Charges	Rate	Charges
Loading						\$
Driving				(2)		\$
Unloading						\$
Total						

AT RATES IN DOLLARS PER PIECE (5 Pieces or Less)

Number of Pieces	Rate for First Piece	Rate for Each Addition- al Piece	Charges
			\$
			\$
		Total	\$

AT RATES IN DOLLARS PER 100 POUNDS

Weight	Miles	Tariff Rate	Item Rate	Charges
				\$
				\$
OTHER SERVICES (inc. no. of packers)(3) AND CHARGES				\$
Valuation Charge				\$
Total to Collect				\$
NOT TO EXCEED PRICE				\$

Description of Shipment:

Shipper's preferred delivery date:

Received by Carrier in good condition on

_____ [date],

except as noted

_____.

Received by Consignee: Name

Date

The charge will include a minimum of [list any minimum hours, weights, rates, per pound valuation, etc.].

(1) Show time not chargeable, such as time for meals.

(2) Show double the driving time, except when more than one shipment transported on a single unit of equipment, show not less than _____ minutes actual time.

(3) Show each charge separately and what it represents.

The carrier agrees to perform the stated services at the stated rates [signature].

IMPORTANT NOTICE

NO RATES HIGHER THAN THE MAXIMUM FIXED RATES PROMULGATED IN THE CALIFORNIA PUBLIC UTILITIES COMMISSION'S MAXIMUM RATE TARIFF 4 MAY BE QUOTED OR CHARGED, UNLESS AN ESTIMATED COST OF SERVICES HAS BEEN ISSUED THREE (3) DAYS OR MORE BEFORE THE DAY OF THE MOVE.

THE NOT TO EXCEED PRICE SHALL BE NO HIGHER THAN THE ESTIMATED COST OF SERVICES PLUS ANY CHANGE ORDER FOR SERVICES ISSUED PRIOR TO SIGNING THIS AGREEMENT. THE MAXIMUM CHARGE SHALL BE THE QUOTED RATES APPLIED TO: THE NUMBER OF HOURS, WEIGHT, OR NUMBER OF OTHER UNITS OF MEASUREMENT, BUT NO HIGHER THAN THE NOT TO EXCEED PRICE.

COPIES OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION'S MAXIMUM RATE TARIFF 4 ARE OPEN FOR PUBLIC INSPECTION AT THE COMMISSION'S OFFICE IN SAN FRANCISCO AND LOS ANGELES AND AT THE CARRIER'S OFFICE: [designate location].

NOT TO EXCEED PRICE (for all specified services and articles):

THE MAXIMUM CHARGE THAT MAY BE ASSESSED FOR THIS SHIPMENT (subject to any Change Orders for Service) IS \$_____.

Shipper must pay these charges [in cash or by check or by authorized credit card]. [If payment will be by credit card, add: I hereby authorize carrier to charge the freight charges to my credit card account.]

_____ [name of shipper]

_____ [name of carrier]

_____ [signature of shipper or
agent]

_____ [name of carrier's repres-
entative]

_____ [address of shipper or
agent]

_____ [signature of carrier's rep-
resentative]

_____ [date]

_____ [date]

EXECUTION OF THIS AGREEMENT DOES NOT EXEMPT CARRIER FROM COMPLIANCE WITH ANY PROVISION OF LAW OR PUBLIC UTILITIES COMMISSION RULES OR REGULATIONS, EVEN THOUGH NOT EXPRESSLY SET FORTH IN THE AGREEMENT.

CONSUMER PROTECTIONS AND/OR WAIVERS

1. IMPORTANT INFORMATION BOOKLET

In accordance with the rules of the California Public Utilities Commission (CPUC), before your move, the carrier (the moving company) is required to ensure you (the shipper) have been given a booklet, IMPORTANT INFORMATION FOR PERSONS MOVING HOUSEHOLD GOODS. You may choose not to receive a booklet from this carrier if you previously received one from another source. By initialing below, the shipper acknowledges receipt of the booklet either before or on the day of the move.

I have received the booklet [*initial*]. Date _____.

2. MAXIMUM RATES

The CPUC has set the maximum rates a carrier may charge for a move. The carrier may exceed these rates only if a written estimate of cost for the move is provided more than three days before the move occurs and the estimate indicates that maximum rates are to be exceeded.

- Have you received a written estimate?
Yes _____ No _____
- Does the estimate indicate that maximum rates are to be exceeded?
Yes _____ No _____
- If maximum rates are to be exceeded, have you been informed of the amount of charges to be assessed over the maximum rates?
Yes _____ No _____
- Do you consent to the amount of charges to be assessed over the maximum rates?
Yes _____ No _____

3. COVERAGE FOR LOSS AND DAMAGE

As explained in the "Important Information" booklet, there are options available to cover loss or damage to your goods. These options are:

- (1) 60 cents per pound per article. This option provides for recovery for lost or damaged item(s) based on 60 cents times the weight of the item(s). This coverage is provided at no additional cost.
- (2) Actual cash value. This option provides for recovery for lost or damaged item(s) based on actual cash value (depreciated value) at the time of loss or damage, up to the total dollar amount of value declared by you. You may be charged for coverage under this option.
- (3) Full value protection. This option provides for recovery for lost or damaged item(s) based on current replacement value at the time of loss or damage, up to the total dollar amount of valuation declared by the shipper. You may be charged for coverage under this option.

VALUATION DECLARATION

NOTICE:

COVERAGE FOR LOSS AND DAMAGE IS LIMITED TO THE ACTUAL CASH VALUE OF LOSSES UP TO THE AMOUNT OF \$20,000 UNLESS THE SHIPPER SIGNING THIS CONTRACT INSERTS IN THE SPACE BELOW, IN HIS OR HER OWN HANDWRITING, ANOTHER VALUE. YOU MAY BE CHARGED FOR COVERAGE PROVIDED OTHER THAN \$.60 PER POUND PER ARTICLE.

SHIPPER HEREBY RELEASES THE ENTIRE SHIPMENT TO A VALUE NOT EXCEEDING \$[*amount inserted by shipper signing below*].

[*Select one of the following alternatives:*]

[*If carrier does not apply a minimum per pound valuation level, use:*]

VALUATION OPTIONS	INITIAL CHOICE	VALUATION CHARGE
Basic: 60 cents/lb/article, per \$100 of declared value no additional charge	_____	\$ _____
Actual cash value	_____	\$ _____
Full value	_____	\$ _____

[*If carrier elects to apply a minimum per pound valuation level, use:*]

VALUATION OPTIONS	INITIAL CHOICE	VALUATION CHARGE	PER POUND VALUATION MINIMUMS
Basic: 60 cents/lb/article, per \$100 of declared value		no additional charge	not applicable
Actual cash value		\$ _____	\$ _____ per pound
Full value		\$ _____	\$ _____ per pound

[*Continue with the following:*]

Shipper's signature _____
Date _____

4. ISSUANCE OF AGREEMENT FOR SERVICE

The CPUC requires that an "Agreement for Service" be issued to you by the carrier three days or more in advance of the move. An exception to this requirement is where the arrangement to move occurs on short notice (less than three days). You may also choose to waive this requirement entirely, at any time prior to the move.

■ Did you choose to waive this requirement entirely? Yes _____ No _____

● Was the moving date agreed to between you and the carrier less than three days prior to the day of the move? Yes _____ No _____

DESCRIPTION OF SHIPMENT

Description of Shipment: [*specify, e.g., uncrated used household goods and related articles*]

Shipper's preferred delivery date: _____

Received by Carrier in good condition on _____ [date], except as noted _____.

Received by Consignee: Name _____ Date _____

NOTICE:

INSPECT GOODS PROMPTLY

CLAIMS FOR LOST OR DAMAGED GOODS MUST BE FILED WITH THE CARRIER IN WRITING.

Computation of Amount Payable When Estimated Cost of Services was Given:

The amount of Estimated Cost of Service \$ _____

Total charge on Change Order for Services \$ _____

Maximum charge shipper shall pay (total) \$ _____

Signature of shipper or shipper's representative

Date

Signature of carrier or carrier's representative

Date _____

[Print following terms starting on new page:]

GENERAL CONTRACT TERMS

Ownership of Goods

1. The Shipper represents and warrants that Shipper is lawfully possessed of the listed property and has the authority to ship and/or store this property in accordance with the terms of this Agreement. Shipper agrees to indemnify and hold harmless the Carrier ("Company") in the event of any adverse claim, or in the event it is made a party of any litigation by reason of having any of the listed property transported or stored, and to pay attorneys' fees and any court costs incurred in connection with the property. The Company's lien secures all costs and expenses in addition to its transportation, storage, and other charges.

Liability**General**

2(a). All references in this Agreement to "Company" apply to the carrier or warehouser in possession of all or any of the property listed in this Agreement. It is agreed that this property will be moved, packed, stored, shipped, forwarded, or otherwise handled at Shipper's risk with respect to loss, damage, or delay caused by acts of God, the acts of public authority, quarantine, war, insurrection, strikes, labor troubles, riots, earthquake, liquefaction, deterioration by time, moth, termite, vermin, rodent, leakage, and heat, perils of navigation, occurrence in customs warehouses, the act or default of the shipper or owner, nature of property, or defect or inherent vice. Except in case of its negligence, the Company is neither liable for the loss or damage of any of this property nor responsible for its condition, operation, or functioning, whether or not the property is packed, or unpacked, by the Shipper or its agents, or by the Company or its agents. Except in case of negligence, the Company is not liable for damage to or loss of contents of pieces of furniture, crates, bundles, cartons, boxes, barrels, or other containers unless those containers are open for the Company's inspection and then only for those articles specifically listed by the Shipper.

Storage

(b) In storing the listed property, the Company is liable only for its failure to use ordinary care. In the event of loss or damage from fire or theft, the Company is only liable if the loss or damage occurred by reasons of its own negligence. The burden of proving negligence or failure to use the care required by law is on the Shipper. The Company is not responsible for loss of or damage to fragile or breakable articles that are not packed and unpacked by its employees and the Shipper assumes the full risk for such loss or damage. Fragile or breakable articles include paintings, statuary, works of art, antiques, dishes, glassware, lamp shades, etc. This property may be stored in any Company depository. The Company may, without notice to the Shipper, transfer the goods, or any part of the goods, from one depository to another and may move same from one location within a building to another.

Transportation

(c) The provisions of Maximum Rate Tariff 4, issued by the Public Utilities Commission of the State of California, are incorporated in this agreement and are incorporated by reference.

Terms

(d) The terms "Declared Value," "Agreed Value," and "Released Valuation" as used in various tariffs, laws, and regulations, and this Agreement, are intended to have the same meaning. As used in this Agreement, these terms fix the value of the listed property for the purpose of this Agreement, regardless of their actual value, and the limit of the maximum amount of the Company's liability, under all conditions, as rates and charges are based on that declared and agreed value. In the event that the weight of the goods or any item is not known or cannot be ascertained, it is agreed that the weight will be computed on the basis of seven pounds per cubic foot.

Additions

(e) All applicable terms and conditions in this Agreement apply to any property of Shipper added to storage, and also when that property is ordered out of storage or is ordered shipped or moved.

Buildings, Fire, Watchman

3. The Company does not represent or warrant that its buildings are fireproof or that the contents of its buildings, including the listed property, cannot be destroyed by fire. The Company is not required to maintain a watchman.

Additional Charges

4. Additional charges for storage, extra handling, and transportation will accrue if the goods are not received by Shipper/consignee in accordance with the arrangements described in this Agreement.

Additional Services Automatically Authorized

5. Customer authorizes carrier, at its option, to place the property in storage in transit at destination in the event delivery cannot be made on arrival. Customer warrants that in accordance with the applicable tariff, mechanical appliances (refrigerators, radios, television sets, washers, clocks, and similar appliances) will be properly serviced for movement before storage. This order authorizes the advancing of any dock or other charge made by any warehouser for the account of the shipper, owner, or other person.

Notice Concerning Rates

6. The quoted rates are in accordance with the maximum rates prescribed by the Public Utilities Commission as published in its Maximum Rate Tariff 4. These rates are to be applied to the number of hours involved in providing service, to the actual weight, or to the actual number of other units of measurement, subject to the designated maximum provisions, unless in conflict with the maximum rates, rules, and regulations of that tariff.

Charges

7. All charges including transportation, first month's storage, and advances are due and payable on completion of the transportation or receipt for storage. Thereafter storage bills are payable monthly in advance. A charge will be made for warehouse labor in and out of regular storage and for necessary wrapping, packing, and accessorial services. Payments must be by cash or certified check. Storage rates may be changed on 30 days' written notice to the depositor and will be changed on the actual receipt by the Company of written notice from the depositor.

Interest on Unpaid Charges

8. Charges remaining unpaid 7 days after the receipt of a freight bill are subject to "FINANCE CHARGES" at a periodic rate of [*specify, e.g., one and one-half (1 1/2) percent per month, 18 percent "ANNUAL PERCENTAGE RATE"*]] on the unpaid previous balance.

General Lien for Charges

9. The Company has a general lien on any and all property now or subsequently delivered to or deposited with the Company by the Shipper for the following:

- All charges for transportation, storage, preservation of the property, and the performance of other services.
- All lawful claims for money advanced, interest, insurance, labor, weighing, coopering, wrapping, and other charges in relation to the listed property.
- All charges and expenses for notice and advertisement of sale and for sale of the property when there has been a default in satisfying the Company's lien.
- All court costs and reasonable attorneys' fees incurred in collecting these charges and enforcing its lien, or defending itself in the event that it is made a party to any litigation concerning the listed property while the same is in its possession.

The Company may bring suit for delinquent charges without first foreclosing its lien.

Time for Filing Claim for Damages

10. The Company is not liable for the loss of, destruction of, or damage to the goods, or any part the goods unless, after the date on which the goods are delivered or a demand for the goods is refused or the date on which written notice of loss of or damage to the goods is mailed to the Shipper at the Shipper's last known address, whichever date is earlier, the Shipper files a written claim. The Shipper's claim is timely if made: (1) within 9 months after the delivery or demand date, the Shipper presents a claim for damages in writing to the Company accompanied by paid bill or receipt for charges; and (2) within 2 years and 1 day after that date (excluding the time during which a claim is pending in arbitration), the Shipper (or other person entitled to sue) files suit. Company may require a certified or sworn statement of claim.

Arbitration

11. The Company may, but need not, require that any dispute or claim arising out of or for the breach of this Agreement or in connection with the property shipped or stored under it, whether founded in tort or contract, be settled by arbitration under the arbitration laws of the State of California and the rules of the American Arbitration Association. However, if the event of arbitration, the arbitrator or arbitrators may not vary, modify, or disregard the provisions, contained in this Agreement, including those respecting the declared value of the goods, the limitation of liability of the Company, and the burden of proof. If the Company desires arbitration, it must notify Shipper by written demand mailed to Shipper at Shipper's last known address at any time after filing of a claim, but no later than 30 days after service of summons on the Company. If the Company does not demand arbitration, the right to require arbitration is waived. When arbitration is required, the award of the arbitrator may be entered as a judgment of a court of record in the county where the award is made. The Shipper and the Company share equally the cost of arbitration. While arbitration is pending, the Shipper may not file suit and no further proceeding may be taken by the Shipper in any suit previously filed.

Costs of Suit and Attorneys' Fees

12. The Shipper is liable for costs of suit and attorneys' fees in the event of any suit or adverse claims by or against the Company, or interpleader, involving title or possession of Shipper's goods or charges for services rendered.

Warranty Against Dangerous Materials

13. The Shipper represents and warrants that the listed property includes no dangerous, hazardous, combustible, or inflammable material.

Notices

14. All notices required or permitted to be given under this Agreement must be personally served or mailed by certified United States mail, return receipt requested, postage prepaid.

Nonwaiver

15. Failure of either party to enforce any provision of this Agreement is not construed as a waiver of that provision or of either party's right to enforce that provision or any other provision of this Agreement.

Severability

16. If any term of this Agreement is held by a court of competent jurisdiction to be void or unenforceable, the remainder of this Agreement remains in full force and effect.

Time of the Essence

17. Time is of the essence of this Agreement.

Entire Agreement

18. This Agreement contains the entire agreement between Carrier and Shipper with respect to the subject matter of this Agreement. Any prior agreements, promises, or negotiations, whether oral or written, that are not expressly set forth in this Agreement are of no force or effect.

Modification

19. This Agreement can be modified only by a writing signed by both Carrier and Shipper. Any purported oral modification of the terms of this Agreement is of no force or effect.

Governing Law

20. This Agreement is governed by and construed in accordance with the laws of the State of California.

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesRates
& Tariffs



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

A. Intrastate Shipment of Household Goods

1. Shipping Documents

22-54 California Legal Forms--Transaction Guide § 54.206

§ 54.206 "Not to Exceed" Notice

[1] Comment

[a] Use of Form

This form is the "not to exceed" notice that must be provided to each consignor by a household goods carrier engaged in the business of transporting used household goods and personal effects by motor vehicle over any public highway in California [see *Pub. Util. Code § 5143(b)*]. The form and content of the notice are prescribed by statute [see *Pub. Util. Code § 5143(e)*, [c], below].

[b] Definitions

The "not to exceed" amount set forth in the notice and the agreement for services [see §§ 54.203[2]-54.205[2]] between the household goods carrier and the consignor is the maximum total dollar amount for which the consignor may be liable for the transportation of household goods and personal effects and any additional services ordered by the consignor (including any bona fide change order permitted under the PUC's rules and tariffs) and agreed to by the consignor, before any goods or personal effects are moved from their location or any other services are performed [*Pub. Util. Code § 5143(d)*].

For purposes of these notice requirements, "consignor" means the person named in the bill of lading as the person from whom the household goods and personal effects have been received for shipment and that person's agent [*Pub. Util. Code § 5143(a)(1)*]. "Consignee" means the person named in the bill of lading to whom or to whose order the household goods carrier is required to make delivery as provided in the bill of lading and that person's agent [*Pub. Util. Code § 5143(a)(2)*].

[c] Form and Content

A household goods carrier may provide the required notice either as a separate document or by including it as the

centerfold of the informational booklet entitled "Important Information for Persons Moving Household Goods" that the household goods carrier is required to provide the consignor under the commission's tariffs [*Pub. Util. Code § 5143(e)*; §§ 54.203[2], 54.205[2] (references to informational booklet)]. If the household goods carrier provides the notice as part of the informational booklet, the booklet must contain a tab that extends beyond the edge of the booklet at the place where the notice is included. The statement "Important Notice" must be printed on the tab in at least 12-point boldface type [*Pub. Util. Code § 5143(e)*]. In addition, the statement "Customer Must Read And Sign The Important Notice In The Middle Of This Booklet Before A Move Can Begin" must be set forth in 14-point boldface type on the front cover of the booklet [*Pub. Util. Code § 5143(e)*]. The notice provided the consignor must be in the form prescribed by statute [see *Pub. Util. Code § 5143(f)*; [2], below].

[2] FORM

"Not to Exceed" Notice

IMPORTANT NOTICE ABOUT YOUR MOVE

IT IS VERY IMPORTANT THAT YOU ONLY AGREE TO A "NOT TO EXCEED" AMOUNT THAT YOU THINK IS A PROPER AND REASONABLE FEE FOR THE SERVICES YOU ARE REQUESTING. THE "NOT TO EXCEED" AMOUNT THIS MOVER IS REQUESTING IS \$_____ to perform the following services: _____

IF YOU DO NOT AGREE TO THE "NOT TO EXCEED" AMOUNT LISTED OR THE DESCRIPTION OF SERVICES, YOU HAVE THE RIGHT TO REFUSE THE MOVER'S SERVICE AT NO CHARGE TO YOU.

If you request additional or different services at the time of the move, you may be asked to complete a Change Order which will set forth your agreement to pay for additional fees for those newly requested services. If you agree to the additional charges on that Change Order, those charges may be added to the "NOT TO EXCEED" amount set forth above. If you do not agree to the amounts listed in the Change Order, you should not sign it and may refuse the mover's services.

A mover cannot refuse to release your goods once you have paid the "NOT TO EXCEED" amount for the transportation of your goods and personal effects and any additional services that you have agreed to in writing. The "NOT TO EXCEED" amount must be reasonable.

A mover cannot, under any circumstances, withhold food, medicine, medical devices, items to treat or assist a disabled person, or items used for care of a minor child. An unlicensed mover has no right to withhold your goods for any reason including claims that you have not adequately paid for services rendered.

For additional information or to confirm whether a mover is licensed by the California Public Utilities Commission, please call the Public Utilities Commission toll free at:

(800) 366-4782

I have completed this form and provided the consumer (shipper) with a copy of this notice.

Signed: [*carrier*].....Dated: _____

I have been provided with a copy of this form.

Signed: [consumer].....Dated: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState
& Local Regulation



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

A. Intrastate Shipment of Household Goods

1. Shipping Documents

22-54 California Legal Forms--Transaction Guide § 54.207

§ 54.207 Intrastate Check List

[1] Comment

[a] Use of Form

This form is an intrastate check list, referred to by some carriers as a "receipt and bill of lading check list." The check list is used primarily for three purposes:

- To check each article of the shipment every time that the shipment is loaded or unloaded to reduce the chances of losing or misplacing any of the articles.
- To establish the condition of those articles that, when first received by the carrier, were not in good condition.
- To indicate the condition of each of the articles at the time of delivery at the point of destination.

Carriers can use this check list when the charges are based on weight or time. This type of check list can be particularly useful when the shipper requires more detailed information, such as might be the case with a corporate shipper.

When this type of form is used, each article in the shipment is tagged with a number beginning with "1." The bill of lading number for the shipment is also stated on each tag. This form is designed to accommodate an unlimited number of articles, simply by using additional forms. The letters "A," "B," "C," "D," and "E" are intended to designate the occasion for checking each item on the check list. In the majority of instances, this inspection is done on only two occasions: (1) when the shipment is loaded at the point of origin; and (2) when it is unloaded at the point of destination. However, this inspection may be done at other times, such as when the shipment is moved into a warehouse for in-transit storage and again when the shipment is taken out of the warehouse and loaded onto a second van for delivery to the point of destination. The form has spaces, to be filled in below each letter, to describe the time and place when each of the articles were checked against the check list.

[b] Effect of Statement Concerning Condition of Goods

No claim against a household goods carrier for lost or damaged goods will be denied solely because the lost or damaged goods were not noted at the time of delivery. Whenever the carrier requires a signed statement acknowledging delivery and receipt of goods, that statement must not contain any representation that the goods were received in satisfactory condition. The statement must contain a notice that the shipper may file a claim with the carrier for lost or damaged goods [*Pub. Util. Code* § 5241].

A written claim for loss or damage must be filed with the carrier within nine months after delivery of the goods to the consignee, or, if delivery is not made, within nine months after a reasonable time for delivery has elapsed. Suit must be instituted against the carrier within two years and one day from the date that the carrier notifies the claimant in writing that the claim has been disallowed. If a claim is not timely filed or a suit is not timely brought, the carrier is not liable for any loss of or damage to the goods [MAX-4, item 92(14)].

[c] Exception and Location Symbols

The condition of each article that is not in good condition when received by the shipper at the point of origin, and when delivered at the point of destination, is noted on this check list by the use of symbols. The meaning of the symbols is set forth in the form. Letter symbols are used to designate the nature of the defect. The numerical symbols indicate the location of the defect on the article.

[d] Signatures at Point of Origin

As the various articles in the shipment are loaded onto the moving van, the driver of the van lists each article on the check list, noting any defective conditions opposite each article. After the loading is complete and the list filled in, the driver signs the check list and requests the shipper or the shipper's representative to sign. By signing, the shipper acknowledges that (1) the listed goods were in the condition noted on the check list when received by the carrier and (2) that shipper has received from the carrier a copy of "Important Information for Shippers of Household Goods (Within California)."

[e] Signature of Consignee at Point of Destination

After the goods are unloaded at the point of destination, the carrier's representative (usually the driver of the van) will request the consignee (who in the majority of instances is also the shipper) to sign the check list. By signing the form, the consignee acknowledges that all of the articles in the shipment were received, except as noted on the check list. However, the receipt may not contain any representation that the goods were received in satisfactory condition [*Pub. Util. Code* § 5241].

[2] FORM**Intrastate Check List****INTRASTATE CHECK LIST**

[name of carrier]

[T number of carrier]

[address of carrier]

[telephone number]

Carrier has conducted business using the following names: _____[specify all real and fictitious business names used by carrier to conduct operations].

Carrier's principal place of business is: _____.

[Optional: add, if desired:]

Carrier also conducts business with the public at the following local address(es): [specify].

[Continue with the following:]

[If more than one name is listed above, add:]

The transportation of goods under this Change Order will be performed by: _____[name of carrier under which transportation is to be performed].

[Continue with the following:]

Bill of Lading No. _____

SHIPPER		DESTINATION			
A B C D E		Article (list indi- vidually)		Condition When Re- ceived at Origin	Condition When Delivered at Destination
		A	B	C	D E

Date
City
In Warehouse
Out Warehouse
Checker's Signature

EXCEPTION SYMBOLS	EXCEPTION SYMBOLS	LOCATION SYMBOLS
BE: Bent	MI: Mildew	1. Arm
BR: Broken	MO: Moth-eaten	2. Bottom
BU: Burned	PBC: Packed by Carrier	3. Corner
CH: Chipped	PBO: Packed by Owner	4. Front
CU: Contents, condition unknown	R: Rubbed	5. Left
D: Dented	RU: Rusted	6. Leg
F: Faded	SC: Scratched	7. Rear

G: Gouged	SO: Soiled	8. Right
L: Loose	T: Torn	9. Side
M: Marred	W: Badly Worn	10. Top
	Z: Cracked	11. Veneer

NOTE:

The omission of a symbol indicates good condition except for normal wear.

Pickup Address: _____

Date: _____

Signature of Driver: _____

I accept this receipt in lieu of the company's standard documents of title that will be issued at the destination when all rates and charges are known. I agree that the service shall be performed under the terms and conditions of the company's order form and documents of title.

I hereby acknowledge: (1) that the goods listed above were in the condition described when delivered to the company; and (2) that I have received a copy of "Important Notice to Shippers of Household Goods."

Date: _____

Signature of Shipper/Representative: _____

NOTICE:

CLAIMS FOR ANY LOST OR DAMAGED GOODS MAY BE FILED IN WRITING WITH THE CARRIER WITHIN NINE MONTHS OF THE DELIVERY DATE.

I hereby acknowledge delivery and receipt of the goods in the above shipment.

Date: _____

Signature of Shipper/Representative: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesDamages



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

A. Intrastate Shipment of Household Goods

1. Shipping Documents

22-54 California Legal Forms--Transaction Guide §§ 54.208-54.219

[Reserved]

§§ 54.208[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

A. Intrastate Shipment of Household Goods

2. Claim Forms

22-54 California Legal Forms--Transaction Guide § 54.220

§ 54.220 Claim for Loss or Damage

[1] Comment

[a] Use of Form

This form is a claim for loss or damage to used property that was moved (or stored) by a carrier. Typically, a carrier requires a claimant to file a claim on its printed form. This form illustrates the type of claim form used by carriers; however, each carrier uses a slightly different form. This form may be used for either intrastate or interstate shipments. However, some carriers use separate forms for intrastate and interstate shipments.

Claim forms used by carriers ordinarily include "instructions" for completing the form. This form similarly contains completion instructions. The instructions stated on the printed form of the carrier with whom the claim is to be filed should be carefully followed.

[b] Filing Requirements

A claim for loss or damage must be filed in writing with the receiving or delivering carrier, the carrier that issued the shipping document, or the carrier on whose line the alleged loss or damage occurred [MAX-4, item 92(1)]. The claim must be filed within the time limit specified in MAX-4, by law, the terms of the shipping document or other contract of carriage, and all applicable tariff provisions [MAX-4, item 92(1)].

Under MAX-4, a claim for loss or damage must be filed within nine months after delivery of the property to the consignee or, if delivery is not made, within nine months after a reasonable time for delivery has elapsed. Further, suit must be instituted within two years and one day from the date that notice of disallowance of the claim is given by the carrier to the claimant. If a claim is not filed or suit is not instituted in accordance with these requirements, the carrier is not liable [MAX-4, item 92(14)].

[c] Acknowledgment of Receipt and Settlement

A household goods carrier that receives a written claim for loss or damage must acknowledge receipt of the claim in writing to the claimant within 30 calendar days after receipt by the carrier or its agent. The carrier must also record the date of receipt at the time that the claim is received [MAX-4, item 92(15)].

Within 60 days after receipt of the claim, the carrier must, in writing, pay the claim, decline to pay, or make a firm settlement offer to the claimant. If the carrier declines to pay or offers less than the amount sought, the carrier must state, in writing, the basis for the denial or reduction. However, if the claim cannot be processed and disposed of within the 60-day period for reasons beyond the carrier's control, the carrier must at the end of that period and at the expiration of each 30-day period while the claim remains pending, advise the claimant in writing of the status of the claim and the reasons for the delay. The carrier must send a copy of the letter to the California Public Utilities Commission, Compliance and Enforcement Branch, 505 Van Ness Avenue, San Francisco, California 94102 [MAX-4, item 92(15)].

[d] Contents of Claim Form

A claim for loss or damage must contain the following information [MAX-4, item 92(2)]:

- Facts sufficient to identify the shipment of property involved.
- Assertion of liability for the alleged loss or damage.
- A claim for payment of a specified or determinable amount of money.

Bad-order reports, damage appraisal reports, notations of shortage or damage on freight bills, delivery receipts, or other documents, or inspection reports, standing alone, are not sufficient to comply with these minimum claim filing requirements [MAX-4, item 92(3)].

Any insurer who reproduces or furnishes a claim form in connection with any insurance contract must include, on the face of the form or on a rider attached to the form, in comparative prominence with the other contents of the form, the following statement: "Any person who knowingly presents false or fraudulent claim for the payment of a loss is guilty of a crime and may be subject to fines and confinement in state prison." This statement must be preceded by the words "For your protection California law requires the following to appear on this form," or other explanatory words of similar meaning [*Ins. Code* § 1871.2]. This preamble and the required statutory language are reproduced in this form.

[e] False Claims

The Public Utilities Code prohibits individuals, corporations, and their agents and employees from making false statements, using false documentation, or misrepresenting the value or extent of damage, in connection with damage claims growing out of the transportation of used property subject to the Household Goods Carriers Act [*Pub. Util. Code* § 5199]. No specific penalty is imposed for violation of these provisions, but violators are subject to the general penalty provisions of the Act [*see Pub. Util. Code* § 5111 *et seq.*], which provide, among other things, for a fine of \$1,000 and three months' imprisonment for persons other than household goods carriers who knowingly violate any provision of the Act [*Pub. Util. Code* § 5312]. The Act's remedies and penalties are cumulative to each other and to the remedies and penalties available under any other law, and do not bar or affect the availability of any other remedy or penalty or criminal prosecution [*Pub. Util. Code* § 5316]. Thus, in appropriate cases, the filing of a false claim can also be prosecuted under appropriate provisions of the Insurance Code and/or Penal Code.

[f] Effect of Statement Concerning Condition of Goods

No claim against a household goods carrier for loss or damage of goods may be denied solely because the lost or

[2] FORM

CLAIM FOR LOSS OR DAMAGE

Address

Loss and Damage _____

Address Where Shipment Unloaded _____

Address _____

Damage discovered by _____

Item	Approx. Weight	Month and Year Pur- chased	Original Cost	Present Value	Amount Claimed
1.	_____	_____	\$_____	\$_____	\$_____
2.	_____	_____	\$_____	\$_____	\$_____
3.	_____	_____	\$_____	\$_____	\$_____
4.	_____	_____	\$_____	\$_____	\$_____
5.	_____	_____	\$_____	\$_____	\$_____
6.	_____	_____	\$_____	\$_____	\$_____
7.	_____	_____	\$_____	\$_____	\$_____
8.	_____	_____	\$_____	\$_____	\$_____

The total claim for loss and/or damage is: \$_____. The carrier is liable for this amount.

The full actual value of this shipment was \$_____. I am the owner of the above-described property. I did not cause or contribute to the damage stated above.

All statements made in this Claim for Loss or Damage and any attached documents are true and correct to the best of my knowledge and belief, and constitute my entire and complete claim. No material information has been withheld from this claim.

Date: _____

Signature of claimant: _____

IMPORTANT NOTICE

For your protection California law requires the following to appear on this form:

Any person who knowingly presents false or fraudulent claim for the payment of a loss is guilty of a crime and may be subject to fines and confinement in state prison.

INSTRUCTIONS

1. Please read the terms and conditions of the agreement for services and the shipping order and freight bill or the bill of lading.

2. Claims must be filed within nine months after the date of delivery. No claim will be considered as filed until the carrier has received a completed Claim for Loss or Damage signed by the claimant.

3. All claims in excess of [*specify amount, e.g., \$200*] must be notarized. The carrier reserves the right to require notarization of any other claims.

4. Please note under the following headings:

Check List No. If a check list was prepared, each item in your shipment carries a tag stating the number of the freight bill or bill of lading and the check list number for that particular item. If you cannot identify the check list number from the tag, do so from your copy of the check list.

Description of Article. Carefully describe each article. Identify contents of containers as completely and accurately as possible. If articles are claimed to be missing, identify by size, color, model number, brand name or manufacturer, and similar data.

Description of Loss or Damage. If the article was damaged, state the type, severity, and location of the damage.

Approximate Weight. The weight of each item should be indicated to the best of your ability.

Month and Year of Purchase. If the article was purchased used, so indicate. If you received the article as a gift, so state, giving the month and year in which it was received.

Original Cost. State this to the best of your ability. Attempt to locate the original of the sales slip and show it to our representative when the representative contacts you.

Present Value. Depreciation should be taken into consideration.

Amount Claimed. If the article was lost or damaged beyond repair, this amount is the same as Present Value. If the article was damaged, this amount should be the cost of reasonable repair.

5. Estimate to the best of your ability the full actual value of your entire shipment as of the time it was tendered to us for moving. Present-day replacement cost less depreciation must be considered in determining actual value.

6. The carrier reserves the right to inspect within a reasonable time any articles claimed to be damaged. Do not repair or replace any listed article until we have had the opportunity to review your completed Claim for Loss or Damage and to determine the course of action necessary.

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesDamages



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CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

A. Intrastate Shipment of Household Goods

2. Claim Forms

22-54 California Legal Forms--Transaction Guide §§ 54.221-54.229

[Reserved]

§§ 54.221[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

B. Intrastate Shipment of Commercial Goods

22-54 California Legal Forms--Transaction Guide § 54.230

§ 54.230 Straight Bill of Lading (Nonnegotiable)

[1] Comment

[a] Use of Form

This form is a uniform straight bill of lading for use in the intrastate transportation of commercial goods; that is, goods *other than* used property subject to the Household Goods Carriers Act [see § 54.10 et seq.]. A straight bill of lading is nonnegotiable; the form is uniform in the sense that it generally complies with the content and format prescribed by federal regulations for use in interstate commerce [see 49 C.F.R. § 1035.1; see also 49 C.F.R. pt. 1035, apps. A, B].

A bill of lading is a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods and which, by its terms, evidences the intention of the issuer that the person entitled under the document has the right to receive, hold, and dispose of the document and the goods it covers. Designation of the document by the issuer as a "bill of lading" is conclusive evidence of that intention [Com. Code § 1201(b)(6)]. Bills of lading used for transporting goods within California are governed by Division 7 of the Commercial Code [see Com. Code § 7101 et seq.].

A bill of lading is negotiable if:

- By its terms, the goods covered by it are to be delivered to the bearer or to the order of a named person [Com. Code § 7104(a)]; and
- When it was issued, it did not have a conspicuous legend, however expressed, that it is nonnegotiable [Com. Code § 7104(c)].

Any other bill of lading is nonnegotiable [Com. Code § 7104(b)].

A nonnegotiable bill of lading may be called a "straight" bill of lading in the transportation industry. (A negotiable bill of lading may be known as an "order" bill of lading; for a form for an order bill of lading, see § 54.231.)

[b] Completion of Form

When goods are loaded by the issuer of a bill of lading, the issuer must count the packages of goods if shipped in packages and ascertain the kind and quantity if shipped in bulk. Words in a bill of lading such as "shipper's weight, load, and count," or words of similar import indicating that the description was made by the shipper, are ineffective except as to goods concealed in packages [*Com. Code § 7301(b)*].

If bulk goods are loaded by a shipper who makes available to the issuer of a bill of lading adequate facilities for weighing those goods, the issuer must ascertain the kind and quantity within a reasonable time after receiving the shipper's request in a record to do so [*see Com. Code § 7102(a)(10)* (definition of "record"); § 54.30[2][b]]. In that case, "shipper's weight" or words of similar import are ineffective in a bill of lading [*Com. Code § 7301(c)*].

The shipper guarantees, to the issuer of the bill of lading, the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition, and weight, as furnished by the shipper. The shipper must indemnify the issuer against damage caused by inaccuracies in those particulars. This right of indemnity does not limit the issuer's responsibility or liability under the contract of carriage to any person other than the shipper [*Com. Code § 7301(e)*].

The terms and conditions of this bill are based on 49 C.F.R. pt. 1035, app. B. However, the language and format has been modified.

[c] Carrier's Lien

The carrier has a lien on the goods covered by the bill of lading (or on the proceeds in the carrier's possession) for charges after the date of the carrier's receipt of the goods for storage or transportation, including demurrage and terminal charges, and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. However, against a purchaser for value of a negotiable bill of lading, the carrier's lien is limited to charges stated in the bill or the applicable tariffs or, if no charges are stated, a reasonable charge [*Com. Code § 7307(a)*].

The carrier's lien on goods that the carrier was required by law to receive for transportation is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to those charges and expenses. In any other case, the carrier's lien is effective against the consignor and any person who permitted the bailor to have control or possession of the goods, unless the carrier had notice that the bailor lacked authority [*Com. Code § 7307(b)*].

The carrier loses its lien on any goods that it voluntarily delivers or unjustifiably refuses to deliver [*Com. Code § 7307(c)*].

[d] Carrier's Liability for Loss or Damage

After issuing a nonnegotiable bill of lading, a carrier must exercise the degree of care in relation to the goods that a reasonably careful person would exercise under similar circumstances. However, this duty does not affect any statute, regulation, or rule of law that imposes liability on a common carrier for damages not caused by its negligence [*Com. Code § 7309(a)*].

Damages may be limited by a term in the bill of lading (or in a transportation agreement) that the carrier's liability may not exceed a value stated in the bill of lading (or transportation agreement), if all of the following conditions are satisfied [*Com. Code § 7309(b)*; *but see Dictor v. David & Simon, Inc. (2003) 106 Cal. App. 4th 238, 249-250, 130 Cal. Rptr. 2d 588* (plaintiff's claim under *Com. Code § 7309* is preempted by 49 U.S.C. § 14706 when case arises out of interstate shipment)]:

- The carrier's rates are dependent on value;
- The consignor is afforded an opportunity to declare a higher value; and
- The consignor is advised of the opportunity.

However, such a limitation is not effective with respect to the carrier's liability for conversion to its own use [*Com. Code § 7309(b)*].

[e] Carrier's Liability for Errors in Bill of Lading

A consignee of a nonnegotiable bill of lading who has given value in good faith, relying on the description of the goods in the bill or on the date shown in the bill, may recover from the issuer damages caused by the misdating of the bill or the nonreceipt or misdescription of the goods, except to the extent that the bill indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, such as where the description is in terms of marks or labels or kind, quantity, or condition, or the receipt or description is qualified by "contents or condition of contents of packages unknown," "said to contain," "shipper's weight, load, and count," or words of similar import, if that indication is true [*Com. Code § 7301(a)*].

[f] Carrier's Liability for Goods Loaded by Shipper

The issuer of a bill of lading, by including in the bill the words "shipper's weight, load, and count," or words of similar import, may indicate that the goods were loaded by the shipper; and if that statement is true, the issuer is not liable for damages caused by the improper loading. However, omission of such words does not imply liability for damages caused by improper loading [*Com. Code § 7301(d)*].

[2] FORM

Straight Bill of Lading

STRAIGHT BILL OF LADING
NONNEGOTIABLE

[*name of carrier*]

[*address*]

[*telephone number*]

[*identifying number*]

Date: _____ No. _____

Name of carrier: _____ Telephone No. _____

Address of carrier: _____

Name of shipper _____ Telephone No. _____

Address of shipper _____

Received, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading, at _____ [*place of issuance*], from _____ [*name of shipper/consignor*] the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), to be delivered to _____ [*name of shipper/consignee*] at _____ [*specify delivery address*]

]. _____ [*name of issuer*] (Company) agrees to transport this property by
 _____ [*specify, e.g., motor vehicle*] from the point of shipment to the point of destination.

For Notification Purposes Only:

Mail or Street Address of Consignee: _____.

Consigned to: _____ Length: _____

Destination: _____ Plan: _____

State of: _____ Length: _____

County of: _____ Plan: _____

Route: _____ Container initials/number: _____

Delivering carrier: _____ Length: _____

Car initial: _____ Plan: _____

Car No.: _____ Length: _____

Trailer initials/number: _____ Plan: _____

[*Include following information or, to provide information in tabular form, see form in § 54.231.*]

Description of goods: _____

Quantity of goods: _____

Nature of goods: _____

Weight of goods: _____

Charges:

Over line of _____ [*name of issuer*]: \$_____.

Over connecting lines: \$_____.

Tendered by: _____ [*signature of shipper/consignor or agent*]

Shipper

Accepted by: _____ [*signature of issuer or agent*]

Carrier

Date: _____ [*specify date set forth above*]

[*Reverse side of form*]

CONTRACT TERMS AND CONDITIONS

General Liability

1. (a) The carrier or party in possession of any of the property described in this bill is liable as at common law for any loss of or damage to the property, except as provided below.

Limitation of Liability

(b) No carrier or party in possession of all or any of the property described in this bill is liable for any loss or damage or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability is that of a warehouseman only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (as free time is computed in the tariff) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from negligence is on the carrier or party in possession), the carrier or party in possession is not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

Quarantine Conditions

(c) In case of quarantine, the property may be discharged at the risk and expense of the owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility ceases when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind on or in respect to property will be borne by the owners of the property or be a lien on the property. The carrier is not liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier is liable, except in case of negligence, for any mistake for inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper will hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at that place.

General Transport Conditions

2. (a) No carrier is bound to transport the listed property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier has the right in case of physical necessity to forward the property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, when a lower value than actual value has been represented in writing by the shipper or has been agreed on in writing as the released value of the property as determined by the classification or tariffs on which the rate is based, the lower value plus freight charges if paid are the maximum amount to be recovered, whether or not that loss or damage occurs from negligence.

Filing of Claims and Suits

(b) Claims for loss, damage, or injury to property must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed. However, if the loss, damage, or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim is required as a condition precedent to recovery.

Suits for loss, damage, injury, or delay must be instituted within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed. If the claim on which the suit is based was made in writing within nine months (whether or not filing of the claim is required as a condition precedent to recovery), suit must be instituted not later than two years and one day after notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts of the claim specified in the notice.

Insurance

(c) Any carrier or party liable on account of loss of or damage to any of the listed property shall have the full benefit of any insurance that may have been effected on or on account of that property, to the extent that this does not avoid the policies or contracts of insurance: provided, that the carrier reimburse the claimant for the premium paid on the insurance.

Accessory Costs

3. Except when service is required as the result of carrier's negligence, all property is subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported under this bill has the privilege, at its own cost and risk, of compressing the same for greater convenience in handling and forwarding, and will not be held responsible for deviation or unavoidable delays in procuring compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice must be given to the consignor), and if so delivered is subject to a lien for elevator charges in addition to all other charges under this bill.

Storage at Delivery Time

4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (as computed in the tariff), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse, or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and held there without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

Disposal of Nonperishable Goods

(b) When nonperishable property that has been transported to destination under this bill is refused by consignee or the party entitled to receive it, or the consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival has been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at a place designated by the carrier: Provided, that the carrier must first mail, send, or give to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition is not arranged for, and publish notice containing a description of the property, the name of the party to whom consigned, or, if shipped "order notify," the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where that newspaper is published; provided that 30 days have elapsed before publication of notice of sale after the notice that the property was refused or remains unclaimed was mailed, sent, or given.

Disposal of Perishable Goods

(c) When perishable property that has been transported under this bill to destination is refused by consignee or party entitled to receive it, or the consignee or party entitled to receive it fails to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale; provided that if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, this notification must be given, in the manner as the exercise of due diligence requires, before the property is sold.

Other Lawful Disposition of Goods

(d) When the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in those paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under the circumstances and in the manner as may be authorized by law.

Application of Proceeds From Sales

(e) The proceeds of any sale made under the preceding paragraphs must be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense. If any balance remains, it must be paid to the owner of the property sold under this bill.

Risk on Unattended Delivery

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent is entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to those stations, wharves, or landings is at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Unrated Shipments

5. No carrier under this bill is liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of

the articles are endorsed on this bill.

Hazardous Commodities

6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by the goods, and the goods may be warehoused at owner's risk and expense or destroyed without compensation.

Payment of Charges

7. The owner or consignee must pay the freight and average, if any, and all other lawful charges on the listed property; but except in those instances when it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges have been paid. The consignor is liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier may not make delivery without requiring payment of the charges and the carrier, contrary to such a stipulation, must make delivery without requiring payment, the consignor is not liable for the charges. Nothing in this bill limits the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If on inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid on the articles actually shipped.

Substitute Bills

8. If this bill of lading is issued on the order of the shipper, or agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with that prior bill of lading, must be considered a part of this bill of lading as fully as if it were written or made in or in connection with this bill of lading.

Related Water Carriage

9. (a) If all or any part of the listed property is carried by water over any part of said route, that water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An Act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith or with this paragraph.

Fire Liability

(b) No carrier by water is liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of that carrier.

Other Peril

(c) If the owner exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no carrier will be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters,

or from latent defects in hull, machinery, or appurtenances whether existing before, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property described in this bill is at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, transship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence the carrier is not responsible for any loss or damage to property if it is necessary or is usual to carry the same on deck.

Loss Payment

(d) General average is payable according to York-Antwerp Rules, 1924, and, as to any matter not therein provided for, according to the law and usage of the port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is agreed that in case of danger, damage, or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, machinery, or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees or owners of the cargo must nevertheless pay salvage and any special charges incurred in respect of the cargo, and must contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

Modification by Tariff

(e) If the property is being carried under a tariff that provides that any carrier or carriers party is liable for loss from perils of the sea, then as to that carrier or carriers the provisions of this paragraph must be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

Exclusions From Coverage

(f) The term "water carriage" in this paragraph will not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Alterations

10. Any alteration, addition, or erasure in this bill of lading that is made without the special notation of the agent of the carrier issuing this bill of lading, is without effect, and this bill of lading is enforceable according to its original terms.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Bills of Lading
 Commercial Law (UCC) Documents of Title (Article 7) Obligations
 Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts
 Liens
 Transportation Law
 Carrier Duties & Liabilities
 Bills of Lading



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

B. Intrastate Shipment of Commercial Goods

22-54 California Legal Forms--Transaction Guide § 54.231

§ 54.231 Order Bill of Lading (Negotiable)

[1] Comment

[a] Use of Form

This form is a uniform order bill of lading for use in the intrastate transportation of commercial goods; that is, goods other than household goods [*see § 54.10 et seq.*]. An order bill of lading is negotiable; the form is "uniform" in the sense that it generally complies with the format required by federal regulations for use in interstate commerce [*see 49 C.F.R. § 1035.1; see also 49 C.F.R. pt. 1035, apps. A, B*].

A bill of lading is a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods and which, by its terms, evidences the intention of the issuer that the person entitled under the document has the right to receive, hold, and dispose of the document and the goods it covers. Designation of the document by the issuer as a "bill of lading" is conclusive evidence of that intention [*Com. Code § 1201(b)(6)*]. Bills of lading used for transporting goods within California are governed by Division 7 of the Commercial Code [*see Com. Code § 7101 et seq.*].

A bill of lading is negotiable if:

- By its terms, the goods covered by it are to be delivered to the bearer or to the order of a named person [*Com. Code § 7104(a)*]; and
- When it was issued, it did not have a conspicuous legend, however expressed, that it is nonnegotiable [*Com. Code § 7104(c)*].

Any other bill of lading is nonnegotiable [*Com. Code § 7104(b)*].

A negotiable bill of lading may be called an "order" bill of lading in the transportation industry. (A nonnegotiable bill of lading may be known as a "straight" bill of lading; for a form for a straight bill of lading, see § 54.230.)

[b] Completion of Form

When goods are loaded by the issuer of a bill of lading, the issuer must count the packages of goods if shipped in packages and ascertain the kind and quantity if shipped in bulk. Words in a bill of lading such as "shipper's weight, load, and count," or words of similar import indicating that the description was made by the shipper, are ineffective except as to goods concealed in packages [*Com. Code § 7301(b)*].

If bulk goods are loaded by a shipper who makes available to the issuer of a bill of lading adequate facilities for weighing those goods, the issuer must ascertain the kind and quantity within a reasonable time after receiving the shipper's request in a record to do so [*see Com. Code § 7102(a)(10)* (definition of "record"); § 54.30[2][b]]. In that case, "shipper's weight" or words of similar import are ineffective in a bill of lading [*Com. Code § 7301(c)*].

The shipper guarantees, to the issuer of the bill of lading, the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition, and weight, as furnished by the shipper. The shipper must indemnify the issuer against damage caused by inaccuracies in those particulars. This right of indemnity does not limit the issuer's responsibility or liability under the contract of carriage to any person other than the shipper [*Com. Code § 7301(e)*].

[c] Carrier's Lien

The carrier has a lien on the goods covered by the bill of lading (or on the proceeds in the carrier's possession) for charges after the date of the carrier's receipt of the goods for storage or transportation, including demurrage and terminal charges, and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. However, against a purchaser for value of a negotiable bill of lading, the carrier's lien is limited to charges stated in the bill or the applicable tariffs or, if no charges are stated, a reasonable charge [*Com. Code § 7307(a)*].

The carrier's lien on goods that the carrier was required by law to receive for transportation is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to those charges and expenses. In any other case, the carrier's lien is effective against the consignor and any person who permitted the bailor to have control or possession of the goods, unless the carrier had notice that the bailor lacked authority [*Com. Code § 7307(b)*].

The carrier loses its lien on any goods that it voluntarily delivers or unjustifiably refuses to deliver [*Com. Code § 7307(c)*].

[d] Carrier's Liability for Loss or Damage

A carrier, after issuing a negotiable bill of lading, must exercise the degree of care in relation to the goods that a reasonably careful person would exercise under similar circumstances. However, this duty does not affect any statute, regulation, or rule of law that imposes liability on a common carrier for damages not caused by its negligence [*Com. Code § 7309(a)*].

Damages may be limited by a term in the bill of lading (or in a transportation agreement) that the carrier's liability may not exceed a value stated in the bill of lading (or transportation agreement), if all of the following conditions are satisfied *Com. Code § 7309(b)*; but see *Dictor v. David & Simon, Inc.* (2003) 106 Cal. App. 4th 238, 249-250, 130 Cal. Rptr. 2d 588 (plaintiff's claim under *Com. Code § 7309* is preempted by 49 U.S.C. § 14706 when case arises out of interstate shipment)]:

- The carrier's rates are dependent on value;

- The consignor is afforded an opportunity to declare a higher value; and
- The consignor is advised of the opportunity.

However, such a limitation is not effective with respect to the carrier's liability for conversion to its own use [*Com. Code § 7309(b)*].

[e] Carrier's Liability for Errors in Bill of Lading

A holder to whom a negotiable bill of lading has been duly negotiated, relying on the description of the goods in the bill or on the date shown in the bill, may recover from the issuer damages caused by the misdating of the bill or the nonreceipt or misdescription of the goods, except to the extent that the bill indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, such as where the description is in terms of marks or labels or kind, quantity, or condition, or the receipt or description is qualified by "contents or condition of contents of packages unknown," "said to contain," "shipper's weight, load, and count," or words of similar import, if that indication is true [*Com. Code § 7301(a)*].

[f] Carrier's Liability for Goods Loaded by Shipper

The issuer of a bill of lading, by including in the bill the words "shipper's weight, load, and count," or words of similar import, may indicate that the goods were loaded by the shipper; and if that statement is true, the issuer is not liable for damages caused by the improper loading. However, omission of such words does not imply liability for damages caused by improper loading [*Com. Code § 7301(d)*].

[2] FORM

Order Bill of Lading

ORDER BILL OF LADING
NEGOTIABLE

[*name of carrier*]
[*address*]
[*telephone number*]
[*identifying number*]

Date: _____ No. _____
Name of carrier: _____ Telephone No. _____
Address of carrier: _____
Name of shipper _____ Telephone No. _____
Address of shipper _____

Received, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading, at _____ [*place of issuance*], from _____ [*name of shipper/consignor*] the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), to be delivered to the order of _____ [*name of shipper/consignee*] at _____ [*specify shipper/consignee's address*]. _____ [*name of issuer*] (Company) agrees to transport this property by _____ [*specify, e.g., motor vehicle*] from the point of shipment to the point of destination. The

surrender of this original order bill of lading, properly endorsed, is required for delivery of the property.

For Notification Purposes Only:

Mail or Street Address of Consignee:

_____.

Consigned to order of: _____ Length: _____

Destination: _____ Plan: _____

State of: _____ Length: _____

County of: _____ Plan: _____

Route: _____ Container initials/number: _____

Delivering carrier: _____ Length: _____

Car initial: _____ Plan: _____

Car No.: _____ Length: _____

Trailer initials/number: _____ Plan: _____

No. Packages	Description of articles, special marks, and exceptions	*Weight (subject to correction)	Class or rate	Check column
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

* If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

[If shipment to be delivered without recourse on shipper/consignor, add:]

Subject to Section 7 of the terms and conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, consignor must sign the following statement: The carrier may not make delivery of this shipment without payment of freight and all other lawful charges. _____ [signature of shipper/consignor].

[Continue with the following:]

If the charges are to be prepaid, write or stamp here, "To be Prepaid:" _____.

Received \$_____ to apply in prepayment of the charges on the above-described property.

Agent or Cashier

Per _____ [signature]

NOTE: This signature acknowledges only the amount prepaid.

Charges advanced: \$_____.

NOTE: When the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is specifically stated by the shipper to not exceed \$_____ per _____ [specify, e.g., article].

Shipper: _____ Agent: _____

per _____ [signature] per _____ [signature]

Permanent post office address of shipper:

[For terms and conditions to be printed on reverse side, see § 54.130 .]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Bills of Lading Commercial Law (UCC) Documents of Title (Article 7) Negotiation & Transfer Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liens Transportation Law Carrier Duties & Liabilities Bills of Lading



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

B. Intrastate Shipment of Commercial Goods

*22-54 California Legal Forms--Transaction Guide § 54.232***§ 54.232 Notice of Satisfaction of Carrier's Lien****[1] Comment--Use of Form**

This form is a notice of satisfaction of a carrier's lien. It may be used by a shipper, or any other person claiming a right or interest in the shipment, to notify the carrier that the person is paying the lien amount and redeeming the goods.

A carrier's lien on goods may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after the carrier has notified all persons known to claim an interest in the goods [*Com. Code § 7308(a)*]. For discussion, see § 54.34[4]. Before the lien enforcement sale, any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred in complying with the lien enforcement procedure. In that event, the goods may not be sold but must be retained by the carrier, subject to the terms of the bill of lading and Division 7 [*Com. Code § 7308(b)*].

[2] FORM**Notice of Satisfaction of Carrier's Lien**

Notice of Satisfaction of Carrier's Lien

To: _____[*name of carrier in possession of goods*]_____[*address*]

Re: Bill of Lading Number _____

Dear _____[*name of carrier*]

I tender to you the amount of \$_____, representing the full amount of your claim of lien as carrier for the goods of _____[*name of shipper*] covered by bill of lading number _____, plus the amount of

all reasonable expenses incurred by you in enforcing your lien for the carriage of these goods.

[If person redeeming goods is the owner, add:]

I represent that I am the owner of these goods.

[Or, if person redeeming goods is not the owner, add:]

I claim an interest in these goods.

[Continue with the following:]

I claim the right pursuant to *Commercial Code Section 7308* to redeem the goods. You must continue to hold the goods under the terms of the above-referenced bill of lading that you issued for the goods and the applicable provisions of Division 7 of the Commercial Code.

Date: _____.

Sincerely,

_____ *[signature]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) General Overview Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liens



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22-54 California Legal Forms--Transaction Guide §§ 54.233-54.239

[Reserved]

§§ 54.233[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

C. Interstate Shipment of Household Goods

22-54 California Legal Forms--Transaction Guide § 54.240

§ 54.240 Non-Binding Estimate of Charges

[1] Comment

[a] Use of Form

This form may be used by a carrier to give a prospective shipper a non-binding estimate of the charges that will be made for the transportation of the shipper's household goods in interstate commerce. Carriers of household goods must provide estimates of the approximate costs that will be charged to prospective shippers [49 U.S.C. § 14104(b); 49 C.F.R. § 375.401(a)]. Non-binding estimates must be furnished without charge and in writing to the shipper or other person responsible for payment of the freight charges. The estimate must be retained by the carrier as an addendum to the bill of lading [49 C.F.R. § 375.405(b)(3), (4)].

Non-binding estimates must be reasonably accurate. These estimates do not bind the carrier; the final charges for shipments moved on non-binding estimates are determined in accordance with the rates that appear in the carrier's tariff applicable to the transportation [49 C.F.R. § 305.405(a)(1), (2)].

All non-binding estimates must clearly indicate on their face the facts that [49 C.F.R. § 375.405(b)(5)]:

- The estimate is not binding on the carrier; and
- The charges shown are the approximate charges that will be made for the services specified in the estimate.

In addition, these estimates must clearly describe the shipment and all services to be provided [49 C.F.R. § 375.405(b)(6)].

When a carrier gives a non-binding estimate, the carrier must enter the estimated charges on the order for service (if an order for service is required [see § 54.242]) and on the bill of lading [49 C.F.R. § 375.405(c); see § 54.243].

At the time that a motor carrier provides the written estimate, the motor carrier must provide the shipper a copy of the Department of Transportation publication FMCSA-ESA-03-005 (or its successor publication) entitled "Ready to Move?". Before the execution of a contract for service, the motor carrier must provide the shipper with a copy of the Department of Transportation publication OCE 100, entitled "Your Rights and Responsibilities When You Move," required by 49 C.F.R. § 375.213 (or any successor regulation) [49 C.F.R. § 14104(b)(2)].

For a binding estimate, see § 54.241.

[b] Table of Measurements

The rate charged for transportation, which generally accounts for most of the cost involved in an interstate shipment of household goods, is based, in most cases, on the weight of the shipment. Because actually weighing the goods is impracticable at the time an estimate is given, the weight must be estimated. The accuracy of the estimate of the total charges depends in great part on the accuracy of the weight estimation.

The estimate form contains a Table of Measurements, which specifies the number of cubic feet considered to be occupied by each of the various types of articles commonly included in shipments of household goods. By the use of this table, the total cubic feet involved in the proposed shipment is then estimated. In fact, the estimate is made only after a visual inspection of the goods by the estimator, and the estimate of total cubic feet is then multiplied by a weight factor of seven pounds per cubic foot; this numerical factor is used because it best represents the average weight of one cubic foot of household goods.

[c] Two Methods of Using Estimate

The first and most common method of using the estimate form is for the representative of the carrier to visually inspect all of the goods, fill in the proper blanks on the table of measurements, and then compute the total estimated weight by multiplying the total number of cubic feet by seven. The representative then executes the rest of the form as appropriate in the particular situation, and determines the total estimated cost. The original, or a legible copy of the estimate, is then given to the shipper.

The second method is for the carrier's representative to give the prospective shipper a copy of the estimate form so that the shipper may make his or her own estimate. Before giving the shipper the form, the representative will note on it the rates applicable to the particular services involved.

[2] FORM

Non-Binding Estimate of Charges

NON-BINDING ESTIMATE OF COST OF SERVICES

[name of carrier]

[address]

[telephone number]

[identifying number]

Date: _____

No. _____

Name of carrier: _____

Telephone No. _____

Address of carrier: _____

Name of shipper _____

Telephone No. _____

Address of shipper _____

IMPORTANT NOTICE

This estimate covers only the articles and services listed. It is a reasonably accurate estimate; the charges shown are the approximate charges that will be assessed for the services specified. This estimate is non-binding, that is, it is not a guarantee that the actual charges will not exceed the amount of the estimate. Common carriers must, by law, collect transportation and other incidental charges computed on the basis of rates shown in their lawfully published tariffs, regardless of prior rate quotations or estimates made by the carrier or its agents. Exact charges for loading, transporting, and unloading are based on the weight of the goods transported, and those charges may not be determined before the goods are loaded on the van and weighed. Charges for additional services will be added to the transportation charges.

Shipment moving from _____ to _____

Shipper's destination
contact: _____

Phone No. _____

Packing date requested

Loading date requested

Delivery date or period of time
requested _____

TOTAL ESTIMATED COST OF SERVICES: \$ _____.

(Based on tariff _____ MF-ICC No. _____)

[If shipment is collect on delivery, add:]

If the total tariff charges for the listed articles and services exceed this estimate by more than 10 percent, then, on your request, the carrier must relinquish possession of your shipment on delivery in advance of the payment of the total amount of tariff charges shown on the bill of lading or freight bill. The maximum amount to be paid on delivery of your C.O.D. shipment _____ *[specify acceptable form of payment, e.g., in cash, by certified check, or by money order]* is \$ _____ *[specify total estimated cost plus 10 percent]*. You are still obligated to pay the balance of the total charges within 30 days after the date of delivery.

[Continue with the following:]

BASIS FOR ESTIMATE

Transportation:

Estimated weight _____ lbs. _____ mi.

At \$_____ per 100 lbs. \$_____

ESTIMATED COSTS OF SERVICES

TRANSPORTATION AND VALUATION CHARGES

Valuation charge On Transportation: \$_____ at 50 per \$100 or \$_____
(for liability on part fraction
of carrier in excess
of that assumed
when its lowest rates
are charged)

On Storage-in-Transit: _____ per \$_____
CWT. (10% of monthly
storage rate) for each 30
days or fraction thereof

Additional transport-
ation charges:
(explain)

Pickup or delivery for _____ lbs. \$_____
storage-in-transit: at \$_____ per 100 lbs. for
each 30 days or fraction
thereof

Storage-in-transit: _____ lbs. \$_____
at \$_____ per 100 lbs. for
each 30 days or fraction
thereof

Warehouse handling \$_____

lbs.; at

per 100 lbs. (one time
charge)

Extra pickup or delivery \$_____
at

Special servicing of ap- \$_____
pliances

Hoisting, lowering, or \$_____
carrying pianos, heavy
articles (explain)

Containers (see be-
low)

\$_____

_____	Packing (see below)	\$ _____

_____	Unpacking (see below)	\$ _____

_____	Labor	at \$ _____ per person hour \$ _____

_____	person(s) for	

_____	hrs.;	
Other services		\$ _____
(explain)		

		TOTAL ESTIMATED COST \$ _____

ESTIMATED COST OF CONTAINERS, AND PACKING AND UNPACKING SERVICES

		CONTAINERS	PACKING	UNPACKING
		Est. Per No.	Est. Per No.	Est. Per No.
		Each Total	Each Total	Each Total
BARREL,	dishpack,			
	drum etc.			
_____	\$ _____	\$ _____	\$ _____	
_____	_____	_____	_____	
BOXES:				
_____	\$ _____	\$ _____	\$ _____	
_____	_____	_____	_____	
	Not over 5			
_____	\$ _____	\$ _____	\$ _____	
_____	_____	_____	_____	
	Over 5 but not			
_____	\$ _____	\$ _____	\$ _____	
_____	_____	_____	_____	
CARTONS:				
	Less than 11/2			
_____	\$ _____	\$ _____	\$ _____	
_____	_____	_____	_____	
	11/2 cubic feet			
_____	\$ _____	\$ _____	\$ _____	

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_____	_____	_____	_____
	3 cubic feet		
_____	\$ _____	\$ _____	\$ _____
_____	_____	_____	_____
	4 1/2 cubic feet		
_____	\$ _____	\$ _____	\$ _____
_____	_____	_____	_____
	6 cubic feet		
_____	\$ _____	\$ _____	\$ _____
_____	_____	_____	_____
	6 cubic feet		
_____	\$ _____	\$ _____	\$ _____
_____	_____	_____	_____
	6 1/2 cubic feet		
_____	\$ _____	\$ _____	\$ _____
_____	_____	_____	_____
WARDROBE			
_____	\$ _____	\$ _____	\$ _____
_____	_____	_____	_____
	CARTON		
	CRIB		
	MATTRESS		
	CARTON		
_____	\$ _____	\$ _____	\$ _____
_____	_____	_____	_____
MATTRESS			
	CARTON:		
	Not exceeding		
_____	\$ _____	\$ _____	\$ _____
_____	_____	_____	_____
	Exceeding		
_____	\$ _____	\$ _____	\$ _____
_____	_____	_____	_____
MATTRESS			
	COVER:		
	Plastic or paper		
_____	\$ _____	\$ _____	\$ _____
_____	_____	_____	_____

CRATES AND CONTAINERS (specifically designed for mirrors, paintings, glass or marble tops and similar fragile articles)

Gross Measurement of Crates or Contain- ers	Est. Costs of Containers	Est. Costs of Packing	Est. Costs of Unpacking
_____	\$ _____	\$ _____	\$ _____
—			
_____	\$ _____	\$ _____	\$ _____
—			
_____	\$ _____	\$ _____	\$ _____
—			
_____	\$ _____	\$ _____	\$ _____
—			

NOTICE

It is mandatory that the total cubic footage shown on the table of measurements be multiplied by not less than 7 to determine the total estimated weight. Articles not to be shipped should be indicated by a "check mark" in the column provided on the table of measurements.

_____ *[signature of estimator]*
_____ *[title]*

TABLE OF MEASUREMENTS

[For a Table of Measurements, see § 54.200[2] .]

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesRates
& Tariffs



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

C. Interstate Shipment of Household Goods

22-54 California Legal Forms--Transaction Guide § 54.241

§ 54.241 Binding Estimate of Charges

[1] Comment--Use of Form

This form may be used by a carrier to give a prospective shipper a binding estimate of the charges that the shipper will be required to pay for the services included in the estimates for the transportation of the shipper's household goods in interstate commerce. Carriers of household goods may provide in their tariffs for the preparation and furnishing of binding estimates of the costs that will be charged to prospective shippers for the services described in the estimate [49 C.F.R. § 375.403(a)]. When given, the estimate must be furnished in writing to the shipper or other person responsible for payment of the freight charges [49 C.F.R. § 375.403(a)(1)]. A copy of each estimate must be retained by the carrier as an attachment to the bill of lading [49 C.F.R. § 375.403(a)(2)].

All binding estimates must clearly indicate on their faces that the estimate is binding on the carrier and that the charges shown are the charges that will be assessed for the services identified in the estimate. In addition, binding estimates must clearly describe the shipment and all of the services to be provided [49 C.F.R. § 375.403(a)(3);(a)].

At the time that a motor carrier provides the written estimate, the motor carrier must provide the shipper a copy of the Department of Transportation publication FMCSA-ESA-03-005 (or its successor publication) entitled "Ready to Move?". Before the execution of a contract for service, the motor carrier must provide the shipper with a copy of the Department of Transportation publication OCE 100, entitled "Your Rights and Responsibilities When You Move," required by 49 C.F.R. § 375.213 (or any successor regulation) [49 U.S.C. § 14104(b)(2)].

[2] FORM

Binding Estimate of Charges

BINDING ESTIMATE OF COST OF SERVICES

[name of carrier]

[address]

[telephone number]
[identifying number]

Date: _____

No. _____

Name of carrier: _____

Phone No. _____

Address of carrier: _____

Name of shipper _____

Address of shipper _____

Shipment moving from

_____ to

Shipper's destination contact: _____

Phone No. _____

Packing date requested _____

Loading date requested _____

Delivery date or period of time requested

IMPORTANT NOTICE

This estimate covers only the articles and services listed. It is a binding estimate; the charges shown are the charges that will be assessed for the services identified in this estimate.

TOTAL ESTIMATED COST OF SERVICES:

\$_____.

(Based on tariff _____ MF-ICC No. _____)

BASIS FOR ESTIMATE

Transportation:

Estimated weight _____ lbs. _____ mi.

At \$_____ per 100 lbs. \$_____

ESTIMATED COSTS OF SERVICES

Valuation charge
(for liability on part
of carrier in excess
of that assumed

when its lowest rates
are charged)

On Transportation: \$_____ at 50 per \$_____
\$100 or fraction thereof

On Storage-in-Transit: _____ \$_____
per CWT. (10% of
monthly storage rate)
for each 30 days or
fraction thereof

Additional transport-
ation charges:
(explain)

Pickup or delivery for stor- _____ \$_____
age-in-transit: lbs. at \$_____ per
100 lbs. for each 30
days or fraction thereof

Storage-in-transit: _____ \$_____
lbs. at \$_____ per
100 lbs. for each 30
days or fraction thereof

Warehouse handling _____ \$_____
_____ lbs.;
at _____
per 100 lbs. (one time
charge)

Extra pickup or delivery at _____ \$_____

Special servicing of appli- _____ \$_____
ances

Hoisting, lowering, or carry- _____ \$_____
ing pianos, heavy articles
(explain)

Containers (see below) _____ \$_____

Packing (see below) _____ \$_____

Unpacking (see below) _____ \$_____

Labor _____ at \$_____ per person \$_____
_____ per- hour
son(s) for _____
_____ hrs.;

Other services _____ \$_____

(explain)

TOTAL ESTIMATED \$ _____
COST

ESTIMATED COST OF CONTAINERS, AND PACKING AND UNPACKING SERVICES

		CONTAINERS	PACKING	UNPACKING
		Est. Per No.	Est. Per No.	Est. Per No.
		Each Total	Each Total	Each Total
BARREL,				
	dishpack,	_____		

		\$ _____		

		\$ _____		
	_____ drum etc.			
BOXES:				
	Not over 5	_____	\$ _____	\$ _____
		_____	_____	_____
	Over 5 but not	_____	\$ _____	\$ _____
		_____	_____	_____
		_____	\$ _____	\$ _____
		_____	_____	_____
CARTONS:	Less than 1 1/2	_____	\$ _____	\$ _____
		_____	_____	_____
	1 1/2 cubic feet	_____	\$ _____	\$ _____
		_____	_____	_____
	3 cubic feet	_____	\$ _____	\$ _____
		_____	_____	_____
	4 1/2 cubic feet	_____	\$ _____	\$ _____
		_____	_____	_____
	6 cubic feet	_____	\$ _____	\$ _____
		_____	_____	_____
	6 1/2 cubic feet	_____	\$ _____	\$ _____
		_____	_____	_____
WARDROBE	CARTON	_____	\$ _____	\$ _____
		_____	_____	_____
CRIB				
	MATTRESS			

CARTON	_____	\$ _____	\$ _____
	_____	_____	_____
MATTRESS			
CARTON:			
Not exceeding	_____	\$ _____	\$ _____
	_____	_____	_____
Exceeding	_____	\$ _____	\$ _____
	_____	_____	_____
MATTRESS			
COVER:			
Plastic or paper	_____	\$ _____	\$ _____
	_____	_____	_____

CRATES AND CONTAINERS (specifically designed for mirrors, paintings, glass or marble tops and similar fragile articles)

Gross Measurements of Crates or Containers	Est. Costs of Containers	Est. Costs of Packing	Est. Costs of Unpacking
_____	\$ _____	\$ _____	\$ _____
—			
_____	\$ _____	\$ _____	\$ _____
—			
_____	\$ _____	\$ _____	\$ _____
—			
_____	\$ _____	\$ _____	\$ _____
—			

NOTICE

It is mandatory that the total cubic footage shown on the table of measurements be multiplied by not less than 7 to determine the total estimated weight. Articles not to be shipped should be indicated by a "check mark" in the column provided on the table of measurements.

_____ [signature of estimator]
 _____ [title]

TABLE OF MEASUREMENTS

[For a Table of Measurements, see § 54.200[2] .]

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesRates
& Tariffs



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

C. Interstate Shipment of Household Goods

22-54 California Legal Forms--Transaction Guide § 54.242

§ 54.242 Order for Service

[1] Comment

[a] Use of Form

This form is an order for service for interstate shipment of household goods [*see 49 C.F.R. 375.501(a)*]. This document is used to initiate all interstate shipments of household goods by common carriers; in effect, this form is a contract between a shipper and the carrier under which the shipper requests the specified services and the carrier agrees to perform them.

Every carrier must prepare an order for service before receipt of the household goods from an individual shipper [*49 C.F.R. 375.501(a)*]. A copy of the completed order for service must be furnished to the shipper when the order is executed [*49 C.F.R. § 375.501(c)*].

For detailed coverage of the information that must be set forth in the order for service, and the signatures required by regulation [*49 C.F.R. § 375.501(c)*], see § 54.122[2].

[b] Information for Shippers

Before executing an order for service for the shipment of household goods, every carrier must ensure that the prospective individual shipper receives certain publications [*see 49 C.F.R. 375.213*]. An "individual shipper" is any person who is the consignor or consignee of a household goods shipment and who is so identified in the bill of lading and who owns the goods being transported [*49 C.F.R. 375.103(4)*]. These publications include [*49 C.F.R. 375.213*]:

- Publication, *Your Rights and Responsibilities When You Move*.
- A concise, easy-to-read, accurate, and officially approved summary of any dispute settlement program in which the carrier participates [*see 49 U.S.C. § 14708* (dispute settlement program); *see also 49 U.S.C. §§ 13902, 13903* (registration)].

- A written description of the customer complaint and inquiry handling procedures maintained by the carrier, including a telephone number that the shipper may use to communicate with the carrier and a clear and concise statement concerning who is responsible for the costs of these calls.
- A concise, easy-to-read, accurate estimate of the carrier's charges.
- A notice of the availability of the applicable sections of the carrier's tariff for the estimate of charges.

[2] FORM**Order for Service****ORDER FOR SERVICE**

[name of carrier]
 [address]
 [telephone number]
 [identifying number]

Name of carrier responsible for service: _____
 Carrier's address: _____
 Carrier's telephone number: _____
 M.C. No. _____ [ICC docket number]
 Shipment No. _____ [identification or registration number]

Name of delivering carrier or agent: _____
 Delivering carrier's address: _____ [specify office at or nearest shipment destination]
 Delivering carrier's telephone number: _____

1. Shipper, _____ [name], of _____ [present address],
 _____ [telephone number], orders the transportation and delivery by Carrier,
 _____ [name of carrier responsible for service] of the household goods located at
 _____ [address] to _____ [name of shipper or consignee] at
 _____ [destination address].

2. Shipper orders the following materials, and packing and unpacking services from Carrier:

Description	Estimated Numbers of Containers	Packing	Unpacking
BARREL	_____	_____	_____
	_____	_____	_____
DISH-PACK	_____	_____	_____
	_____	_____	_____
BOXES:			
Not over 5 cubic feet	_____	_____	_____
Over 5 but not over 8 cubic feet	_____	_____	_____

CARTONS:

Less than 11/2 cu-	_____	_____	_____
bic feet	_____	_____	_____
11/2 cubic feet	_____	_____	_____
	_____	_____	_____
3 cubic feet	_____	_____	_____
	_____	_____	_____
4 1/2 cubic feet	_____	_____	_____
	_____	_____	_____
6 cubic feet	_____	_____	_____
	_____	_____	_____
6 1/2 cubic feet	_____	_____	_____
	_____	_____	_____

WARDROBE

_____	_____	_____
_____	_____	_____

CARTON

CRIB

_____	_____	_____
_____	_____	_____

MATTRESS

CARTON

MATTRESS

CARTON:

Not exceeding	_____	_____	_____
54[2] x 75[2]	_____	_____	_____
Exceeding 54[2] x	_____	_____	_____
75[2]	_____	_____	_____

CRATE

_____	_____	_____
_____	_____	_____

CONTAINER

_____	_____	_____
_____	_____	_____

OTHER

_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

3. Shipper orders the special or accessorial services indicated below:

Store shipment: in transit _____ at origin _____ at destination
 _____ at _____ warehouse for _____ days.

Extra Flight _____ Origin _____ No.: _____ Destination
 _____ No.: _____.

Carry Piano _____ Origin _____ Destination _____ Type: _____.

Arrange Appliance Service _____ Stove _____ Refrigerator _____
Freezer _____ Washer _____ Dryer _____ Television _____
Stereo _____ Air Conditioner _____ Other _____.

Space Reservation _____ for _____ cubic feet.

Complete Occupancy _____ of a _____ cubic feet vehicle.

Exclusive Use _____ of a _____ cubic feet vehicle.

Other _____ [set forth complete description of any other special or accessorial services to be rendered].

4. The minimum weight or volume charges applicable to this shipment are \$ _____ per _____ [specify weight unit, e.g., CWT or volume unit, e.g., cubic foot] under Tariff No. _____. The approximate weight of this shipment is _____ pounds; the approximate volume of this shipment is _____ cubic feet. The distance this shipment is to be transported is approximately _____ miles.

5. Shipper declares the following documents, specie, and articles of extraordinary value as part of this shipment: _____ [set forth list].

6. Shipper requests packing services to be performed on _____ [date].

7. The delivering carrier's office or agent at or nearest to the destination point is _____ [name], of _____ [address], _____ [telephone number].

8. The telephone number at which the shipper or consignee may contact the carrier or its designated agent, _____ [name of designated agent], is _____ [telephone number].

9. The shipment is to be picked up and delivered as follows:

[If service is not on guaranteed basis, select one of following alternatives:]

On an agreed pickup and delivery basis, with pickup on _____ [date], and delivery on _____ [date].

[OR]

On an agreed pickup and delivery basis, with pickup to be during _____ [specify period], and delivery to be during _____ [specify period].

[OR]

During the following period _____ [specify agreed period for entire move .

[If service is on guaranteed basis, select one of following alternatives:]

On a guaranteed service basis, with pickup to be on _____ [date], and delivery to be on _____ [date]. If Carrier's fails to make pickup and delivery on the guaranteed dates, Carrier must pay Shipper _____ [a penalty of \$ _____ or the sum of \$ _____ for each day of delay beyond the guaranteed date].

[OR]

On a guaranteed service basis, with pickup to be during [period] and delivery to be during [period]. If Carrier's fails to make pickup and delivery during these guaranteed periods, Carrier must pay Shipper _____ [a penalty of \$ _____ or the sum of \$ _____ for each day of delay beyond the guaranteed period].

[Continue with the following:]

NOTE:

If the carrier issued a binding estimate, PP 10 and 11 must conform to the particulars of that estimate.

10. Shipper must pay Carrier the total charges for the services ordered in this Order for Service as indicated below:

In advance of pickup: _____

On delivery: _____

11. Unless credit is extended, charges must be paid in cash, money order, certified check, or by credit card before the shipment is relinquished by carrier. The extension of credit is approved: yes _____

no _____.

If credit is extended on the basis of the promise of the shipper's employer or of others to pay all or part of the charges, the shipper acknowledges that the shipper remains primarily liable for payment.

Invoice to _____ [address].

Charges authorized by _____.

[Select one of following alternatives:]

[If carrier gave non-binding estimate, use:]

12. The non-binding estimated cost of the services covered by this Order for Service is \$ _____. The maximum amount required to be paid on delivery of a C.O.D. shipment is \$ _____ [specify estimated total plus 10 percent]. Any remaining balance is due in 30 days.

[If carrier gave binding estimate, use:]

12. The maximum amount required to be paid to obtain possession of the shipment, per the binding estimate dated _____, is \$_____.

[Continue with the following:]

13. Notification of actual charges before delivery requested by shipper:

Yes _____ No _____

If yes, notify at _____ [address], _____ [telephone number].

14. Both shipper and carrier may agree to amend this order for service at any time before loading begins. [Optional: All amendments must be in writing and signed by both the shipper and the carrier or the carrier's agent.]

15. Special Provisions: _____.

16. Remarks: _____.

17. SHIPPER AUTHORIZES AND DIRECTS CARRIER, AND CARRIER AGREES TO PERFORM OR ARRANGE FOR THE PERFORMANCE OF PACKING, STORING, AND OTHER SERVICES, AND TO TRANSPORT OR FORWARD OVER THE LINES OF ANY AUTHORIZED CARRIER, AS DIRECTED IN THIS ORDER, ONE LOT OF HOUSEHOLD GOODS FOR WHICH RECEIPT WILL BE GIVEN SHIPPER WHEN CARRIER PHYSICALLY RECEIVES SAME, AT THE RATES AND CHARGES, AND SUBJECT TO THE RULES AND REGULATIONS FOR THE GOVERNMENT OF CARRIER'S BUSINESS AS PROVIDED IN THE APPLICABLE TARIFFS AND RATE SCHEDULES IN EFFECT AS OF THE DATE OF SHIPMENT THAT ARE LAWFULLY PROMULGATED OR FILED IN ACCORDANCE WITH LAW.

THE CARRIER IS AUTHORIZED TO ADVANCE FOR MY ACCOUNT ANY DOCK OR OTHER CHARGE MADE BY A WAREHOUSER OR OTHER PERSON THAT MAY BE REQUIRED FOR THE PROPER HANDLING OF THE SHIPMENT.

I HAVE READ THIS ORDER FOR SERVICE, AGREE TO ALL ITS PROVISIONS, AUTHORIZE THE INDICATED SERVICES TO BE PERFORMED, AND ACKNOWLEDGE RECEIPT OF A SIGNED COPY.

Date: _____.

SHIPPER

_____ [signature]
 _____ [print name]

CARRIER

_____ [typed name of carrier]
 BY: _____ [signature]
 _____ [typed name of agent]

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

C. Interstate Shipment of Household Goods

22-54 California Legal Forms--Transaction Guide § 54.243

§ 54.243 Nonnegotiable Bill of Lading (Household Goods)

[1] Comment

[a] Use of Form

This form is a nonnegotiable bill of lading for use by a motor common carrier of household goods [see 49 C.F.R. § 375.505(a)] to evidence the receipt of household goods and the contract for interstate or foreign carriage for the goods. Every motor common carrier must issue a receipt or bill of lading ("bill of lading") for the property that the carrier receives for transportation [see 49 C.F.R. §§ 375.505(a); see also 49 U.S.C. § 80101 et seq.].

The carrier must also furnish the shipper with a complete copy of the bill of lading before beginning to load the shipment [49 C.F.R. § 375.505(a)]. In addition, a copy of the bill of lading (or receipt) must accompany the shipment at all times while the goods are in the carrier's possession. When the shipment is loaded onto a vehicle, the driver responsible for the shipment must have a copy of the bill [49 C.F.R. § 375.505(c)].

[b] Contents of Bill of Lading for Household Goods

A bill of lading for household goods must include the terms and conditions of the contract between the parties [49 C.F.R. § 375.505]. Many of these terms and conditions are as set forth in the tariff filed by the carrier with the ICC. A bill of lading must also include certain minimum information and the signatures of the parties [49 C.F.R. § 375.505, (b); see also § 54.122[3]].

Bills of lading used by motor common carriers of household goods in interstate commerce are typically nonnegotiable. A "nonnegotiable bill of lading," formerly referred to as a straight bill of lading, is one that states that the goods are consigned to a specific person [49 U.S.C. § 80103(b)(1)]. Nonnegotiable bills of lading are contrasted with "negotiable bills of lading," formerly referred to as order bills of lading, which state that the goods are consigned to the order of a person named in the bill and do not contain an agreement on the face of the bill that the bill is not negotiable [49 U.S.C. § 80103(a)(1)]. As a nonnegotiable bill, a household goods bill of lading must have placed plainly on its face the wording "not negotiable" or "nonnegotiable" [49 U.S.C. § 80103(b)(2)].

[2] FORM**Nonnegotiable Bill of Lading (Household Goods)**

NONNEGOTIABLE
BILL OF LADING

[name of issuing carrier]

[address]

[telephone number]

[identifying number]

NONNEGOTIABLE**I.**

Issue Date _____

No. _____

Received tendered property, subject to classifications, rates, rules, and regulations of the tariff in effect on the issue date of this bill of lading, at _____ [location] on _____ [date] from _____ [name of shipper].

SHIP HOUSEHOLD GOODS DESCRIBED BELOW FROM:

Shipper: _____ Telephone: _____

Associated with: _____

Loading Address: _____

[Select one of following alternatives:]

[If shipment is for individual shipper and service is not under guaranteed service dates in tariff, use:]

NOTE:

The agreed dates or periods must conform to the agreed dates or periods in the order of service or proper amendment [49 C.F.R. 1056.6(5)].

Pickup Date or Period: _____

Delivery Date or Period: _____

[If shipment is subject to tariff provisions providing for guaranteed service, use:]

Pickup Date or Period: _____

Delivery Date or Period: _____

If carrier fails to pickup or deliver _____ [on the applicable dates or within the applicable periods], carrier must pay \$ _____ [specify penalty or per diem entitlements due shipper].

[Continue with the following:]

Issuer: _____ [specify identifying number]

Address: _____ Telephone: _____

FOR TRANSPORTATION AND DELIVERY TO:

Consignee: _____ Telephone: _____

Delivery Address: _____

If delivery delayed, notify: _____ [name] Address: _____

Carrier's Contact Office:

_____ [name] [address]

Telephone: _____

DESCRIPTION OF PROPERTY:

One lot of household goods as per attached list:

Loaded on Van No. _____

Vehicle Load Manifest No. _____

	Date	Hauling Driver or Interline Carrier	Address	Telephone
1.	_____	_____	_____	_____
	_____	_____	_____	_____
2.	_____	_____	_____	_____
	_____	_____	_____	_____
3.	_____	_____	_____	_____
	_____	_____	_____	_____
	Contractor or Agent Code No.	Equipment No.	From	To
1.	_____	_____	_____	_____
	_____	_____	_____	_____

2. _____

3. _____

SUBJECT TO THE FOLLOWING CHARGES & CONDITIONS:

1. Rates, Rules & Regulations in Tariff No. _____ MF-ICC No. _____ Sec. _____ in effect on the date of this bill.
2. Charges payable by credit card or in cash, money order, or certified check on _____ delivery or _____ charge: _____.
3. Store shipment _____ in transit or _____ permanently at _____ Warehouse at _____.
4. Carrier is authorized to advance for the account of Shipper any dock or other charge made by a Warehouser or other person that may be required for the proper handling of the shipment.
5. All terms printed or stamped on this bill or on the reverse side.

RELEASED VALUE OF SHIPMENT--LIMITATION OF CARRIER'S LIABILITY

Unless the shipper expressly releases the shipment to a value of 60 cents per pound per article, the carrier's maximum liability for loss and damage is either the lump sum value declared by the shipper or an amount equal to \$1.25 for each pound of weight in the shipment, whichever is greater.

The shipment will move subject to the rules and conditions of the carrier's tariff. Shipper releases the entire shipment to a value not exceeding \$____ [*person signing below must specify declaration of actual value of the shipment or the words "60 cents per pound per article"*].

NOTICE: The shipper signing this contract must insert in the space above, in his or her own handwriting, either a declaration of the actual value of the shipment, or the words "60 cents per pound per article." Absent this provision, the shipment will be deemed released to a maximum value equal to \$1.25 times the weight of the shipment in pounds.

Signature of Shipper _____

Date _____

SHIPMENT WEIGHT

Gross Wt. _____ lbs.

Tare Wt. _____ lbs.

Net Wt. _____ lbs.

Shipper requests notification of actual charges: Yes _____ No _____

Notify:
Name: _____ Address: _____

Telephone: _____

ARTICLES OF EXTRAORDINARY VALUE

The carrier assumes no liability whatsoever for articles of extraordinary value as defined in its terms and conditions unless specifically listed and declared below.

QUANTITY	DESCRIPTION	VALUE
_____	_____	\$ _____
_____	_____	\$ _____
_____	_____	\$ _____
_____	_____	\$ _____
_____	_____	\$ _____
_____	_____	\$ _____

COST OF SERVICES

Transportation: Estimated weight

_____ lbs.
_____ mi.
\$ _____

Valuation charge
(for liability on part
of carrier in excess
of that assumed
when its lowest
rates are charged)

On Transportation:
\$ _____

On Storage-in-Transit:
\$ _____

\$ _____ at 50 per
\$100 or fraction

_____ per CWT.
(10% of monthly
storage rate) for
each 30 days or
fraction thereof

Additional transportation charges:
(explain)

____ lbs. at
\$_____ per 100
lbs. for each 30
days or fraction
thereof

____ lbs. at
\$_____ per 100
lbs. for each 30
days or fraction
thereof

____ lbs.; at
____ per 100 lbs.
(one time charge)

Pickup or delivery for storage-in-transit:

\$_____

Storage-in-transit:

\$_____

Warehouse handling:

\$_____

Extra pickup or delivery at

\$_____

Special servicing of appliances

\$_____

Hoisting, lowering, or carrying pianos, heavy articles
(explain)

\$_____

Containers (see below)

\$_____

Packing (see below)

\$_____

Unpacking (see below)

\$_____

Labor _____

at \$_____ per
 person hour

\$_____
 person(s) for
 _____ hrs.;

 _____ hrs. at
 \$_____

Other services
 (explain)

TOTAL COST \$_____

Estimate made: Yes _____ No _____

Amount of estimated charges: \$ _____

[Select one of the following alternatives:]

[If payment not C.O.D. basis, use:]

Payment received by _____ [name] on _____ [date] \$ _____

Balance due 30 days: \$ _____
 (excluding Saturdays, Sundays, and Holidays)

[If payment on C.O.D. basis, use:]

This shipment was performed C.O.D. The amount required before delivery, in cash, certified check, or money order, is estimate plus 10%: \$ _____

Balance required within 30 days: \$ _____
 (excluding Saturdays, Sundays, and Holidays)

Person to whom notification of deliver must be sent: _____ [name], at
 _____ [address]; _____ [name] may be reached by telephone at
 _____.

[Continue with the following:]

COST OF CONTAINERS, AND PACKING AND UNPACKING SERVICE

CON- TAIN- ER/ MA- TERIAL	EST.	NO. USED	MATERIALS	PACKING	UNPACK- ING
			Rate Amount	Rate Amount	Rate Amount
dish- packs (not less than 5 cu. ft.)			\$_____	\$_____	\$_____
Barrels:			\$_____	\$_____	\$_____
Drums:			\$_____	\$_____	\$_____
Boxes: less than 5 cu. ft.			\$_____	\$_____	\$_____
5-8 cu. ft.			\$_____	\$_____	\$_____
Cartons:					
less than 11/2 cu. ft.			\$_____	\$_____	\$_____
11/2 cu. ft.			\$_____	\$_____	\$_____
3 cu. ft.			\$_____	\$_____	\$_____
4 1/2 cu. ft.			\$_____	\$_____	\$_____
6 cu. ft.			\$_____	\$_____	\$_____
6 1/2 cu. ft.			\$_____	\$_____	\$_____
Mattress:					
Single size			\$_____	\$_____	\$_____
Double size			\$_____	\$_____	\$_____
King size			\$_____	\$_____	\$_____
Queen size			\$_____	\$_____	\$_____
Crib size			\$_____	\$_____	\$_____
Mirror Cartons			\$_____	\$_____	\$_____
Ward- robes			\$_____	\$_____	\$_____
Crates			\$_____	\$_____	
			\$_____	\$_____	\$_____
			\$_____	\$_____	\$_____

SHIPMENT RECEIVED SUBJECT TO TERMS AND CONDITIONS OF THIS BILL AND DECLARATION OF SHIPPER.

Date: _____

_____ [name of carrier]

By _____ [signature of carrier's representative]

THE ABOVE SHIPMENT WAS RECEIVED IN GOOD CONDITION EXCEPT AS NOTED ON THE DESCRIPTIVE INVENTORY.

Date: _____

_____ [signature of consignee or agent]

II. CONTRACT TERMS AND CONDITIONS

This contract is subject to all the rules, regulations, rates, and charges, in carrier's currently effective applicable tariffs currently on file including, but not limited to, the following terms and conditions:

A. Liability of Shipper

The Shipper:

1. Is liable for any and all charges applicable under carrier's tariffs; and must pay the charges as provided in those tariffs; and
2. Indemnify carrier against loss or damage caused by the inclusion in the shipment of explosives or dangerous articles or goods.

B. Liability of Carrier for Loss or Damage

1. The carrier is liable for physical loss of or damage to any articles from external cause while being carried or held in storage-in-transit:

EXCEPT for the condition or flavor of perishable articles;

EXCEPT for documents, currency, money, jewelry, watches, precious stones or articles of extraordinary value that are not specifically listed on the bill of lading; and

EXCEPT loss or damage caused by or resulting:

- a. From an act, omission or order of the shipper;
- b. From insects, moths, vermin, and ordinary wear and tear;
- c. From defect or inherent vice of the article, including susceptibility to damage because of atmospheric conditions, such as temperature and humidity or changes in those conditions;

- d. From (1) hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack by any government or sovereign power; by any authority maintaining or using military, naval, or air forces; or by an agent of any government, power, authority, or forces; (2) any weapon of war employing atomic fission or radioactive force whether in time of peace or war; (3) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating, or defending against such an occurrence, seizure, or destruction under quarantine or customs regulations, confiscation by order of any government of public authority, or risks of contraband or illegal transportation or trade;
- e. From strikes, lockouts, labor disturbances, riots, civil commotions, or the acts of any person or persons taking part in any such occurrence or disorder;
- f. From acts of God when the shipper releases the value of each article in the shipment to a value not exceeding 60 cents per pound per article; or
- g. From breakage of china, glassware, bric-a-brac, or similar articles of a brittle or fragile nature unless packed by the carrier or unless that breakage results from negligence of the carrier when the shipper has released the value of each article in the shipment to a value not exceeding 60 cents per pound per article.

2. In addition to the foregoing, the carrier's liability is further limited as follows:

The carrier's maximum liability is either:

- a. The amount of the actual loss or damage not exceeding \$1.25 times the actual weight (in pounds) of the shipment, or the lump sum declared value, whichever is greater; or
- b. The actual loss or damage not exceeding 60 cents per pound of the weight of any lost or damaged article when the shipper has released the shipment to carrier, in writing, with liability limited to 60 cents per pound per article.

C. Liability of Carrier for Delay

The carrier is not liable for delay caused by highway obstruction, or faulty or impassable highways, or lack of capacity of any highway, bridge, or ferry, or caused by breakdown or mechanical defect of vehicles or equipment, or from any cause other than negligence of the carrier; nor is the carrier bound to transport by any particular schedule, means, vehicle or otherwise than with reasonable dispatch. Every carrier has the right in case of physical necessity to forward the shipment by any carrier or route between the point of shipment and the point of destination.

D. Inability to Deliver

If for any reason other than the fault of carrier, delivery cannot be made at address shown on the face of this bill, or at any changed address of which carrier has been notified, the carrier, at its option, may cause the articles contained in shipment to be stored in a warehouse selected by it at the point of delivery or at other available points, and held there without liability on the part of the carrier, at the cost of the owner, and subject to a lien for all accrued tariff and other lawful charges.

E. Refusal or Failure to Receive or Claim Shipment

If the consignee refuses to accept the shipment at the destination, or if shipper, consignee, or owner of property fails to

receive or claim it within 15 days after written notice by United States mail addressed to shipper and consignee at post office addresses shown on face of this bill, or if shipper fails or refuses to pay lawfully applicable charges in accordance with carrier's applicable tariff, carrier may sell the property at its option, either (1) on notice in the manner authorized by law; or (2) at public auction to highest bidder for cash at a public sale to be held at a time and place named by carrier, after 30 days notice is given in writing to shipper and consignee, and after advertisement of the sale is published at least once a week for two consecutive weeks in a newspaper of general circulation at or near the place of sale. This notice of sale must contain a description of the property as described in the bill of lading and the names of the consignor and consignee. The proceeds of the sale will be applied toward the payment of the lawful charges applicable to shipment and toward the expenses of notice, advertising and sale, and of storing, caring for and maintaining the property before sale. Any balance will be paid to owner of property; PROVIDED that any perishable articles contained in this shipment may be sold at public or private sale without notices, if, in the opinion of carrier, this action is necessary to prevent deterioration or further deterioration.

F. Claims

1. Any claim for loss, damage, or overcharge must be in writing. As a condition precedent to any claim adjustment or payment, the claim must be accompanied by the original paid bill for transportation and original bill of lading, if not previously surrendered to the carrier. Carrier may require certified or sworn statement of claim.
2. Carrier must be immediately notified of all claims for concealed and/or external damage and must be given reasonable opportunity to inspect the alleged external damage or concealed damage in original package.
3. The carrier's liability may not exceed the cost of repairing or replacing the property lost or damaged with materials of like kind and quality not exceeding the actual cash value of the property at time and place of loss, with due allowance for depreciation or deterioration, but in no event to exceed the released value.
4. The carrier is not liable for loss or damage occurring after the property has been delivered to or receipted for by the consignee or shipper, or the authorized agent of either. When the carrier is directed to unload or to deliver property (or render any services) at a place or places at which the consignee or its agent is not present, the property is at the risk of the owner after unloading or delivery.
5. When the carrier is directed to load property from (or render any services at) a place or places at which the consignor or its agent is not present, the property is at the risk of the owner before loading.
6. The carrier's liability with regard to sets or matched pieces is limited to repair or replacement of the lost or damaged piece or pieces only and does not extend to repair, replacement, or recovering of the entire set, but in no event to exceed the released value.

G. Limitation of Time Within Which Claims Can Be Filed and Suits Instituted

As a condition precedent to recovery, a claim for any loss or damage, injury, or delay, must be filed in writing with carrier within 9 months after delivery to consignee as shown on face of this bill, or in case of failure to make delivery, then within 9 months after a reasonable time for delivery has elapsed. Suit must be instituted against carrier within 2 years and 1 day from the date when notice in writing is given by carrier to the claimant that carrier has disallowed the claim or any part or parts of the claim specified in the notice. Whenever a claim is not filed or suit is not instituted in accordance with these requirements, the carrier is not liable and the claim will not be paid.

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesBills of Lading



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

C. Interstate Shipment of Household Goods

22-54 California Legal Forms--Transaction Guide §§ 54.244-54.249

[Reserved]

§§ 54.244[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

D. Interstate Shipment of Commercial Property

22-54 California Legal Forms--Transaction Guide § 54.250

§ 54.250 Nonnegotiable Bill of Lading (Commercial Property)

[1] Comment

[a] Use of Form

This form is a nonnegotiable bill of lading used to ship commercial or non-household goods in interstate commerce [see 49 C.F.R. § 1035.1]. A "nonnegotiable bill of lading," formerly referred to as a "straight bill of lading," is one that states that the goods are consigned to a specific person [49 U.S.C. § 80103(b)(1); see *C.A.R. Transportation v. Darden Restaurants, Inc.* (9th Cir. [Cal.] 2000) 213 F.3d 474 (parties adapted straight bill of lading for their use; transportation broker sued shipper to recover freight charges)]. For a negotiable bill of lading form, see § 54.251.

This form is drafted in accordance with 49 C.F.R. pt. 1035, apps. A and B. The front portion of the bill, based on Appendix A, may deviate from the prescribed language, provided that (1) the deviation conforms to approved national standards; (2) the deviation does not affect the shipper's obligation to provide information without the shipper's consent; and (3) the deviation does not alter any rights or obligations conferred by statute or regulation on either carriers or shippers with respect to the preparation or issuance of a bill of lading [49 C.F.R. § 1035.2].

The reverse portion of the bill strictly conforms to the requirements of Appendix B. The regulations do not permit deviation from the prescribed language [see 49 C.F.R. § 1035.2]. Therefore, legalese and gender specific language remains in that portion of the form.

[b] Effect of Alterations and Additions

Any alteration or addition to a bill of lading after its issuance made without authorization from the carrier in writing or noted on the bill is void. The attempted alteration or addition does not affect the efficacy of the original bill, which remains enforceable according to its original terms [49 U.S.C. § 80108].

[2] FORM

Nonnegotiable Bill of Lading (Commercial Property)

NONNEGOTIABLE BILL OF LADING
ORIGINAL

[name of carrier]
[address]
[telephone number]
[identifying number]

I.

Date: _____ No. _____
Name of carrier's agent: _____ Telephone No. _____

Address of carrier's agent: _____

Name of shipper _____ Telephone No. _____
Address of shipper _____

Received, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading, at _____ [place of issuance], on _____ [date], from _____ [name of shipper/consignor] the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of the property, that every service to be performed under this bill is subject to all the conditions not prohibited by law, whether printed or written, contained in the bill, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for shipper and the shipper's assigns.

Mail or Street Address of Consignee--For Purposes of Notification Purposes Only: _____

Consigned to: _____ Length: _____
Destination: _____ Plan: _____
State of: _____ Length: _____
County of: _____ Plan: _____
Route: _____ Container initials/number: _____
Delivering carrier: _____ Length: _____
Car initial: _____ Plan: _____
Car No.: _____ Length: _____
Trailer initials/number: _____ Plan: _____

No. Packages	Description of art-	*Weight (subject	Class or rate	Check column

	icles, special marks, and excep- tions	to correction)		
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

* If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

Subject to Section 7 of the terms and conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. _____ [signature of shipper/consignor].

If the charges are to be prepaid, write or stamp here, "To be Prepaid:" _____.

Received \$_____ to apply in prepayment of the charges on the above-described property.

Agent or Cashier

Per _____ [signature]

NOTE: This signature acknowledges only the amount prepaid.

Charges advanced: \$_____.

NOTE: When the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is specifically stated by the shipper to not exceed \$_____ per _____ [specify, e.g., article].

Shipper: _____ Agent: _____

per _____ [signature] per _____ [signature]

Permanent post office address of shipper: _____

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouse, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake for inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carrier harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury, or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, that the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling and forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse, or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouse, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, that the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, that 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, that if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after

unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are endorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage [caused] by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges on said property; but except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigning or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigning or diverted by an agent who has furnished the carrier in the reconsigning or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the

freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage, or injury to said property occurs while the same is in the custody of the carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An Act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability as well as the following subdivisions of this section: and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, transship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General average shall be payable according to the York-Antwerp Rules of 1924, sections 1 to 15, inclusive, and section 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesBills of Lading



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54 SHIPMENT OF PROPERTY

PART IV. FORMS

D. Interstate Shipment of Commercial Property

22-54 California Legal Forms--Transaction Guide § 54.251

§ 54.251 Negotiable Bill of Lading

[1] Comment

[a] Use of Form

This form is a negotiable bill of lading used to ship commercial or non-household goods in interstate commerce [*see 49 C.F.R. § 1035.1*]. A "negotiable bill of lading," formerly referred to as an "order bill of lading" is a bill that states that the goods are consigned to the order of a person named in the bill and does not contain an agreement on the face of the bill that the bill is not negotiable [*49 U.S.C. § 80103(a)(1)*]. For a nonnegotiable bill of lading form, see § 54.250.

This form is drafted in accordance with 49 C.F.R. pt. 1035, apps. A and B. The front portion of the bill, based on Appendix A, may deviate from the prescribed language, provided that (1) the deviation conforms to approved national standards; (2) the deviation does not affect the shipper's obligation to provide information without the shipper's consent; and (3) the deviation does not alter any rights or obligations conferred by statute or regulation on either carriers or shippers with respect to the preparation or issuance of a bill of lading [*49 C.F.R. § 1035.2*].

The reverse portion of the bill, "Contract Terms and Conditions," must strictly conform to the requirements of Appendix B. The regulations do not permit deviation from the prescribed language [*see 49 C.F.R. § 1035.2*]; therefore, legalese and gender specific language remains in that portion of the form. This portion of the form is the same as that *set forth in § 54.250[2]* and is not repeated here.

[b] Effect of Alterations and Additions

Any alteration or addition to a bill of lading after its issuance made without authorization from the carrier in writing or noted on the bill is void. The attempted alteration or addition does not affect the efficacy of the original bill, which remains enforceable according to its original terms [*49 U.S.C. § 80108*].

[2] FORM

Negotiable Bill of Lading

NEGOTIABLE
BILL OF LADING

[name of carrier]
[address]
[telephone number]
[identifying number]

Date: _____ No. _____
Name of carrier's agent: _____ Telephone No. _____

Address of carrier's agent: _____

Name of shipper _____ Telephone No. _____
Address of shipper _____

Received, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading, at _____ [place of issuance], on _____ [date], from _____ [name of shipper/consignor] the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed under this bill is subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for shipper and the shipper's assigns.

Mail or Street Address of Consignee--For Purposes of Notification Purposes Only: _____

Consigned to order of: _____ Length: _____

Destination: _____ Plan: _____
State of: _____ Length: _____
County of: _____ Plan: _____
Route: _____ Container initials/number: _____
Delivering carrier: _____ Length: _____
Car initial: _____ Plan: _____
Car No.: _____ Length: _____
Trailer initials/number: _____ Plan: _____

No. Packages	Description of articles, special	*Weight (subject to correction)	Class or rate	Check column

marks, and excep-
tions

_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
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_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

* If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

Subject to Section 7 of the terms and conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. _____ [signature of shipper/consignor].

If the charges are to be prepaid, write or stamp here, "To be Prepaid:" _____.

Received \$_____ to apply in prepayment of the charges on the above-described property.

Agent or Cashier

Per _____ [signature]

NOTE: This signature acknowledges only the amount prepaid.

Charges advanced: \$_____.

NOTE: When the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is specifically stated by the shipper to not exceed \$_____ per _____ [specify, e.g., article].

Shipper: _____ Agent: _____

per _____ [signature] per _____ [signature]

Permanent post office address of shipper: _____

CONTRACT TERMS AND CONDITIONS

[For terms and conditions to be printed on reverse side, see reverse side of form in § 54.250[2] .]

NOTE: Appendix B must be endorsed [49 C.F.R. § 1035.1(a)(3)

Endorsement: _____]

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesBills of Lading



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22-54A California Legal Forms--Transaction Guide 54A.syn

§ 54A.syn Synopsis to Chapter 54A: STORAGE OF GOODS

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[2] Statutes

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§ 54A.07 Text References

[1] Matthew Bender Sources

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§ 54A.32 Owner's Liens

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§ 54A.101 Transportation of Individual Storage Containers

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Nonnegotiable Warehouse Receipt and Storage Contract

§ 54A.201 Certificate of Interest Under Warehouse Insurance

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Certificate of Interest Under Warehouse Insurance

§ 54A.202 Signature Card

[1] Comment--Use of Form

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Signature Card

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[b] Contents

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Notice of Claim of Lien

§ 54A.204 Advertisement of Lien Sale

[1] Comment

[a] Use of Form

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[2] FORM

Advertisement of Lien Sale

§§ 54A.205-54A.209 [Reserved]

§ 54A.210 Notice of Satisfaction of Warehouse's Lien

[1] Comment--Use of Form

[2] FORM

Notice of Satisfaction of Lien

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[1] Comment--Use of Form

[2] FORM

Delivery Order

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Demand to Remove Hazardous Goods

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Self-Service Storage Rental Agreement

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§ 54A.223 Declaration in Opposition to Lien Sale

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 54A STORAGE OF GOODS

22-54A California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses the storage of commercial, noncommercial, and household goods. It covers storage in warehouses and storage in self-service storage facilities. With respect to the storage of noncommercial and household goods in warehouses, it discusses the functions of storage companies under the Commercial Code, including the warehouse's duty to care for and deliver stored goods and the procedures under which a warehouse may terminate storage and assert a lien for unpaid storage charges [see § 54A.20 et seq.]. As it relates to storage of personal property in self-service storage facilities, it discusses the rights and duties under the California Self-Service Storage Facility Act [see § 54A.30 et seq.]

Storage of goods while the goods are in transit, which is an incident of the shipment of goods, is covered in Ch. 54, *Shipment of Property* . Bailment of personal property other than household goods, and the availability of liens against this property, are covered in Ch. 102, *Bailments* . For other related topics, see Ch. 42, *Secured Transactions* , Ch. 102A, *Personal Property Liens* , and Ch. 102D, *Registration and Transfer of Vehicles, Vessels, and Aircraft* .



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A. Primary Sources

22-54A California Legal Forms--Transaction Guide § 54A.01

§ 54A.01 California Sources

[1] Constitution

Legislative control through Public Utilities Commission over carriage and storage operations. *Cal. Const., art. XII, § 4.*

[2] Statutes

California Self-Service Storage Facility Act. *Bus. & Prof. Code § 21700 et seq.*

"Self-service storage facility" defined. *Bus. & Prof. Code § 21701(a).*

Transportation of individual storage containers, for a fee, to and from self service storage facility by facility's owner or operator *Bus. & Prof. Code § 21701.1*].

Owner's lien. *Bus. & Prof. Code § 21702.*

Liens on vehicles or vessels subject to registration or identification under Vehicle Code. *Bus. & Prof. Code § 21702.5.*

Preliminary lien notice. *Bus. & Prof. Code §§ 21703, 21704.*

Attachment of lien; notice of sale; declaration against sale. *Bus. & Prof. Code § 21705.*

Lien enforcement when there is no declaration in opposition to lien sale. *Bus. & Prof. Code §§ 21706-21709.*

Lien enforcement when there is declaration in opposition to lien sale. *Bus. & Prof. Code § 21710.*

Rights of good faith purchaser. *Bus. & Prof. Code § 21711.*

Contract requirements. *Bus. & Prof. Code § 21712.*

Right of parties to create additional rights and duties. *Bus. & Prof. Code § 21713.*

Agreement subject to Act. *Bus. & Prof. Code § 21714.*

Validity of preexisting agreements. *Bus. & Prof. Code § 21715.*

Unauthorized material alteration extinguishes written contract. *Civ. Code § 1700.*

Deposits of personal property. *Civ. Code § 1813 et seq.*

"Deposit" defined. *Civ. Code §§ 1813-1815.*

Liability of depository. *Civ. Code § 1816.*
"Deposit for keeping" defined. *Civ. Code § 1817.*

Obligations of depositories. *Civ. Code § 1822 et seq.*
Delivery on demand. *Civ. Code § 1822.*
Demand required. *Civ. Code § 1823.*
Place of delivery. *Civ. Code § 1824.*
Adverse claims; notice. *Civ. Code § 1825.*

Deposits for keeping. *Civ. Code § 1833 et seq.*
Indemnification of depository. *Civ. Code § 1833.*
Damages for wrongful use. *Civ. Code § 1836.*
Liability for negligence limited to value of deposited property. *Civ. Code § 1840.*

Gratuitous deposits. *Civ. Code § 1844 et seq.*

Storage. *Civ. Code § 1851 et seq.*

Unclaimed property. *Civ. Code § 2081 et seq.*

Liens in general. *Civ. Code § 2872 et seq.*
Nature and kinds of liens. *Civ. Code § 2872 et seq.*
Creation of liens. *Civ. Code § 2881 et seq.*
Effect of liens. *Civ. Code § 2888 et seq.*
Priorities of liens. *Civ. Code § 2897 et seq.*
Redemption. *Civ. Code § 2903 et seq.*
Extinction. *Civ. Code § 2909 et seq.*

Document of title defined. *Com. Code § 1201(b)(16).*

Warehouse receipt defined. *Com. Code § 1201(b)(42).*

Documents of title in general. *Com. Code § 7101 et seq.*

Warehouse receipts. *Com. Code § 7201 et seq.*

Obligations imposed on issuers of warehouse receipts. *Com. Code § 7401 et seq.*

Negotiation and transfer of warehouse receipts. *Com. Code § 7501 et seq.*

Lost or missing warehouse receipts. *Com. Code § 7601.*

Attachment of goods covered by negotiable warehouse receipts. *Com. Code § 7602.*

Interpleader of conflicting claimants under warehouse receipts. *Com. Code § 7603.*

Alteration of writing. *Evid. Code § 1402.*

Health inspection of warehouses. *Health & Safety Code §§ 110140, 110160.*

Cold storage warehousing. *Health & Safety Code § 112350 et seq.*

Hazardous substances labeling act. *Health & Safety Code § 28740 et seq.*

Crimes involving bailments. *Penal Code §§ 560-560.6.*

Issuance of fictitious warehouse receipt for goods not received. *Penal Code § 578.*

Receipt conforming to marks or labels. *Penal Code § 579.*

Failure to designate a duplicate warehouse receipt as "duplicate." *Penal Code § 580.*

Sale or pledge of goods by warehouse without owner's consent. *Penal Code § 581.*

"Public utility" defined. *Pub. Util. Code § 216.*

Regulation of household goods carriers as public utilities. *Pub. Util. Code § 5101 et seq.*



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United States Warehouse Act. 7 U.S.C. § 241 *et seq.*



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B. Secondary Sources

22-54A California Legal Forms--Transaction Guide § 54A.05

§ 54A.05 Law Reviews

Note, *Southern Pacific Transportation Co. v. Commercial Metals Co.: An Effort Toward Uniformity in Decisions Concerning Liability of Consignors, Shippers, and Consignees in Interstate Commercial Actions*, 16 U. West L.A. L. Rev. 195 (1984).

Riegert, *Documents of Title Under Article 7*, 13 UCC L.J. 105 (1980).

Dolan, *Good Faith Purchase and Warehouse Receipts: Thoughts on the Interplay of Articles 2, 7, and 9 of the UCC*, 30 Hastings L.J. 1 (1978).

Note, *Commercial Law: Private Enforcement of Warehouseman's Lien Pursuant to UCC § 7-210 Constitutes Action Under Color of State Law*, 8 Cumb. L. Rev. 553 (1977).

Funk, *Trust Receipt vs. Warehouse Receipt--Which Prevails When They Cover the Same Goods?* 19 Bus. Law. 627 (1964).



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§ 54A.06 Annotations

Annot., Liability of Warehouseman or Other Bailee for Loss of Goods Stored at Other Than Agreed-Upon Place, 76 A.L.R.4th 883 (1990) .

Annot., Construction and Effect of § 1-202 of the Uniform Commercial Code Dealing With Documents Which are Prima Facie Evidence of Their Own Authenticity and Genuineness, 72 A.L.R.3d 1243 (1976) .

Annot., Presumption and Burden of Proof Where Subject of Bailment is Destroyed or Damaged by Fire, 44 A.L.R.3d 171 (1972) .

Annot., Sufficiency of Warehouseman's Precautions to Protect Goods Against Fire, 42 A.L.R.3d 908 (1972) .

Annot., Bailee's Duty to Insure Bailed Property, 28 A.L.R.3d 513 (1969) .

Annot., Construction and Effect of UCC Art. 7, Dealing With Warehouse Receipts, Bills of Lading, and Other Documents of Title, 21 A.L.R.3d 1339 (1968) .



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22-54A California Legal Forms--Transaction Guide § 54A.07

§ 54A.07 Text References

[1] Matthew Bender Sources

California Forms of Pleading and Practice (Matthew Bender).

Ch. 93, *Bailments* .

Ch. 213, *Documents of Title* .

California Legal Forms (Matthew Bender).

Ch. 54, *Shipment of Property* .

Ch. 102, *Bailments* .

Ch. 102A, *Personal Property Liens* .

Forms and Procedures Under the Uniform Commercial Code (Bender' s U.C.C. Serv.), §§ 22.02- 22.12 (delivery of goods); §§ 72.01- 74.08 (documents of title) (Matthew Bender).

[2] Additional Text References

Anderson on the Uniform Commercial Code (Clark, Boardman, Callaghan 3d ed. 1995).

Witkin, Summary of California Law, vol. 1, *Contracts*, § 679; vol. 4, *Secured Transactions in Personal Property*, §§ 23, 24, 36, 38-42, 44, 47; vol. 13 *Personal Property*, §§ 173 et seq. (10th ed. 2005).



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[Reserved]

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PART II. LEGAL BACKGROUND

A. Governing Law

22-54A California Legal Forms--Transaction Guide § 54A.10

§ 54A.10 Storage of Goods in California

The storage of commercial, noncommercial, and household goods may be variously governed by general provisions of the Civil Code dealing with deposits of property [*see Civ. Code § 1813 et. seq.*], provisions of the Commercial Code relating to warehouse receipts and other documents of title [*see Com. Code § 7101 et seq.; see also § 54A.20 et seq.*], and provisions of the Business and Professions Code relating to self-service storage facilities [*Bus. & Prof. Code § 21700 et seq.; see also § 54A.30 et seq.*]. As a general rule, the law governing the warehousing of property within California does not distinguish between household and other noncommercial types of goods.

"Storage" is the deposit of property for hire. Persons or entities who accept personal property for storage for hire are variously referred to as "warehousemen," "storage companies," "depositories for hire," and "bailees." The Civil Code describes one who accepts a deposit of personal property as a "depository" [*Civ. Code § 1814*] and one who accepts a deposit that is not gratuitous as a "depository for hire" [*Civ. Code § 1851*]. The Commercial Code refers to one who, by a warehouse receipt or other document of title, acknowledges possession of goods and contracts to deliver them, as a "bailee"; a "warehouse" is a person engaged in the business of storing goods for hire [*Com. Code § 7102(a)(1), (13)*]. Under the California Self-Service Storage Facility Act [*Bus. & Prof. Code § 21700 et seq.*], the person or company accepting goods for storage is the "owner" and the person renting storage space is referred to as the "occupant" [*Bus. & Prof. Code § 21701(b), (c)*]. For purposes of convenience, this chapter will refer to a person or company who stores property for another for hire as a "warehouse" or "depository," or an "owner," and a person who stores property with another for hire is a "depositor" or "occupant," depending on the context.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) General Overview Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview



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PART II. LEGAL BACKGROUND

A. Governing Law

22-54A California Legal Forms--Transaction Guide § 54A.11

§ 54A.11 Storage of Goods in California While in Transit

[1] California Law

Strictly speaking, the storage of household goods in California is "regulated" only while the goods are in transit over California highways. Provisions of the Public Utilities Code relating to household goods carriers [*see Pub. Util. Code § 5101 et seq.*] apply only to the transportation of used property, including household goods and personal effects, over public highways within California [*Pub. Util. Code § 5112*]. Goods are deemed to be in transit and thus subject to the jurisdiction of the Public Utilities Commission under its Minimum Rate Tariff 4 (generally referred to as "MAX 4") on the first occasion that the goods are stored incidental to their transportation, and then only for a period not in excess of 90 days from the date they are unloaded at the storage point [*see MAX 4, Item 160*]. For further discussion, see Ch. 54, *Shipment of Property* .

[2] Federal Law

When household goods are shipped in interstate commerce and are stored in transit, they are subject to federal regulation [*see 49 U.S.C. § 14104; 49 C.F.R. § 375.101 et seq.*]. For further discussion, see Ch. 54, *Shipment of Property* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local Regulation



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A. Governing Law

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[Reserved]

§§ 54A.12[Reserved]



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PART II. LEGAL BACKGROUND

B. Warehouse Storage

22-54A California Legal Forms--Transaction Guide § 54A.20

§ 54A.20 Storage of Goods Under Uniform Commercial Code

The storage of goods in California is governed by Division 7 of the Uniform Commercial Code--Documents of Title [see *Com. Code § 7101 et seq.*] unless the good are being stored while in transit [see § 54A.11] or are stored in a self-service storage facility [see § 54A.30 et seq.]. Under Division 7, goods are defined as all things that are treated as movable for the purposes of a contract of storage or transportation [*Com. Code § 7102(a)(7)*], and a warehouse is any person engaged in the business of storing goods for hire [see *Com. Code § 7102(a)(13)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Documents of Title (Article 7)General OverviewCommercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsGeneral Overview



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CHAPTER 54A STORAGE OF GOODS

PART II. LEGAL BACKGROUND

B. Warehouse Storage

22-54A California Legal Forms--Transaction Guide § 54A.21

§ 54A.21 Warehouse Receipts

[1] Issuance

On receipt of property for storage, a warehouse issues a warehouse receipt [*see Com. Code § 7201(a)*]. A warehouse receipt is a document that evidences the receipt of goods for storage and that, by its terms, states the intention of the issuer that the person entitled under the document has the right to receive, hold, and dispose of the document and the goods it covers [*Com. Code § 1201(b)(42)*].

A warehouse receipt is negotiable if:

- By its terms, the goods covered by it are to be delivered to the bearer or to the order of a named person [*Com. Code § 7104(a)*]; and
- When it was issued, it did not have a conspicuous legend, however expressed, that it is nonnegotiable [*Com. Code § 7104(c)*].

Any other warehouse receipt is nonnegotiable [*Com. Code § 7104(b)*]. In practice, warehouse receipts usually are nonnegotiable.

[2] Form and Content

A warehouse receipt need not be in any particular form [*Com. Code § 7202(a)*]. Unless a warehouse receipt provides for each of the items listed in *Com. Code § 7202(b)(1)-(9)*, the warehouse is liable for damages caused to a person injured by the omission [*Com. Code § 7202(b)*]. A warehouse may insert in its receipt any terms that are not contrary to the provisions of the Commercial Code and do not impair the warehouse's obligation of delivery [*see Com. Code § 7403; § 54A.22[4]*] or its duty of care [*see Com. Code § 7204; § 54A.22[2]*]. Any contrary provision is ineffective [*Com. Code § 7202(c)*]. For a drafting guide for a warehouse receipt, see § 54A.120. For a warehouse receipt form, see § 54A.200.

[3] Substitute Warehouse Receipts

[a] Tangible Document Superseded by Electronic Document

On request of a person entitled under a tangible warehouse receipt, the issuer may issue an electronic warehouse receipt as a substitute for the tangible document if [*Com. Code § 7105(c)*]:

- The person entitled under the tangible document surrenders possession of the document to the issuer; and
- The electronic document when issued contains a statement that it is issued in substitution for the tangible document.

On issuance of an electronic warehouse receipt in substitution for a tangible warehouse receipt [*Com. Code § 7105(d)*]:

- The tangible document ceases to have any effect or validity.
- The person that procured issuance of the electronic document warrants to all subsequent persons entitled under the electronic document that the warrantor was a person entitled under the tangible document when the warrantor surrendered possession of the tangible document to the issuer.

[b] Electronic Document Superseded by Tangible Document

On request of a person entitled under an electronic warehouse receipt, the issuer may issue a tangible warehouse receipt as a substitute for the electronic document if [*Com. Code § 7105(a)*]:

- The person entitled under the electronic document surrenders control of the document to the issuer; and
- The tangible document when issued contains a statement that it is issued in substitution for the electronic document.

On issuance of a tangible warehouse receipt in substitution for an electronic warehouse receipt [*Com. Code § 7105(b)*]:

- The electronic document ceases to have any effect or validity.
- The person that procured issuance of the tangible document warrants to all subsequent persons entitled under the tangible document that the warrantor was a person entitled under the electronic document when the warrantor surrendered control of the electronic document to the issuer.

[c] Control of Electronic Document

A person has control of an electronic warehouse receipt if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to whom the electronic document was issued or transferred [*Com. Code § 7106(a)*]. A system meets that requirement, and a person is deemed to have control of an electronic warehouse receipt, if the document is created, stored, and assigned in such a manner that all of the following conditions are satisfied [*Com. Code § 7106(b)*]:

- A single authoritative copy of the document exists which is unique and identifiable.
- The authoritative copy identifies the person asserting control as either the person to whom the document was issued or, if the authoritative copy indicates that the document has been transferred, the

person to whom the document was most recently transferred.

- The authoritative copy is communicated to and maintained by the person asserting control or that person's designated custodian.
- The authoritative copy is unalterable, except as otherwise allowed by the conditions stated below.
- Copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control.
- Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy.
- Any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview



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B. Warehouse Storage

22-54A California Legal Forms--Transaction Guide § 54A.22

§ 54A.22 Warehouse's Obligations

[1] Duties Imposed Regardless of Improper Receipt or Conduct of Warehouse

The obligations imposed by Division 7 on the issuer of a warehouse receipt apply even if one (or more) of the following conditions apply [*Com. Code § 7401*]:

- The document does not comply with the requirements of Division 7 or of any other statute, rule, or regulation regarding its issuance, form, or content.
- The issuer violated laws regulating the conduct of its business.
- The goods covered by the document were owned by the bailee when the document was issued.
- The person issuing the document was not a warehouse but the document purports to be a warehouse receipt.

[2] Duty of Care in Storage of Goods

[a] Reasonable Care

The general duty of a depositary is to use at least ordinary care for the preservation of the goods deposited [*Civ. Code § 1852*]. However, a warehouse is liable for damages for loss of or injury to the goods caused by the warehouse's failure to exercise care with regard to the goods that a reasonably careful person would exercise under similar circumstances. Unless otherwise agreed, the warehouse is not liable for damages that could not have been avoided by the exercise of that care [*Com. Code § 7204(a)*; see *Insurance Co. of N. Am. v. NNRAir cargo Serv. (USA), Inc. (9th Cir. 2000) 201 F.3d 1111, 1115* (carrier that did not store goods for profit was not warehouse and therefore was not liable under *Com. Code § 7204(a)* for theft from storage facility)].

[b] Limitation of Damages

Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage beyond which the warehouse is not liable. Such a limitation is not effective with respect to the warehouse's liability for conversion to its own use. On request of the bailor in a record [*Com. Code § 7102(a)(10)* (definition of "record")] at the time of signing the storage agreement or within a reasonable time after receipt of the warehouse receipt, the warehouse's liability may be increased on part or all of the goods covered by the storage agreement or the warehouse receipt. In this event, increased rates may be charged based on an increased valuation of the goods [*Com. Code § 7204(b)*].

[3] Obligation to Segregate Stored Goods

Unless the warehouse receipt provides otherwise, a warehouse must keep separate the goods covered by each receipt, so as to permit at all times identification and delivery of those goods. However, different lots of fungible goods may be commingled [*Com. Code § 7207(a)*; see *Com. Code § 1201(b)(18)* (definition of "fungible goods")]. If different lots of fungible goods are commingled, the goods are owned in common by the persons entitled to them, and the warehouse is severally liable to each owner for that owner's share. If, because of overissued receipts, a mass of fungible goods is insufficient to meet all receipts that the warehouse has issued against it, the persons entitled include all holders to which overissued receipts have been duly negotiated [*Com. Code § 7207(b)*].

[4] Obligation of Delivery

[a] Demand Required

Unless the warehouse can establish a ground to excuse delivery [see [b], *below*], the warehouse is bound to deliver the goods to a person entitled under a warehouse receipt, on that person's demand [see *Civ. Code § 1823* (depository is not bound to deliver without demand)], if two conditions are satisfied [*Com. Code § 7403(a)*]. First, the person claiming goods covered by the warehouse receipt must discharge the warehouse's lien if the warehouse so requests or if the warehouse is prohibited by law from delivering the goods until the charges are paid [*Com. Code § 7403(b)*]. Second, unless the person claiming the goods is a person against whom the warehouse receipt does not confer a right under *Com. Code § 7503(a)* [see § 54A.24[3]], the person claiming under the warehouse receipt must surrender possession or control of any outstanding negotiable document covering the goods, for cancellation or indication of partial deliveries. In addition, the warehouse must cancel the document or conspicuously indicate in the document the partial delivery, otherwise the warehouse is liable to any person to whom the document is duly negotiated [*Com. Code § 7403(c)*].

[b] Delivery Obligation Excused

The warehouse is not required to deliver the goods to a person entitled under a warehouse receipt to the extent that the warehouse establishes any of the following [*Com. Code § 7403(a)(1)-(3),(6),(7)*]:

- Delivery of the goods to a person whose receipt was rightful as against the claimant.
- Damage to, or delay, loss, or destruction of, the goods for which the warehouse is not liable.
- Previous sale or other disposition of the goods in lawful enforcement of a lien or on the warehouse's lawful termination of storage.
- Release, satisfaction, or any other personal defense against the claimant.
- Any other lawful excuse.

If the warehouse in good faith has received goods and delivered or otherwise disposed of the goods according to the

terms of a warehouse receipt (or other document of title) or pursuant to Division 7, then the warehouse is not liable for the goods even if the person from whom the warehouse received the goods did not have authority to procure the document or to dispose of the goods; nor is the warehouse liable if the person to whom the warehouse delivered the goods did not have authority to receive the goods [*Com. Code § 7404*].

If more than one person claims title to or possession of the goods, the warehouse is excused from delivery until the warehouse has a reasonable time to ascertain the validity of the adverse claims or to commence an action for interpleader. The warehouse may assert an interpleader either in defending an action for nondelivery of the goods or by original action [*Com. Code § 7603*].

[c] Delivery When Receipt Is Lost, Stolen, or Destroyed

If a warehouse receipt is lost, stolen, or destroyed, a court may order delivery of the goods or issuance of a substitute document, and the warehouse may, without liability to any person, comply with the order. If the warehouse receipt was negotiable, a court may not order delivery of the goods or issuance of a substitute document without the claimant's posting security, unless the court finds that any person who may suffer loss as a result of nonsurrender of possession or control of the document is adequately protected against the loss. If the warehouse receipt was nonnegotiable, the court may require security. The court may also order payment of the warehouse's reasonable costs and attorney's fees in any action [*Com. Code § 7601(a)*].

A warehouse that, without a court order, delivers goods to a person claiming under a missing negotiable warehouse receipt is liable to any person injured by that wrongful delivery. If the delivery is not in good faith, the warehouse is liable for conversion. Delivery in good faith is not conversion if the claimant posts security with the warehouse in an amount at least double the value of the goods at the time of posting, to indemnify any person injured by the delivery who files a notice of claim within one year after the delivery [*Com. Code § 7601(b)*].

[d] Delivery After Termination Notice

A warehouse, by giving due notice, may require removal of the goods from the warehouse at the termination of the period of storage [*see § 54A.23*]. If the goods are not removed before the date specified in the notice, the warehouse may sell them or otherwise dispose of them [*Com. Code § 7206(a)-(c)*]. However, the warehouse must deliver the goods to any person entitled to them under Division 7 on due demand made at any time before the sale or other disposition of the goods [*Com. Code § 7206(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsGeneral OverviewCommercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsLiability



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22-54A California Legal Forms--Transaction Guide § 54A.23

§ 54A.23 Termination of Storage

[1] At End of Storage Period

A warehouse, by giving notice to the person on whose account the goods are held and to any other person known to claim an interest in the goods, may require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the warehouse receipt [*but see* [2], *below*]. If the goods are not removed before the date specified in the notice, the warehouse may sell them pursuant to *Com. Code § 7210* (procedure for sale to discharge warehouse's lien, discussed in § 54A.24) [*Com. Code § 7206(a)*].

[2] When No Specified Termination Date

If a period of storage is not fixed in the warehouse receipt, then the warehouse's notice [*see* [1], *above*] may require payment of any charges and removal of the goods from the warehouse within a stated period not less than 30 days after the warehouse gives notice [*Com. Code § 7206(a)*; *see Civ. Code § 1854* (reasonable notice is required)], unless the goods are about to deteriorate or decline significantly in value [*see* [3], *below*]. Obviously, then, a storage agreement should specify the storage period, the period required for notice of termination of the agreement by either party, and suitable provisions for automatic renewal if appropriate. Even when the agreement specifies the duration of the storage period, the agreement may be terminated by the bailor on payment of all sums that would become due to the warehouse if the agreement were to continue to the end of the stated period [*see Civ. Code § 1855*].

If the goods are not removed before the date specified in the notice, the warehouse may sell them pursuant to *Com. Code § 7210* (procedure for sale to discharge warehouse's lien, discussed in § 54A.24) [*Com. Code § 7206(a)*].

[3] Deteriorating Goods

If a warehouse believes in good faith that goods are about to deteriorate or decline in value to less than the amount of the warehouse's lien within the time normally required for due notice before a sale or other disposition of the goods [*see Com. Code §§ 7206(a), 7210*; [1], [2], *above*], the warehouse may specify in the notice of termination any reasonable shorter time for removal of the goods and, if the goods are not removed, may sell them at public sale held not less than

one week after a single advertisement or posting [*Com. Code § 7206(b)*].

[4] Hazardous Goods

If, as a result of a quality or condition of the goods of which the warehouse did not have notice at the time of deposit, the goods are a hazard to other property, the warehouse facilities, or other persons, then the warehouse may sell the goods at public or private sale without advertisement or posting, on reasonable notification to all persons known to claim an interest in the goods. If the warehouse, after a reasonable effort, is unable to sell the goods, it may dispose of them in any lawful manner and does not incur liability by reason of that disposition [*Com. Code § 7206(c)*].

[5] Delivery After Demand

The warehouse must deliver the goods to any person entitled to them under Division 7 on due demand made at any time before a sale or other disposition under *Com. Code § 7206* [*Com. Code § 7206(d)*]. The warehouse may satisfy its lien [see § 54A.24[1]] from the proceeds of the sale or disposition, and must hold any balance for delivery on the demand of any person to whom the warehouse would have been bound to deliver the goods [*Com. Code § 7206(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liens



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22-54A California Legal Forms--Transaction Guide § 54A.24

§ 54A.24 Warehouse's Lien for Storage Charges

[1] Scope of Lien

A warehouse has a lien against the bailor on the goods covered by a warehouse receipt or storage agreement, or on the proceeds of the goods in the warehouse's possession, for charges for storage or transportation, including demurrage and terminal charges, insurance, labor, or other charges, present or future, in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law [*Com. Code § 7209(a)*].

If the person on whose account the goods are held is liable for similar charges or expenses in relation to other goods (whenever deposited), and if it is stated in the warehouse receipt or storage agreement that a lien is claimed for charges and expenses in relation to other goods, then the warehouse also has a lien against the goods covered by the warehouse receipt or storage agreement, or on the proceeds of the goods in the warehouse's possession, for those charges and expenses, whether or not the other goods have been delivered by the warehouse [*Com. Code § 7209(a)*].

However, as against a person to whom a negotiable warehouse receipt is duly negotiated, a warehouse's lien is limited to charges in an amount or at a rate specified in the warehouse receipt or, if no charges are so specified, the lien is limited to a reasonable charge for storage of the specific goods covered by the receipt after the date of the receipt [*Com. Code § 7209(a)*].

If the proceeds of a lien sale [*see* [5], *below*] exceed the amount necessary to discharge the lien, then the warehouse must hold the excess amount for delivery on demand to any person to whom the warehouse would have been bound to deliver the goods [*Com. Code § 7210(f)*].

[2] Reservation of Security Interest

A warehouse may reserve a security interest against the bailor for the maximum amount specified on the receipt for charges other than those specified in *Com. Code § 7209(a)*, such as for money advanced and interest [*Com. Code § 7209(a)*; *but see Civ. Code § 1856* (lien of depositary for hire covers advances made at bailor's request)]. The security interest is governed by Division 9 of the Commercial Code [*Com. Code § 7209(a)*; *see Com. Code § 9101 et seq.*; *see*

also Ch. 42, *Secured Transactions*].

[3] Persons Affected by Lien

A warehouse's lien for charges and expenses under *Com. Code § 7209(a)* [see [1], *above*] or a security interest under *Com. Code § 7209(b)* [see [2], *above*] is also effective against any person who entrusted the bailor with possession of the goods so that a pledge of the goods by the bailor to a good faith purchaser for value would have been valid. However, the lien or security interest is not effective against a person who, before issuance of a document of title, had a legal interest or a perfected security interest in the goods and did not do either of the following [*Com. Code § 7209(c)*; see *Com. Code § 7503(a)*] (warehouse receipt confers no right in goods against person who, before issuance of receipt, had legal interest or perfected security interest in goods and did not do either of the acts listed below):

- Acquiesce in the procurement of any document by the bailor or the bailor's nominee; or
- Deliver or entrust the goods or any document of title covering the goods to the bailor or the bailor's nominee with either:
 - Actual or apparent authority to ship, store, or sell;
 - Power to obtain delivery under *Com. Code § 7403* [see § 54A.22[4]]; or
 - Power of disposition under any statute or rule of law [see, e.g., *Com. Code §§ 2403, 9320, 9321(c), 10304(b), 10305(b)*].

A warehouse's lien on household goods for charges and expenses in relation to the goods under *Com. Code § 7209(a)* [see [1], *above*] is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. "Household goods" means furniture, furnishings, or personal effects used by the depositor in a dwelling [*Com. Code § 7209(d)*].

[4] Loss of Lien

A warehouse loses its lien on any goods that it voluntarily delivers or unjustifiably refuses to deliver [*Com. Code § 7209(e)*].

[5] Enforcement of Lien

[a] Commercial Goods

A warehouse's lien on goods stored by a merchant in the course of business may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after notification to all persons known to claim an interest in the goods. Notification may be made by mail, personal service, or verifiable electronic mail. The notification must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale [*Com. Code § 7210(a)*; see *Com. Code § 1202(d),(f)* (what is "notification")].

The fact that a better price could have been obtained by a sale at a different time or in a method different from that selected by the warehouse is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. The warehouse sells in a commercially reasonable manner if the warehouse sells the goods in the usual manner in any recognized market for the goods, sells at the price current in that market at the time of the sale, or otherwise sells in conformity with commercially reasonable practices among dealers in the type of goods sold. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable, except in

cases covered by the preceding sentence [*Com. Code § 7210(a)*].

In lieu of the foregoing procedure, the warehouse may follow the procedure, described in [b], *below*, for enforcing a lien against noncommercial goods [*Com. Code § 7210(h)*].

For a procedural guide to enforcement of a warehouse's lien, see § 54A.130.

[b] Noncommercial Goods

A warehouse may enforce its lien by selling noncommercial goods (that is, goods other than goods stored by a merchant in the course of business) only if specific requirements are met regarding notice to interested persons and advertisement of the sale [*see Com. Code § 7210(b)*]. For a procedural guide setting out those requirements, see § 54A.130.

A warehouse is liable for damages caused by failure to comply with the requirements for sale under *Com. Code § 7210* and, in case of willful violation, is liable for conversion [*Com. Code § 7210(i)*]. However, a good faith purchaser of goods sold to enforce a warehouse's lien takes the goods free of any rights of persons against whom the lien was valid, whether or not the warehouse complied with *Com. Code § 7210* [*Com. Code § 7210(e)*].

[c] Effect of Payment Before Sale

Before any sale pursuant to *Com. Code § 7210*, any person claiming a right in the goods may pay the amount necessary to discharge the lien plus the reasonable expenses incurred in complying with *Com. Code § 7210*. In that event, the goods may not be sold but must be retained by the warehouse subject to the terms of the warehouse receipt and Division 7 [*Com. Code § 7210(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liens



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[Reserved]

§§ 54A.25[Reserved]



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22-54A California Legal Forms--Transaction Guide § 54A.30

§ 54A.30 California Self-Service Storage Facility Act

[1] Application of Act

Self-service storage facilities in California are subject to the California Self-Service Storage Facility Act [*Bus. & Prof. Code § 21700 et seq.* (effective January 1, 1982)]. The Act generally applies to all self-service storage facilities [*see Bus. & Prof. Code § 21701(a)*; *see also* [2], *below*], and to any kind of personal property stored in a self-service storage facility; that is, movable property not affixed to land, including goods, merchandise, furniture, and household items [*Bus. & Prof. Code § 21701(e)*]. The Act applies broadly to any written agreement concerning the use or occupancy of space in a self-service storage facility including agreements or leases that establish or modify the terms, conditions, rules, or other provisions concerning that use or occupancy [*Bus. & Prof. Code § 21701(d)*]. The Act also applies to the storage of individual storage containers provided to occupants who have exclusive use of the container for the purpose of storing and removing personal property, whether or not the individual storage containers are transported in accordance with *Bus. & Prof. Code § 21701.1* [*Bus. & Prof. Code § 21701(a)*; *see Bus. & Prof. Code § 21701.1* (transportation for fee by self-service storage facility's owner or operator of individual storage containers to and from facility without household goods carrier permit); *see also* § 54A.114]. The Act even contemplates the storage of vehicles and vessels subject to registration or identification under the Vehicle Code, by prescribing rules for determining the priorities of multiple liens on these vehicles and vessels [*see Bus. & Prof. Code § 21702.5(a)* (priority of liens on vehicles and vessels subject registration or identification under Vehicle Code)].

The Act does not apply to any property for which a warehouse receipt, bill of lading, or other document of title has been issued; a self-storage facility is not a warehouse or a public utility [*Bus. & Prof. Code § 21701(a)*; *see Pub. Util. Code § 216* ("public utility" defined)]. If a warehouseman or storage company issues a document of title for any stored property, the rights and obligations of the warehouseman or storage company and the owner of the property are governed by provisions of the Commercial Code relating to warehouse receipts, bills of lading, and other documents of title [*Bus. & Prof. Code § 21701(a)*; *see Com. Code § 7101 et. seq.*; *see also* § 54A.20 *et seq.*].

The Act does not apply to garages or other storage areas in private residences [*Bus. & Prof. Code § 21701(a)*]. The Act also does not apply to rental agreements entered into, extended, or renewed before January 1, 1982 [*Bus. & Prof. Code*

§ 21714]. Any rental agreement entered into before that date (and not extended or renewed after that date) is valid and may be enforced or terminated in accordance with its terms and the then-applicable law [*Bus. & Prof. Code* § 21715].

[2] Definitions

[a] Self-Service Storage Facility

A "self-service storage facility" means real property designed and used for the purpose of renting or leasing individual storage space to occupants who are to have access to the space for the purpose of storing and removing personal property or for storing individual storage containers provided to occupants who have exclusive use of the container for the purpose of storing and removing personal property, whether or not the individual storage containers are transported in accordance with *Bus. & Prof. Code* § 21701.1 [*Bus. & Prof. Code* § 21701(a); *see Bus. & Prof. Code* § 21701.1 (transportation for fee by self-service storage facility's owner or operator of individual storage containers to and from facility without household goods carrier permit); *see also* § 54A.114]. The term does not include a garage or other storage area in a private residence, and does not include a warehouse or public utility [*Bus. & Prof. Code* § 21701(a); *see* [1], *above*; *see also* § 54A.20 *et seq.*].

[b] Owner

The term "owner" refers to the owner, operator, lessor, or sublessor of a self-service storage facility, his or her agent, or any other person authorized by the owner to manage the facility, or to receive rent from an occupant under a rental agreement. No real estate license is required [*Bus. & Prof. Code* § 21701(b)].

[c] Occupant

The term "occupant" refers to a person, or his or her sublessee, successor, or assign, who is entitled to the use of the storage space at a self-service storage facility under a rental agreement to the exclusion of others [*Bus. & Prof. Code* § 21701(c)].

[d] Rental Agreement

A "rental agreement" is any written agreement or lease that establishes or modifies the terms, conditions, rules, or other provision concerning the use and occupancy of a self-service storage facility [*Bus. & Prof. Code* § 21701(d); *see In re Safeguard Self-Storage Trust* (9th Cir. 1993) 2 F.3d 967, 970-973 (bankruptcy court holds that self-storage agreement is lease)].

[e] Personal Property

The term "personal property" is defined to mean movable property not affixed to land, and includes goods, merchandise, furniture, and household items [*Bus. & Prof. Code* § 21701(e)]. Thus, the Act applies broadly to any kind of movable property not affixed to land that is stored in a self-service storage facility, including vehicles and vessels [*see Bus. & Prof. Code* § 21702.5(a)]; the Act is not limited to household goods, and commercial property is not excluded from coverage [*see Bus. & Prof. Code* § 21701(a)].

Property for which a warehouse receipt, bill of lading, or other document of title is given is not covered by the Act [*Bus. & Prof. Code* § 21701(a)]. If the owner of a storage facility issues a warehouse receipt, bill of lading, or other document of title for the property stored, Division 7 of the Commercial Code governs [*see Com. Code* § 7101 *et seq.*; *see also* § 54A.20 *et seq.*]. If no such document is issued, the Act governs provided that the facility is not a garage or other storage area in a private residence [*Bus. & Prof. Code* § 21701(a)].

[f] Individual Storage Container

"Individual storage container" means a container that is fully enclosed and locked, contains not less than 100 cubic feet and not more than 1,100 cubic feet, and is constructed out of durable material appropriate for repeated use [*Bus. & Prof. Code* § 21701.1(d)]. A box constructed out of cardboard or a similar material does not constitute an individual storage container for purposes of the law governing transportation of individual storage containers [*Bus. & Prof. Code* § 21701.1(d)(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) General Overview Contracts Law Types of Contracts General Overview



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§ 54A.31 Rental Agreements

[1] Requirements Under Act

Rental agreements for storage in self-service storage facilities must meet certain requirements set forth in the Act [*see Bus. & Prof. Code §§ 21712, 21714, 21715*]. These requirements apply to any written agreement that establishes or modifies the terms, conditions, rules, or other provisions concerning the use and occupancy of a self-service storage facility, regardless of whether the agreement is denominated a "rental agreement," a "lease," a "contract," or otherwise [*Bus. & Prof. Code § 21701(d)*; *see In re Safeguard Self-Storage Trust (9th Cir. 1993) 2 F.3d 967, 970-973* (bankruptcy court holds that self-storage agreement is lease)].

Specifically, every contract for the rental or lease of storage space in a self-service storage facility must satisfy the following [*Bus. & Prof. Code § 21712(a)*]:

- Be in writing.
- Include a statement that the occupant's property will be subject to a claim of lien and may even be sold to satisfy the lien if the rent or other charges due under the agreement remain unpaid for 14 consecutive days, and that these actions are authorized by the Act.
- Request and provide space for the occupant to give the name and address of another person to whom the preliminary lien notice [*see Bus. & Prof. Code §§ 21703, 21704*; *see also § 54A.221*] and the subsequent notice required by the Act [*see Bus. & Prof. Code § 21705* (notice of lien sale); *see also § 54A.222*] may be sent [*Bus. & Prof. Code § 21712(b)* (owner has no lien unless agreement requests and provides space for alternative name and address)].

Technically, the third requirement is not mandated by statute [*see Bus. & Prof. Code § 21712(a)*]; however, the failure to satisfy this requirement effectively eliminates the owner's right to a lien under the Act [*Bus. & Prof. Code § 21712(b)*; *see § 54A.32*]. The failure of the occupant to provide an alternative address does not affect an owner's

remedies under the Act, or under any other provision of law, as long as the agreement requests this information and provides space for the occupant to include it [*Bus. & Prof. Code § 21712(b)*].

These contract requirements are in addition to any other provisions otherwise required or permitted by law [*Bus. & Prof. Code § 21712(a)*; *see Bus. & Prof. Code § 21713*; *see also* [2], *below*].

[2] Parties May Create Additional Rights and Duties

The right of the parties to a self-service storage facility rental agreement to create additional rights, duties, and obligations in their agreement is specifically recognized in the Act, which states that it may not be construed to impair or affect that right [*Bus. & Prof. Code § 21713*]. The rights provided by the Act are in addition to all other rights provided by law to a creditor against a debtor [*Bus. & Prof. Code § 21713*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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§ 54A.32 Owner's Liens

[1] Imposition of Lien

The Act authorizes the imposition of liens on property stored in self-service storage facilities [*Bus. & Prof. Code § 21702*]. A lien imposed under the Act is in favor of the owner of the facility and the owner's heirs, executors, administrators, successors, and assigns [*Bus. & Prof. Code § 21702*]. It is imposed against all personal property located at a self-service storage facility [*Bus. & Prof. Code § 21702*; see *U.S. v. Poulsen (9th Cir. 1994) 41 F.3d 1330, 1334-1337* (imposition of lien destroys depositor's legitimate expectation of privacy in contents)].

[2] Charges Covered by Lien

The lien is for rent, labor, late payment fees, or other charges, present or future, incurred pursuant to a rental agreement, and for expenses necessary for the preservation, sale, or disposition of personal property subject to the provisions of the Act [*Bus. & Prof. Code § 21702*]. The lien may be enforced only in accordance with the provisions of the Act [*Bus. & Prof. Code § 21702*] and only if the requirements of the Act have been satisfied [see *Bus. & Prof. Code §§ 21703-21707, 21712*; see also [3], below].

[3] Procedure

If any part of the rent or other charges due from an occupant remain unpaid for 14 consecutive days, the owner may begin the process of enforcing an owner's lien against the occupant of a self-service storage space [*Bus. & Prof. Code § 21703*]. The Act requires that an owner give the occupant a preliminary lien notice [see *Bus. & Prof. Code §§ 21703, 21704*; see also § 54A.221]. The notice must be sent either by certified mail, postage prepaid, or by regular first-class mail if the owner obtains a certificate of mailing indicating the date the notice was mailed [*Bus. & Prof. Code § 21703*].

If the total sum due has not been paid as of the date specified in the preliminary lien notice as the termination date, a lien attaches as of that date [*Bus. & Prof. Code § 21705(a), (b)*]. The owner may then enter the space and deny the occupant access to it [*Bus. & Prof. Code § 21705(a)(1), (2), (b)*]. If the preliminary lien notice was sent by certified mail and the total sum due was not paid as of the termination date, the owner may also remove any property found in

the space to a place of safe keeping [*Bus. & Prof. Code § 21705(a)(3)*]. If the preliminary lien notice was sent by regular first class mail with a certificate of mailing, the owner still may enter the space and deny the owner access to it if the total sum due has not been paid as of the termination date, but may not remove the occupant's property until at least 14 days after the termination date, during which time the occupant may regain full use of the space by paying the full lien amount [*Bus. & Prof. Code § 21705(b)*]. In either case, the owner must then send a notice of lien sale [*Bus. & Prof. Code § 21705(a)*; see § 54A.222]. These notices must be sent to the occupant's last known address, as well as to any alternative address provided by the occupant [*Bus. & Prof. Code § 21705(c)*; see *Bus. & Prof. Code § 21712(b)* (alternate address)]. The occupant's last known address is the address provided by the occupant in the most recent rental agreement, or any address provided by the occupant in a subsequent written notice of a change of address [*Bus. & Prof. Code § 21701(f)*].

The occupant or any other person claiming a right to the goods may redeem the goods at any time before the lien sale by paying the amount necessary to satisfy the lien and the reasonable expenses incurred in the lien procedure [*Bus. & Prof. Code § 21709*]. Partial payment is insufficient to prevent a lien, and the owner's acceptance of partial payment does not alter the agreement [see *U.S. v. Poulsen (9th Cir. 1994) 41 F.3d 1330, 1334-1337* (imposition of lien destroys depositor's legitimate expectation of privacy in contents)]. Further, the occupant has the right to file a declaration in opposition to the lien sale [see *Bus. & Prof. Code § 21705(c)(2)*; see also § 54A.223], in which case the owner's lien can be enforced only through a judicial proceeding [see *Bus. & Prof. Code § 21710*].

The lien sale itself must be advertised in accordance with statutory requirements [see *Bus. & Prof. Code § 21707(a)*] and conducted in a commercially reasonable manner [*Bus. & Prof. Code § 21707(b)*]. The owner must retain any excess proceeds of the sale on the occupant's behalf [see *Bus. & Prof. Code § 21707(b)*].

For detailed discussion of the owner's lien, and coverage of the enforcement procedures, see §§ 54A.132, 54A.221.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54A STORAGE OF GOODS

PART II. LEGAL BACKGROUND

C. Self-Service Storage

22-54A California Legal Forms--Transaction Guide §§ 54A.33-54A.99

[Reserved]

§§ 54A.33[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54A STORAGE OF GOODS

PART III. TRANSACTION GUIDE

A. Preliminary Determinations

22-54A California Legal Forms--Transaction Guide § 54A.100

§ 54A.100 Receipt of Goods for Storage

1. Determine storage period to be specified in warehouse receipt.

NOTE:

The specification of the storage period in the warehouse receipt effectively identifies the date on which a notice of termination and demand of payment for charges due may be made [*see Com. Code § 7206(a); see also § 54A.23*].

If the goods are to be stored in transit; that is, stored only as an incident to their transportation entirely within California for a period of 90 days or less or interstate for a period of 180 days or less, state or federal regulations governing the transportation of household goods apply exclusively [*see § 54A.11; see also Ch. 54, **Shipment of Property***], and the goods are covered only by a bill of lading. No warehouse receipt is issued for goods stored in transit.

- a. Minimum period.
- b. Maximum period.
- c. Month to month.
- d. At will of depositor.
- e. For goods picked up and stored entirely within California, storage period in excess of 90 days.

f. For goods picked up in one state and stored in another, storage period in excess of 180 days.

2. Determine whether warehouse should issue negotiable or nonnegotiable warehouse receipts.

NOTE:

A warehouse receipt is negotiable if (1) by its terms, the goods covered by it are to be delivered to the bearer or to the order of a named person [*Com. Code § 7104(a)*] and (2) when it was issued, it did not have a conspicuous legend, however expressed, that it is nonnegotiable [*Com. Code § 7104(c)*]. Any other warehouse receipt is nonnegotiable [*Com. Code § 7104(b)*]. Warehouse receipts usually are nonnegotiable.

3. Determine whether warehouse receipt should provide for warehouse's liability for damages that could not have been avoided by exercise of reasonable care, or whether insurance coverage for such damage should be offered to depositor.

NOTE:

Unless otherwise agreed, the warehouse is not liable for damages that could not have been avoided by the exercise of care with regard to the goods that a reasonably careful person would exercise under similar circumstances [*Com. Code § 7204(a)*; see *Insurance Co. of N. Am. v. NNRAircargo Serv. (USA), Inc. (9th Cir. 2000) 201 F.3d 1111, 1115* (carrier that did not store goods for profit was not warehouse and therefore was not liable under *Com. Code § 7204(a)* for theft from storage facility)].

a. Indemnity provisions in warehouse receipt.

b. Requirement that warehouse or depositor purchase insurance to cover liability.

4. Determine whether or to what extent warehouse receipt should limit amount of liability for loss or damage and, if so, whether limitation should be stated in terms of [*see Com. Code § 7204(b)*]:

a. Specific liability per article or item.

b. Value per unit of weight or other measure.

5. Determine what time periods and methods should be specified in warehouse receipt for following [*see Com. Code § 7204(c)*]:

a. Presentation of claims.

(1) Written claims only.

(2) Stated number of days after discovery of damage or loss.

(3) Delivery at warehouse or principal place of business.

b. Institution of any suit.

6. Determine loading/unloading and any transportation charges.

- a. Hourly rate.
- b. Flat rate.
- c. Per mile rate.
- d. Additional surcharge for especially valuable or fragile items.

7. Determine charges to be imposed for preparation of goods being stored.

- a. Types of preparation work to be offered, such as wrapping, moth protection, padding, dunnage.
- b. Basis for preparation charges:
 - (1) Flat rate per item, type of item, or weight unit.
 - (2) On time and materials basis.
 - (3) Combined unit and time and materials basis.

8. Determine basis for storage charges:

- a. Period of time.

NOTE:

The basic storage period is usually one month and the warehouse receipt generally provides for storage on a month-to-month basis.

- b. Periodic charge based on:

- (1) Number of items, boxes, or crates.
- (2) Size of stored goods as packed.
- (3) Volume, i.e., number of cubic feet occupied by stored goods as packed.
- (4) Weight of stored goods as packed.
- (5) Flat rate, or flat rate only for storage boxes provided by warehouse.
- (6) Extra charges over basic rate for specially large or valuable items.

9. Determine rates to be charged for access services:

- a. Handling or access charge to be levied each time depositor obtains access to goods.
 - (1) Flat rate.
 - (2) Hourly rate, with or without a minimum period specified.

(3) Limited access included in basic rate, access over specified number subject to surcharge based on either (1) or (2), above.

b. Handling charge to be levied each time goods are added to or withdrawn from storage.

NOTE:

Storage facilities often levy an "in" charge equivalent to the monthly storage charge and an "out" charge that varies from one-half that amount up to a full monthly storage charge.

10. Determine whether warehouse will offer insurance and, if so, applicable rates to be charged for insurance offered through warehouse.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liability Contracts Law Types of Contracts General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54A STORAGE OF GOODS

PART III. TRANSACTION GUIDE

A. Preliminary Determinations

22-54A California Legal Forms--Transaction Guide § 54A.101

§ 54A.101 Transportation of Individual Storage Containers

1. Determine whether owner or operator of self service storage facility will transport individual storage containers to and from facility.
2. If owner or operator will perform transportation activities for fee, determine whether proposed activities may be provided without household goods carrier permit [*see Bus. & Prof. Code § 21701.1; see also § 54A.114*].

NOTE:

The owner or operator of a self service storage facility, or a household goods carrier, may, for a fee, transport individual storage containers to and from the facility that he or she operates. This transportation activity will not be deemed transportation for compensation or hire as a business of used household goods and will not require a household goods carrier permit if specified requirements are met [*Bus. & Prof. Code § 21701.1; see § 54A.114*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54A STORAGE OF GOODS

PART III. TRANSACTION GUIDE

A. Preliminary Determinations

22-54A California Legal Forms--Transaction Guide §§ 54A.102-54A.109

[Reserved]

§§ 54A.102[Reserved]



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CHAPTER 54A STORAGE OF GOODS

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B. Procedural Guide

22-54A California Legal Forms--Transaction Guide § 54A.110

§ 54A.110 Delivery of Goods Into Storage

1. Issue and/or execute all necessary documents preliminary to receipt of goods in warehouse:

a. Written estimate of cost of services is given by carrier or warehouse acting in its capacity as carrier [*see Ch. 54, Shipment of Property*].

b. Execute agreement for services between:

(1) Depositor and carrier.

(2) Depositor and warehouse acting in its capacity as carrier [*see Ch. 54, Shipment of Property*].

c. After execution of agreement for services, party acting as carrier for transportation of goods will issue a bill of lading [*see Ch. 54, Shipment of Property*].

2. On receipt of goods at warehouse for "permanent" storage, warehouse must issue warehouse receipt [*Com. Code § 7201(a); Penal Code § 578*].

NOTE:

A warehouse is a person engaged in the business of storing goods for hire [*Com. Code § 7102(a)(13)*], and a warehouse receipt is a receipt issued by such a person [*Com. Code § 1201(b)(42)*]. For a guide to drafting a warehouse receipt, see § 54A.120. It is an offense to issue a warehouse receipt for goods that are not actually on the warehouse premises and under the warehouse's control at the time of issuing the receipt [*Penal Code § 578*].

3. Contemporaneously with execution of warehouse receipt, warehouse should have depositor execute signature card that [*see § 54A.202*]:

a. Enables warehouse personnel to identify depositor or any other person depositor desires to have access to stored goods when access is sought.

b. Should be canceled if card authorizes access by person other than depositor and that person:

(1) No longer has faith and confidence of depositor.

(2) Dies.

(3) Moves to another area.

(4) Becomes seriously ill.

(5) Is depositor's spouse who is seeking dissolution of marriage.

4. Depositor should be advised or encouraged to obtain insurance covering loss of or damage to stored household goods, as follows:

NOTE:

For a certificate issued to evidence insurance coverage under a blanket policy issued to the warehouse, see § 54A.201.

a. Coverage should extend to loss or damage that results from causes other than warehouse's negligence, since warehouse receipt provides for liability on part of warehouse for loss or damage caused by warehouse's negligence.

b. Coverage should not duplicate insurance depositor has in force.

NOTE:

The insurance certificate issued by the warehouse usually provides that payment will not be made if there is other coverage and that, if made, the insurer has a right of subrogation against the depositor's insurer [*see* § 54A.201[2], Part III(7), (8)].

c. Coverage should equal to actual value of stored goods.

NOTE:

Under an insurance certificate issued by the warehouse, the depositor is considered a co-insurer to the extent of the difference between the value declared in the warehouse receipt and the actual value [*see* § 54A.201[2], Part III(2)].

d. Depositor should have warehouse pack and unpack all fragile items since insurance usually covers breakage of these items only if [*see* § 54A.201[2], Part II(2)]:

(1) Items are packed and unpacked by warehouse's employees.

(2) There is physical external damage to container in which they are packed.

e. All articles of "extraordinary value" (e.g., jewelry, watches, gems, art, money, and critical documents)

must be declared if they are to be covered [see § 54A.201[2], Part II(4)].

NOTE:

If there is any doubt as to whether a particular item is in this category, it should be declared. The warehouse should have special safety vaults for valuable items, and the vaults should be made available to the depositor and used.

f. Depositor must avoid concealment or misrepresentation of any material fact to avoid having insurance coverage of this type considered void ab initio [see § 54A.201[2], Part II(4)].

g. Insurance premiums are generally based on valuation of goods stored and paid simultaneously with periodic storage charge.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liability Contracts Law Types of Contracts General Overview



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22-54A California Legal Forms--Transaction Guide § 54A.111

§ 54A.111 Caring for Stored Goods

1. Instruct warehouse to establish procedures designed to ensure standard of care for stored goods that reasonably careful person would exercise under circumstances [*Com. Code § 7204(a)*], such as:
 - a. Smoke and fire alarms and fire prevention programs, including periodic fire drills for warehouse personnel, fire extinguishers, and sprinkler systems.
 - b. Vermin control and packaging or chemical or other protection of goods and premises sufficient to guard against rats, mice, insects, and moths.
 - c. Training program for warehouse personnel in warehouse safety and care of household goods in storage.
2. Instruct warehouse to establish procedures limiting access to stored goods by warehouse personnel or depositor and persons designated by depositor as having access:
 - a. Master key under management supervision.
 - b. Records showing date and time access and name of person, with signature, who had access:
 - (1) Depositor's signature card [*see § 54A.202*].
 - (2) Ledger or other record book.
3. Instruct warehouse to prohibit all warehouse employees from using stored goods [*see Civ. Code § 1835*].

4. If any stored box or package was purposely fastened by depositor, instruct warehouse not to open it without consent of depositor, except in case of necessity; and instruct depositor to establish regulations defining "necessity."
5. Instruct warehouse to take steps, following receipt of goods into storage, to ensure that they are kept separate so as to permit identification and delivery at all times [*Com. Code § 7207(a)*].
6. Instruct warehouse to institute and carry out schedule for periodic inspection or inventory of stored goods.
7. Instruct warehouse, on detection of any loss of or injury to any stored goods, to inform depositor of circumstances [*see Civ. Code § 1838*].

NOTE:

If loss or injury occurs during the deposit, and the depositary refuses to inform the depositor of the circumstances under which it occurred, so far as it has the necessary information, or willfully misrepresents the circumstances, the depositary is presumed to have willfully or by gross negligence permitted the loss or injury to occur [*see Civ. Code § 1838*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liability



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B. Procedural Guide

22-54A California Legal Forms--Transaction Guide § 54A.112

§ 54A.112 Termination of Storage

1. Advise that warehouse may terminate storage at its option as follows [*Com. Code § 7206(a)*]:

a. Notice must be given to:

NOTE:

Notification requires taking such steps as may be reasonably required to inform a person in ordinary course, whether or not the person actually comes to know of it [*Com. Code § 1202(d)*].

(1) Person on whose account goods are held.

(2) Any other person known to claim interest in goods.

b. Notice must:

(1) Require payment of any charges due.

(2) Require removal of goods from warehouse either at termination of period of storage fixed by warehouse receipt or, if no period is stated, within stated period not less than 30 days after notice.

2. If goods are not removed before date specified in notice of termination, advise that warehouse may sell them in accordance with statutory provisions governing enforcement of warehouse's lien [*see Com. Code § 7206(a)*].

NOTE:

For the procedures involved in enforcement of a warehouse's lien [*Com. Code § 7210*], see § 54A.130.

3. If warehouse in good faith determines that goods are about to deteriorate or decline in value to less than lien amount within period prescribed for termination notice [*see P (1)(b), above*], advertisement, and sale [*see Com. Code § 7210; see also § 54A.130*], advise that warehouse [*Com. Code § 7206(b)*]:

- a. Must give notice of termination [*see P (1)(a), above*].
- b. May specify in termination notice any reasonably shorter time for removal of goods.
- c. May sell goods that are not removed in compliance with termination notice at public sale to be held not less than one week after single advertisement or posting.

4. If goods present hazard to other property, warehouse, or persons employed by or visiting warehouse because of quality or condition of goods of which warehouse had no notice at time of their deposit, advise that warehouse [*Com. Code § 7206(c)*]:

- a. Must provide reasonable notification [*see P (1)(a), above*] to all persons known to claim an interest in stored goods.
- b. May then sell goods at public or private sale without advertisement.
- c. If unable to sell goods, may dispose of them in any lawful manner without incurring liability based on that disposition.

5. Advise that, following any such sale or disposition, warehouse [*Com. Code § 7206(e)*]:

- a. May satisfy any lien from proceeds.
- b. Must hold any balance for delivery on demand of any person to whom it would have been bound to deliver goods.

6. Advise that depositor may:

- a. Terminate deposit at any time, in absence of any agreement as to duration of deposit [*Civ. Code § 1854*].
- b. Notwithstanding any agreement respecting duration of deposit period, terminate deposit on payment of all that would become due if deposit continued [*Civ. Code § 1855*].
- c. After notice of any sale or other disposition of goods on termination of deposit by warehouse, obtain delivery of goods by [*Com. Code § 7206(a), (d)*]:

(1) Making due demand for delivery at any time before sale or disposition.

(2) Making payment of any amount necessary to satisfy warehouse's lien and reasonable expenses incurred by warehouse pursuant to its termination of storage.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liability Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liens



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B. Procedural Guide

22-54A California Legal Forms--Transaction Guide § 54A.113

§ 54A.113 Delivery of Goods From Storage

[1] Single Claim

NOTE:

For discussion of the warehouse's obligation to deliver household goods from storage, see § 54A.22[4].

1. Advise that warehouse need not deliver goods deposited for storage before depositor [*Civ. Code* § 1823]:

- a. Makes demand, even though deposit is made for specified time
- b. Satisfies any warehouse's lien on demand by warehouse [*see Com. Code* § 7403(b)].
- c. Surrenders for cancellation or notation of partial deliveries any outstanding negotiable document covering goods [*see Com. Code* § 7403(c)].

NOTE:

Ordinarily, the document covering the goods is a nonnegotiable warehouse receipt. Although surrender of a nonnegotiable document is not mandated by law, as a practical matter, the warehouse should require the depositor to submit the receipt. The warehouse should cancel the receipt or make any necessary notations of partial deliveries.

2. Advise that warehouse must deliver goods to person entitled under warehouse receipt who has complied with above requirements [*see P 1, above*] unless and to the extent that it can establish any of following [*Com. Code* § 7403(1)]:

NOTE:

The "person entitled" under a nonnegotiable warehouse receipt is the person to whom delivery of the goods is to be made by the terms of the receipt, or pursuant to instructions in a record under the receipt [Com. Code § 7102(a)(9); see Com. Code § 7102(a)(10) (definition of "record")].

The disposition or hypothecation of goods without the written consent of the holder of the warehouse receipt is illegal [see Penal Code § 581] unless the property was sold or demanded by virtue of process of law [Penal Code § 583].

- a. Delivery of goods to person whose receipt was rightful as against claimant.
- b. Damage to or delay, loss, or destruction of goods for which warehouse is not liable.

NOTE:

The burden of establishing negligence in the event of damage or destruction by fire is on the person entitled under the document [Com. Code § 7403(a)(2)].

- c. Previous sale or other disposition of the goods:

(1) in lawful enforcement of lien [see § 54A.130].

(2) on warehouse's lawful termination of storage [see § 54A.112].

- d. Release, satisfaction, or any other fact affording personal defense against claimant.

NOTE:

The warehouse's failure to deliver may be excused to the extent that the warehouse establishes any lawful excuse, such as the bailor's exercise of a seller's or lessor's right to stop delivery because of the buyer's or lessee's nonpayment or insolvency [see Com. Code §§ 2705, 10526] or a lawful diversion, reconsignment, or other disposition by a carrier [Com. Code § 7403(a)(4),(5),(7); see Com. Code § 7303 (disposition by carrier)].

- 3. Advise that, pending resolution of conflicting claims for title to or possession of stored goods, warehouse is excused from making delivery [see Com. Code § 7603].

NOTE:

Conflicting claims may be asserted by two or more of the following classes of persons: the depositor, the true owner or joint owners of the goods, the survivor or survivors of the depositor or joint depositors, the holder of legal title to goods subject to a conditional sales contract, the spouse of a depositor when the spouses are involved in separation or dissolution of the marriage and community property is an issue, or when a business partner of the depositor asserts an interest in the goods. For further discussion, see [2], **below**.

- 4. Advise that, when making delivery, warehouse must act in good faith and observe reasonable commercial standards [see Com. Code § 7404].

- 5. Advise that delivery should not be made to person claiming under missing document; if warehouse receipt or other document of title is lost, stolen, or destroyed, warehouse should require claimant to obtain court order for issuance of substitute document [see Com. Code § 7601].

6. Advise that delivery must be made at depositary's place of business [*see Civ. Code § 1824*] or to place agreed on in warehouse receipt and any bill of lading for transportation.

[2] Conflicting Claims for Stored Goods

1. If more than one person asserts title to or right to possession of stored goods, advise warehouse to exercise its statutory excuse from duty to make delivery until it has had reasonable time to either [*Com. Code § 7603*]:

- a. Ascertain validity of adverse claims;
- b. Bring action to compel all claimants to interplead; or
- c. Defend action for nondelivery and compel all claimants to interplead.

NOTE:

For a complaint in interpleader by a warehouse to determine the conflicting claims of a bailor and a claimant, see California Forms of Pleading and Practice, Ch. 213, ***Documents of Title*** (Matthew Bender).

2. Instruct warehouse that warehouse receipt should include language providing warehouse lien for court costs and reasonable attorneys' fees in [*see § 54A.200[2]*, Part II, art. XV]:

- a. Defending itself if it is made party to any litigation concerning stored goods.
- b. Filing any action in interpleader.

3. Instruct warehouse to give prompt notice to depositor of any proceedings taken adversely to depositor's interest in stored goods that may tend to excuse depositary from making delivery [*Civ. Code § 1825*].

4. Advise that if warehouse believes that stored goods are wrongfully detained from their true owner, it may give that person notice of deposit [*see Civ. Code § 1826*].

NOTE:

If, within a reasonable time, the person notified does not claim the goods, establish a right to the goods, and indemnify the depositary against any claim by the depositor, the depositary will be exonerated from liability to the person notified [*see Civ. Code § 1826*].

5. If stored item is owned jointly or in common by persons who cannot agree on manner of its delivery, warehouse may deliver proper share to each owner, if it can be done without injury to item [*Civ. Code § 1827*].

6. If deposit is made in name of two or more persons, deliverable to either or to their survivor or survivors, deposit may be delivered to either depositor or to survivor or survivors in due course of business [*Civ. Code § 1828*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liability Commercial Law (UCC) Documents of Title (Article

7) Warehouse Receipts Liens



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CHAPTER 54A STORAGE OF GOODS

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B. Procedural Guide

22-54A California Legal Forms--Transaction Guide § 54A.114

§ 54A.114 Transportation of Individual Storage Container

1. If owner or operator of self service storage facility will transport individual storage containers to and from facility for a fee, advise owner or operator that it must comply with all of following conditions to avoid regulation under *Pub. Util. Code § 5101 et seq.*:

NOTE:

The owner or operator of a self service storage facility, or a household goods carrier, may, for a fee, transport individual storage containers to and from the facility that he or she operates. This transportation activity will not be deemed transportation for compensation or hire as a business of used household goods and will not require a household goods carrier permit if all the requirements enumerated below are met.

a. Charged fee to deliver empty individual storage container, transport loaded container to facility, or return loaded container to customer may not exceed \$100 [*Bus. & Prof. Code § 21701.1(a)(1)*].

b. Owner, operator, or carrier, or affiliate may not load, pack, or otherwise handle container's contents [*Bus. & Prof. Code § 21701.1(a)(2)*].

c. Owner, operator, or carrier must be properly registered or hold required permit [*see Bus. & Prof. Code § 21701.1(a)(3)*].

d. Owner, operator, or carrier must have cargo insurance of at least \$20,000 per shipment [*Bus. & Prof. Code § 21701.1(a)(4)*].

e. Owner, operator, or carrier must disclose to customer, in advance, in written document

separate from others furnished at time of disclosure, terms and conditions of transfer service [see *Bus. & Prof. Code* § 21701.1(a)(5); see also § 54A.122].

NOTE:

The disclosure of terms and conditions, and the rental agreement, must be received by the customer a minimum of 72 hours before delivery of the empty individual storage container [*Bus. & Prof. Code* § 21701.1(a)(5)]. However, the customer may, in writing, knowingly and voluntarily waive that receipt [*Bus. & Prof. Code* § 21701.1(a)(5)]. The company must record in writing and retain for at least six months after the end of the rental the time and method of delivery of the information, any waiver made by the customer, and the times and dates of initial pickup and redelivery of the containerized goods [*Bus. & Prof. Code* § 21701.1(a)(5)].

2. Advise owner or operator that company must provide customer, no later than time empty storage container is delivered, informational brochure containing following information about loading container [see *Bus. & Prof. Code* § 21701.1(a)(6)]:

- a. Packing and loading tips to minimize damage.
- b. Suggestion that customer make inventory of items as they are loaded.
- c. Suggestion that customer keep any other record (e.g., photographs, video recording) that may assist in subsequent claims processing.
- d. List of items that are impermissible to pack in container (e.g., flammable items).
- e. List of items that are not recommended to be packed in light of foreseeable hazards inherent in company's handling of containers and in light of any limitation of liability contained in agreement.

NOTE:

The brochure must be provided to the customer no later than the time the empty storage container is delivered [*Bus. & Prof. Code* § 21701.1(a)(6)].

3. Advise owner or operator that pickup and delivery of individual storage container must be on date agreed between customer and company [*Bus. & Prof. Code* § 21701.1(b)].

NOTE:

If the company requires the customer to be physically present at the time of pickup, the company must be at the customer's premises prepared to perform the service not more than four hours later than the agreed scheduled time [*Bus. & Prof. Code* § 21701.1(b)]. In the event of a preventable breach of this obligation by the company, the customer is entitled to receive a penalty of \$50 from the company and to elect rescission of the rental agreement without liability.

4. Advise owner or operator that no charge may be assessed for [*Bus. & Prof. Code* § 21701.1(c)]:

- a. Moving container at company's discretion.
- b. Delivery of container to customer's premises if customer has advised company, orally or in writing, at least 24 hours before agreed time for container drop off, that customer is rescinding request for services.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54A STORAGE OF GOODS

PART III. TRANSACTION GUIDE

B. Procedural Guide

22-54A California Legal Forms--Transaction Guide §§ 54A.115-54A.119

[Reserved]

§§ 54A.115[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54A STORAGE OF GOODS

PART III. TRANSACTION GUIDE

C. Drafting Guide

22-54A California Legal Forms--Transaction Guide § 54A.120

§ 54A.120 Warehouse Receipts

NOTE:

The warehouse receipt need not be in any particular form [*Com. Code § 7202(a)*]. For a warehouse receipt for storage of household goods, see § 54A.200[2].

A warehouse is subject to the obligations of Division 7 regardless of the fact that the receipt does not satisfy all statutory requirements or that the person purporting to be a warehouse is not in fact a warehouse [*Com. Code § 7401*; *see § 54A.22[1]*].

1. Designate document as "warehouse receipt."

2. If receipt is to be negotiable:

a. State that goods are to be delivered to bearer or to order of named person.

b. Do not show in any way that it is nonnegotiable.

NOTE:

A warehouse receipt is negotiable if (1) by its terms, the goods covered by it are to be delivered to the bearer or to the order of a named person [*Com. Code § 7104(a)*] and (2) when it was issued, it did not have a conspicuous legend, however expressed, that it is nonnegotiable [*Com. Code § 7104(c)*]. Any other warehouse receipt is nonnegotiable [*Com. Code § 7104(b)*]. Usually warehouse receipts are nonnegotiable.

3. If receipt is to be nonnegotiable, mark it conspicuously as "nonnegotiable."

4. Include all of following in warehouse receipt:

NOTE:

Unless a warehouse receipt provides for each of the following, the warehouse is liable for damages caused to any person injured by the omission [*Com. Code § 7202(b)(1)-(9)*].

- a. Statement of location of warehouse facility where goods are stored.
- b. Date of issue of receipt.
- c. Unique identification code of receipt.
- d. Statement whether goods received will be delivered to bearer, to named person, or to named person or its order.
- e. Rate of storage and handling charges or, when goods are stored under field warehousing arrangement, statement of that fact on nonnegotiable receipt.
- f. Description of goods or packages containing them.

NOTE:

A party to a warehouse receipt, or a good faith purchaser of a warehouse receipt for value, who relies on the description of the goods in the receipt may recover from the warehouse any damages caused by the nonreceipt or misdescription of the goods, except to the extent that the receipt conspicuously indicates that the warehouse does not know whether all or part of the goods in fact were received or conform to the description, such as a case in which the description is in terms of marks or labels or kind, quantity, or condition, or the receipt or description is qualified by "contents, condition, and quality unknown," "said to contain," or words of similar import, if the indication is true [*Com. Code § 7203*].

- g. Signature of warehouse or its agent.
- h. If receipt is issued for goods that warehouse owns, either solely, jointly, or in common with others, statement of fact of that ownership.
- i. One of following statements, either:
 - (1) Statement of amount of advances made and of liabilities incurred for which warehouse claims lien or security interest; or
 - (2) If precise amount of advances made or liabilities incurred is unknown, at time of issue of receipt, to warehouse or to its agent that issued receipt, statement of fact that advances have been made or liabilities incurred and purpose of advances or liabilities.

5. Add any other terms desired [*see PP 6-12, below*] except terms that [*Com. Code § 7202(c)*]:

NOTE:

Any terms inserted in the warehouse receipt that are contrary to the prohibitions set forth below are ineffective [*Com. Code § 7202(c)*].

a. Are contrary to provisions of Commercial Code.

b. Impair obligation of delivery [*see* § 54A.22[4]].

c. Impair duty of care [*see* § 54A.22[2]].

6. Include declarations of value for use by depositor; either "released value" per pound per article stored or lump sum value for entire lot stored.

NOTE:

The warehouse receipt in § 54A.200 contains two types of declaration of value, one of which must be used by the depositor. The first is a declaration of released value and specifies a small amount of value per pound per article. The second is a declaration of lump sum value. If the latter is chosen, the monthly storage charge is substantially higher than for storage under a declaration of released value in order to cover the cost of insurance.

The depositor usually finds it less costly to declare a released value and purchase insurance, typically through the warehouse. In this situation, the warehouse usually will give the depositor a certificate of interest under warehouse insurance [*see* § 54A.201].

As a practical matter, most goods placed in storage arrive on a bill of lading, either intrastate or interstate. Interstate and intrastate bills of lading may specify either a released value per article or a lump sum value. As a practical matter, if a released rate valuation is specified, it should be the same as that stated in the bill of lading covering shipment to the warehouse because, in the event of any damage, it is usually impossible to ascertain whether during shipment or storage.

7. Include terms limiting warehouse's liability, if desired.

NOTE:

Limitations of liability may not impair the warehouse's statutory obligation of delivery under *Com. Code* § 7403 [*Com. Code* § 7202(c); *see* § 54A.22[4]], or avoid the warehouse's duty to exercise care with regard to goods that reasonably careful person would exercise under similar circumstances [*Com. Code* § 7204(a); *see* § 54A.200[2], pt. II, art. III].

a. If desired, exclude liability for damages that could not have been avoided by exercise of care with regard to goods that reasonably careful person would exercise under similar circumstances [*Com. Code* § 7204(a); *see* § 54A.200[2], pt. II, art. II(2)], such as following:

NOTE:

Ordinarily, a warehouse receipt for household goods is very detailed in excluding liability for every conceivable incident of damage, except for the failure to exercise reasonable care.

(1) Acts, omissions, or orders of depositor or agents of depositor.

(2) Damage from insects, moths, and vermin.

- (3) Depreciation, deterioration, and ordinary wear and tear.
- (4) Obsolescence.
- (5) Nature of items, including defects, characteristics, or inherent vice.
- (6) Warlike actions or nuclear damage.
- (7) Acts of God, including specifically, earthquake, liquefaction, flood, water damage, other types of weather.
- (8) Fire, explosion, and specified damage to warehouse.
- (9) Strikes, lockouts, or labor disturbances.
- (10) Riots or civil unrest.
- (11) Breakage of brittle or fragile items unless appropriately packaged or resulting from negligence of the warehouse or its agents as shown by specified evidence.

b. Exclude liability for loss or damage [*Com. Code § 7204(a)*; *see § 54A.200[2]*, pt. II, art. II(3)]:

- (1) Before delivery to warehouse or custody and control of warehouse and after packing, if any packing is involved.
- (2) After delivery to or receipt for by depositor or owner or agent.

8. Limit amount for which warehouse will be liable in event of loss of or damage to stored property [*Com. Code § 7204(b)*]:

a. Warehouse's liability may be expressed as not to exceed least of following [*see § 54A.200*, pt. II, art. III(1)]:

- (1) Cost of repairs.
- (2) Cost of replacement with material of similar kind and quality.
- (3) Actual cash value at time of receipt by warehouse and delivery to depositor.
- (4) Difference between actual cash value at time of receipt by warehouse and delivery to depositor.
- (5) Either released value per pound per article stored or lump sum value declared on entire lot.

b. Include provisions limiting liability, as follows:

- (1) Deductions for depreciation, deterioration, and ordinary wear and tear [*see § 54A.200[2]*, part II, art. III(2)].

(2) Exclusion of sentimental value, if any [see § 54A.200[2], pt. II, art. III(2)].

(3) Limitation of liability for loss or damage of one article of matched set to that item and not to repairing or replacing complete set [see § 54A.200[2], pt. II, art. III(3)].

(4) Limitation of liability for consequential damages solely to those described in writing by depositor at time of deposit [see § 54A.200[2], pt. II, art. III(4)].

c. Do not limit amount of liability for conversion of property to warehouse's own use, as this limitation is ineffective.

d. Limited liability, as specified in warehouse receipt, may, on depositor's written request, be increased to value not to exceed actual value of goods, either:

(1) When storage agreement portion of warehouse receipt is signed; or

NOTE:

This increase, as a practical matter, would be made by the depositor on a pre-printed warehouse receipt form when the depositor signs the receipt.

(2) Within reasonable time after receiving warehouse receipt [see § 54A.200[2], pt II, art. VII].

NOTE:

If the depositor increases the stated value of the goods, the warehouse may charge increased rates based on any increased valuation [Com. Code § 7204(b)].

9. Set forth reasonable provisions as to time and manner of presenting claims and instituting actions [Com. Code § 7204(c)]:

a. Time limit for filing claims and suits [see § 54A.200[2], pt. II, art. XVI].

b. Arbitration provisions [see § 54A.200[2], pt. II, art. XVII].

10. Provide for warehouse's lien [Com. Code § 7209; see § 54A.200[2], pt.. II, art. XV]:

a. Against depositor [Com. Code § 7209(a)].

b. Against all persons when goods are household goods and depositor was legal possessor of goods at time of deposit [Com. Code § 7209(d)].

c. For following types of charges or expenses [Com. Code § 7209(a)]:

(1) Storage and processing incidental to storage.

(2) Transportation, including demurrage and terminal charges.

(3) Insurance.

- (4) Labor.
- (5) Charges, present or future, in relation to goods.
- (6) Expenses necessary for preservation of goods.
- (7) Expenses reasonably incurred in lawful sale of goods.

d. Similar charges and expenses for which person on whose account goods are held is liable in relation to other goods whenever deposited [*Com. Code § 7209(a)*].

e. On goods deposited or proceeds of goods in warehouse's possession [*Com. Code § 7209(a)*].

11. Consider reserving security interest against depositor for charges other than those outlined in P 10, *above*, such as for money advanced and interest [*see Com. Code § 7209(b)*; *see also § 54A.24[2]*].

NOTE:

If a receipt is issued for the goods, the security interest is not valid as against third persons without notice unless the maximum amount of the security interest is conspicuously specified on the receipt [*Com. Code § 7209(b)*; *see § 54A.24[2]*].

12. Include additional contract terms and conditions:

a. Warranties by depositor as to ownership of goods [*see § 54A.200[2]*, pt. II, art. IV]:

- (1) Lawful possession.
- (2) Legal right to store.
- (3) Agreement to pay storage and other costs incurred by warehouse in defending against adverse claims.
- (4) Agreement to interpleader of depositor by warehouse in event of adverse claims.

b. Provisions under which additional goods may be delivered to warehouse for storage under terms and conditions of warehouse receipt [*see § 54A.200[2]*, pt. II, art. V].

c. Provisions governing services to be performed regarding stored goods by warehouse and charges for those services [*see § 54A.200[2]*, pt. II, art. VI].

d. Provision permitting written notice correcting errors in warehouse receipt only within specified period, after which document is deemed correct [*see § 54A.200[2]*, pt. II, art. VII].

e. Provision permitting transfer of stored goods by warehouse to another warehouse or location within original warehouse, with or without notice to depositor [*see § 54A.200[2]*, pt. II, art. VIII].

f. Provision governing access by or delivery of goods to depositor, including following [*see § 54A.200[2]*, pt. II, art. IX]:

- (1) Restriction to regular working days, as defined.

(2) Prior notice required.

(3) Exclusion of responsibility for delays caused by specified incidents.

(4) Access or partial delivery charges.

g. Provision specifying circumstances under which transfer of warehouse receipt by depositor will be recognized by warehouse [see § 54A.200[2], pt. II, art. X].

h. Provision authorizing warehouse to act for depositor in arranging for delivery or shipment of goods from storage at specified valuation [see § 54A.200[2], pt. II, art. XI].

i. Provision expressly denying any warranty or representation that warehouse is fireproof or that stored goods cannot be destroyed by fire [see § 54A.200[2], pt. II, art. XII].

NOTE:

When a depositor proves that the stored goods were destroyed by fire, the burden is then on the warehouse to prove that the fire occurred without negligence on the part of the warehouse or its employees [*Hanson v. Wells Van & Storage Co. (1950) 100 Cal. App. 2d 332, 334, 223 P.2d 509*].

j. Provision specifying whether stored goods are insured by warehouse and whether warehouse is insured to cover its legal liability [see § 54A.200[2], pt. II, art. XIII].

k. Terms of payment, including [see § 54A.200[2], pt. II, art. XIV]:

(1) Dates on which due and payable, e.g., monthly based on execution date of warehouse receipt.

(2) Terms relating to payment for fractional periods.

(3) Provision for interest on advances and unpaid balances.

l. Requirements for notice of change of address [see § 54A.200[2], pt. II, art. XVIII].

m. Miscellaneous provisions:

(1) Severability [see § 54A.200[2], pt. II, art. XIX].

(2) Binding effect on heirs and assigns [see § 54A.200[2], pt. II, art. XX].

(3) Time is of essence [see § 54A.200[2], pt. II, art. XXI].

(4) Entire contract [see § 54A.200[2], pt. II, art. XXII].

(5) California law controlling [see § 54A.200[2], pt. II, art. XXIII].

13. On issuance, fill in all blanks in warehouse receipt form [see *Com. Code* § 7208].

NOTE:

When a blank in a negotiable warehouse receipt is filled in without authority, a purchaser for value and

without notice of the lack of authority may treat the insertion as authorized. Any other unauthorized alteration leaves any warehouse receipt enforceable against the issuer according to its original terms [Com. Code § 7208]. Although warehouse receipts are usually nonnegotiable, all blanks should be filled in so that any alteration would be demonstrably unauthorized.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liability Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liens



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DIVISION III: COMMERCIAL TRANSACTIONS

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22-54A California Legal Forms--Transaction Guide § 54A.121

§ 54A.121 Self-Service Storage Rental Agreement

1. Include following in all self-service storage rental agreements [*Bus. & Prof. Code § 21712(a)*]:

NOTE:

The following provisions are required by statute. The parties may include any other provision required or permitted by law [*Bus. & Prof. Code § 21712(a)*].

a. Statement that occupant's property will be subject to a claim of lien and may even be sold to satisfy lien if rent or other charges due under agreement remain unpaid for 14 consecutive days, and that these actions are authorized by Self-Service Storage Facility Act [*see § 54A.220[2]*, P 16].

b. Request and provide space for occupant to include name and address of another person to whom any preliminary lien notice [*see Bus. & Prof. Code §§ 21703, 21704; see also § 54A.221*] and any subsequent notice required by Self-Service Storage Facility Act [*see Bus. & Prof. Code § 21705* (notice of lien sale); *see also § 54A.222*] may be sent [*Bus. & Prof. Code § 21712(b)*; *see § 54A.220[2]*, P 17].

NOTE:

Technically, this requirement is not mandated by statute [*see Bus. & Prof. Code § 21712(a)*]; however, the failure to satisfy this requirement effectively eliminates the owner's right to a lien under the Act [*Bus. & Prof. Code § 21712(b)*; *see § 54A.32*]. The failure of the occupant to provide an alternative address does not affect an owner's remedies under the Act, or under any other provision of law, as long as the agreement requests this information and provides space for the occupant to include it [*Bus. & Prof. Code § 21712(b)*].

2. Identify parties and include date of agreement [*see* § 54A.220[2]].
3. Specify location of storage facility [*see* § 54A.220[2]].
4. Provide for storage:
 - a. Storage space or locker number.
 - b. Lease term [*see* § 54A.220[2], P 1]:
 - (1) Start date for term.
 - (2) Month-to-month.
 - (3) Specified term.
 - c. Rent [*see* § 54A.220[2], P 2]:
 - (1) Amount of rent.
 - (2) Payment schedule.
 - (3) Location where rent is payable [*see* § 54A.220[2], P 30].
 - d. Service charges [*see* § 54A.220[2], P 20].
 - e. Security deposit [*see* § 54A.220[2], P 3].
 - f. Use of storage space [*see* § 54A.220[2], P 4]:
 - (1) Storage use only.
 - (2) No residential, office, or other use.
5. State that no bailment is created [*see* § 54A.220[2], P 5].
6. Specify owner's rights and obligations:
 - a. Owner does not provide utilities [*see* § 54A.220[2], P 6].
 - b. Owner must provide lock and keys for storage space [*see* § 54A.220[2], P 10].
 - c. Owner may enter storage area to inspect and maintain premises [*see* § 54A.220[2], P 11].
 - d. Owner may reasonably restrict access [*see* § 54A.220[2], P 7].
 - e. Owner's rights on termination [*see* P 8, *below*], including right to enter and remove property, prepare space for rental, change locks, and exercise all other legal rights [*see* § 54A.220[2], P 18].

7. Specify occupant's rights and obligations:

- a. Occupant may not assign agreement or sublet space [see § 54A.220[2], P 8].
- b. Occupant bears risk of loss [see § 54A.220[2], P 9].

8. Provide for termination of storage:

- a. Owner or occupant may terminate storage if storage area is damaged or destroyed [see § 54A.220[2], P 12].
- b. Termination based on occupant's breach of agreement [see § 54A.220[2], P 13].
- c. Termination based on occupant's apparent abandonment of storage space [see § 54A.220[2], P 14].
- d. Termination for nonpayment of rent [see § 54A.220[2], P 15].

9. Specify notice requirements [see § 54A.220[2], P 21].

10. Miscellaneous provisions:

- a. Attorneys' fees [see § 54A.220[2], P 22].
- b. No waiver of any breach [see § 54A.220[2], P 23].
- c. Severability [see § 54A.220[2], P 24].
- d. Effect on heirs and assigns [see § 54A.220[2], P 25].
- e. Time is of essence [see § 54A.220[2], P 26].
- f. Entire agreement [see § 54A.220[2], P 27].
- g. Modification of agreement only in writing [see § 54A.220[2], P 28].
- h. Governing law [see § 54A.220[2], P 29].
- i. Mailing addresses of parties [see § 54A.220[2], P 30].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

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C. Drafting Guide

22-54A California Legal Forms--Transaction Guide § 54A.122

§ 54A.122 Disclosure Document for Transportation of Individual Storage Containers

NOTE:

This guide is drafted for use when the owner or operator of a self service storage facility does not have a household goods carrier permit [*see Pub. Util. Code § 5101 et seq.*], but wants to transports, for a fee, individual storage containers to and from a self service storage facility he or she operates [*see Bus. & Prof. Code § 21701.1; see also § 54A.114*].

1. Include following in all customer disclosure documents for transportation of individual storage containers [*Bus. & Prof. Code § 21701.1(a)(5); see § 54A.220A[2]*]:

- a. Detailed description of transfer service, including company's commitment to use its best efforts to place container in appropriate location designated by customer.
- b. Individual storage container's dimensions and construction.
- c. Unit charge for container transfer, if any, in addition to the storage charge or other fees under the rental agreement.
- d. Availability of delivery or pickup by customer of his or her goods at self storage facility.
- e. Maximum allowable distance for initial pickup and final delivery of loaded container.
- f. Precise terms of company's right, at is discretion, to move container from its initial location.

g. Statement that customer will not be required to pay additional charges with regard to this transfer.

h. Allocation of responsibility for risk of loss or damage to customer's goods, including any disclaimer of liability and procedures for presenting claims.

2. Ensure that customer receives notice a minimum of 72 hours before delivery of empty individual storage container [*Bus. & Prof. Code § 21701.1(a)(5)*].

NOTE:

The disclosure of terms and conditions, and the rental agreement, must be received by the customer a minimum of 72 hours before delivery of the empty individual storage container [*Bus. & Prof. Code § 21701.1(a)(5)*]. However, the customer, in writing, may knowingly and voluntarily waive that receipt [*Bus. & Prof. Code § 21701.1(a)(5)*]. The company must record in writing and retain for at least six months after the end of the rental the time and method of delivery of the information, any waiver made by the customer, and the times and dates of initial pickup and redelivery of the containerized goods [*Bus. & Prof. Code § 21701.1(a)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsLease AgreementsGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral Overview



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22-54A California Legal Forms--Transaction Guide §§ 54A.123-54A.129

[Reserved]

§§ 54A.123[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

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D. Related and Subsequent Procedures

22-54A California Legal Forms--Transaction Guide § 54A.130

§ 54A.130 Enforcement of Warehouse's Lien

NOTE:

This guide is drafted for use when the stored goods that are the subject of the proposed lien are goods other than those stored by a merchant in the course of his or her business [*see Com. Code § 7210(b)*; *see also § 54A.24[5][b]*]. Merchants may also use this enforcement procedure [*Com. Code § 7210(h)*] or may use a more streamlined procedure that requires commercial reasonableness but no publication [*see Com. Code § 7210(a)*; *see also § 54A.24[5][a]*].

These procedures must be followed carefully. A warehouse is liable for damages caused by the failure to comply with statutory sale requirements and, in the case of a willful violation, for conversion [*Com. Code § 7210(i)*].

1. Send all persons known to claim interest in goods notice of claim of lien [*Com. Code § 7210(b)(1)*] setting forth following information [*Com. Code § 7210(b)(2)*]:

NOTE:

For a notice of claim of lien, see § 54A.203.

- a. Itemized statement of claim.
- b. Description of goods subject to lien.
- c. Demand for payment within specified time not less than 10 days after receipt of notice.
- d. Conspicuous statement that unless claim is paid by specified date, goods will be

advertised for sale and sold by auction at specified time and place.

NOTE:

A term or clause is conspicuous if written, displayed, or presented so that a reasonable person against whom it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court [*Com. Code § 1201(b)(10)*]. Conspicuous terms include [*Com. Code § 1201(b)(10)(A), (B)*]:

- A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
- Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

2. Deliver notice in form reasonable under circumstances at recipient's place of business through which contract was made or at other location held out by recipient as place for receipt of such communications [*see Com. Code § 1202(e)(2)*].

3. Draft advertisement of sale containing description of goods, name of person on whose account they are being held, and time and place of sale.

NOTE:

The sale must take place at least 15 days after the first publication of the advertisement [*Com. Code § 7210(b)(5)*]. For a form for an advertisement of the lien sale, see § 54A.204.

4. Publish advertisement of sale after expiration of time given in notice, as follows [*Com. Code § 7210(b)(5)*]:

- a. Once each week for two consecutive weeks.
- b. In newspaper of general circulation where sale is to be held.

NOTE:

If no newspaper of general circulation is published where the sale is to be held, the advertisement must be posted at least 10 days before the sale in at least six conspicuous places in the neighborhood of the proposed sale [*Com. Code § 7210(b)(5)*].

5. Afford any person claiming right in goods opportunity to pay amount necessary to satisfy lien and reasonable expenses incurred in enforcement of lien [*see Com. Code § 7210(c)*].

NOTE:

Strictly speaking, these persons have already been notified of sale and no additional steps need be taken. However, if these amounts are paid, the goods may not be sold and they must be retained by the warehouse subject to the terms of the warehouse receipt and Division 7 of the Commercial Code [*see Com. Code § 7210(c)*]. It may be prudent to provide a last opportunity to pay the amounts due; clearly trying to evade proper payment is imprudent.

6. At least 15 days after first publication of advertisement, conduct sale [*Com. Code § 7210(b)(5)*]:

- a. In conformity with terms of notice [*Com. Code § 7210(b)(3)*].
- b. At suitable place nearest to location where goods are held or stored [*Com. Code § 7210(b)(4)*].

NOTE:

If the warehouse receipt permits the warehouse to change the place of storage, it may benefit the warehouse to move the goods to a storage site near a sale site more accessible to the public.

- 7. Warehouse may buy goods at sale if sale is public [*Com. Code § 7210(d)*].
- 8. If goods are put up in lots, each lot is subject of separate sale [*Com. Code § 2328(1)*].
- 9. Sale by auction:
 - a. Is complete when auctioneer announces sale [*see Com. Code § 2328(2)*].
 - b. May be "with reserve," i.e., goods may be withdrawn before completion of sale, or "without reserve," i.e., goods cannot be withdrawn unless no bid is made within reasonable time [*see Com. Code § 2328(3)*].
- 10. Satisfy lien from sale proceeds and hold any balance for delivery on demand to person to whom delivery of goods would have to have been made [*Com. Code § 7210(f)*].
- 11. If lien is not satisfied, warehouse may assert any other rights allowed by law to creditor against debtor [*Com. Code § 7210(g)*].

NOTE:

For coverage of the warehouse's rights, see California Forms of Pleading and Practice, Ch. 213, *Documents of Title* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liens



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D. Related and Subsequent Procedures

22-54A California Legal Forms--Transaction Guide § 54A.131

§ 54A.131 Handling Depositor's Claim of Loss or Damage

1. Obtain and examine following documents from depositor:

- a. Bill of lading covering transportation of goods, if any.
- b. Warehouse receipt for goods.
- c. Any notice of loss or injury received by depositor from warehouse [*see Civ. Code § 1838*].
- d. Any insurance certificate provided by warehouse under its blanket liability policy.
- e. Homeowner's insurance policy issued to depositor and in force when loss or damage occurred.
- f. Any notice of claim of lien given by warehouse to depositor.
- g. Any notice of termination of storage given by warehouse to depositor.
- h. Depositor's notice to warehouse concerning consequential damages, if any [*see § 54A.200[2], pt. II, art. III(4)*].

2. Determine (from the warehouse receipt):

- a. When written claim must be filed with warehouse.

- b. When suit must be filed to protect right to litigate.
- 3. Make prompt written claim against carrier and warehouse:
 - a. Informally, by letter.
 - b. Formally, on claim form supplied by warehouse.
- 4. Submit additional claim to insurer that issued homeowner's policy to depositor.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview Contracts Law Types of Contracts Lease Agreements General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54A STORAGE OF GOODS

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D. Related and Subsequent Procedures

22-54A California Legal Forms--Transaction Guide § 54A.132

§ 54A.132 Enforcement of Owner's Lien for Self-Service Storage Facility

1. When rent or other charges due from occupant of self-service storage space are at least 14 days overdue, send occupant preliminary lien notice [*Bus. & Prof. Code § 21703; see § 54A.221*].

a. Include all of following in preliminary lien notice [*Bus. & Prof. Code § 21703*]:

NOTE:

A preliminary lien notice substantially in the form set forth by statute will be deemed to satisfy the applicable statutory requirements [*Bus. & Prof. Code § 21704; see § 54A.221*]. The notice must be sent to the occupant's last known address or to the alternate address specified in the rental agreement [*Bus. & Prof. Code § 21703; see Bus. & Prof. Code § 21712(b)*]. The occupant's last known address is the address provided by the occupant in the latest rental agreement or in a subsequent written notice of a change of address [*Bus. & Prof. Code § 21701(f)*]. If the occupant set forth in the contract provides the name and address of another person to whom the notice may be sent, notice must also be sent to the alternative address [*Bus. & Prof. Code §§ 21703, 21712(b)*]. The occupant's failure to list an alternative address in the contract does not affect any remedies available to the owner as long as the contract requests and provides space for the occupant to provide an alternative address [*Bus. & Prof. Code § 21712(b)*].

(1) Itemized statement of owner's claim showing [*Bus. & Prof. Code § 21703(a)*]:

(a) Sums due at time of notice.

(b) Date when sums became due.

(2) Statement that occupant's right to use storage space terminates on specified date (which must be not

less than 14 days after date notice is mailed) unless all sums due are paid before that date [*Bus. & Prof. Code § 21703(b)*].

(3) Notice that [*Bus. & Prof. Code § 21703(c)*]:

(a) Occupant may be denied access to storage space after termination date if sums are not paid.

(b) Owner's lien, as provided for in *Bus. & Prof. Code § 21702*, may then be imposed.

(4) Name, street address, and telephone number of owner or owner's designated agent whom occupant may contact to respond to notice [*Bus. & Prof. Code § 21703(d)*].

b. Send notice by one of following methods [*Bus. & Prof. Code § 21703*]:

NOTE:

Although certified mail is the more expensive of these two methods, it may be more advantageous to the owner to use that method because the owner's right to remove the occupant's property from the space accrues more quickly when certified mail is used [*see Bus. & Prof. Code § 21705(a), (b)*, discussed in P 2, *below*].

(1) Certified mail, postage prepaid; or

(2) Regular first-class mail, if owner obtains certificate of mailing indicating date notice was mailed.

2. If total sum claimed in preliminary lien notice is not paid as of date specified in preliminary lien notice as termination date, advise owner that owner may take the following steps to enforce the lien on stored property:

a. If preliminary lien notice was sent by certified mail, all of the following steps [*Bus. & Prof. Code § 21705(a)*]:

(1) Deny occupant access to space.

(2) Enter space.

(3) Remove occupant's property to place of safe keeping.

b. If preliminary lien notice was sent by regular first-class mail with certificate of mailing, all of the following steps [*Bus. & Prof. Code § 21705(b)*]:

(1) Deny occupant access to space.

(2) Enter space.

(3) Wait until at least 14 days after the termination date, and then remove occupant's property to a place of safe keeping.

NOTE:

The occupant may regain full use of the space by paying the full lien amount during the 14-day period [*Bus. & Prof. Code* § 21705(b)].

3. After lien has attached, send occupant notice of lien sale stating all of the following [*Bus. & Prof. Code* § 21705(c)(1); *see* § 54A.222]:

NOTE:

The notice of lien sale must be sent to the occupant at the occupant's last known address and to any alternative address given by the occupant in the rental agreement [*see Bus. & Prof. Code* §§ 21705, 21712(b); *see also Bus. & Prof. Code* § 21701(f) ("last known address" defined)].

- a. Occupant's right to use space has terminated and occupant no longer has access to stored property;
- b. Stored property is subject to lien;
- c. Amount of lien; and
- d. Property will be sold to satisfy lien after specified date (which must not be less than 14 days from date of mailing notice) unless:

(1) Amount of lien is paid; or

(2) Occupant executes and returns by certified mail declaration under penalty of perjury in opposition to lien sale [*see Bus. & Prof. Code* § 21705(c)(2)].

NOTE:

If the preliminary lien notice was sent by regular mail with a certificate of mailing, the notice of lien sale must include a statement that the occupant may regain full use of the space by paying the full lien amount prior to the date specified as the termination date [*Bus. & Prof. Code* § 21705(c)(1)(C)].

e. Any excess proceeds of sale over lien amount and costs of sale will be retained by owner and may be reclaimed by occupant or another person at any time for period of one year from sale, and that thereafter proceeds will escheat to county.

4. With notice of lien sale, send occupant blank declaration in opposition to lien sale [*Bus. & Prof. Code* § 21705(c)(2)].

NOTE:

The declaration must be substantially in the form set forth in *Bus. & Prof. Code* § 21705(c)(2) [*see* § 54A.223].

5. If any person who has perfected security interest under Division 9 of Commercial Code [*see Com. Code* § 9101 *et seq.*; *see also* Ch. 42, *Secured Transactions*] pays total amount due (as specified in preliminary lien notice) for storage of property, and if no declaration of opposition to lien sale is executed and returned by occupant [*see Bus. & Prof. Code* § 21710], then [*Bus. & Prof. Code* § 21708]:

- a. Do not sell property.
- b. Deliver property to person who paid total amount due.

NOTE:

An owner who delivers property pursuant to *Bus. & Prof. Code* § 21708 to any person who has a perfected security interest under Division 9 of the Commercial Code is not liable to any person for delivering the property if he or she has complied with all the statutory requirements for a preliminary lien notice [*see Bus. & Prof. Code* § 21704; *see also* P 1, *above*] and a notice of lien sale [*see Bus. & Prof. Code* § 21705; *see also* P 3, *above*].

6. If any person who claims right to property subject to lien pays amount necessary to satisfy lien plus reasonable expenses incurred for preparing for lien sale [*Bus. & Prof. Code* § 21709; *see* § 54A.221]:

- a. Do not sell property.
- b. Retain property pending court order directing its disposition.

7. If owner does not receive completed declaration in opposition to lien sale (executed under penalty of perjury) from occupant before sale date set forth in notice of lien sale, sell property as follows [*Bus. & Prof. Code* § 21706]:

- a. If stored property is vehicle subject to registration or identification under Vehicle Code, enforce lien in accordance with provisions of *Civ. Code* § 3071 [*Bus. & Prof. Code* § 21702.5(b)].

NOTE:

Civ. Code § 3071 prescribes procedures for the enforcement of liens on automobiles when the automobiles have a value over \$300. For a procedural guide to lien sales of vehicles in California, see Ch. 102D, **Registration and Transfer of Vehicles, Vessels, and Aircraft**. A lien under the self-service storage facility act on a vehicle or vessel should be enforced promptly, as the lien cannot include any charges for rent, labor, or other services if application for authorization to conduct lien sale is not made within 60 days [*see Bus. & Prof. Code* § 21702.5(c)].

- b. If stored property is vessel subject to registration or identification under Vehicle Code, enforce lien in accordance with provisions of *Harb. & Nav. Code* § 503 [*Bus. & Prof. Code* § 21702.5(b)].

- c. If stored property is other than vehicle or vessel subject to registration or identification under Vehicle Code, enforce lien as follows:

(1) After date specified in notice of lien sale, advertise sale in following manner [*Bus. & Prof. Code* § 21707(a); *see* § 54A.224]:

(a) If newspaper of general circulation is published in judicial district where sale is to be held, publish advertisement once per week for two consecutive weeks.

(b) If there is no newspaper of general circulation, post advertisement at least 10 days before sale in at least six conspicuous places in neighborhood of proposed sale.

(c) Include all of following in advertisement:

(i) General description of goods to be sold;

(ii) Name of person on whose account goods are being stored;

(iii) Space number of occupant; and

(iv) Name and location of storage facility.

(2) Conduct sale in commercially reasonable manner [*Bus. & Prof. Code § 21707(b)*];

(3) After deducting amount of lien and costs of sale from proceeds of sale, retain balance of proceeds on occupant's behalf [*Bus. & Prof. Code § 21707(b)*; see P 8, below].

8. If declaration in opposition to lien sale (executed under penalty of perjury) is received before date of sale set forth in notice of lien sale, enforce lien only by judicial action, as follows [*Bus. & Prof. Code § 21710*]:

NOTE:

For discussion and forms for litigation under the California Self- Service Storage Facility Act, see California Forms of Pleading and Practice, Ch. 517, ***Self-Service Storage Facilities*** (Matthew Bender).

a. Commence action by filing verified complaint setting forth facts on which claim of lien is based [*Bus. & Prof. Code § 21710(a)*].

b. Serve summons and complaint.

NOTE:

The summons and complaint may be served by certified mail, postage prepaid, addressed to the occupant at his or her last-known address, in which case service is deemed complete on the fifth day after mailing [*Bus. & Prof. Code § 21710(a)*]. Alternatively, the summons and complaint may be served in any other manner authorized by *Code Civ. Proc. § 413.10 et seq.* For rules governing the service of summons and other papers in California, see California Forms of Pleading and Practice, Ch. 518, ***Service of Summons and Papers*** (Matthew Bender).

c. Secure judgment, as follows:

(1) If, after expiration of 10 days from date of service, occupant has not responded to complaint by answer or demurrer, apply to clerk for entry of default and to court for judgment [*Bus. & Prof. Code § 21710(b), (c)*]; or

(2) If occupant responds to summons and complaint within time allowed, proceed through appropriate civil procedure to request trial on complaint.

NOTE:

For a general outline of the procedures an attorney should follow in a civil action, see California Forms of Pleading and Practice, Ch. 431, ***Procedural Guide for Civil Actions (General)*** (Matthew Bender). For a general discussion of the rules applicable to civil trials and related proceedings, see California Forms of Pleading and Practice, Ch. 551, ***Trial*** (Matthew Bender).

d. After entry of judgment, enforce judgment by sale of property, as follows [*Bus. & Prof. Code § 21710(d)*]:

NOTE:

The occupant may avoid the sale of the lien property by paying the full amount of the judgment to the owner at any time before the sale [*Bus. & Prof. Code § 21710(d)*].

(1) Wait at least 10 days after entry of judgment [*Bus. & Prof. Code § 21710(d)*].

(2) If lien is not paid, and if enforcement of judgment has not been stayed pending appeal [*see Bus. & Prof. Code § 21710(e)*], sell lien property in commercially reasonable manner.

9. After sale [*Bus. & Prof. Code § 21707(b)*]:

a. Retain any excess proceeds of sale for one year; and

b. If occupant or other person having court order or judicial process makes just claim for all or part of excess proceeds, pay claim.

10. After one year from date of lien sale, pay any excess proceeds remaining to treasury of county in which sale was held [*Bus. & Prof. Code § 21707(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Judgment Liens Enforcement Contracts Law Types of Contracts Lease Agreements General Overview



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[Reserved]

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54A STORAGE OF GOODS

PART IV. FORMS

A. Warehouse Storage

1. Warehouse Receipts and Lien Enforcement

22-54A California Legal Forms--Transaction Guide § 54A.200

§ 54A.200 Nonnegotiable Warehouse Receipt and Storage Contract

[1] Comment

[a] Use of Form

This form is a nonnegotiable warehouse receipt and storage contract for use by a warehouse in accepting and storing goods. It is divided into two parts: Part I is a warehouse receipt that includes all matters required by law [see [c], *below*]; Part II is a storage contract that specifies the obligations of the parties.

A "warehouse receipt" is a receipt issued by a person engaged in the business of storing goods for hire [*Com. Code § 1201(b)(42)*; see *Com. Code § 7102(a)(9)* ("warehouse" defined)]. The receipt need not be in any particular form [*Com. Code § 7202(a)*; see *Com. Code § 7201* (issuance)]. The warehouse receipt is the most important document involved in a storage transaction.

Many storage companies give the depositor of household goods two separate receipts:

- A preliminary receipt, and
- A subsequent receipt in final form.

The primary purpose of a preliminary receipt is to act as an inventory and checklist to show what items were received and the condition of each item at each stage in the transaction. A copy of the preliminary receipt is then attached to the final receipt so that each article in the lot need not be listed again. Some storage companies that use both a preliminary and a final receipt do not have the depositor sign the final receipt; only the storage company signs it. The depositor receives a copy of the final receipt in the mail, signed by the company, together with a signature card [see § 54A.202]. The signature card is to be signed by the depositor and mailed back to the company; the card includes statements to the effect that the depositor acknowledges receiving a copy of the final receipt, has read it, and accepts its terms and conditions.

[b] Negotiable and Nonnegotiable Warehouse Receipts

A warehouse receipt may be either negotiable or nonnegotiable. A warehouse receipt is negotiable if, by its terms, the goods are to be delivered to the bearer or to the order of a named person [*Com. Code § 7104(a)*], and when it was issued, it did not have a conspicuous legend, however expressed, that it is nonnegotiable [*Com. Code § 7104(c)*]. Any other warehouse receipt is nonnegotiable [*Com. Code § 7104(b)*]. Warehouse receipts usually are nonnegotiable. A term is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it [*Com. Code § 1201(b)(10)*; see [2], *below*]. Conspicuous terms include [*Com. Code § 1201(b)(10)(A), (B)*]:

- A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
- Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

If the storage company fails to conspicuously mark the receipt, a subsequent holder who purchases it for value supposing it to be negotiable may at his or her option treat the document as imposing on the storage company the same liabilities it would have incurred had the document been negotiable [*Com. Code § 7104(3)*]. Most commonly, storage companies issue nonnegotiable warehouse receipts. Therefore, this form includes the word "nonnegotiable" in capital letters as part of its title [see [2], *below*].

[c] Contents of Warehouse Receipt

A warehouse receipt need not be in any particular form [*Com. Code § 7202(a)*]. For this reason, and also because the storage of goods, other than storage-in-transit for which a warehouse receipt is not issued, is not regulated by any governmental authority, the types of forms used by storage companies for the warehouse receipt vary significantly.

Although the receipt need not be in any particular format, it must contain certain terms or information for the warehouse to avoid liability for damages caused by the omission of those terms [*Com. Code § 7202(b)*]. These terms include matters such as [*Com. Code § 7202(b)*]:

- The location of the warehouse where the goods are stored;
- The date of issue of the receipt and a unique identification code;
- A statement as to whether the goods will be delivered to the specified person (in the case of a nonnegotiable document) or the bearer of the warehouse receipt; and
- A description of the goods or the packages containing them.

The warehouse receipt must also include the rates of storage and handling charges and a statement of the amount of advances made and liabilities incurred for which the warehouse claims a lien or security interest [*Com. Code § 7202(b)(5), (9)*; see *Com. Code § 7209*; see also § 54A.24]. In addition, the warehouse may insert in the warehouse receipt any other terms that are not contrary to the provisions of the Commercial Code and that do not impair its obligation of delivery [see § 54A.22[4]] or its duty of care [see § 54A.22[2]]. Any contrary provisions are ineffective [*Com. Code § 7202(c)*].

For a more detailed guide to the drafting of a warehouse receipt, see § 54A.120. For alternative provisions for use in warehouse receipts, see Hart & Willier, *Forms & Procedures Under the Uniform Commercial Code* (Matthew Bender).

[2] FORM**Nonnegotiable Warehouse Receipt and Storage Contract****NONNEGOTIABLE WAREHOUSE RECEIPT AND STORAGE CONTRACT**

Consecutive Number _____

_____ [name of storage company]

_____ [address]

_____ [telephone number]

PART I.

Receipt No. _____ [date]

This nonnegotiable warehouse receipt certifies that we, _____ [name of storage company] ("Company"), have received in our storage warehouse located at _____ [location of warehouse], for the account of _____ [name of depositor] ("Depositor"), the goods described below, in the condition when received as described below, for storage on a month-to-month basis at the warehouse of the Company.

This storage is on the terms and conditions of this Warehouse Receipt and at the rates and charges set forth below and on the rate schedule on file in the office of the Company; provided, however, that all rates and charges are subject to change at any time by the Company on notice to the Depositor.

These goods will be delivered to the Depositor at any time on Depositor's request, on payment in full of all accrued storage, handling, and other charges.

[If warehouse is at least part owner of the goods covered by this receipt, add:]

This receipt is issued for goods that are owned _____ [solely or jointly or in common with others] by the Company.

[Continue with the following:]

Declaration Of Released Value Per Article

Unless the depositor declares in writing in the space provided below a lump sum value on the entire lot of goods, either before or concurrently with their storage or within 15 days after issuance of this receipt and contract, the depositor declares, for the purpose of this warehouse receipt and irrespective of any known value, the value of all the goods of the depositor stored with the company (including the contents of any container stored for the account of the depositor) to be _____ [e.g., \$.60 or \$.30 or \$.10] per pound per article.

Lump Sum Value Declaration

The depositor declares the value of the entire lot to be \$_____.

Receipt of Goods

THE GOODS RECEIVED ARE AS FOLLOWS:

Number of Packages	Lot Number	Described to be or con- tain	Weight
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

The goods listed above are received in apparent good order, except as noted through the use of the symbols set forth below.

EXCEPTION SYMBOLS	EXCEPTION SYMBOLS	LOCATION SYMBOLS
BE: Bent	MI: Mildew	1. Arm
BR: Broken	MO: Motheaten	2. Bottom
BU: Burned	PBC: Packed by Carrier	3. Corner
CH: Chipped	PBO: Packed by Owner	4. Front
CU: Contents, condition un- known	R: Rubbed	5. Left
D: Dented	RU: Rusted	6. Leg
F: Faded	SC: Scratched	7. Rear
G: Gouged	SO: Soiled	8. Right
L: Loose	T: Torn	9. Side
M: Marred	W: Badly Worn	10. Top
Z: Cracked	11. Veneer	

Omission of a symbol indicates good condition except for normal wear and tear.

This receipt is valid only when signed by one of the following officers of the Company: _____.

[The following provisions stating storage and handling charges need not be in the receipt if the goods are stored under a field warehousing arrangement, in which case a statement of that fact on the receipt will suffice (Com. Code § 7202(b)(5)].

Basic storage is to be at the rate of \$_____ [specify] per _____ [specify unit, e.g., carton]
per month from _____ [date].

The additional monthly valuation charge, applicable if a lump sum value is declared above, is
\$_____.

Total monthly charges are: \$_____. *[If amount of advances made and liabilities incurred is known, use:]*

Pre-storage charges for handling, preparation, weighing, packing, and miscellaneous charges total
\$_____.

[Or, if precise amount of advances made and liabilities incurred is not known, use:]

The Company has advanced funds and incurred liability for handling, preparation, weighing, packing, and miscellaneous charges.

[Continue with the following:]

The Company acknowledges receipt of the goods described above and agrees to the Contract Terms and Conditions of this Warehouse Receipt and Storage Contract.

_____ *[name of storage company]*
By _____ *[signature of authorized agent]*
Authorized Agent
_____ *[date]*

I acknowledge that the goods are in the condition shown on this Warehouse Receipt when they are received by the Company and I agree to the Contract Terms and Conditions contained in this Warehouse Receipt.

_____ *[signature of depositor]*
_____ *[date]*

I acknowledge receipt of all goods listed on this Warehouse Receipt (except as noted) and in the condition as shown on this preliminary receipt at the time of delivery by the Company.

[signature of depositor]

Print the following terms and conditions on the reverse or on continuation pages.]

PART II.

CONTRACT TERMS AND CONDITIONS

ARTICLE I. RATES AND CHARGES

1. The rates and charges to be paid by the Depositor to the Company are specified in the contract and the rate schedule on file in the office of the Company and as changed from time to time by the Company.
2. The basic minimum rate applies when the Depositor limits and releases the liability of the Company for loss and damages to _____ [e.g., \$.60 or \$.30 or \$.10] per pound per article.
3. An additional valuation charge is made when the Depositor declares a lump sum value on the entire lot.

ARTICLE II. LIABILITY OF COMPANY

IT IS AGREED THAT THE COMPANY WILL:

1. BE LIABLE for damages for loss of or injury to the stored goods caused by the failure of the Company to exercise the level of care regarding the goods as a reasonably careful person would exercise under similar circumstances.
2. NOT BE LIABLE for loss, injury, damage, or delay caused by or resulting from:
 - (a) An act, omission, or order of the Depositor or the owner of the stored goods or the servant, agent, or employee of either the Depositor or the owner of the goods;
 - (b) Insects, moths, vermin, depreciation, deterioration, obsolescence, and ordinary wear and tear;
 - (c) The nature of the article, or any defect, characteristic, or inherent vice of the article, including susceptibility to damage because of atmospheric conditions such as temperature and humidity, or changes in those conditions;
 - (d) Hostile, or warlike action in time of peace or war by an authority maintaining or using military forces; nuclear reaction or nuclear radiation or radioactive contamination; insurrection, rebellion, revolution, civil war, usurped power or any action taken by government authority against such an occurrence;
 - (e) Earthquake, liquefaction, flood, and rising waters, or other act of God;
 - (f) Fire, explosion, lightning, windstorm, tornado, cyclone, hurricane, collapse of building or sprinkler tanks, fall of elevators, leakage or failure of sprinkler systems;
 - (g) Strikes, lockouts, labor disturbances, riots, civil unrest, or the act of any person or persons taking part in any such occurrence or each; or
 - (h) Breakage of glass, chinaware, bric-a-brac, or similar articles of brittle or fragile nature, UNLESS packed and unpacked by the Company (or a household goods carrier or warehouse) or the breakage results from the negligence of the Company as shown by evidence of physical external damage to the packing container.
3. NOT BE LIABLE for loss or damage occurring:
 - (a) After packing when done by the Company but before delivery to the Company while the property is in the custody or control of the Depositor or his or her agent;
 - (b) Before delivery to the Company;

(c) After delivery to the Company when the Company is directed to deliver the property at a place or places at which the Depositor or his or her agent is not present; or

(d) After the property has been delivered to or receipted for by the Depositor or the owner of the property or the authorized agent of either.

ARTICLE III. LIMITATION OF AMOUNT OF LIABILITY

1. The total liability of the Company for physical loss or damage may not exceed the least of the following items:

(a) The cost of repairing damaged property.

(b) The cost of replacing lost or destroyed property with material of like kind and quality.

(c) The difference between the actual cash value of damaged property at the time of receipt by the Company, and at the time of delivery.

(d) The actual cash value of such property at the time and place of the loss.

(e) Either the released value of _____ [e.g., \$.60 or \$.30 or \$.10] per pound per article (if so declared) or the lump sum value declared on the entire lot.

2. In determining the actual cash value of property, depreciation will be deducted, and sentimental value will be excluded. The deduction for depreciation means the Depositor is charged for the betterment or increase in value of the property from the worn or deteriorated or depreciated property being restored to a better condition or being replaced by an item of like kind and quality of greater value.

3. The total liability of the Company with regard to the sets of matched pieces may not exceed the cost of repairing or replacing the physically lost or damaged piece or pieces only, or the value of the lost or damaged piece or pieces only, and does not extend to repairing, replacing, or recovering the entire set or any diminution in value of the set as a whole, and may not exceed the released value of the lost or damaged piece or pieces.

4. The Company is not liable for consequential damages from negligent delay or proximately caused by the physical loss or damage to any property, unless at the time of deposit, the Depositor delivers a notice in writing to the Company stating the nature and extent of the consequential damages that may be incurred by the Depositor in the event of either negligent delay or physical loss or damage to any stored property.

ARTICLE IV. OWNERSHIP OF GOODS

The Depositor represents and warrants to the Company that the Depositor has the lawful possession of and legal right and authority to store all of the property described in this Receipt. If any claims, demands, or rights adverse to the right of the Depositor arise, the Depositor agrees to pay all storage and other charges together with any costs and expenses incurred by the Company in defending against any litigation or adverse claims, including attorneys' fees, that the Company may reasonably incur or becomes liable to pay. The Company is specifically authorized, at its option, in the event of any adverse claim or demand concerning the ownership or right of possession of the property, to interplead the Depositor and all other claimants.

ARTICLE V. ADDITIONS TO STORAGE

Any additional goods delivered after the date of this Receipt by the Depositor to the Company for storage as a part of this lot while this Receipt is outstanding are subject to the terms and conditions of this Receipt. If a lump sum value is declared on the entire lot, the Depositor may increase that lump sum value by the value of the additional goods stored, and the monthly storage and valuation charges will be proportionately increased.

ARTICLE VI. SERVICES TO STORED GOODS

A warehouse labor charge will be made for placing the goods in storage and for removing them to the platform for delivery. The other services undertaken to be performed by this Company pursuant to this Receipt are storage, packing, moving, and shipping, and the Company does not accept responsibility or undertake to provide additional attention or services, unless specifically agreed pursuant to written "Orders for Service" given to the Company by the Depositor, and accepted by the Company. However, if the Company in its sole discretion should determine that moth treating, fumigating, or otherwise treating or handling all or a portion of the stored goods is necessary for the protection of the goods, or for the protection of other goods stored in the depository, it may render that service and add its regular charges for those services to the amount payable by the Depositor.

ARTICLE VII. CORRECTING ERRORS

Unless written notice is given by the Depositor to the Company within _____ [e.g., 15 or 30] days after this Receipt was signed on behalf of the Company, this Receipt will be deemed to be correct with respect to both the listing of the property received by the Company and the declarations made by the Depositor.

ARTICLE VIII. TRANSFER OF STORED GOODS

The Company may, _____ [with or without] notice to the Depositor, transfer the goods from the address set forth in this receipt, and store them in any other warehouse or building of the Company, whether owned or leased, and may move them, or any part them, from one location within a building to another.

ARTICLE IX. ACCESS AND DELIVERY

The goods deposited under this receipt will be ready for access or delivery during regular working hours or regular working days on _____ [e.g., 24 hours] notice, provided that all storage and other charges are paid in full. [Optional: Saturday is not a working day.] The Company is not responsible for delays in access or delivery caused by strikes, or other conditions beyond its control. An additional charge will be made for all access to or part delivery of the goods.

ARTICLE X. TRANSFER OF RECEIPT

No transfer of this receipt will be recognized unless all charges are paid and the transfer is entered on the books of the Company.

ARTICLE XI. SHIPPING OR FORWARDING

The Company is authorized to act for the Depositor in arranging for delivery or shipment of goods from storage at the declared value of not exceeding _____ [e.g., \$.60 or \$.30 or \$.10] per pound per article, unless the Depositor has declared a lump sum value on the entire lot, in which case the Company will forward or ship the declared goods of higher value. The carrier's or forwarder's liability for loss or damage during delivery or shipment is limited to the declared value.

ARTICLE XII. CONDITION OF DEPOSITORIES

No warranty or representation is made that any of the warehouse buildings of the Company are fireproof or that the goods stored in the buildings cannot be destroyed by fire. The Company _____ [does or does not] undertake to maintain a watchman or other burglar alarm systems.

ARTICLE XIII. INSURANCE

The stored goods are not insured by the Company. The Company, however, does insure its legal liability.

ARTICLE XIV. TERMS OF PAYMENT

The payments for storage and other charges are due and payable on the date of this Receipt and on the same date of each succeeding month thereafter. When goods are allowed to remain in storage for a fraction of a month, a full month's storage will be charged. Interest at the rate of _____ [specify percent] per month, charged monthly, will be made on freight or other charges advanced by the Company. The same interest charge will be assessed on the entire unpaid balance of the account if three months storage charge remains unpaid.

ARTICLE XV. COMPANY'S LIEN

It is agreed that the Company has a general lien against the Depositor and all other persons on any and all property deposited with it, and on the proceeds from the sale for all charges provided in this contract, including storage charges, claims for money advanced, interest, insurance, transportation, labor, wrapping, weighing, and all other charges and expenses in relation to the property or any part, for all expenses necessary for preservation of the property, all reasonable charges and expenses for notice and advertisement of sale and sale of the property when Depositor defaults, and for all costs including court costs and reasonable attorneys' fees in collecting charges or enforcing this lien, or defending itself if the Company is made a party to any litigation concerning the goods stored under this Receipt, or in filing any action in interpleader for the determination of ownership of the property deposited with the Company. The Depositor promises to pay all charges when due and the Company may, at its option, bring suit for delinquent charges without first foreclosing its lien.

ARTICLE XVI. TIME FOR FILING CLAIMS AND SUITS

The Company is not liable for the loss of, destruction of, or damage to the goods or any part of the goods unless, after the date on which the goods are delivered, or demand for the goods is refused:

1. Within _____ [e.g., 60 days] after that date, the Depositor presents a claim in writing to the Company;

2. Within _____ [e.g., one year] after that date, suit is filed by the Depositor or other person entitled to sue.

ARTICLE XVII. ARBITRATION

The Company may require that any disputes or claim arising out of or for the breach of this agreement or in connection with property stored under this agreement, whether founded in tort or contract, be settled by arbitration under the arbitration laws of the state in which the depositary is located and the rules of the American Arbitration Association.

ARTICLE XVIII. CHANGE OF ADDRESS

Notice of any change of address must be given by the Depositor in writing and acknowledged in writing by the Company, and no notice of any change of address is valid or binding against the Company if given in any other manner. It is expressly understood and agreed that all notices of any nature to be given to the Depositor must be sent to the address shown on the face of this Receipt until a written notice of change is received by the Company and acknowledged by it in writing.

ARTICLE XIX. SEVERABILITY

If any term of this agreement is held by a court of competent jurisdiction to be void or unenforceable, the remainder of this agreement remains in full force and effect.

ARTICLE XX. EFFECT ON HEIRS AND ASSIGNS

This agreement is binding on and inures to the benefit of the heirs, executors, administrators, and assigns of the Company and the Depositor.

ARTICLE XXI. TIME OF THE ESSENCE

Time is of the essence of this agreement.

ARTICLE XXII. ENTIRE AGREEMENT

This warehouse receipt and storage contract constitutes the entire agreement between the parties. Any prior agreements, promises, or negotiations, whether oral or written, that are not expressly set forth in this contract are of no force or effect. There are no other terms, warranties, representations, or agreements of either the depositor or the company not contained in this receipt and contract.

ARTICLE XXIII. STATE LAW CONTROLS

This contract is governed by and construed in accordance with the laws of the State of California.

DEPOSITOR

[signature of depositor]
[address]
[telephone number]
[date]

COMPANY

By _____
Authorized Agent

[name of storage company]
[date]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview



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1. Warehouse Receipts and Lien Enforcement

22-54A California Legal Forms--Transaction Guide § 54A.201

§ 54A.201 Certificate of Interest Under Warehouse Insurance

[1] Comment

[a] Use of Form

This form is for use by a storage company to evidence the extension of a blanket policy of insurance issued to the storage company by an insurance company to cover the storage company's liability for physical loss or damage to goods stored by a depositor who has elected to purchase coverage under the blanket policy. This form illustrates the type of certificate that a depositor who has arranged this coverage or "admitted liability" [see [b], *below*] receives from the storage company. The insurance company usually supplies printed certificate forms to the storage company. After all required data is inserted in the appropriate blanks on the certificate, it is signed and dated by the storage company's representative and given to the depositor. The monthly premium for this insurance coverage is paid by the depositor to the storage company simultaneously with the monthly payment for storage.

[b] Admitted Liability

Because the liability of the storage company for loss or damage to stored goods is ordinarily limited by the terms of the warehouse receipt [see § 54A.200[2]], liability is usually limited to loss or damage resulting from negligence of the storage company and the amount of liability is usually limited to a specified amount in cents per pound per article. Therefore, it is advisable for the depositor to procure insurance covering the stored goods. This insurance can generally be purchased through the storage company.

Most storage companies, as a part of the insurance policies they obtain to cover their legal liability regarding all stored goods, are given the right by their insurance company to admit liability with regard to any particular storage lot for all physical loss or damage, with certain specified exceptions. The depositor receiving the benefit of this admitted liability pays to the storage company a monthly premium. If any loss or damage comes within the terms of the admitted liability, the depositor is compensated by the insurance company that insures both the legal liability and the admitted liability of the storage company.

[2] FORM**Certificate of Interest Under Warehouse Insurance****CERTIFICATE OF INTEREST UNDER WAREHOUSE INSURANCE**

[printed name of insurance company]

[address]

Certificate No. _____

Name of Depositor Name of Storage Company_____
Location of Warehouse Receipt/Lot Number_____
Date Coverage Begins Declared Value_____
Monthly Rate per \$100 Coverage Monthly Premium**ARTICLES OF EXTRAORDINARY VALUE DECLARED BY DEPOSITOR TO STORAGE COMPANY:**

ITEM	DESCRIPTION	ACTUAL VALUE
_____	_____	_____
_____	_____	_____
_____	_____	_____

THIS IS TO CERTIFY that _____ [name of insurance company] has issued to the Storage Company and has in full effect Policy No. _____ covering the legal liability of the Storage Company and the liability admitted by Storage Company in that policy.

I. ADMITTED LIABILITY

1. In consideration of the monthly premium specified above, which is to be paid by the Depositor to the Storage Company, the Storage Company admits liability (subject to the exclusions, terms, and conditions provided for in this Certificate) for all physical loss or damage from any external cause to all the goods of the Depositor included in the aforementioned Receipt and Lot Number. For this limited purpose the Storage Company waives all limitations and exclusions from liability and other defenses that it may have at law or under contract.

2. This admitted liability applies only during the period that the goods of the Depositor are in the custody of the Storage

Company and are either in storage in the warehouse or in transit within _____ [e.g., 50] miles to or from the warehouse. The monthly premium to be paid by the Depositor applies to each month (or fraction of month) of the period for which liability is admitted.

3. _____ [name of insurance company] under this policy will, on behalf of the Storage Company, indemnify the Depositor for liability admitted by the Storage Company, subject to the exclusions, terms, and conditions provided for in this Certificate.

II. EXCEPTIONS TO ADMITTED LIABILITY

Notwithstanding anything declared in this Certificate to the contrary, the Storage Company does not admit liability for physical loss or damage:

1. From insects, moths, vermin, dampness of atmosphere, extremes or changes of temperature, ordinary wear and tear, gradual deterioration, inherent vice, depreciation or delay.
2. Caused by breakage of fragile articles such as china, glassware, statuary, marble, bric-a-brac, and other articles of similar nature and character unless:
 - Packed and unpacked by the employees or agents of the Storage Company; or
 - Directly caused by fire, lightning, earthquake, liquefaction, tornado, cyclone, windstorm, flood, collapse of building or sprinkler tanks, or fall of elevator or escalator.
3. Sustained during any cleaning, repairing, restoration, or retouching process, unless caused by fire.
4. To documents, money, currency, securities, jewelry, watches, precious stones, or other articles of extraordinary value whether such extraordinary value arises from the articles' age, being irreplaceable, unique, or some other cause unless these articles are declared in the space provided above.
5. Caused by or resulting from:
 - Hostile or warlike action in time of peace or war, including action in hindering and combating or defending against an actual, impending, or expected attack:
 - By any government or sovereign power (de jure or de facto) or by any authority maintaining or using military, naval, or air forces;
 - By military, naval, or air forces;
 - By any agent of any such government, power, authority, or forces;
 - Any weapon of war employing atomic energy or radioactive force whether in time of peace or war;

or

 - Insurrection, rebellion, revolution, civil war, usurped power or action taken by governmental authority; hindering, combating or defending against such an occurrence; seizure or destruction under quarantine or customs regulations; confiscation by order of any government or public authority; or risks of contraband or illegal transportation or trade.

6. Caused by or resulting from nuclear reaction or nuclear radiation, or radioactive contamination, all whether controlled or uncontrolled, and whether that loss is direct or indirect, or proximate or remote.

7. Caused by or resulting from strikes, lockouts labor disturbances, riots, civil unrest, or the act of any person or persons taking part in such occurrence or disorder.

III. GENERAL TERMS AND CONDITIONS

Limitation of Liability to Actual Cash Value

1. The liability of the Storage Company as admitted in this Certificate may not exceed the lesser of:

- a. The difference between the actual cash value of the goods at the time of pickup by the Storage Company and the actual cash value at the time of delivery to the Depositor resulting from physical loss or damage, to be ascertained with proper deductions for depreciation howsoever caused; or
- b. What it would cost to repair or replace the damaged goods with material of like kind and quality, but in no event is the Storage Company liable beyond the amount declared by the Depositor.

The phrase "to be ascertained with proper deductions for depreciation howsoever caused" means that the Depositor shall be charged for the betterment or increase in value of the goods resulting from the worn or deteriorated being restored to a better condition or being replaced by an item of like kind and quality of greater value.

Effect of Insuring for Less Than Declared Value

2. In the event that the actual cash value (after applying proper deductions for depreciation) of the goods at time of pickup exceeds the amount declared, it is agreed that the Depositor will be regarded as his or her own insurer for the difference, and the Depositor must bear that proportion of any loss that the undeclared amount bears to the actual cash value of the goods.

Pair or Set

3. If physical loss or damage occurs to any article that is part of a pair or set, the liability of the Storage Company as admitted in this Certificate may not exceed the cost of repairing or replacing the lost or damaged article only. This liability does not extend to repairing or replacing the entire pair or set, or any diminution in value of the pair or set as a whole.

Parts

4. If physical loss or damage occurs to any part of the goods consisting of several parts when complete for sale or use, the Storage Company by virtue of its admitted liability is liable only for the value of the part lost or damaged.

Misrepresentation and Fraud

5. The admitted liability of the Storage Company is void ab initio if the Depositor has concealed or misrepresented any material fact or circumstance concerning the goods to the Storage Company or in any case of fraud, attempted fraud, or false swearing by the Depositor in regard to any matter relating to the admitted liability of the Storage Company, whether before or after any physical loss or damage.

Time for Filing Claim and Suit

6. The Depositor must as soon as practicable report to the Storage Company every alleged physical loss or damage. The Storage Company is not liable as admitted in this Certificate unless:

- a. The Depositor files with the Storage Company a written claim on the form that on request will be made available by the Storage Company within _____ [e.g., 90] days after the date of delivery of the goods; and
- b. If the claim is not settled amicably, suit is filed within _____ [e.g., one year] after the date of delivery of the goods.

Other Insurance or Indemnification

7. The admitted liability of the Storage Company does not extend to any loss or damage for which the Depositor is or will be reimbursed or otherwise made whole by recovery from any other insurance company or other person.

Subrogation

8. In the event of any payment to the Depositor by the Storage Company or by _____ [name of insurance company] by reason of the admitted liability of the Storage Company, the Depositor will subrogate to the Storage Company his or her rights of recovery against any person or organization for that loss or damage. The Depositor will execute instruments and papers and do whatever else is necessary to secure these rights of subrogation to the Storage Company. The Depositor will do nothing to prejudice the rights of the Storage Company to recover for any loss or damage.

_____ [printed name of insurance company]
 _____ [printed signature and title of signing officer]

Date _____

_____ [name of storage company]

By _____

Authorized Agent

[signature of depositor]

Depositor

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liability



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1. Warehouse Receipts and Lien Enforcement

22-54A California Legal Forms--Transaction Guide § 54A.202

§ 54A.202 Signature Card

[1] Comment--Use of Form

This form illustrates the type of signature card that ordinarily must be signed by depositors of goods with storage companies. The card should be signed by the depositor, and by any other person whom the depositor desires to have access to the goods, and mailed back to the storage company. The card includes statements to the effect that the depositor acknowledges receiving a copy of the final receipt, has read it, and accepts its terms and conditions. After execution, this signature card is retained by the storage company to verify the authority of persons requesting access to, or delivery or removal of, the stored goods.

Under the terms of this form, the storage company must include a self-addressed envelope.

[2] FORM

Signature Card

SIGNATURE CARD

Complete this card and return immediately in enclosed envelope.

_____ [Name of storage company]

_____ [Address]

Warehouse Receipt No. _____

Lot No. _____

I have read the above referenced Nonnegotiable Warehouse Receipt and Storage Contract. I have executed it contemporaneously with this signature card.

You are authorized to accept orders for access, delivery or removal of my goods from the following person or persons
only

printed name

sample signature

printed name

sample signature

ALL SPACES MUST BE COMPLETED. THIS CARD CANCELS ALL PREVIOUS AUTHORIZATIONS.

Executed _____[date].

[signature of depositor]

[depositor's address]

[depositor's telephone number]

[On the reverse, provide the following space for signatures:]

Date of Access	Authorized Signature	Warehouse Representative's Initials
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral Overview



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1. Warehouse Receipts and Lien Enforcement

22-54A California Legal Forms--Transaction Guide § 54A.203

§ 54A.203 Notice of Claim of Lien

[1] Comment

[a] Use of Form

This form is a notice of claim of lien [*see Com. Code § 7210(b)(2)*]. This notice represents the first step in the lien enforcement process. It notifies the depositor (and every other person known to have an interest in the goods) of the total amount of arrearages due, and warns that if this sum is not paid on or before the date specified in the notice, the property will be sold at public auction [*see [b], below*].

The notice of claim of lien must be sent to all persons known to claim an interest in the goods [*Com. Code § 7210(b)(1)*]. The notice must be delivered in a form reasonable under the circumstances at the recipient's place of business through which the contract was made or at another location held out by the recipient as a place for receipt of such communications [*see Com. Code § 1202(e)(2)*].

For further discussion of lien enforcement, see § 54A.130.

[b] Contents

The notice must contain the following information [*Com. Code § 7210(b)(2)*]:

- An itemized statement of the claim.
- A description of the goods subject to the lien.
- A demand for payment within specified time not less than 10 days after receipt of notice.
- A conspicuous statement that unless the claim is paid by the specified date, the goods will be

advertised for sale and sold by auction at the stated time and place.

A term or clause is conspicuous if it is written, displayed, or presented so that a reasonable person against whom it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court [*Com. Code* § 1201(b)(10)]. Conspicuous terms include [*Com. Code* § 1201(b)(10)(A), (B)]:

- A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

- Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

[2] FORM

Notice of Claim of Lien

NOTICE OF CLAIM OF LIEN

To: _____ [*person entitled to claim interest in goods*]
 _____ [*address*]

NOTICE IS HEREBY GIVEN:

Pursuant to *California Commercial Code Sections 7209 and 7210*, the undersigned _____ [*name of warehouse*] claims a lien on the following goods for an account of storage provided _____ [*name of depositor*] at _____ [*name of warehouse*]'s warehouse located at _____ [*street address*], City of _____, County of _____, California. This storage was provided between _____ [*date*] and _____ [*date of issuance of notice*]. The debt on which this lien is based is due and remains unpaid.

Number or Quantity	Description
_____	_____
_____	_____
_____	_____
_____	_____

1. The person on whose account the above goods are stored is _____ [*name of depositor*] of _____ [*address*].

2. The following persons are known to claim an interest in these goods:

Name	Last known address
_____	_____
_____	_____

3. The amount of the lien as of the date of this notice is \$ _____. The following is an itemized statement of the amount due _____ [*name of warehouse*]:

Date	Item	Amount
_____	_____	_____
_____	_____	_____
_____	_____	_____

4. PLEASE TAKE NOTICE THAT YOU ARE REQUIRED TO PAY THE TOTAL AMOUNT OF THE LIEN SET FORTH ABOVE, ON OR BEFORE _____ [date at least 10 days after receipt of notice]. UNLESS THIS AMOUNT IS PAID IN FULL BY THIS DATE, THE PROPERTY DESCRIBED ABOVE WILL BE ADVERTISED FOR SALE, AS PROVIDED BY CALIFORNIA COMMERCIAL CODE SECTION 7210, AND SOLD AT PUBLIC AUCTION BY OR ON BEHALF OF] _____ name of warehouse] TO THE HIGHEST BIDDER ON _____ [date] _____ AT [time] AT [specify location near where goods are stored].

5. _____ [name of warehouse] also claims a lien for the additional sums due for storage from _____ [date of issuance of notice] to the date of the sale, plus the costs and charges incurred in enforcing this lien as provided by law.
Date: _____.

_____ [name of warehouse]

By _____
Authorized Agent

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsGeneral OverviewCommercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsLiens



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22-54A California Legal Forms--Transaction Guide § 54A.204

§ 54A.204 Advertisement of Lien Sale

[1] Comment

[a] Use of Form

This form is an advertisement for lien sale [*see Com. Code § 7210(b)(5)*]. The advertisement of sale must describe the goods to be sold, identify the name of the person on whose account they are being held, and state the time and place of the sale. The sale must take place at least 15 days after the first publication of the advertisement [*Com. Code § 7210(b)(5)*; *see [b], below*].

The warehouse may conduct the sale no less than 15 days after the first publication of the advertisement [*Com. Code § 7210(b)(5)*]. The sale must be conducted in conformity with the terms set forth in the notice [*Com. Code § 7210(b)(3)*], at a suitable place nearest to the location where the goods are held or stored [*Com. Code § 7210(b)(4)*].

At any time before the actual sale, any person claiming a right to the stored goods may redeem them by paying the full amount of the lien plus the reasonable expenses incurred in enforcing the lien. If the goods are redeemed, the warehouse is precluded from selling them and must instead continue to hold the goods in accordance with the terms of the warehouse receipt under which the goods were accepted for storage [*Com. Code § 7210(c)*].

[b] Publishing Requirements

After the expiration of the time given in notice of lien [*see § 54A.203*], an advertisement of the sale must be published once a week for two consecutive weeks in a newspaper of general circulation where the sale will be held. [*Com. Code § 7210(b)(5)*]. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least 10 days before the sale in at least six conspicuous places in the neighborhood of the proposed sale [*Com. Code § 7210(b)(5)*].

[2] FORM

Advertisement of Lien Sale

ADVERTISEMENT OF LIEN SALE

On _____ [date], at _____ [time] at _____ [address], the following goods stored on account of _____ [name of depositor] will be offered for sale at public auction to enforce the lien of _____ [name of warehouse] for storage and other related charges. These goods are described as follows: _____ [describe]. This sale is made pursuant to *California Commercial Code Section 7210*.

_____ [signature of warehouse]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liens



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22-54A California Legal Forms--Transaction Guide §§ 54A.205-54A.209

[Reserved]

§§ 54A.205[Reserved]



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A. Warehouse Storage

2. Related Forms

22-54A California Legal Forms--Transaction Guide § 54A.210

§ 54A.210 Notice of Satisfaction of Warehouse's Lien

[1] Comment--Use of Form

This form is a notice of satisfaction of a warehouse's lien. It may be used by a depositor, or any other person claiming a right or interest in the stored goods, to notify the warehouse that the person is paying the lien amount and redeeming the goods. Any person claiming a right in the goods may redeem them from the warehouse, at any time before the lien sale, by paying the amount necessary to satisfy the lien plus the reasonable expenses incurred in the lien enforcement process [*Com. Code § 7210(c)*]. Therefore, this form must be accompanied by full payment of the amount set forth in the notice of claim of lien [*see § 54A.203*].

If the goods subject to a lien are redeemed, the warehouse may not sell the goods. Instead, the warehouse must continue to store the goods under the terms of the warehouse receipt and Division 7 of the Commercial Code [*Com. Code § 7210(c)*].

[2] FORM

Notice of Satisfaction of Lien

Notice of Satisfaction of Lien

To: _____ [*name of warehouse*] _____ [*address*]

Re: Warehouse Receipt Number _____

Dear _____ [*name of warehouse*]

I hereby tender to you the sum of \$ _____, representing the full amount of your claim of lien on the goods of _____ [*name of depositor*] covered by warehouse receipt number _____, plus the amount of all reasonable expenses incurred by you in enforcing your lien for storage charges on these goods.

[If person redeeming goods is owner, add:]

I represent that I am the owner of these goods.

[If person redeeming goods is not the owner, add:]

I claim an interest in these goods.

[Continue with the following:]

I claim the right pursuant to *Commercial Code Section 7210* to redeem the goods. You must continue to hold the goods under the terms of the above-referenced warehouse receipt that you issued for the goods and the applicable provisions of Division 7 of the Commercial Code.

Date: _____

Sincerely,

_____ *[signature]*

_____ *[typed name]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts Liens



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2. Related Forms

22-54A California Legal Forms--Transaction Guide § 54A.211

§ 54A.211 Delivery Order

[1] Comment--Use of Form

This form is a delivery order addressed to the warehouse under a warehouse receipt mandating the delivery of the stored goods to a designated person. The form states that no arrearages are owed to the warehouse.

This form assumes that no additional delivery charge applies; however, the form may be adapted if the warehouse receipt and storage contract requires the payment of an additional delivery fee. This type of order should always be drafted after consulting the specifics of the warehouse receipt.

[2] FORM

Delivery Order

Delivery Order

To: _____ [*name of warehouse*]
 _____ [*address*]

Re: Warehouse Receipt Number _____

Dear _____ [*name of warehouse*]

On receipt of this delivery order, please deliver to _____ [*identify recipient of goods*] at
 _____ [*address*] the following goods listed in your warehouse receipt number _____:
 _____ [*describe goods to be delivered*].

Your responsibilities under the above-referenced warehouse receipt continue in full force and effect, subject to all the terms and conditions of receipt, until the goods are delivered to the above address. [*If goods will be delivered by*

unaffiliated transporter, add: However, if the goods are delivered to a transporter for delivery as designated above, your responsibilities terminate as of the delivery of the goods to the transporter.]

Date: _____.

Sincerely,

_____ [signature of depositor or authorized person]

_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Warehouse Receipts General Overview



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A. Warehouse Storage

2. Related Forms

*22-54A California Legal Forms--Transaction Guide § 54A.212***§ 54A.212 Demand to Remove Hazardous Goods****[1] Comment--Use of Form**

This form is a termination notice and a demand to the depositor to remove hazardous goods [see *Com. Code § 7206(c)*; see also § 54.23[4]]. It may be adapted for use when the warehouse wishes to terminate storage, and the warehouse believes in good faith that the stored goods are about to deteriorate in value to less than the amount of the warehouse's lien [see *Com. Code § 7206(b)*; see also § 54A.23[3]].

Whenever stored goods become a hazard to other property, to the warehouse, or to persons as a result of a quality or condition of the goods of which the warehouse had no notice at the time of deposit, the warehouse may sell the goods without advertisement on reasonable notice to all persons known to claim an interest in the goods. If the warehouse is unable to sell the goods after reasonable effort, the warehouse may dispose of the goods in any lawful manner. The warehouse incurs no liability for this disposition [*Com. Code § 7206(c)*].

[2] FORM**Demand to Remove Hazardous Goods****Demand to Remove Hazardous Goods**

To: _____ [name of owner of goods]
 _____ [address]

Re: Warehouse Receipt Number _____

We have discovered that the goods stored by _____ [name of warehouse or us] under warehouse receipt number _____ dated _____ constitute a hazard to
 _____ [specify other property stored by _____ (name of warehouse or us) or the

warehouse or persons] because [specify how quality or conditions of goods presents hazard]. This hazard was not known to _____[name of warehouse or us] when the goods were accepted for storage and the above-referenced warehouse receipt was issued.

This letter is to notify you that _____[name of warehouse or we] intend to sell these goods on or after _____[date] for the purposes of protecting [other stored property or the warehouse or other persons] in accordance with *Commercial Code Section 7206*. If these goods are not removed from the warehouse before _____[specify sale date above], and if _____[name of warehouse or we] cannot after reasonable effort sell these goods, then _____[name of warehouse or we] will dispose of these goods in a reasonable and prudent manner.

Date: _____.

Sincerely,

[signature of warehouse]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54A STORAGE OF GOODS

PART IV. FORMS

A. Warehouse Storage

2. Related Forms

22-54A California Legal Forms--Transaction Guide §§ 54A.213-54A.219

[Reserved]

§§ 54A.213[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54A STORAGE OF GOODS

PART IV. FORMS

B. Self-Service Storage

22-54A California Legal Forms--Transaction Guide § 54A.220

§ 54A.220 Self-Service Storage Rental Agreement

[1] Comment--Use of Form

This form is a rental agreement for a self-service storage facility. On execution by the owner of the storage facility and the occupant of the self-service storage area, the agreement governs the rights and obligations of the parties.

This agreement satisfies the basic requirements applicable to contracts for the rental or lease of storage space [*Bus. & Prof. Code § 21712(a)*]:

- The agreement is in writing.
- The agreement includes a statement that the occupant's property will be subject to a claim or lien and may even be sold to satisfy the lien if the rent or other charges due under the agreement remain unpaid for 14 consecutive days, and that these actions are authorized by the California Self-Service Storage Facility Act.
- The agreement requests and provides space for the occupant to give the name and address of another person to whom the preliminary lien notice [*see Bus. & Prof. Code §§ 21703, 21704*] and the subsequent notices required by the Act [*see Bus. & Prof. Code § 21705* (notice of lien sale); *see also § 54A.222*] may be sent.

This third requirement is particularly important because the owner has no lien against the stored property unless the agreement requests and provides space for an alternative name and address [*Bus. & Prof. Code § 21712(b)*].

[2] FORM

Self-Service Storage Rental Agreement

SELF-SERVICE STORAGE RENTAL AGREEMENT

This Agreement is made on _____ [date], at _____ [city and state], between _____ [name of owner] ("Owner") and _____ [name of occupant] ("Occupant").

Lease Term

[If tenancy is to be month-to-month, use:]

1. Owner rents to Occupant and Occupant hires from Owner the self-service rental storage space described as [description or designation of space, e.g., Unit No. G-15] in _____ [name of self-service storage facility, e.g., ABC Self Storage], located at _____ [address of facility, e.g., 123 Center Street, Townville, CA]. The lease term begins on _____ [date], and continues from month to month thereafter. Either party may terminate this Agreement at any time by giving the other party written notice of intention to terminate at least 30 days in advance of the termination.

[If agreement involves lease for specified term certain, use:]

1. Owner leases to Occupant the following self-service rental storage space ("space"): [description or designation of space] in _____ [name of self-service storage facility, e.g., ABC Self Storage], located at _____ [address of facility, e.g., 123 Center Street, Townville, CA], for a term of [e.g., one year], commencing on _____ [date], and terminating on _____ [date], unless sooner terminated as provided in this Agreement.

[Continue with the following:]

Rent

2. Occupant agrees to pay \$_____ rent per month, payable in advance on the _____ day of each month [add, if desired:, plus the further sum of \$_____, representing prorated rent for the first month from the date of possession]. Rent is payable to Owner at the address set forth in Paragraph 30 of this Agreement, or at any other address designated by Owner in writing [add, if desired: at least _____ days before the payment due date].

Security Deposit

3. Occupant has deposited \$_____ as security. Owner may use any amounts from that deposit that are reasonably necessary to remedy Occupant's defaults in the payment of rent or to repair damages caused by Occupant. If applied toward rent or damages during the term of this Agreement, Occupant agrees to reinstate the total security deposit on five days written notice to Occupant. On termination of this Agreement, the balance, if any, of the security deposit will be mailed to Occupant at Occupant's last known address within 14 days after Occupant surrenders the premises.

Use and Maintenance of Space

4. Occupant must use the space solely for the purpose of storing personal property. Occupant may not use the space for residential purposes; as an office, workshop, or studio; for the storage of flammable materials or explosives; for the keeping of live animals; or for any unlawful purpose.

Occupant may not permit the accumulation of refuse, or dispose of liquid or other waste, in or about the space, nor cause or permit any nuisance or other condition or act that may interfere with the use of the surrounding premises by other occupants or Owner.

Not a Bailment

5. This Agreement is for the [rental *or* lease] of storage space only. **OCCUPANT UNDERSTANDS AND AGREES THAT THIS AGREEMENT IS NOT INTENDED TO, NOR ACTUALLY DOES, CREATE A BAILMENT.**

No Water, Heat, or Electricity

6. Occupant acknowledges that the space has no water, heat, electricity, air conditioning, or other utility service, and that Owner is under no obligation to provide any such services at any time during the term of this Agreement.

Access

7. Owner has the right to restrict access to the space at any time, providing the space is available for access by Occupant at least [*e.g.*, 12] hours per day for at least [*e.g.*, six] days per week.

Sublease or Assignment

8. Occupant may not assign this Agreement, sublease all or any part of the space, or permit any other person to occupy or use all or any part of the space without the prior written consent of Owner. Any attempted assignment or sublease in violation of this Paragraph, at the option of Owner, terminates this Agreement and the right of Occupant to use and occupy the space.

Risk of Loss

9. Occupant bears all risk of loss or damage to any property stored in the space. Owner will not provide insurance for any property stored in the space and is not responsible for any damage to or loss of the stored property, whether caused by fire, water, earthquake, liquefaction, theft, or any other risk.

Lock and Key

10. Owner will supply a lock and [*specify, e.g.*, one key *or* one master and one duplicate key] for the space. This lock is the only lock that may be used to lock the space. Occupant agrees not to use any other lock to lock the space, or to use any other method or device to restrict access to the space without the prior written consent of Owner. Owner will retain keys to the space.

Occupant has paid to Owner the sum of \$_____ as a refundable key deposit, which shall be returned

to Occupant within 10 days after the lock and key and any duplicate keys are returned undamaged to Owner on termination of this Agreement.

Entry for Maintenance and Inspection

11. Owner is entitled to enter into the space at any reasonable time and for any reasonable purpose, including but not limited to maintenance of the space and the surrounding premises, inspection by governmental agencies, and determining whether Occupant is conforming to the terms of this Agreement and all applicable laws. Owner has the right to retain a key to the space and to unlock the space at all times during the lease for the purpose of exercising this right of maintenance and inspection.

Termination After Destruction or Damage to Space

12. If the space is destroyed or damaged to the extent that it is no longer usable during the term of this Agreement, from any cause other than the conduct or negligence of Occupant, either Owner or Occupant may cancel this Agreement immediately, effective on delivery of written notice to the other party. In the event of cancellation, Occupant's obligation to pay rent terminates immediately; however, Occupant remains liable for any unpaid rent due for occupancy of the space before the date of the destruction or damage.

Termination for Breach of Agreement

13. The failure of Occupant to comply with any term or condition contained in this Agreement constitutes a breach of this Agreement. In the event that Occupant breaches this Agreement by failing to comply with any term or condition, other than by nonpayment of rent, Owner may, at Owner's sole option, immediately terminate this Agreement. The waiver by Owner of Occupant's breach of any term or condition of this Agreement does not constitute a waiver of any subsequent breach.

Termination On Abandonment

14. On Occupant's apparent abandonment of the space, Owner may, at owner's option, forthwith enter into and take possession of the space, change the lock or locks to the space, and deny Occupant further access to or use of the space, all without notice to Occupant. Owner's entry after apparent abandonment immediately terminates Occupant's right to use and occupy the space.

Termination for Nonpayment of Rent

15. If any part of the rent due from Occupant under this Agreement remains unpaid for 14 consecutive days, Owner may at Owner's sole option, terminate this Agreement and the right of Occupant to use and occupy the space by sending a preliminary lien notice, in the form provided by law, to Occupant at Occupant's last-known address and to any alternative address specified in Paragraph 17, specifying a date on which Occupant's right to use the space terminates unless all sums due are paid by Occupant before the date specified in the preliminary lien notice. If Occupant fails to pay the full amount due by the date specified in the preliminary lien notice, Owner is entitled to deny Occupant further access to the space, and Owner may enter the space, remove any property to a place of safe keeping, and enforce Owner's lien against that property by sale of the property in the manner provided by law.

Lien Against Occupant's Property

16. As authorized by the California Self-Service Storage Facility Act, if any part of the rent due from Occupant under this Agreement remains unpaid for 14 consecutive days, Occupant's stored property will be subject to a claim of lien for unpaid rent and other charges. The stored property may be sold to satisfy the lien if the rent or other charges due remain unpaid for 14 consecutive days.

[Include following paragraph in order for the Self-Service Storage Facility Act to apply and for the owner's lien to attach to the stored property (Bus. & Prof. Code § 21712(b)):]

Alternative Address

17. TO OCCUPANT: PURSUANT TO THE CALIFORNIA SELF-SERVICE STORAGE FACILITY ACT [BUSINESS AND PROFESSIONS CODE SECTIONS 21700-21716], YOU ARE REQUESTED TO GIVE THE NAME AND ADDRESS OF ANOTHER PERSON TO WHOM THE PRELIMINARY LIEN NOTICE AND THE SUBSEQUENT NOTICES REQUIRED TO BE GIVEN UNDER THE ACT MAY BE SENT. IF YOU GIVE THE NAME AND ADDRESS OF ANOTHER PERSON AS REQUESTED, NOTICES WILL BE SENT TO YOU AT YOUR LAST KNOWN ADDRESS AND TO THE PERSON DESIGNATED BY YOU AT THE ADDRESS DESIGNATED BY YOU. IF YOU DO NOT GIVE THE NAME AND ADDRESS OF ANOTHER PERSON, NOTICES WILL BE SENT ONLY TO YOU AT YOUR LAST KNOWN ADDRESS. YOUR FAILURE TO PROVIDE AN ALTERNATIVE ADDRESS DOES NOT AFFECT THE OWNER'S REMEDIES UNDER THIS AGREEMENT OR UNDER ANY OTHER PROVISION OF LAW.

INITIAL ONE OF THE FOLLOWING:

_____ I do not wish to give an alternative address.

_____ I wish to give an alternative address. The alternative address is as follows:

Name of person to whom notices may be sent: _____.

Street address: _____.

City, state, and zip Code: _____.

Rights of Owner on Termination

18. On termination of this Agreement, Owner may, at Owner's option, enter the space and remove all personal property; clean and repair the space; replace the lock and keys; and exercise any and all rights otherwise available to an owner of a self-service storage facility pursuant to law. Further, Owner may impose a lien on all personal property located in the space for rent, labor, or other charges, present or future, and for all expenses incurred for the storage, preservation, sale, or disposition of any and all property stored in the space. Owner's remedies as specified in this Agreement are in addition to, and not in lieu of, any other legal or equitable relief to which Owner would otherwise be entitled.

Accrual of Rent After Default

19. If Owner elects not to terminate this Agreement on any breach or default by Occupant, all rent and other sums due

under this Agreement continue to accrue.

Service Charges

20. Occupant agrees to pay Owner a monthly service charge equal to [*specify amount, e.g., 6 percent of the amount due or the sum of \$15.00, whichever is greater,*] on all accounts that are delinquent for 10 days or more, for the purpose of deferring expenses and costs of Owner related to additional record keeping, accounting, billing, and other additional measures necessary or appropriate to control and collect payment.

In addition, for each check that is returned to Owner unpaid, Occupant agrees to pay Owner a service charge equal to [*specify amount, e.g., 6 percent of the amount of the check or the sum of \$15.00, whichever is greater*].

Notices

21. All notices required or permitted to be given under this Agreement must be personally served or mailed by certified United States mail, return receipt requested, postage prepaid, to the parties at their addresses stated in Paragraph 30, below, or any other address subsequently furnished in writing to the other party. All notices must be similarly sent to any other person whose name and address are set forth in Paragraph 17.

Both parties are entitled to rely on the currency of the addresses set forth in Paragraph 30, below, unless notified otherwise in writing. Any notice mailed in accordance with this paragraph will conclusively be presumed to have been received within two business days after mailing.

Attorneys' Fees

22. If any action is instituted in a court to enforce this Agreement or any provision of this Agreement, the prevailing party is entitled to recover reasonable attorneys' fees and all costs of suit from the other party, in addition to any other relief to which the prevailing party may be entitled.

Nonwaiver

23. Failure of either party to enforce any provision of this Agreement is not construed as a waiver of that provision or of either party's right to enforce that provision or any other provision of this Agreement.

Severability

24. If any term of this agreement is held by a court of competent jurisdiction to be void or unenforceable, the remainder of this Agreement remains in full force and effect.

Effect on Heirs and Assigns

25. This Agreement is binding on and inures to the benefit of the heirs, executors, administrators, and assigns of Owner and Occupant.

Time of the Essence

26. Time is of the essence of this Agreement.

Entire Agreement

27. This Agreement contains the entire agreement between Owner and Occupant with respect to the subject matter of this Agreement. Any prior agreements, promises, or negotiations, whether oral or written, that are not expressly set forth in this Agreement are of no force or effect.

Modification

28. This Agreement can be modified only by a writing signed by both Owner and Occupant. Any purported oral modification of the terms of this Agreement is of no force or effect.

Governing Law

29. This Agreement is governed by and construed in accordance with the laws of the State of California.

Addresses

30. The mailing addresses of the parties are as follows:

Owner:

_____[*name*]
 _____[*street address*]
 _____[*city, state, and zip code*]

Occupant:

_____[*name*]
 _____[*street address*]
 _____[*city, state, and zip Code*]

Date: _____.

OWNER

By _____ [*signature*]
 [*typed name*]

OCCUPANT

[*signature*]
 [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
[Contracts Law](#)[Types of Contracts](#)[Lease Agreements](#)[General Overview](#)



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 54A STORAGE OF GOODS

PART IV. FORMS

B. Self-Service Storage

22-54A California Legal Forms--Transaction Guide § 54A.220A

§ 54A.220A Disclosure Document for Transportation of Individual Storage Containers

[1] Comment

[a] Use of Form

This form is a disclosure document for the transportation of individual storage containers [*see Bus. & Prof. Code § 21701.1(a)(6)*; *see also Bus. & Prof. Code § 21701.1(d)* (individual storage container means container that is fully enclosed and locked, contains not less than 100 and not more than 1,100 cubic feet, and is constructed out of durable material appropriate for repeated use)]. It is one of the requirements with which an owner or operator of a self service storage facility must comply if he or she wants to transport, for a fee, individual storage containers to and from the facility, without a household goods carrier permit [*see Bus. & Prof. Code § 21701.1(a)(6)*; *see also* [3], *below* (other requirements)].

Disclosure must be in a written document separate from others furnished at the time of disclosure [*Bus. & Prof. Code § 21701.1(a)(6)*]. The customer must receive the disclosure statement and the rental agreement a minimum of 72 hours before delivery of the empty individual storage container [*Bus. & Prof. Code § 21701.1(a)(5)*]. However, the customer may, in writing, knowingly and voluntarily waive that receipt [*Bus. & Prof. Code § 21701.1(a)(5)*]. The company must record in writing and retain for at least six months after the end of the rental the time and method of delivery of the information, any waiver made by the customer, and the times and dates of initial pickup and redelivery of the containerized goods [*Bus. & Prof. Code § 21701.1(a)(5)*].

[b] Contents

A disclosure statement must contain all of the following [*Bus. & Prof. Code § 21701.1(a)(5)*]:

- A detailed description of the transfer service, including company's commitment to use its best efforts to place the container in an appropriate location designated by the customer.
- The dimensions and construction of the individual storage container.

- The unit charge, if any, for the container transfer, that is, in addition to the storage charge or other fees under the rental agreement.
- The availability of delivery or pickup by the customer of his or her goods at the self storage facility.
- The maximum allowable distance, measured from the self service storage facility, for the initial pickup and final delivery of the loaded container.
- The precise terms of company's right, at its discretion, to move the container from its initial location; and a statement that customer will not be required to pay additional charges with regard to this transfer.
- The conspicuous disclosure in bold text of the allocation of responsibility for risk of loss or damage to the customer's goods, including any disclaimer of the company's liability, and the procedure for presenting any claim regarding loss or damage to the company.

[c] Additional Requirements

In addition to the written disclosure document, the owner or operator of a self service storage facility, or a household goods carrier, must comply with all of following conditions to avoid regulation under *Pub. Util. Code § 5101 et seq.*:

- The fee charged to deliver empty individual storage container, transport loaded container to facility, or return loaded container to customer may not exceed \$100 [*Bus. & Prof. Code § 21701.1(a)(1)*].
- The owner, operator, or carrier, or their affiliates may not load, pack, or otherwise handle the container's contents [*Bus. & Prof. Code § 21701.1(a)(2)*].
- The owner, operator, or carrier must be properly registered or hold the required permit [*see Bus. & Prof. Code § 21701.1(a)(3)*].
- The owner, operator, or carrier must have cargo insurance of at least \$20,000 per shipment [*Bus. & Prof. Code § 21701.1(a)(4)*].

[2] FORM

Disclosure Document for Transportation of Individual Storage Containers

Disclosure Document for Transportation of Individual Storage Containers

_____ [*Name of self service storage facility*] (Company)
 _____ [*address of self-storage facility*]

Container Pick Up and Delivery. Company will deliver an individual storage container to Lessee, pick up that container at the location designated by Lessee, and transport that container to Company's self storage facility located at the address described above. Company agrees to use its best efforts to place the container in an appropriate location in Company's facility as designated by Lessee. However, due to space limitations and the need to accommodate other lessees, Company cannot absolutely guarantee that Lessee's container will be placed in the exact location requested by Lessee. Company requires at least [*specify, e.g., 5 business days*] advance notice by Lessee to schedule pick up or delivery of a container. Company will make a reasonable effort to accommodate Lessee, but cannot guarantee pickup at a specific time of day and will not guarantee pick up on the scheduled date. If for any reason Company cannot pick up or deliver a container on a scheduled date, Company will give Lessee priority on the next available pick up or delivery

date or will reschedule on the next available pickup or delivery date that is convenient for Lessee. Company [requires or does not require] that Lessee be physically present at Lessee's premises at the time of pickup or delivery.

Dimensions of Individual Storage Container: *[specify]*.

Construction: *[specify]*

Unit Charge per Container Transfer: *[specify charge not to exceed \$100]*. This charge is in addition to the storage charge or any other fees due under the rental agreement.

Pick Up and Delivery by Lessee: Lessee [may or may not] personally pick up or deliver Lessee's goods at the self-service storage facility *[if pick up and delivery will be permitted, specify time when goods may be picked up or delivered, e.g., from Monday through Friday from the hours of 9A.M. to 6P.M., except holidays]*.

Maximum Allowable Distance for Initial Pick Up and Final Delivery of Loaded Container: *[specify, e.g., Within 10 miles]* from the location of Company's self service storage facility at the address specified above.

Moving Lessee's Container. Company reserves the right, at its discretion, to move Lessee's container from its initial location at Company's self-service storage facility to another location within that facility. Company agrees to notify Lessee *[e.g., 48 hours]* prior to moving Lessee's container, except when the container is moved as a result of an emergency, in which case Company agrees to notify Lessee within 24 hours thereafter. In the event that Company exercises its right to move Lessee's container from its initial location, Lessee will not be required to pay additional charges with regard to the transfer.

Risk of Loss

IT IS AGREED THAT THE COMPANY WILL

(A) BE LIABLE FOR DAMAGES FOR LOSS OF OR INJURY TO THE STORED GOODS DURING TRANSPORTATION IN THE INDIVIDUAL STORAGE CONTAINER TO AND FROM THE STORAGE FACILITY CAUSED BY THE FAILURE OF THE COMPANY TO EXERCISE THE LEVEL OF CARE REGARDING THE GOODS AS A REASONABLY CAREFUL PERSON WOULD EXERCISE UNDER SIMILAR CIRCUMSTANCES.

(B) NOT BE LIABLE FOR LOSS, INJURY, DAMAGE, OR DELAY (EXCEPT AS PROVIDED BY BUSINESS & PROFESSIONS CODE SECTION 21701.1(b)) CAUSED BY OR RESULTING FROM

(1) AN ACT OR OMISSION, OR ORDER OF THE CUSTOMER, OR ITS SERVANT, AGENT, OR EMPLOYEE.

(2) THE PACKING, LOADING, OR UNLOADING THE CONTENTS OF THE INDIVIDUAL STORAGE CONTAINER, INCLUDING THE BREAKAGE OF GLASS, BRIC-A-BRAC, OR SIMILAR ARTICLES OF BRITTLE OR FRAGILE NATURE, UNLESS THE BREAKAGE RESULTS FROM THE NEGLIGENCE OF THE COMPANY AS SHOWN BY EVIDENCE OF PHYSICAL EXTERNAL DAMAGE TO THE INDIVIDUAL STORAGE CONTAINER.

(3) THE NATURE OF THE CONTENTS OF THE CONTAINER, OR ANY DEFECT, CHARACTERISTIC, OR INHERENT VICE OF ANY ARTICLE IN THE CONTAINER, INCLUDING SUSCEPTIBILITY TO DAMAGE BECAUSE OF ATMOSPHERIC CONDITIONS SUCH AS TEMPERATURE AND HUMIDITY,

OR CHANGES IN THOSE CONDITIONS.**(4) ACTS OF WAR, ACTS OF NATURE, OR OTHER ACTS OF GOD.****(C) NOT BE LIABLE FOR LOSS OR DAMAGE OCCURRING****(1) AFTER PACKING, BUT BEFORE DELIVERY TO THE COMPANY WHILE THE PROPERTY IS IN THE CUSTODY OR CONTROL OF THE CUSTOMER OR THE CUSTOMER'S AGENT.****(2) BEFORE DELIVERY TO THE COMPANY.****(3) AFTER THE PROPERTY HAS BEEN DELIVERED TO OR RECEIPTED BY THE CUSTOMER OR THE CUSTOMER'S AUTHORIZED AGENT.****Procedure and Time for Filing Claims and Suits****THE COMPANY IS NOT LIABLE FOR THE LOSS OF, DESTRUCTION OF, OR DAMAGE TO THE CONTENTS OF THE INDIVIDUAL STORAGE CONTAINER UNLESS, AFTER THE DATE ON WHICH THE CONTAINER IS TRANSPORTED****(A) WITHIN _____ [e.g., 60 DAYS] AFTER THAT DATE, THE CUSTOMER PRESENTS A CLAIM IN WRITING TO THE COMPANY, AT THE ADDRESS SPECIFIED IN THIS AGREEMENT.****(B) WITHIN _____ [e.g., ONE YEAR] AFTER THAT DATE, SUIT IS FILED BY THE CUSTOMER OR OTHER PERSON ENTITLED TO SUE.****Limitation on Amount of Liability****THE TOTAL LIABILITY OF THE COMPANY FOR PHYSICAL LOSS OR DAMAGE MAY NOT EXCEED THE LEAST OF THE FOLLOWING ITEMS:****(1) THE COST OF REPAIRING DAMAGED PROPERTY.****(2) THE COST OF REPLACING LOST OR DESTROYED PROPERTY WITH MATERIAL OF LIKE KIND AND QUALITY.****(3) THE DIFFERENCE BETWEEN THE ACTUAL CASH VALUE OF DAMAGED PROPERTY AT THE TIME OF RECEIPT BY THE COMPANY, AND AT THE TIME OF DELIVERY.****(4) THE ACTUAL CASH VALUE OF SUCH PROPERTY AT THE TIME AND PLACE OF THE LOSS.****(5) EITHER THE RELEASED VALUE OF _____ [e.g., \$0.60 or \$0.30 or \$0.10] PER POUND PER ARTICLE (IF SO DECLARED) OR THE LUMP SUM VALUE DECLARED ON THE ENTIRE LOT.****IN DETERMINING THE ACTUAL CASH VALUE OF PROPERTY, DEPRECIATION WILL BE DEDUCTED, AND SENTIMENTAL VALUE WILL BE EXCLUDED. THE DEDUCTION FOR DEPRECIATION MEANS THE DEPOSITOR IS CHARGED FOR THE BETTERMENT OR INCREASE IN VALUE OF THE PROPERTY FROM THE WORN OR DETERIORATED OR DEPRECIATED PROPERTY**

BEING RESTORED TO A BETTER CONDITION OR BEING REPLACED BY AN ITEM OF LIKE KIND AND QUALITY OF GREATER VALUE.

THE TOTAL LIABILITY OF THE COMPANY WITH REGARD TO THE SETS OF MATCHED PIECES MAY NOT EXCEED THE COST OF REPAIRING OR REPLACING THE PHYSICALLY LOST OR DAMAGED PIECE OR PIECES ONLY, OR THE VALUE OF THE LOST OR DAMAGED PIECE OR PIECES ONLY, AND DOES NOT EXTEND TO REPAIRING, REPLACING, OR RECOVERING THE ENTIRE SET OR ANY DIMINUTION IN VALUE OF THE SET AS A WHOLE, AND MAY NOT EXCEED THE RELEASED VALUE OF THE LOST OR DAMAGED PIECE OR PIECES.

THE COMPANY IS NOT LIABLE FOR CONSEQUENTIAL DAMAGES FROM NEGLIGENT DELAY OR PROXIMATELY CAUSED BY THE PHYSICAL LOSS OR DAMAGE TO ANY PROPERTY, UNLESS AT THE TIME OF DEPOSIT, THE DEPOSITOR DELIVERS A NOTICE IN WRITING TO THE COMPANY STATING THE NATURE AND EXTENT OF THE CONSEQUENTIAL DAMAGES THAT MAY BE INCURRED BY THE DEPOSITOR IN THE EVENT OF EITHER NEGLIGENT DELAY OR PHYSICAL LOSS OR DAMAGE TO ANY STORED PROPERTY.

Receipt of disclosure statement acknowledged _____[date]

CUSTOMER

_____ [signature]
[printed name]

RETAIN THE FOLLOWING FOR AT LEAST SIX MONTHS AFTER END OF RENTAL:

Date and time of delivery of this disclosure document: _____

Method of delivery of this disclosure document: _____

Time and date of initial pickup of the containerized goods: _____

Time and date of redelivery of the containerized goods: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsLease AgreementsGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral Overview



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B. Self-Service Storage

22-54A California Legal Forms--Transaction Guide § 54A.221

§ 54A.221 Preliminary Lien Notice

[1] Comment

[a] Use of Form

This form is a preliminary lien notice in substantially the form prescribed by statute [*see Bus. & Prof. Code § 21704; see [b], below*]. When an occupant owes any part of the rent or other charges due for 14 consecutive days, an owner may terminate storage and begin the lien enforcement process by giving the occupant both a preliminary lien notice [*see Bus. & Prof. Code §§ 21703, 21704*] and a notice of lien sale [*Bus. & Prof. Code § 21705(a); see § 54A.222*]. This preliminary lien notice is the first prerequisite to terminating the occupant's right to occupy a self-service storage space and imposing an owner's lien on the occupant's stored property [*see Bus. & Prof. Code § 21703; see [c], below*].

This notice must be sent to the occupant's address, as well as to any alternative address provided by the occupant [*Bus. & Prof. Code §§ 21703, 21712(b)*]. The occupant's last known address is the address provided by the occupant in the most recent rental agreement, or any address provided by the occupant in a subsequent written notice of a change of address [*Bus. & Prof. Code § 21701(f)*]. The notice must be sent by certified mail, postage prepaid, or by regular first-class mail if the owner obtains a certificate of mailing indicating the date the notice was mailed [*Bus. & Prof. Code § 21703*]. Although certified mail is the more expensive of these two methods, it may be more advantageous to the owner to use that method because the owner's right to remove the occupant's property from the space accrues more quickly when certified mail is used [*see Bus. & Prof. Code § 21705(a), (b)*, discussed in [c], below].

[b] Contents

A preliminary lien notice must contain all of the following [*Bus. & Prof. Code § 21703*]:

- An itemized statement of the owner's claim, showing the sums due at the time of the notice and the date when the sums became due.
- A statement that the occupant's right to use the storage space will terminate on a specified date (not

less than 14 days after the mailing of the notice) unless all sums due are paid by the occupant before the specified date.

- A notice that the occupant may be denied access to the storage space after the termination date if the sums are not paid and that an owner's lien, as provided for in *Bus. & Prof. Code § 21702*, may be imposed after the termination date.
- The name, street address, and telephone number of the owner, or his or her designated agent, whom the occupant may contact to respond to the notice.

[c] Overview of Lien Enforcement Procedure

If any part of the rent or other charges due from an occupant remain unpaid for 14 consecutive days, the owner may begin the process of enforcing an owner's lien against the occupant of a self-service storage space [*Bus. & Prof. Code § 21703*]. To enforce the lien, the owner must first send the occupant this preliminary lien notice [*Bus. & Prof. Code § 21703*; see *Bus. & Prof. Code § 21704*].

If the total sum due has not been paid as of the date specified in the preliminary lien notice as the termination date, a lien attaches as of that date [*Bus. & Prof. Code § 21705(a),(b)*]. The owner may then enter the space and deny the occupant access to it [*Bus. & Prof. Code § 21705(a)(1), (2), (b)*]. If the preliminary lien notice was sent by certified mail and the total sum due was not paid as of the termination date, the owner may also remove any property found in the space to a place of safe keeping [*Bus. & Prof. Code § 21705(a)(3)*]. If the preliminary lien notice was sent by regular first class mail with a certificate of mailing, the owner still may enter the space and deny the owner access to it if the total sum due has not been paid as of the termination date, but may not remove the occupant's property until at least 14 days after the termination date, during which time the occupant may regain full use of the space by paying the full lien amount [*Bus. & Prof. Code § 21705(b)*].

In either case, the owner must then send the occupant a notice of lien sale [see § 54A.222] stating, among other things, that the occupant's right to use the space has terminated, that the stored property is subject to a lien, the amount of the lien, and that the property will be sold to satisfy the lien after a specified date (not less than 14 days from the date of mailing the notice) unless the occupant pays the full amount of the lien, or executes and returns a declaration in opposition to the lien sale [*Bus. & Prof. Code § 21705(c)(1)(A)-(D)*]. If the preliminary lien notice was sent by regular mail with a certificate of mailing, the notice of lien sale must include a statement that the occupant may regain full use of the space by paying the full lien amount prior to the date specified as the termination date [*Bus. & Prof. Code § 21705(c)(1)(C)*]. When mailing the notice of lien sale, the owner must include a blank declaration in opposition to lien sale [*Bus. & Prof. Code § 21705(c)(2)*; see § 54A.223].

The next step in the lien enforcement procedure depends on whether the occupant completes and returns a declaration; thereafter, the owner may advertise and conduct the sale of the goods in a commercially reasonable manner [see [d], [e], below].

The failure of an owner to comply with the provisions of the Self-Service Storage Facility Act does not impair the rights of a good-faith purchaser at a lien sale. A purchaser in good faith of goods sold to enforce a lien, or a judgment entered on a lien, takes the goods free of any rights of persons against whom the lien was claimed, despite the noncompliance by the owner of the storage facility with the requirements of the Act [*Bus. & Prof. Code § 21711*].

[d] When Judicial Action Required

If the occupant executes a completed declaration in opposition to lien sale [see § 54A.223] and returns it to the owner before the date of sale set forth in the notice of lien sale, the lien may be enforced further only by judicial action [*Bus. &*

Prof. Code § 21710]. An action to enforce the owner's lien must be commenced by filing a verified complaint and serving the complaint and summons by certified mail addressed to the occupant at his or her last-known address [*Bus. & Prof. Code § 21710(a)*; see *Bus. & Prof. Code § 21701(f)* ("last known address" defined)]. The occupant has 10 days after service in which to respond to the complaint [*Bus. & Prof. Code § 21710(b)* (time may be extended for good cause)]. If the occupant does not respond within the time allowed, the clerk of the court, after application by the owner, may enter a default. Thereafter, the owner may apply to the court for judgment in the amount of the lien plus costs [*Bus. & Prof. Code § 21710(c)*].

A judgment in favor of the owner may be enforced by sale of the property by the owner [*Bus. & Prof. Code § 21710(d)*]. The sale must be conducted in a commercially reasonable manner and must take place at least 10 days after the entry of judgment, unless the occupant pays the owner the full amount of the judgment before the sale [*Bus. & Prof. Code § 21710(d)*]. Enforcement of the judgment may be stayed pending appeal (and the property may be released to the occupant) if the occupant posts a bond in an amount equal to one and one-half times the amount of the judgment [*Bus. & Prof. Code § 21710(e)*].

[e] When Judicial Action Not Required

If the occupant does not return a completed declaration in opposition to lien sale before the date of sale specified in the notice of lien sale, the owner may proceed to sell the property [*Bus. & Prof. Code § 21706*; see also *Bus. & Prof. Code §§ 21707-21709*]. Advertisement of the sale [see § 54A.224] must be published once a week for two consecutive weeks in a newspaper of general circulation published in the judicial district where the sale is to be held. If there is no newspaper of general circulation, the advertisement must be posted for at least 10 days before the sale in at least six conspicuous places in the neighborhood of the proposed sale [*Bus. & Prof. Code § 21707(a)*]. The advertisement must include a general description of the goods to be sold, the name of the person on whose account the goods are being stored, the space number of the occupant, and the name and location of the storage facility [*Bus. & Prof. Code § 21707(a)*; see § 54A.224].

The sale must be conducted in a commercially reasonable manner [*Bus. & Prof. Code § 21707(b)*]. After deducting the amount of the lien and the costs of sale, the owner must retain any excess proceeds of the sale on the occupant's behalf. The occupant, or any other person having a court order or other judicial process against the property, may claim the excess proceeds (or a portion of the proceeds sufficient to satisfy the particular claim) at any time within one year of the date of sale [*Bus. & Prof. Code § 21707(b)*]. After the expiration of one year, the owner must pay any remaining excess proceeds to the treasury of the county in which the sale was held [*Bus. & Prof. Code § 21707(b)*].

[f] Priorities of Multiple Liens

Property stored in a self-service storage facility may be subject to liens other than the lien granted the owner under the Self-Service Storage Facility Act. A vehicle or vessel stored in a self-service storage facility may, for example, be subject to a lien imposed under the Vehicle Code. Similarly, personal property stored in a self-service storage facility may be subject to a perfected security interest under the Commercial Code [see *Com. Code § 9303* (when security interest is perfected)]. The Act contains two provisions dealing with the priorities of multiple liens on stored property:

- Any lien on a vehicle or vessel subject to registration or identification under the Vehicle Code that has attached and is set forth in the documents of title to the vehicle or vessel has priority over any lien created under the Act [*Bus. & Prof. Code § 21702.5*; see [g], below].
- Any person who has perfected a security interest under Division 9 of the Commercial Code [see *Com. Code § 9101 et. seq.*; see also Ch. 42, *Secured Transactions*] may claim any personal property subject to the security interest and also subject to a lien under the Act by paying the total amount due to the owner of the self-service storage facility as specified in the preliminary lien notice for the storage of

the property, provided that no declaration of opposition to the lien sale is executed and returned by the occupant [*Bus. & Prof. Code* § 21708].

Thus, in the second situation, the interest of a person who has perfected a security interest under the Commercial Code is junior to an owner's lien under the Act. The holder of a perfected security interest under the Commercial Code may enforce that interest in the property only by paying the owner of the self-service storage facility. This result is consistent with the Commercial Code rule that a lien given by statute to a person who in the ordinary course of business furnishes services with respect to the goods subject to a perfected security interest has priority over the security interest unless the statute providing for the lien expressly provides to the contrary [*Com. Code* § 9333].

[g] Liens on Stored Vehicles and Vessels

Liens created under the Act on vehicles or vessels subject to registration or identification under the Vehicle Code are not enforced under the Act but under separate lien-enforcement provisions of the Civil Code and the Harbors and Navigation Code. In the case of a vehicle, the lien must be enforced under *Civ. Code* § 3071. In the case of a vessel, the lien must be enforced under *Harb. & Nav. Code* § 503. However, if judicial action is required [see [d], *above*], the action may be conducted as provided in *Bus. & Prof. Code* § 21710 [*Bus. & Prof. Code* § 21702.5(b); see [c], [d], *above*].

Liens on vehicles and vessels subject to registration or identification under the Vehicle Code are subject to a special rule designed to promote prompt enforcement. Under this rule, charges for rent, labor, or other services incurred pursuant to the rental agreement that accrue more than 60 days after the date that the lien is imposed under the Act are not included in the lien, unless the charges are incurred after application is made for authorization to conduct the lien sale pursuant to *Civ. Code* § 3071 or *Harb. & Nav. Code* § 503 [*Bus. & Prof. Code* § 21702.5(c)]. The effect of this rule is to deprive a lienholder who fails to apply for authorization to conduct a sale within 60 days after the lien is imposed of his or her lien for rent, labor, or other services accruing after the expiration of 60 days.

Proceeds from a lien sale of a vehicle must be disposed of as provided in *Civ. Code* § 3073 [*Bus. & Prof. Code* § 21702.5(d)]. Proceeds from the sale of a vessel must be disposed of as provided in *Harb. & Nav. Code* § 507.5 [*Bus. & Prof. Code* § 21702.5(d)]. These sections provide that the amount necessary to discharge the lien and the actual cost of selling the vehicle or vessel (but not over \$100 for a vehicle, \$100 for a vessel without a trailer, and \$125 for a vessel with a trailer) must be paid to the lienholder [*Civ. Code* § 3073(a); *Harb. & Nav. Code* § 507.5(a)]. The balance, if any, must be forwarded to the Department of Motor Vehicles and deposited in the Motor Vehicle Account in the State Transportation Fund [*Civ. Code* § 3073(b); *Harb. & Nav. Code* § 507.5(b)]. Any person claiming an interest in a vehicle or vessel sold at a lien sale may file a claim for a portion of the balance [*Civ. Code* § 3073(c); *Harb. & Nav. Code* § 507.5(c)]. If the Department determines that the claimant is entitled to an amount from the deposited balance, the Department will pay that amount to the claimant [*Civ. Code* § 3073(c); *Harb. & Nav. Code* § 507.5(c)]. Claims must be filed within three years of the date that the funds were deposited in the Motor Vehicle Account [*Civ. Code* § 3073(c); *Harb. & Nav. Code* § 507.5(c)].

For more detailed coverage of lien sales of vehicles, see Chapter 102D, *Registration and Transfer of Vehicles, Vessels, and Aircraft*.

[2] FORM

Preliminary Lien Notice

PRELIMINARY LIEN NOTICE

TO: _____ [name of occupant]
 _____ [street address]
 _____ [city, state, and zip code]

You owe and have not paid rent and/or other charges for the use of storage [space number] at _____ [name and address of storage facility]. These charges total \$ _____ and have been due for more than 14 days. They are itemized as follows:

Due Date	Description	Amount
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
TOTAL: \$		_____

If this sum is not paid in full before _____ [date at least 14 days from mailing], your right to use the storage space will terminate, you will be denied access, and an owner's lien on any stored property will be imposed.

You may pay this sum and may contact the owner at:

_____ [name of owner]
 _____ [street address]
 _____ [city, state, and zip code]
 [telephone]
 _____ [date].

_____ [signature of owner]
 [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Secured Transactions (Article 9) Priority Liens Contracts Law Types of Contracts Lease Agreements General Overview



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B. Self-Service Storage

22-54A California Legal Forms--Transaction Guide § 54A.222

§ 54A.222 Notice of Lien Sale

[1] Comment

[a] Use of Form

This form is a notice of lien sale in substantially the form prescribed by statute [*see Bus. & Prof. Code § 21705(c)(1); see also [b], below*]. It must be accompanied by a blank declaration in opposition to the lien sale [*Bus. & Prof. Code § 21705(c)(2); see § 54A.223 for form*]. The notice must be sent to the occupant at the occupant's last known address, as well as to any specified alternative address [*see Bus. & Prof. Code §§ 21705(c), 21712(b); see also § 54A.220[2], P 17*], by certified mail, postage prepaid [*Bus. & Prof. Code § 21705*].

After rent or other charges remain unpaid for 14 consecutive days, the owner may terminate the occupant's storage rights by sending a preliminary lien notice [*Bus. & Prof. Code § 21703; see § 54A.221*]. If the total sum due has not been paid as of the date specified in the preliminary lien notice as the termination date, a lien attaches as of that date [*Bus. & Prof. Code § 21705(a), (b)*]. The owner may then enter the space and deny the occupant access to it [*Bus. & Prof. Code § 21705(a)(1), (2), (b)*]. If the preliminary lien notice was sent by certified mail and the total sum due was not paid as of the termination date, the owner may also remove any property found in the space to a place of safe keeping [*Bus. & Prof. Code § 21705(a)(3)*]. If the preliminary lien notice was sent by regular first class mail with a certificate of mailing, the owner still may enter the space and deny the owner access to it if the total sum due has not been paid as of the termination date, but may not remove the occupant's property until at least 14 days after the termination date, during which time the occupant may regain full use of the space by paying the full lien amount [*Bus. & Prof. Code § 21705(b)*].

In either case, the owner then must send this notice of lien sale in order to commence the lien enforcement process [*Bus. & Prof. Code § 21705*].

For additional discussions of the procedures for enforcing an owner's lien, see § 54A.132 and § 54A.221[1][c]. For discussion and forms for litigation under the California Self-Service Storage Facility Act, see California Forms of Pleading and Practice, Ch. 517, *Self-Service Storage Facilities* (Matthew Bender).

[b] Contents

A notice of lien sale must state all of the following [*Bus. & Prof. Code § 21705(c)(1)*]:

- That the occupant's right to use space has terminated and the occupant no longer has access to the stored property.
- That the stored property is subject to a lien;
- The amount of the lien;
- That the property will be sold to satisfy the lien after the specified date, which may not be less than 14 days from date of mailing the notice, unless the amount of the lien is paid or the occupant executes and returns by certified mail a declaration under penalty of perjury in opposition to the lien sale [*see Bus. & Prof. Code § 21705(c)(2); see also § 54A.223*]. If the preliminary lien notice was sent by regular mail with a certificate of mailing, the notice of lien sale must include a statement that the occupant may regain full use of the space by paying the full lien amount prior to the date specified as the termination date.
- That any excess proceeds of the sale over the lien amount and the costs of the sale will be retained by owner and may be reclaimed by occupant or another person at any time for period of one year from sale, and that thereafter proceeds will escheat to county.

[2] FORM**Notice of Lien Sale**

Notice of Lien Sale

TO: _____ [*Name of occupant*]
 _____ [*Occupant's last known address*]
 _____ [*city, state, and zip Code*]

You are hereby notified, pursuant to the California Self-Service Storage Facility Act [*Bus. & Prof. Code § 21700 et seq.*], that your right to the use of storage space [*space number*] at _____ [*name and address of storage facility*] has terminated. You no longer have access to the stored property.

The stored property is now subject to a lien in the amount of \$_____.

The property will be sold to satisfy the lien after _____ [*date not less than 14 days from date of mailing of this notice*] unless the amount of this lien is paid, or you execute and return by certified mail a declaration under penalty of perjury in opposition to the lien sale in the form set forth in *California Business and Professions Code Section 21705(c)*. A blank Declaration in Opposition to Lien Sale is enclosed.

[*If preliminary lien notice was sent by regular mail, with certificate of mailing [see [1][a], above, add:]*]

You may regain full use of the space by paying the full lien amount prior to the date specified in the preceding paragraph.

[*Continue with the following:*]

Any proceeds of sale of the stored property that exceed the lien amount and the costs of the sale will be retained by the undersigned and may be reclaimed by you, or by another person, at any time for a period of one year from the sale. After that one-year-period, the proceeds escheat to the county.

Date: _____.

_____ [*signature of owner*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview



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*22-54A California Legal Forms--Transaction Guide § 54A.223***§ 54A.223 Declaration in Opposition to Lien Sale****[1] Comment--Use of Form**

This form is a declaration in opposition to lien sale in substantially the form prescribed by the California Self-Service Storage Facility Act [*Bus. & Prof. Code § 21705(b); see Bus. & Prof. Code § 21700 et seq.*]. As a prerequisite to enforcing the owner's lien against property stored in a self-service storage space, the owner must send a preliminary lien notice [*see § 54A.221*] and a blank copy of this form to the occupant of the space, together with a notice of lien sale [*Bus. & Prof. Code § 21705(c)(2); see § 54A.222*]. The declaration must be executed under penalty of perjury [*Bus. & Prof. Code § 21706; see Code Civ. Proc. § 2015.5 (declaration under penalty of perjury)*].

After receiving the blank form, the occupant has the option of filling out the form and returning it to the owner. If a declaration in opposition to lien sale is not received before the date of sale set forth in the notice, the owner may sell the property by complying with the requirements of *Bus. & Prof. Code §§ 21707-21709; see §§ 54A.132, 54A.221[1][c]-[e]*. If a declaration in opposition to the lien sale is received before that date, the owner may enforce the lien only by court action [*Bus. & Prof. Code § 21710; see §§ 54A.132, 54A.221[1][c], [f]*].

[2] FORM**Declaration in Opposition to Lien Sale**

Declaration in Opposition to Lien Sale

I, _____ [*occupant's name*], have received the notice of lien sale of the property stored at [*location and number of space*].

I oppose the lien sale of the property. My address is:

_____ [*street address*]
 _____ [*city, state, and zip code*]

I understand that the lienholder may file an action in court against me, and if a judgment is given in his or her favor, I may be liable for the court costs. I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was signed by me on _____[*date*] at [*place*].

_____ [*signature of occupant*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral Overview



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B. Self-Service Storage

22-54A California Legal Forms--Transaction Guide § 54A.224

§ 54A.224 Advertisement of Sale

[1] Comment

[a] Use of Form

This form is an advertisement of sale that satisfies the requirements of the California Self-Service Storage Facility Act [*Bus. & Prof. Code § 21700 et seq.*]. After the expiration of the time given in the notice of lien sale [*see Bus. & Prof. Code § 21705(a); see also § 54A.222*], the owner must publish an advertisement of the sale before selling the stored property [*see Bus. & Prof. Code § 21707(a)*]. Publication requirements are covered in [b], below; the content of the advertisement is discussed in [c], below.

[b] Publication Requirements

An advertisement of sale must be published in a newspaper of general circulation after the expiration of the time given in the notice of lien sale [*see Bus. & Prof. Code § 21705(a); see also § 54A.222*] and before the property subject to the lien can be sold [*Bus. & Prof. Code § 21707(a)*]. Publication must be once a week for two consecutive weeks in a newspaper of general circulation published in the judicial district where the sale is to be held [*Bus. & Prof. Code § 21707(a)*]. If no newspaper of general circulation is published in the judicial district where the sale is to be held, the advertisement must be posted at least 10 days before the sale in at least six conspicuous places in the neighborhood of the proposed sale [*Bus. & Prof. Code § 21707(a)*].

[c] Contents

The advertisement must include a general description of the goods, the name of the person on whose account the goods are being stored, the space number of the occupant, and the name and location of the storage facility [*Bus. & Prof. Code § 21707(a)*].

[2] FORM

Advertisement of Sale

ADVERTISEMENT OF SALE

NOTICE IS HEREBY GIVEN that the undersigned intends to sell the personal property described below to enforce a lien imposed on that property under the California Self-Service Storage Facility Act [*Bus. & Prof. Code § 21700 et seq.*].

The property to be sold is: [*general description of the goods or other property to be sold*]. The property is now being stored on account of: _____ [*name of occupant*], who formerly was the occupant of storage space [*space number*] at _____ [*name and address of storage facility*].

The property will be sold at _____ [*address*].

Date: _____.

_____ [*signature of owner*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 55 NEGOTIABLE INSTRUMENTS

22-55 California Legal Forms--Transaction Guide 55.syn

§ 55.syn Synopsis to Chapter 55: NEGOTIABLE INSTRUMENTS

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§§ 55.03-55.04 [Reserved]

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§ 55.130 Procedural Guide to Excuse of Presentment and of Notice of Dishonor

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Corporate Note Providing for Payment of Principal and Interest in Installments With Final Balloon Payment

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 55 NEGOTIABLE INSTRUMENTS

22-55 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses negotiable instruments and their use in business transactions. The Legal Background covers terms and principles relating to negotiable instruments. The Transaction Guide includes guides to the use and negotiation of negotiable instruments, as well as guides for solving problems that arise after the negotiation of commercial paper.

The forms section includes promissory notes and individual promissory note provisions. Forms related to the liability of parties to a note or other negotiable instrument, including ratification of an unauthorized signature, discharge from liability, accommodation or guarantee of collection, and a waiver relating to statutes of limitations, are also included. This chapter also includes forms for use in the assignment and collection of notes and other negotiable instruments. The forms are drafted for use in promissory notes; however, they may be used by an endorser to any other negotiable instrument, as applicable.

This chapter does not cover financing, although negotiable instruments are commonly used in connection with financing. Real estate financing and related security interests are covered in Ch. 25, *Real Estate Loans* , and Ch. 25A, *Security Interests for Real Estate Financing* . Business finance is covered in Ch. 43, *Commercial Loans* .

Other commercial lending practices and procedures involving the generation and use of negotiable instruments are covered in Ch. 42, *Secured Transactions* , Ch. 44, *Accounts Receivable Financing and Factoring* , Ch. 45, *Consumer Installment Loans and Credit Sales* , and in Ch. 47, *Automotive Financing and Vehicle Leasing*, Ch. 48, *Agricultural Financing* . For discussion of the law of negotiable bills of lading and warehouse receipts, see Ch. 54, *Shipment of Property* , and Ch. 54A *Storage of Goods* . Letters of credit and electronic fund transfers are covered in Ch. 56, *Letters of Credit and Electronic Fund Transfers* .

Negotiable securities are covered extensively in Ch. 6J, *Issuance of Debt Securities* , and Ch. 6K *Non Issuer Transactions In Investment Securities* . Loans secured by stock ("margin stock accounts") and the Federal Reserve Bank requirements for these loans are discussed Ch. 43, *Commercial Loans*.



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§ 55.01 California Sources

[1] Constitution

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[2] Statutes

Nondiscrimination in commercial transactions. *Bus. & Prof. Code §§ 16721, 16721.5, 16721.6.*

Transfer of nonnegotiable instruments not intended to create security interests. *Civ. Code § 955.*

Nonnegotiable instruments transferable by endorsement. *Civ. Code § 1459.*

Civil damages and costs related to written demand for payment authorized for failure to redeem dishonored check, draft, or order. *Civ. Code § 1719.*

Regulation of check cashing businesses. *Civ. Code § 1789.30 et seq.*

Loans presumed made with interest. *Civ. Code § 1914.*

"Interest" defined. *Civ. Code § 1915.*

Interest rate stated without period deemed annual rate. *Civ. Code § 1916.*

Four-year statute of limitations for actions founded on written instruments. *Code Civ. Proc. § 337.*

Action by assignee of nonnegotiable instrument is without prejudice to any set-off or other defense existing at or before

notice of assignment. *Code Civ. Proc. § 368.*

Abandonment of homestead exemption. *Code Civ. Proc. § 704.980.*

Commercial Code, Division 1--General Provisions. *Com. Code § 1101 et seq.*

Construction, application, and subject matter. *Com. Code § 1101 et seq.*

General definitions and principles of interpretation. *Com. Code § 1201 et seq.*

Commercial Code, Division 3--Negotiable Instruments. *Com. Code § 3101 et seq.*

General provisions and definitions. *Com. Code § 3101 et seq.*

Transfer, negotiation, and endorsement. *Com. Code § 3201 et seq.*

Enforcement of instruments. *Com. Code § 3301 et seq.*

Liability of parties. *Com. Code § 3401 et seq.*

Dishonor. *Com. Code § 3501 et seq.*

Discharge and payment. *Com. Code § 3601 et seq.*

Commercial Code, Division 4--Bank Deposits and Collections. *Com. Code § 4101 et seq.*

General provisions and definitions. *Com. Code § 4101 et seq.*

Collection of items by depositary and collecting banks. *Com. Code § 4201 et seq.*

Collection of items by payor banks. *Com. Code § 4301 et seq.*

Relationship between payor bank and customer. *Com. Code § 4401 et seq.*

Collection of documentary drafts. *Com. Code § 4501 et seq.*

Commercial Code, Division 5--Letters of Credit. *Com. Code § 5101 et seq.*

Commercial Code, Division 7--Documents of Title, including warehouse receipts and bills of lading. *Com. Code § 7101 et seq.*

Commercial Code, Division 8--Investment Securities. *Com. Code § 8101 et seq.*

Commercial Code, Division 9--Secured Transactions. *Com. Code § 9101 et seq.*

Diversion program for bad-check writers. *Penal Code §§ 1001.60-1001.67.*

Exemptions from usury provisions of California Constitution.

Retail installment sales and accounts. *Civ. Code §§ 1805.1, 1810.2.*

Real estate brokers. *Civ. Code § 1916.1.*

Automobile installment loans. *Civ. Code § 2982(j).*

Qualified securities. *Corp. Code § 25116.*

Broker-dealers. *Corp. Code § 25211.5.*

Lending institutions acting as fiduciaries. *Fin. Code §§ 1504, 6515(c).*

Foreign banks. *Fin. Code § 1716.*

Lending institution holding companies. *Fin. Code §§ 3707, 7675.*

Credit unions. *Fin. Code § 14901.*

Industrial loan companies. *Fin. Code §§ 18191, 18212.*

Pawnbrokers. *Fin. Code §§ 21200, 21200.5.*

Personal property brokers. *Fin. Code §§ 22451, 22451.1.*

California Deferred Deposit Transaction Law. *Fin. Code § 23000 et seq.*

Consumer finance licensees. *Fin. Code § 24451.*

Insurers. *Ins. Code § 1100.1.*



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§ 55.02 Federal Sources

[1] Statutes

Discount of notes, drafts, bills of exchange, and trade acceptances by Federal Reserve Bank. *12 U.S.C. §§ 343-346.*

Preemption of due-on-sale prohibitions in real property loans. *12 U.S.C. § 1701j-3.*

Types of short-term negotiable instruments that are exempt from registration and prospectus requirements of federal Securities Act of 1933. *15 U.S.C. § 77c(a)(3).*

Truth in lending: consumer credit disclosures. *15 U.S.C. § 1601 et seq.*

Commercial financing agreements exempt from federal tax lien. *I.R.C. § 6323(c).*

Garnishment of corporate debtors in federal government actions for recovery of money on bill, note, or corporate security. *28 U.S.C. § 2405.*

[2] Regulations

Collection of checks and other items and transfers of funds (Federal Reserve Bank Regulation J). *12 C.F.R. § 210.1 et seq.*

Truth in lending: disclosure of terms and cost in consumer credit transactions (Federal Reserve Bank Regulation Z). *12 C.F.R. § 226.1 et seq.*

Preservation of consumers' claims and defenses, unfair or deceptive acts or practices. *12 C.F.R. § 443.2.*



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PART I. RESEARCH GUIDE

B. Secondary Sources

22-55 California Legal Forms--Transaction Guide § 55.05

§ 55.05 Law Reviews and Periodicals

Garland, *A New Law of Negotiable Instruments: Revised Article 3 of the UCC*, 109 Banking L.J. 557 (1992).

Norwood, *An Overview of Revised Articles Three and Four of the Uniform Commercial Code*, 97 Com. L.J. 1 (1992).

Ellis & Dow, *Banks and Their Customers Under the Revisions to Uniform Commercial Code Articles 3 and 4; Allocation of Losses Resulting From Forged Drawers' Signatures*, 25 Loy. L.A. L. Rev. 57 (1991).

Ballen, *Commercial Paper, Bank Deposits and Collections, and Other Payment Systems (Uniform Commercial Code Annual Survey)*, 46 Bus. Law. 1521 (1991).

Conlon, *Contingent Debt Instruments Are Divided and Conquered Under the New OID Proposed Regulations*, 75 J. Tax'n 46 (1991).

Keyes, *Acquisition Financing and Refinancing: Tax Treatment of Selected Instruments, Recent Developments and Planning*, 49 New York University Institute On Federal Taxation 21 (Matthew Bender 1991).

Miller, *The Benefits of New UCC Articles 3 and 4*, 24 UCC L.J. 99 (1991).

Norwood, *Cashier's Checks and the Bank's Right to Deny Payment*, 108 Banking L.J. 476 (1991).

Norwood, *Punitive Damages for Wrongful Dishonor of a Check*, 24 UCC L.J. 64 (1991).

Reidinger, *Checks and Balances: Making the Bank Pay*, 77 A.B.A. J. 909(3) (1991).

Ballen, *Commercial Paper, Bank Deposits and Collections, and Other Payment Systems (Uniform Commercial Code Annual Survey)*, 45 Bus. Law. 2341 (1990).

Ballen, *Duties of Beneficiary's Bank (on Receipt of Payment Order)*, 45 Bus. Law. 1461 (1990).

Baxter, *Proper and Improper Execution of Payment Orders*, 45 Bus. Law. 1447 (1990).

French, *Unauthorized and Erroneous Payment Orders*, 45 Bus. Law. 1425 (1990).

Nation, *Recognition and Enforcement of Demandable Notes*, 23 UCC L.J. 51 (1990).

Nelson, *Settlement Obligations and Bank Insolvency*, 45 Bus. Law. 1473 (1990).

Quinn, *After Reves v. Ernst & Young: When Are Certificates of Deposit "Notes" Subject to Rule 10b-5 of the Securities Exchange Act?* 46 Bus. Law. 173 (1990).

Ballen, *Commercial Paper, Bank Deposits and Collections, and Other Payment Systems (Uniform Commercial Code Annual Survey)*, 44 Bus. Law. 1515 (1989).

Tillman, *Variable Interest Rates, Negotiability, and the Sum Certain Requirement*, 22 UCC L.J. 36 (1989).

Anderson, *An Overview of Buyers' Damage Remedies*, 21 UCC L.J. (1988).

Ballen, *Commercial Paper, Bank Deposits and Collections, and Other Payment Systems (Uniform Commercial Code Annual Survey)*, 43 Bus. Law. 1305 (1988).

Dubner, *Variable Interest Rates--Their Effect on Negotiability Under the UCC*, 93 Com. L.J. 1 (1988).

Kalevitch, *Luck of the Drawee: The Finality of Bank Payments to Holders in Due Course*, 105 Banking L.J. 416 (1988).

Reigert, *Stopping Payment and Refusing Payment on Bank Checks*, 93 Com. L.J. 137 (1988).

Rubin, *Policies and Issues in the Proposed Revision of Articles 3 and 4 of the UCC*, 43 Bus. Law. 621 (1988).

West, *The Demandable Note and the Obligation of Good Faith*, 21 UCC L.J. 99 (1988).

Miller, *Commercial Paper, Bank Deposits and Collections, and Commercial Electronic Fund Transfers (Uniform Commercial Code Annual Survey)*, 42 Bus. Law. 1269 (1987).

Royse, *Determining a Drawee Bank's Liability for Payment Over the Forged Endorsement of a Co-Payee*, 92 Com. L.J. 339 (1987).

Cooper, *Checks Held Hostage--Current Legislation on Funds Availability*, 103 Banking L.J. 4 (1986).



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B. Secondary Sources

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§ 55.06 Annotations

Annot., What Constitutes "Good Faith" Under UCC § 1-208 Dealing With "Insecure" or "At Will" Acceleration Clauses, 85 A.L.R.4th 284 (1991) .

Annot., What Constitutes "Cover" Upon Breach by Seller Under UCC § 2-712(1), 79 A.L.R.4th 844 (1990) .

Annot., What Constitutes Violation of Federal Bank Fraud Statute (18 USCS § 1344), 99 A.L.R. Fed. 888 (1990) .

Annot., Liability of Bank for Overpayment of Federal Government Check, 96 A.L.R. Fed. 908 (1990) .

Annot., Bank's Liability to Customer for Imposing Allegedly Excessive Service Charges, 73 A.L.R.4th 1028 (1989) .

Annot., Negotiability of Instruments Providing for Variable Rate of Interest Under UCC § 3-106, 69 A.L.R.4th 1127 (1989) .

Annot., Unintentional Cancellation of Negotiable Instrument Under UCC Article 3, 59 A.L.R.4th 617 (1988) .

Annot., Effect on Negotiability of Instrument, Under Terms of UCC § 3-104(1), of Statements Expressly Limiting Negotiability or Transferability, 58 A.L.R.4th 632 (1987) .

Annot., Bank's Liability for Breach of Implied Contract of Good Faith and Fair Dealing, 55 A.L.R.4th 1026 (1987) .

Annot., Bank's "Reasonable Commercial Standards" Defense Under UCC § 3-419(3), 49 A.L.R.4th 888 (1986) .

Annot., Modern Status of Rule That Acceptance of Check Purporting to be Final Settlement of Disputed Amount Constitutes Accord and Satisfaction, 42 A.L.R.4th 12 (1985) .

Annot., What Constitutes "Money" Within Meaning of Uniform Commercial Code, 40 A.L.R.4th 346 (1985) .

Annot., Application of UCC § 1-207 to Avoid Discharge of Disputed Claim Upon Qualified Acceptance of Check Tendered as Payment in Full, 37 A.L.R.4th 358 (1985) .

Annot., What Constitutes Taking Instrument in Good Faith, and Without Notice of Infirmities or Defenses, to Support Holder-in-Due-Course Status, Under UCC § 3-302, 36 A.L.R.4th 212 (1985) .

Annot., Extent of Bank's Liability for Paying Postdated Check, 31 A.L.R.4th 329 (1984) .

Annot., Payee's Right of Recovery, in Conversion Under UCC § 3-419(1)(c), for Money Paid on Unauthorized Indorsement, 23 A.L.R.4th 855 (1983) .

Annot., Provision in Draft or Note Directing Payment "On Acceptance" as Affecting Negotiability, 19 A.L.R.4th 1268 (1983) .

Annot., Recovery by Bank of Money Paid Out to Customer by Mistake, 10 A.L.R.4th 524 (1981) .

Annot., Construction and Effect of UCC § 3-416 Governing Guaranty Contracts, 10 A.L.R.4th 897 (1982) .

Annot., Bank's Liability for Payment or Withdrawal on Less Than Required Number of Signatures, 7 A.L.R.4th 655 (1981) .

Annot., Uniform Commercial Code: Bank's Right to Stop Payment on its Own Uncertified Check or Money Order, 97 A.L.R.3d 714 (1980) .

Annot., Who Is Holder of Instrument for "Value" Under UCC § 3-303, 97 A.L.R.3d 1114 (1980) .



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22-55 California Legal Forms--Transaction Guide § 55.07

§ 55.07 Text References

[1] Matthew Bender Sources

Banking Law, Chs. 112-138 (Matthew Bender).

F. Hart & W. Willier, *Bender's U.C.C. Service, Commercial Paper*, vols. 2, 2A (Matthew Bender).

F. Hart & W. Willier, *Bender's U.C.C. Service, Forms & Procedures, Article 3: Commercial Paper* (Matthew Bender).

California Forms of Pleading and Practice (Matthew Bender).

Ch. 95, *Banks, Deposits, and Checks* .

Ch. 385, *Negotiable Instruments* .

Ch. 568, *Usury* .

California Legal Forms (Matthew Bender).

Ch. 5, *Directors' Meetings, Actions, and Resolutions* .

Ch. 6J, *Issuance of Debt Securities* .

Ch. 6K, *Nonissuer Transactions in Investment Securities* .

Ch. 25, *Real Estate Loans* .

Ch. 25A, *Security Instruments for Real Estate Financing* .

Ch. 42, *Secured Transactions* .

Ch. 43, *Commercial Loans* .

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Ch. 54A, *Storage of Goods* .

Ch. 56, *Letters of Credit and Electronic Fund Transfers* .

California Points and Authorities, Ch. 166, *Negotiable Instruments* (Matthew Bender).

Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 5C, *Letters of Credit and Negotiable Instruments* (Matthew Bender).

Warren's Forms of Agreements (Matthew Bender).

Ch. 30, *Commercial Loan Agreements* .

Ch. 31, *Security Agreements* .

Ch. 33, *Promissory Notes* .

Ch. 34, *Letters of Credit* .

Rabkin & Johnson, Federal Income, Gift and Estate Taxation (Matthew Bender).

Ch. 35, *Creditor's Income and Deductions*.

Ch. 36, *Debtor's Income and Deductions*.

Ch. 37, *Interest, Premium, and Discount*.

[2] Additional Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments* (10th ed. 2005).



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PART II. LEGAL BACKGROUND

A. Nature of Negotiable Instruments

22-55 California Legal Forms--Transaction Guide § 55.10

§ 55.10 Governing Law

[1] Overview

Negotiable instruments are governed by Division 3 of the California version of the Uniform Commercial Code [*see Com. Code § 3101 et seq.*]. The Commercial Code is annotated with Uniform Commercial Code and California Code comments. Uniform Commercial Code comments are cited in this chapter as "Official Comment." Revised Divisions 3 and 4 of the Commercial Code do not yet contain new California comments. Accordingly, no California comments are cited.

Negotiable instruments are subject to Division 4 of the Commercial Code [*see Com. Code § 4101 et seq.*] governing bank deposits and collections; for relevant checklists based on Division 4, see *Sections 55.130through 55.132*. They are also subject to Division 9 of the Commercial Code [*see Com. Code § 9101 et seq.*; *see also* Ch. 42, *Secured Transactions*] governing secured transactions [*Com. Code § 3102(b)*].

Division 3 does not apply to money, payment orders, or securities [*Com. Code § 3102(a)*].

The 1993 repeal and addition of Division 3 of the Commercial Code (relating to negotiable instruments) and the 1993 repeal, addition, and amendment of Division 4 of the Commercial Code (relating to banking) were intended by the Legislature to be construed as amendments to the existing Divisions 3 and 4 of the Commercial Code before revision [*Com. Code § 16101*]. Unless a provision of the Commercial Code has clearly been changed, rather than merely clarified, it is declaratory of the Commercial Code as it existed before the 1993 revision [*Com. Code § 16104*].

[2] Special Rules Governing Consumer Credit Transactions

Promissory notes used in consumer credit transactions are subject to numerous federal and California requirements, including the Unruh Act [*see Civ. Code § 1801 et seq.* (retail installment sales)] and the federal Truth in Lending Act [*see 15 U.S.C. § 1601 et seq.* (consumer credit cost disclosure)]. For further discussion of promissory notes, see § 55.200[1]. For detailed discussion of consumer credit requirements, see Ch. 45, *Consumer Installment Loans and Credit Sales* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection General Overview Commercial Law (UCC) Negotiable Instruments (Article 3) General Overview Commercial Law (UCC) Bank Deposits & Collections (Article 4) General Overview Commercial Law (UCC) Secured Transactions (Article 9) General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 55 NEGOTIABLE INSTRUMENTS

PART II. LEGAL BACKGROUND

A. Nature of Negotiable Instruments

22-55 California Legal Forms--Transaction Guide § 55.11

§ 55.11 Function of Negotiable Instruments

Negotiable instruments function as a substitute for money in the payment of obligations or as evidence of an obligation, an extension of credit, or both [*see Com. Code § 1201(b)(24)* ("money" defined); *see also Com. Code § 3110*]. The term "negotiable instruments" applies to notes, drafts, checks (including cashier's checks, teller's checks, and traveler's checks), certificates of deposit, and demand drafts [*Com. Code § 3104(e)-(k)*] and to orders that fall within the definition of check and are otherwise negotiable but not payable to bearer or to order at the time the instrument is issued or comes into possession of the holder [*Com. Code § 3104(c)*; *see Com. Code §§ 3103(a)(6)* ("order" defined), *3104(f)* ("check" defined)].

Negotiable instruments function as money in commercial affairs because they are freely transferrable and, if properly negotiated [*see §§ 55.20-55.24*], give a transferee or "holder" all the rights that were possessed by the transferor. Moreover, if the transferee is a "holder in due course" [*see § 55.33*], he or she takes the instrument free of claims [*Com. Code § 3306*] and free of defenses, with limited exceptions [*Com. Code §§ 3302(a), 3305(b)*; *see Com. Code § 3305(a)(1)* (exceptions)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsChecksCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsHolders in Due CourseCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsNegotiable & Nonnegotiable Instruments



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A. Nature of Negotiable Instruments

22-55 California Legal Forms--Transaction Guide § 55.12

§ 55.12 Negotiable Instruments Distinguished From Other Documents Subject to Commercial Code

Payment orders that are part of electronic fund transfers under Division 11 of the Commercial Code [*see Com. Code § 11101 et seq.*] are not negotiable instruments under Division 3 of the Commercial Code [*Com. Code § 3102(a)*].

Securities, even though they can be drafted in negotiable form under Division 8 of the Commercial Code [*see Com. Code § 8101 et seq.*], are not negotiable instruments [*Com. Code § 3102(a)*] and are not covered in this chapter [*see Ch. 6, Securities Regulation Issues*]. Letters of credit are governed by Division 5 of the Commercial Code [*see Com. Code § 5101 et seq.*] and are not negotiable instruments [*see Com. Code § 3104(c), (e)-(k)* (types of negotiable instruments)]. For coverage of pertinent law and the uses of letters of credit, see Ch. 56, *Letters of Credit and Electronic Fund Transfers* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsNegotiable & Nonnegotiable InstrumentsCommercial Law (UCC)Letters of Credit (Article 5)General OverviewCommercial Law (UCC)Investment Securities (Article 8)General Overview



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A. Nature of Negotiable Instruments

22-55 California Legal Forms--Transaction Guide § 55.13

§ 55.13 Types of Negotiable Instruments

[1] Overview

A "negotiable instrument" is an unconditional promise or order to pay a fixed amount of money if it meets the following conditions [*Com. Code § 3104(a)*]:

- It is payable to bearer or to order at the time it is issued or first comes into possession of the holder;
- It is payable on demand or at a definite time; and
- It does not state any other undertaking or instruction by the drawer or maker other than to pay money, with limited exceptions [*see Com. Code § 3104(a)(3)* (exceptions)].

Notes, drafts, checks, certificates of deposit, and demand drafts are negotiable instruments [*Com. Code § 3104(e)-(k)*], as are orders that fall within the definition of "check" and are otherwise negotiable but not payable to bearer or to order at the time they are issued or at the time they first come into possession of the holder [*Com. Code § 3104(c)*; *see Com. Code §§ 3103(a)(6)* ("order" defined), *3104(f)* ("check" defined)]. The term "check" includes cashier's checks, teller's checks, traveler's checks, and demand drafts [*see Com. Code § 3104(f)-(k)*]. An instrument may be a check even though it is described on its face by another term, such as "money order" [*Com. Code § 3104(f)*].

[2] Note

A "note" (also known as a promissory note) is a promise to pay [*Com. Code § 3104(e)*]. The "promise" is a written undertaking to pay money signed by the payor, rather than a mere acknowledgment of an obligation [*Com. Code § 3103(a)(9)*]. In a typical note transaction, the debtor or borrower (maker) expressly promises to pay the named creditor (payee) a particular amount of money at a specified future time [*see F. Hart & W. Willier, Bender's U.C.C. Service, Commercial Paper, Ch. 1A, Types of Money Paper Currently in Use* (Matthew Bender)].

Short-term promissory notes are used extensively by money market mutual funds, lending institutions, and business

firms with temporary surplus cash to invest on a short-term basis [*see* § 55.200[1][g]].

[3] Draft

[a] Overview

A "draft" is a negotiable instrument if it is an order [Com. Code § 3104(e)]. An "order" is a written instruction to pay money signed by the person giving the instruction. It may be addressed to one or more persons jointly or alternatively, but not in succession. An authorization to pay is not an order unless the person authorized to pay is also instructed to pay [Com. Code § 3103(a)(6)].

A draft may be payable on demand (sight draft) or payable at a definite time (time draft). A draft is "payable on demand" if it (1) states that it is payable on demand or at sight or otherwise indicates that it is payable at the holder's will, or (2) does not state any time for payment [Com. Code § 3108(a)]. A draft is "payable at a definite time" if it is payable (1) on elapse of a definite period of time after sight or acceptance, (2) at a fixed date, (3) automatically on or after a specified date or event, or (4) at a time readily ascertainable at the time of issue, subject to the rights of prepayment, acceleration, or extension at the option of the holder, maker, or acceptor [Com. Code § 3108(b)].

Time drafts are frequently used as a means of obtaining short-term credit. For further discussion of drafts and a form of bill of exchange, see Ch. 56, *Letters of Credit and Electronic Fund Transfers* .

[b] Documentary Draft

A "documentary draft" is a draft that requires accompanying documents, securities, or other papers be received by the payor before acceptance or payment [Com. Code § 4104(a)(6)]. Documentary drafts are commonly used in the consummation of a sale on temporary credit. Instead of the usual practice with checks, in which the buyer draws the instrument and sends it directly to the seller, the seller draws a draft on the buyer (that is, ordering the buyer to pay a stated sum) naming the seller or the seller's bank as the payee. The seller then sends the draft to the buyer, care of the buyer's bank, together with an invoice listing the goods involved and a warehouse receipt or bill of lading. An independent certification of the quantity or quality of the goods may either be included or obtained by the buyer's bank. The buyer's bank then notifies the buyer that it has received the draft and calls on the buyer to honor it. After the buyer honors it by making the necessary amount of cash available, the bank delivers the documents that accompanied the draft to the buyer so that the buyer can claim the goods from the carrier or warehouse and disburses payment to the seller. Another method of negotiation is for the seller to draw the draft and sell it to the seller's bank; the latter, as a holder in due course, then sends the draft and documents to the buyer's bank [see Banking Law, Ch. 112, *Characteristics of Checks and Other Negotiable Instruments* (Matthew Bender)].

Documentary drafts are frequently used in letter of credit transactions [*see* Ch. 56, *Letters of Credit and Electronic Fund Transfers*].

[c] Trade Acceptance

A "trade acceptance" is a draft that is used to extend credit to a drawee when the drawee is not a bank, but generally a buyer of goods in commercial quantities. A time draft is drawn by the seller and issued to the buyer with documents of title to the goods. Instead of paying for the goods, the buyer accepts the draft by signing it to receive the documents of title. This converts the draft from a simple order to pay to a promise by the buyer to pay on the date specified [see F. Hart & W. Willier, Bender's U.C.C. Service, Commercial Paper, Ch. 1A, *Types of Money Paper Currently in Use* (Matthew Bender)].

[4] Check

A "check" is a draft (other than a documentary draft) [see [3], *above*] drawn on a bank and payable on demand. The term "check" also includes cashier's checks, teller's checks, and demand drafts [Com. Code § 3104(f)]. However, a check is only an order. It does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the check until it accepts it [Com. Code § 3408]. Rather, a check serves only to direct the drawee bank to pay the face amount to the bearer, while committing the drawer to make good the obligation if the bank dishonors the check [see Com. Code § 3414(b)]. When the payee of a negotiable instrument properly endorses and deposits it in his or her bank account, the bank becomes a holder in due course of the instrument to the extent that credit given for the instrument by the bank is withdrawn or applied [Com. Code §§ 4210, 4211; see § 55.33 (holder in due course)].

A civil penalty may be levied against any person who produces, advertises, offers for sale, distributes, or otherwise transfers any simulated check [Bus. & Prof. Code § 22433(b)]. A "simulated check" is any document that is not currency or a check, draft, note, bond, or other negotiable instrument, but that because of its appearance, tends to mislead or deceive a person viewing into believing that it, in fact, represents any of the following: (1) currency or a negotiable instrument that can be deposited in a bank or used for third party payments; (2) a prize, gift, or monetary benefit that the recipient has won or is entitled or guaranteed to receive; or (3) an actual check or other item of value that can be claimed or redeemed [Bus. & Prof. Code § 22433(a)].

"Simulated check" does not include a nonnegotiable check, draft, note, or other instrument that is used for soliciting orders for the purchase of checks, drafts, notes, bonds, or other instruments, and this is clearly marked as a sample, specimen, or nonnegotiable [Bus. & Prof. Code § 22433(a)]. "Simulated check" also does not include any document indicating in a truthful and nonmisleading manner that a person, in fact, unconditionally has won or is entitled or guaranteed to receive a specific prize, gift, or amount of money or credit [Bus. & Prof. Code § 22433(a)].

[5] Certificate of Deposit

A "certificate of deposit" is a note of the bank; it is an acknowledgment by a bank of receipt of money and a promise to repay it [Com. Code § 3104(j); see Com. Code § 3104(e) ("note" defined); see also [2], *above*]. A certificate of deposit may be issued in either negotiable or nonnegotiable form. Certificates of deposit do not operate in the same way as other types of negotiable instruments. They are primarily used as deposit instruments, representing time deposits.

Simple time deposit certificates of deposit are usually nonnegotiable, while certificates of deposit for sums exceeding \$100,000 are usually negotiable and are commonly known as money market certificates [see Banking Law, Ch. 112, *Characteristics of Checks and Other Negotiable Instruments* (Matthew Bender)].

[6] Demand Draft

A "demand draft" is a written demand to a bank, for the purpose of charging a customer's account, that is created by a third person under the purported authority of the bank customer and is not signed by the customer [Com. Code § 3104(k)]. A demand draft must include the customer's account number and may contain any or all of the following: (1) the customer's printed or typewritten name, (2) a notation that the customer authorized the draft, and (3) a statement that no signature is required [Com. Code § 3104(k)]. A demand draft does not include a check purportedly drawn by and bearing the signature of a fiduciary [Com. Code § 3104(k); see Com. Code § 3307(a)(1) (fiduciary defined)], nor does it include an instrument bearing a forged or unauthorized customer signature [Stats. 1996, ch. 316, § 7 (uncodified expression of legislative intent in enacting Com. Code § 3104(k))].

Typical users of demand drafts would include telemarketers (in order to obtain payment from a bank customer's account as a means to pay a third party) and home banking service providers (as a means to pay themselves or others) [see Stats. 1996, ch. 316, § 7 (uncodified expression of legislative intent in enacting Com. Code § 3104(k))].

An important function of a demand draft is to shift the risk of loss for processing the instrument from the payor bank to the depository collecting bank, which is in the best position to prevent the unauthorized introduction of a demand draft into the check collection system by scrutinizing the customers allowed to deposit those drafts [see Stats. 1996, ch. 316, § 7 (uncodified expression of legislative intent in enacting *Com. Code* § 3104(k))]. Further, the demand draft creates an additional warranty to each transferee that the draft was authorized by the bank customer on whose account the draft is drawn [*Com. Code* § 3416(a)(6)].

For further discussion of demand drafts, see Banking Law, Ch. 112, *Characteristics of Checks and Other Negotiable Instruments* (Matthew Bender).

[7] Negotiated Order of Withdrawal

A "negotiable order of withdrawal" is an unconditional order by a savings account depositor to transfer money from the savings account to a third party on demand. These instruments, if drafted in negotiable form, are treated as negotiable instruments [see *Com. Code* § 3104(a)]. For discussion of the factors that make an instrument negotiable, see § 55.21.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsCharacteristicsGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsCharacteristicsUnconditional Order & PromiseCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsNegotiable & Nonnegotiable Instruments



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22-55 California Legal Forms--Transaction Guide §§ 55.14-55.19

[Reserved]

§§ 55.14[Reserved]



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CHAPTER 55 NEGOTIABLE INSTRUMENTS

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B. Negotiability

22-55 California Legal Forms--Transaction Guide § 55.20

§ 55.20 Negotiation

[1] Definition

"Negotiation" is the transfer of possession of a negotiable instrument by a nonissuer to a person who thereby becomes its holder [*Com. Code § 3201(a)*]. A "holder" is the person in possession of a negotiable instrument that is payable either to bearer or, to an identified person that is the person in possession [*Com. Code § 1201(b)(21)*]. The term also includes the person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession [*Com. Code § 1201(b)(21)*; see *Com. Code § 1201(b)(5)* ("bearer" defined)]. Thus, a "holder" can become a "holder in due course" only by negotiation [see *Com. Code § 3201(a)*; see also *Com. Code § 3302(a)* ("holder in due course" defined)]. For discussion of a holder's rights and the meaning of "holder in due course," see §§ 55.31-55.33. Although a negotiable instrument may be assigned by a simple transfer [see *Com. Code § 3203*] (such as when the instrument itself is used as collateral), it is usually transferred by negotiation. For detailed discussion of the requirements that an instrument must meet in order to be negotiable, see § 55.21.

[2] Rights Conferred by Negotiation

In general, negotiation gives the transferee all of the rights that were held by the transferor [*Com. Code § 3203(b)*]; a transfer of less than an entire instrument is not a negotiation and the transferee only has the rights of a partial assignee [*Com. Code § 3203(d)*]. For example, a person who signs a check as a drawer indicates by his or her signature an intent to be liable on the order stated in the check. When the payee or bearer transfers it by endorsing it, the drawer is then liable on the order to the transferee [see *Com. Code § 3401(a)*]. This feature renders negotiable instruments readily transferrable and, therefore, readily acceptable in commercial transactions.

There is an exception to the general rule that the transferee of a negotiable instrument acquires all of the rights that were held by the transferor. A transferee who has engaged in fraud or illegality affecting the instrument cannot acquire the rights of a holder in due course by transfer [*Com. Code § 3203(b)*].

[3] Effect of Negotiation Under Certain Circumstances

The act of negotiation effectively transfers the instrument even if obtained (1) from an infant, a corporation exceeding its powers, or a person without capacity; (2) by fraud, duress, or mistake; or (3) in breach of duty or as part of an illegal transaction [*Com. Code § 3202(a)*]. However, except as against a subsequent holder in due course, this type of negotiation may be rescinded or subject to other remedies as permitted by law [*Com. Code § 3202(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsHolders in Due CourseCommercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer & IndorsementNegotiation



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B. Negotiability

22-55 California Legal Forms--Transaction Guide § 55.21

§ 55.21 Requirements for Negotiability

[1] Overview

An instrument must be in writing [*see Com. Code § 3103(a)(6), (9)*]. If the instrument is a note, it must be signed by its maker; if it is a draft or check, it must be signed by its drawer [*Com. Code §§ 3103(a)(3), (5), (6), 3104(a)*]. To be negotiable, an instrument must contain an unconditional promise or order to pay a fixed amount of money [*Com. Code § 3104(a)*]; must be payable to order or to bearer [*Com. Code § 3104(a)(1)*]; and must be payable on demand or at a definite time [*Com. Code § 3104(a)(2)*]. In addition, a negotiable instrument must not contain any undertaking by the payor other than to pay money, except that it may contain the following [*Com. Code § 3104(a)(3)*]:

- A power to give, maintain, or protect collateral to secure payment;
 - An authorization or power to the holder to confess judgment or to realize on or dispose of collateral;
- or
- A waiver of any law intended to protect the obligor.

[2] Signature

[a] Overview

No one is liable on an instrument unless his or her signature appears on it [*Com. Code § 3401(a)*]. A "signature" may be made manually or by means of a device or machine and may be made by the use of any name, including a trade or assumed name, or by a word, mark or symbol [*Com. Code § 3401(b)*; *see Com. Code § 3308* (determining validity of signature)]. A person paying an instrument or taking it for value must exercise ordinary care in paying or taking the instrument insofar as the validity of a signature is concerned [*see Com. Code §§ 3404* (impostors), *3405* (fraudulent endorsement by employee), *3406* (forgery)]; *see also Newman v. Wells Fargo Bank* (2001) 87 Cal. App. 4th 73, 83-85, 104 Cal. Rptr. 2d 310 (complaint alleging that bank allowed plaintiff's employees to cash or deposit checks in their personal accounts despite suspicious circumstances indicating fraud stated cause of action under *Com. Code § 3405(b)*)

)).

[b] By Agent or Representative

A signature may be made by an agent or representative [Com. Code § 3401(a)(2)]. If a representative signs the name of the represented person or the name of the signer, the represented person is bound by the signature to the same extent as if the signature were on a simple contract; if the represented person is bound, the signature of the representative is the "authorized signature of the represented person" [Com. Code § 3402(a); see Com. Code § 3402(b), (c) (liability of representative)]. If the signature of more than one person is required to constitute the authorized signature of an organization, the signature of the organization is unauthorized if one of the requisite signatures is lacking [Com. Code § 3403(b); see *Edward Fineman Company v. Superior Court* (1998) 66 Cal. App. 4th 1110, 1124-1125, 78 Cal. Rptr. 2d 478 (amendment to Com. Code § 3403 providing that signature of organization is unauthorized if multiple signatures are required and one of required signatures is lacking was clarification of existing law and therefore operated retroactively)]. Unless ratified (or as otherwise permitted by Divisions 3 and 4 of the Commercial Code), an unauthorized signature is ineffective except in favor of a person who in good faith pays for the instrument or takes it for value [Com. Code § 3403(a); see Com. Code § 3403(c) (civil or criminal liability for unauthorized signature unaffected by ratification)]. For a form for ratification of an unauthorized signature, see § 55.320.

[3] Promise or Order

A "promise" is a written undertaking to pay money signed by the person undertaking to pay. The mere acknowledgment of an obligation to pay is not a promise unless the obligor also undertakes to pay [Com. Code § 3103(a)(9)]. Similarly, an "order" is a written instruction to pay money signed by the person giving the instruction. An authorization to pay is not an order unless the person so authorized is also instructed to pay [Com. Code § 3103(a)(6)]. An order may be addressed to one or more persons jointly or alternatively, but not in succession [Com. Code § 3103(a)(6)].

A promise or order is unconditional (and thus negotiable [see Com. Code § 3104(a)]) unless it states (1) an express condition to payment; (2) that the promise or order is governed by another writing; or (3) that related rights or obligations are stated in another writing [Com. Code § 3106(a)]. However, a reference to another writing, including a reference to another writing for rights relating to collateral, prepayment, or acceleration [Com. Code § 3106(b)], does not of itself make the promise or order conditional [Com. Code § 3106(a)]. A promise or order is not made conditional because (1) payment is limited to a particular source [Com. Code § 3106(b)]; (2) it requires a countersignature by a person whose signature appears on the promise or order as a condition to payment [Com. Code § 3106(c)]; or at the time it is issued or comes into possession by the holder, the promise or order contains a statement required by applicable law that the rights of the holder or transferee are subject to the claims and defenses of the issuer against the original payee [Com. Code § 3106(d)]. Furthermore, an instrument that is conditionally issued or is issued for a special purpose is binding on its maker or drawer, although failure of the condition or special purpose is a defense [Com. Code § 3105(b)].

[4] Money

A negotiable instrument must be payable in a fixed amount of money [Com. Code § 3104(a); see Com. Code § 1201(b)(24) ("money" defined); see also Com. Code § 3110]. If an instrument states the amount payable in foreign money, the instrument is payable in that currency or in an equivalent amount in dollars calculated by using the current bank-offered spot rate on the day and at the place of payment, unless the instrument provides otherwise [Com. Code § 3107].

[5] When Payment Is to Be Made

A negotiable instrument must be payable either on demand or at a definite time [Com. Code § 3104(a)(2)]. When an instrument is made payable on demand, it need not specify a time for payment and is payable at sight or at the will of the holder [Com. Code § 3108(a)].

A negotiable instrument is payable at a definite time if it is payable on elapse of a definite period of time after sight or acceptance, at a fixed date or dates, or at a time or times readily ascertainable at issue, subject to certain rights [*Com. Code § 3108(b)*]; *see Com. Code § 3108(b)* (rights); *see also § 55.13[3][a]*. Furthermore, if an instrument is payable at a fixed date, and is also payable on demand before that date, it is payable on demand until the fixed date and becomes payable at a definite time on the fixed date [*Com. Code § 3108(c)*].

[6] To Whom Payment Is to Be Made

[a] Overview

The person to whom an instrument is initially payable is determined by the intent of the person signing as or on behalf of the issuer, whether authorized or not [*Com. Code § 3110(a)*]. If the issuer's signature is made by an automated device, the payee is determined by the intent of the person who identified the payee [*Com. Code § 3110(b)*]. The instrument is payable to the person intended by the signer even if that person is identified incorrectly in the instrument [*Com. Code § 3110(a)*]. Furthermore, a person to whom an instrument is payable may be identified in any way, including by name, identifying number, office, or account number [*Com. Code § 3110(c)*]; *see Com. Code § 3110(c)(1)* (instruments payable to account numbers); *see also Com. Code § 3110(c)(2)* (instruments payable to entities other than natural persons)]. If an instrument is payable to two or more persons alternatively, it is payable to any of them and may be enforced by any or all of them in possession of the instrument. If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be enforced only by all of them. If an instrument payable to two or more persons is ambiguous on this issue, it is payable to the persons alternatively [*Com. Code § 3110(d)*].

A negotiable instrument must be payable either to bearer or to order [*Com. Code § 3104(a)(1)*]; *see [b], [c], below*].

[b] To Bearer

An instrument is payable "to bearer" if (1) it states that it is payable to bearer, to the order of bearer, or otherwise indicates that the person in possession is entitled to payment; (2) it does not state a payee; or (3) it states that it is payable to cash, to the order of cash, or otherwise indicates that it is not payable to an identified person [*Com. Code § 3109(a)*].

An instrument payable to an identified person may become payable to bearer if it is endorsed in blank [*Com. Code § 3109(c)*]; *see Com. Code § 3205(b)* (blank endorsement); *see also § 55.24[2][b]*].

[c] To Order

An instrument that is not payable to bearer is payable "to order" if it is payable to the order of an identified person or to an identified person or order. This type of instrument is payable to the identified person [*Com. Code § 3109(b)*].

An instrument payable to bearer may become payable to an identified person if it is specially endorsed [*Com. Code § 3109(c)*]; *see Com. Code § 3205(a)* (special endorsement); *see also § 55.24[2][b]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsCharacteristicsPayable on Demand or at Definite TimeCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsCharacteristicsUnconditional Order & PromiseCommercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer & IndorsementGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer & IndorsementNegotiationCommercial Law (UCC)Negotiable Instruments (Article 3)Party

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B. Negotiability

22-55 California Legal Forms--Transaction Guide § 55.22

§ 55.22 Conditions and Omissions That Do Not Affect Negotiability

[1] Place of Payment

The negotiability of an instrument is unaffected by whether it specifies a place of payment. Except as otherwise permitted by Division 4 of the Commercial Code, an instrument is payable at the place of payment stated in the instrument. If no place is stated, the place of payment is the address of the drawer or maker. If no address is stated, the place of payment is the place of business of the drawer or maker, or if there is no place of business, at his or her residence [*Com. Code § 3111*].

[2] Interest

Unless the instrument provides otherwise, it is not payable with interest [*Com. Code § 3112(a)*]. If interest is payable, it is payable from the date of the instrument [*Com. Code § 3112(a)*] and may be expressed as a fixed or variable rate or rates or amount of money [*Com. Code § 3112(b)*]. If the amount of interest payable cannot be ascertained from its description, it is payable at the judgment rate in effect at the place of payment and at the time interest first accrues [*Com. Code § 3112(b)*].

[3] Dates

The negotiability of an instrument is unaffected by the fact that it is undated, antedated, or postdated. If an instrument is undated, its date is the date of issue or, if unissued, the date the instrument comes into possession of the holder [*Com. Code § 3113(b)*]. If an instrument is antedated or postdated, the stated date determines the time of payment if the instrument is payable at a fixed period after the date [*Com. Code § 3113(a)*]. With one exception, an instrument payable on demand is not payable before the date of the instrument [*Com. Code § 3113(a)*]. The exception is that a bank may charge a check against an account before the date of the check unless the customer has given notice to the bank, describing the check with reasonable certainty [*Com. Code § 4401(c)*].

It is an unlawful business practice to require or request that a consumer issue a postdated check unless (1) the person accepting the check advises the consumer in writing that the check may be cashed immediately, regardless of the

postdating (unless the consumer files a postdating order with his or her bank [see *Com. Code* § 4401], and (2) the consumer acknowledges in writing receipt of the advice or the advice is printed on the invoice provided to the consumer at the time the check is solicited [*Bus. & Prof. Code* § 17538.6(a); see *Bus. & Prof. Code* § 17538.6(c) (definitions)]. This provision does not apply to a check recipient who will not cause a check to be submitted for collection until on or after its date [*Bus. & Prof. Code* § 17538.6(b)].

[4] Contradictory Terms

Contradictory terms do not render an instrument nonnegotiable. If an instrument contains contradictory terms, typewritten terms prevail over printed terms, handwritten terms prevail over both typewritten and printed terms, and words prevail over numbers [*Com. Code* § 3114].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDateCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsPlace of PaymentCommercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer & IndorsementGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 55 NEGOTIABLE INSTRUMENTS

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B. Negotiability

22-55 California Legal Forms--Transaction Guide § 55.23

§ 55.23 Incomplete and Altered Instruments

An "incomplete instrument" is a signed writing, whose contents show, at the time of signing, that although incomplete, the signer intended it to be completed by the addition of words or numbers [*Com. Code § 3115(a)*]. An instrument that is an incomplete instrument under *Com. Code § 3104* may be enforced according to its terms if it is not completed, or may be enforced according to its terms as augmented by completion [*Com. Code § 3115(b)*]. If an incomplete instrument is not an instrument under *Com. Code § 3104*, but on completion meets the requirements of *Com. Code § 3104*, the instrument may be enforced according to terms as augmented by completion [*Com. Code § 3115(b)*]. However, if completion is unauthorized, such completion constitutes an alteration [*Com. Code § 3115(c)*; see *Com. Code § 3407* ("alteration" defined)]. The burden of establishing that any completion is unauthorized is on the party asserting the lack of authority [*Com. Code § 3115(d)*].

"Alteration" is an unauthorized change in an instrument purporting to modify a party's obligations, or an unauthorized addition of words or numbers or other change to an incomplete instrument relating to a party's obligations [*Com. Code §§ 3407(a), 3115(c)*]. A fraudulent alteration discharges the party whose obligation is so affected, unless the party assents or is precluded from asserting the alteration [*Com. Code § 3407(b)*]. However, a payor bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration, may enforce rights according to the instrument's original terms or according to the instrument's terms as completed if an incomplete instrument was altered by an unauthorized completion [*Com. Code § 3407(c)*]. No other alteration discharges a party; and the instrument may be enforced according to its original terms [*Com. Code § 3407(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)EnforcementGeneral Overview



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22-55 California Legal Forms--Transaction Guide § 55.24

§ 55.24 Process of Negotiation

[1] Overview

If an instrument is payable to an identified person, negotiation (except by a remitter) requires transfer of possession of the instrument and its endorsement by the holder [*Com. Code § 3201(b)*; see *Com. Code § 3103(a)(11)*]. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone [*Com. Code § 3201(b)*]. "Transfer" of an instrument occurs when it is delivered by a person other than its issuer for the purpose of giving rights of enforcement to the receiver [*Com. Code § 3203(a)*; see *Com. Code § 1201(b)(15)* ("delivery" defined)]. Regardless of whether a negotiable instrument originates in order or bearer form, it may be changed from one form to the other by use of the appropriate words as part of the endorsement when the instrument is transferred [see [2][b], *below*].

[2] Endorsement

[a] Overview

The endorsement required to negotiate, restrict payment, or incur liability on an instrument is a signature (other than that of a signer as maker, drawer, or acceptor) made on the instrument, either alone or accompanied by other words [*Com. Code § 3204(a)*; see *Com. Code § 3401(a)* (person not liable on instrument unless person or person's agent signed instrument)]. An endorsement made by a person who is not the holder of an instrument is an "anomalous endorsement," which does not affect the negotiation of the instrument [*Com. Code § 3205(d)*]. A signature and its accompanying words is an endorsement regardless of the intent of the signer, unless the accompanying words, terms of the instrument, place of signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than endorsement [*Com. Code § 3204(a)*]. A transferee of an instrument transferred for value has a specifically enforceable right to the unqualified endorsement of the transferor, unless otherwise agreed [*Com. Code § 3203(c)*].

An endorsement may be placed anywhere on an instrument. The UCC contains no rules on the subject, except by implication from the provision that unless there is an unambiguous indication that the signature is made in some other capacity, it is an endorsement [see *Com. Code § 3204(a)*]. For the purpose of determining whether a signature is made

on an instrument, a paper affixed to the instrument is a part of the instrument [*Com. Code § 3204(a)*].

If an instrument is payable to a holder under an incorrect name, the holder may endorse the instrument in the name stated, in the holder's name, or in both names. However, signature in both names may be required by a person paying the instrument or taking it for value or collection [*Com. Code § 3204(d)*].

For discussion of the obligations of an endorser, see § 55.30[3]. For a guide to the procedures for making a proper endorsement and the use of special, blank, or restrictive endorsements, see § 55.120.

[b] Subsequent Negotiation by Special or Blank Endorsement

The subsequent negotiation of an instrument may be affected by the character of an endorsement. Endorsements may be "special" or "blank." A special endorsement specifies the person to whom or to whose order it makes the instrument payable. If there is a special endorsement, the instrument becomes payable to the identified person, and may be further negotiated only by his or her endorsement [*Com. Code § 3205(a)*]. A blank endorsement does not specify any particular person and may consist solely of the endorser's signature. An instrument payable to order and endorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially endorsed [*Com. Code § 3205(b)*]. A holder may convert a blank endorsement into a special endorsement by writing above the signature of the endorser words identifying the person to whom the instrument is made payable [*see Com. Code § 3205(c)*].

[c] Effect of Restrictive Endorsements

Generally, conditional endorsements that limit payment to a particular person or otherwise prohibit further transfer or negotiation, and endorsements that identify the endorsee as a fiduciary, do not effect transfer or negotiation of the instrument.

An endorsement that limits payment to a particular person or otherwise prohibits further transfer or negotiation does not prevent further transfer or negotiation of the instrument [*Com. Code § 3206(a)*]. An endorsement stating a condition on the right of the endorsee to receive payment does not affect the enforceability of the instrument by the endorsee, and the condition may be disregarded by a person paying the instrument or taking it for value or collection [*Com. Code § 3206(b)*]. If an endorsement is endorsed to the endorsee as an agent, trustee, or other fiduciary, that restriction does not affect a subsequent transferee or payor of the instrument unless the transferee or payor knows that the fiduciary dealt with the instrument or its proceeds in breach of the fiduciary duty [*Com. Code § 3206(d)*; *see Com. Code § 3307* (notice of breach of fiduciary duty)].

However, if an endorsement includes the words "pay any bank" or is in blank or to a particular bank "for deposit" or "for collection" or otherwise indicates the purpose of having the instrument collected by a bank for the endorser or for a particular account, transferees (other than intermediary banks) must pay or apply proceeds in accordance with the endorsement or the instrument will be considered converted [*Com. Code § 3206(c)*; *see Com. Code § 4201(b)*]. An endorsement "for deposit only," while restrictive, is also a blank endorsement because it does not specify where or for whose benefit the check is to be deposited [*Spencer v. Sterling Bank* (1998) 63 Cal. App. 4th 1055, 1059-1060, 74 Cal. Rptr. 2d 576 (bank's acceptance for collection of cashiers' checks endorsed "for deposit only," for deposit to third party's trust account, was not violation of restrictive endorsement)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer &
IndorsementIndorsementCommercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer &
IndorsementNegotiationCommercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer &

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22-55 California Legal Forms--Transaction Guide §§ 55.25-55.29

[Reserved]

§§ 55.25[Reserved]



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22-55 California Legal Forms--Transaction Guide § 55.30

§ 55.30 Obligations of Parties

[1] Overview

Unless the instrument provides otherwise, two or more persons having the same liability on an instrument are jointly and severally liable in the capacity in which they sign [*Com. Code § 3116(a)*]. Except by agreement or in cases involving an accommodation party [*see Com. Code § 3419(e)*; *see also* [4], *below*], a party having joint and several liability who pays the instrument is entitled to receive contribution from any party sharing that joint and several liability [*Com. Code § 3116(b)*]. The obligation of a party to an instrument to pay that instrument may be modified, supplemented, or nullified by a separate agreement made between the obligor and a person entitled to enforce the instrument if the instrument was issued or the obligation incurred in reliance on the agreement or as part of the same transaction giving rise to the agreement [*Com. Code § 3117*].

[2] Issuer, Acceptor, or Drawer

An "issuer" is the maker or drawer of an instrument, whether issued or unissued [*Com. Code § 3105(c)*]. An instrument is issued when it is first delivered to a holder or nonholder for the purpose of giving rights on it to any person [*Com. Code § 3105(a)*]. The issuer of an instrument is obliged to pay the instrument according to its terms at the time it was issued, or at the time it first came into a holder's possession, if not issued. If the issuer signed an incomplete instrument, he or she is obliged to pay the instrument according to its terms when completed [*Com. Code § 3412*; *see Com. Code §§ 3105(b)* (nonissuance as defense), 3115, 3407 (incomplete instruments)].

An "acceptor" of a draft is obliged to pay the draft according to its terms at the time of acceptance, or at the time of completion if the draft was initially incomplete [*Com. Code § 3413(a)*; *see Com. Code § 3115* (incomplete instruments)].

A "drawer" of a draft, other than a cashier's check or other draft drawn on the drawer [*see Com. Code § 3414(a)*], is obliged on dishonor of an unaccepted draft to pay the amount of the check or draft according to its terms at the time it was issued, at the time it came into possession of a holder if unissued, or at the time it was completed, if initially incomplete [*Com. Code § 3414(b)*]. However, a drawer may avoid the liability to pay an unaccepted dishonored draft

(other than a check), if the draft states it is drawn "without recourse" or otherwise disclaims liability [*Com. Code § 3414(e)*]. The drawer is discharged of all liability if the draft is accepted by a bank [*Com. Code § 3414(c)*]. If a draft accepted by an acceptor that is not a bank is dishonored, the drawer has the same obligation to pay as an endorser [*Com. Code § 3414(d)*; *see Com. Code § 3415* (liability of endorser); *see also* [3], *below*].

The above-described obligations of an issuer, acceptor, or drawer are owed to any person entitled to enforce the draft and to any endorser who fulfilled an obligation to pay a dishonored draft [*see Com. Code §§ 3412-3415*].

[3] Endorser

On dishonor, an "endorser" is obliged to pay the amount due on an instrument according to its terms at the time of endorsement. For an incomplete instrument, the endorser is obliged to pay the amount due at the time of completion [*see Com. Code §§ 3115, 3407*]. The endorser's obligation is owed to a holder or any subsequent endorser who fulfilled an obligation to pay the instrument [*Com. Code § 3415(a)*]. If an endorsement states that it is made "without recourse" or otherwise disclaims liability of the endorser, the endorser is not liable to pay the instrument [*Com. Code § 3415(b)*].

An endorser's liability is discharged in the following circumstances:

- If the required notice of dishonor of an instrument is not given to the endorser [*Com. Code § 3415(c)*; *see Com. Code § 3503*].
- If a draft is accepted by a bank after an endorsement is made [*Com. Code § 3415(d)*].
- If a check is not presented for payment, or is not given to a depository bank for collection, within 30 days after the day the endorsement was made [*Com. Code § 3415(e)*].

For further discussion of endorsement, *see § 55.24[2]*.

[4] Accommodation Party

[a] Guarantor of Payment

An "accommodation party" is one who signs an instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument; the party receiving the benefit of the value given is the accommodated party [*Com. Code § 3419(a)*; *see* [b], *below*]. The accommodation party is obliged to pay in the capacity, such as maker, drawer, acceptor, or endorser, in which he or she has signed, even though the taker knows of the accommodation [*Com. Code § 3419(b), (c)*]. A person signing an instrument is presumed to be an accommodation party if the signature is an anomalous endorsement or is accompanied by words indicating that the signer is acting as a surety or guarantor with respect to the obligation of another party to the instrument [*Com. Code § 3419(c)*]. An accommodation party who pays the instrument is entitled to reimbursement from, and can enforce the instrument against, the accommodated party [*Com. Code § 3419(e)*; *see Quality Wash Group V, Ltd. v. Hallak* (1996) 50 Cal. App. 4th 1687, 1701-1702, 58 Cal. Rptr. 2d 592 (after paying note at issue, accommodated party had no right of recourse against, and was not entitled to contribution from, accommodation parties pursuant to *Com. Code § 3419(e)*)]. In an action to enforce the obligation of an accommodation party to pay an instrument, the defenses of discharge in insolvency proceedings, infancy, and lack of legal capacity are not available to the accommodation party; otherwise, the accommodation party may assert any defense or claim in recoupment that the accommodated party could assert [*Com. Code § 3305(d)*].

[b] Guarantor of Collection

If the signature of a party to an instrument is accompanied by words unambiguously indicating that the party is

guaranteeing collection rather than payment of the obligation of another party, the signer is not an accommodation party [see [a], *above*]. The signer will be obliged to pay a person entitled to enforce the instrument only if (1) execution of judgment against the other party is returned unsatisfied, (2) the other party is insolvent or in an insolvency proceeding, (3) the other party cannot be served with process, or (4) it is otherwise apparent that payment cannot be obtained from the other party [*Com. Code* § 3419(d)].

[5] Warranties

[a] Overview

The warranties enumerated in regard to the presentment and transfer of instruments [see [b]-[d], *below*] cannot be disclaimed with respect to checks [*Com. Code* §§ 3416(c), 3417(e)]. Notice of a claim for breach must be given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, or the liability of the warrantor will be discharged to the extent of any loss caused by the delay in giving notice [*Com. Code* §§ 3416(c), 3417(e)]. The cause of action for breach of warranty accrues when the claimant has reason to know of the breach [*Com. Code* §§ 3416(d), 3417(f); see *Com. Code* §§ 3416(b), 3417(b), (d)(2) (damages)].

[b] Warranties on Presentment of Unaccepted Draft

If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, the person obtaining payment or acceptance and any previous transferor of the draft warrant to the drawee paying or accepting the instrument in good faith that the warrantor is entitled to enforce the draft or is authorized to obtain payment or acceptance on behalf of a person so entitled [*Com. Code* § 3417(a)(1)]. The warrantor also warrants that the draft has not been altered and that he or she has no knowledge that the signature of the drawer is unauthorized [*Com. Code* § 3417(a)(2), (3)]. If the draft is a demand draft, the warrantor also warrants that creation of the draft according to the terms on its face was authorized by the person identified as the drawer [*Com. Code* § 3417(a)(4); see *Com. Code* § 3417(h) (exception for transferor as transferee when transferor does not give warranty under applicable conflict of law rules)].

[c] Warranties on Presentment of Dishonored Draft or Other Obligation

If a dishonored draft is presented for payment to the drawer or an endorser, or any other instrument is presented for payment to a party obliged to pay, and payment is made in good faith, the person obtaining payment and a prior transferor warrant that the warrantor is (or was at the time of transfer) a person entitled to enforce the instrument or authorized to obtain payment on behalf of a person entitled to enforcement [*Com. Code* § 3417(d)(1)].

[d] Warranties of Transferor for Consideration

A person who transfers an instrument for consideration warrants to the transferee (and, if the transfer is by endorsement, to any subsequent transferee) that he or she is entitled to enforce the instrument, that all signatures are authentic and authorized, and that the instrument has not been altered [*Com. Code* § 3416(a)(1)-(3)]. In addition, the transferor warrants that the instrument is not subject to a defense or claim in recoupment of any party that can be asserted against the warrantor, and that the warrantor has no knowledge of any insolvency proceedings against the maker or acceptor, or against the drawer of an unaccepted instrument [*Com. Code* § 3416(a)(4), (5)]. An additional warranty to each transferee of a demand draft [see *Com. Code* § 3104(k) ("demand draft" defined); see also § 55.13[6]] is that the draft was authorized by the bank customer on whose account the draft is drawn [*Com. Code* § 3416(a)(6); see *Com. Code* § 3416(e) (exception for transferor as transferee when transferor does not give warranty under applicable conflict of law rules)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsMultiple
SignatoriesCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesGeneral OverviewCommercial
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(UCC)Negotiable Instruments (Article 3)Party LiabilitiesParty ObligationsCommercial Law (UCC)Negotiable
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22-55 California Legal Forms--Transaction Guide § 55.31

§ 55.31 Persons Entitled to Enforce Instruments

[1] Holders and Nonholders in Possession

A "holder" is the person in possession of a negotiable instrument that is payable either to bearer or, to an identified person that is the person in possession [*Com. Code § 1201(b)(21)*]. The term also includes the person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession [*Com. Code § 1201(b)(21)*; see *Com. Code § 1201(b)(5)* ("bearer" defined)]. As a transferee, a holder has all of the rights that were held by the transferor [*Com. Code § 3203(b)*]. A holder of an instrument is a person entitled to enforce it. A nonholder in possession of an instrument who has the rights of a holder is also a person entitled to enforcement [*Com. Code § 3301*].

[2] Persons Not in Possession Entitled to Enforcement

A person not in possession of an instrument is entitled to enforce it if all of the following conditions are satisfied [*Com. Code §§ 3301, 3309(a)*]:

- The person had possession of the instrument and was entitled to enforce it when possession was lost;
- Loss of possession did not result from a transfer by the person or a lawful seizure; and
- The person cannot reasonably obtain possession.

Possession cannot reasonably be obtained if the instrument was destroyed, if its whereabouts cannot be determined, or if it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process [*Com. Code § 3309(a)*].

A joint payee was held to have sufficiently alleged a cause of action for recovery of the amount of a check from the drawer under *Com. Code § 3309* when, with respect to the requirement that "the person had possession" before possession was lost, it alleged that it was a joint payee of a check which was delivered to a copayee who deposited the

check without obtaining plaintiff's endorsement or consent [*Crystaplex Plastics, Ltd. v. Redevelopment Agency of the City of Barstow* (2000) 77 Cal. App. 4th 990, 999-1000, 92 Cal. Rptr. 2d 197 (failure to allege plaintiff's actual possession of check was not fatal to cause of action because delivery of check to joint payee was sufficient to satisfy possession requirement)]. A person not in possession can also have the right to enforce a dishonored instrument. If the instrument was paid by mistake and the payor then recovered payment, the person from whom payment was recovered will be entitled to enforce the instrument [Com. Code §§ 3301, 3418(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)EnforcementHolders in Due CourseGeneral
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22-55 California Legal Forms--Transaction Guide § 55.32

§ 55.32 Restriction on Enforcement Rights of Persons Other Than Holders in Due Course

A person entitled to enforcement who is not a holder in due course [*see* § 55.33] takes the instrument subject to the following:

- A claim of a property right or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds [*Com. Code* § 3306];
- Any defense available if the person were enforcing a right to payment under a simple contract [*Com. Code* § 3305(a)(2)]; and
- A claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument [*Com. Code* § 3305(a)(3)].

Additionally, the obligor will not be obliged to pay if the obligor proves that the instrument is a lost or stolen instrument [*Com. Code* § 3305(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)EnforcementGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementLost, Destroyed & Stolen Instruments



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22-55 California Legal Forms--Transaction Guide § 55.33

§ 55.33 Holder in Due Course

[1] Overview

A "holder in due course" is a holder who takes an instrument for value, in good faith [*see Com. Code § 1201(b)(20)* ("good faith" defined)], and without notice that it is overdue [*see Com. Code § 3304* (when instrument is overdue)], that it has been dishonored, that there is an uncured default with respect to payment of another instrument issued as part of the same series, that the instrument contains an unauthorized signature, or that the instrument has been altered [*Com. Code § 3302(a)(2)*]. Furthermore, a holder in due course must take the instrument without notice of any claim of a property right or possessory right in the instrument or its proceeds and without notice that any party has a defense or claim of recoupment [*Com. Code § 3302(a)(2)*; *see Com. Code §§ 3306* (property claim), 3305(a)(3) (claim in recoupment); *see also Gentner v. Wells Fargo Bank*(1999) 76 Cal. App. 4th 1165, 1168-1170, 90 Cal. Rptr. 2d 904 (finding payee of check to be holder in due course under *Com. Code § 3302*)]. The holder in due course also must not have any reason, such as an irregularity in or incompleteness of the document, to call into question the authenticity of the instrument when it is issued or negotiated to the holder. Specifically, the instrument must not bear apparent evidence of forgery or alteration [*Com. Code § 3302(a)(1)*].

However, a holder who acquires an instrument in any of the following ways does *not* become a holder in due course, except to the extent a transferor or predecessor in interest has rights as a holder in due course, as follows [*Com. Code § 3302(c)*]:

- By legal process or by purchase in an execution, bankruptcy, creditor's sale, or similar proceeding;
- By purchase as a part of a bulk transaction not in transferor's ordinary course of business; or
- As the successor in interest to an estate or other organization.

In certain circumstances, a person entitled to enforcement may have rights as a holder in due course to less than the entire amount payable under the instrument [*see Com. Code § 3302(d)* (partial performance), (e) (security interest)].

For discussion of the rights of a holder in due course with respect to a negotiable instrument, see [4], *below*.

[2] For Value

A holder takes an instrument "for value" under the following conditions:

- If the instrument is issued or transferred for a promise of performance, to the extent that the promise has been performed [*Com. Code § 3303(a)(1)*];
- When the holder acquires a security interest or other lien in the instrument other than a lien obtained by a judicial proceeding [*Com. Code § 3303(a)(2)*];
- When the instrument is issued or transferred as payment of, or as security for, a prior claim against any person, whether or not the claim is due [*Com. Code § 3303(a)(3)*];
- When the holder gives a negotiable instrument for it [*Com. Code § 3303(a)(4)*]; or
- When the holder makes an irrevocable obligation to a third party in exchange for the instrument [*Com. Code § 3303(a)(5)*].

[3] Notice

[a] Overview

A person has "notice" of a fact when that person has actual knowledge of it, has received notice or notification of it, or has reason to know that it exists based on all the facts and circumstances known at the time in question [*Com. Code § 1202(a)*]. The filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument to one who would otherwise be a holder in due course [*Com. Code § 3302(b)*]. To be effective, notice must be received at a time and in a manner that will afford a reasonable opportunity to act on it [*Com. Code § 3302(f)*]. Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense, but the discharge will be effective against a person who became a holder in due course with notice of the discharge [*Com. Code § 3302(b)*].

[b] Notice of Claim or Defense When Instrument Taken From Fiduciary

Notice of a breach of fiduciary duty by the fiduciary is notice of the claim of the represented person [*Com. Code § 3307(b)(1)*]. A holder has notice of a breach of fiduciary duty when he or she knows that a fiduciary has negotiated the instrument in payment of or as security for the fiduciary's own debt, when the instrument has been taken in any transaction for the fiduciary's own benefit, or when the instrument has been deposited to an account other than an account of the fiduciary as such, or an account of the represented person [*Com. Code § 3307(b)(2), (4)*]; *but see Com. Code § 3304(b)(3)* (fact that person negotiating instrument is fiduciary not sufficient by itself to give notice)].

[4] Rights of Holder in Due Course

A holder in due course takes a negotiable instrument free of a claim of a property right or possessory right to the instrument on the part of any person [*Com. Code § 3306*]. In general, a holder in due course takes the instrument free from all defenses of all parties to the instrument with whom he or she has not dealt [*see Com. Code § 3305(b)*]; *see also Sharpe v. F.D.I.C. (9th Cir. 1997) 126 F.3d 1147, 1153* (transferees to whom bank tendered cashier's checks in lieu of wire fund transfer required by agreement were holders in due course)]. However, parties to the instrument may assert the following defenses [*Com. Code § 3305(b)*]: (1) infancy, to the extent that it is a defense to a simple contract; (2)

duress, lack of legal capacity, or illegality in the transaction that would render the obligation a nullity [*see* Ch. 75, *Formation of Contracts and Standard Contractual Provisions* (defenses to formation of contract)]; (3) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or essential terms; and (4) discharge of the obligor in insolvency proceedings [*Com. Code* § 3305(a)(1)]. The defenses that continue to be available against a holder in due course [*see Com. Code* § 3305(a)(1), (b)] are sometimes referred to as "real defenses," that is, defenses that go to the validity of the instrument itself.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)EnforcementHolders in Due CourseGeneral
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[Reserved]

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22-55 California Legal Forms--Transaction Guide § 55.40

§ 55.40 Need for Presentment and Acceptance

A check or draft does not of itself operate as an assignment of funds from a drawee. A drawee is not liable on a check or draft until he or she accepts it [*Com. Code § 3408*; *see Com. Code § 3409(a)* ("acceptance" defined); *see also § 55.42*]. Presentment is a demand for acceptance [*Com. Code § 3501(a)*]. Therefore, unless excused or waived [*see Com. Code § 3504*; *see also § 55.130*], presentment is a prerequisite to acceptance of a check or draft.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentPresentmentCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesAcceptance



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22-55 California Legal Forms--Transaction Guide § 55.41

§ 55.41 Presentment

[1] Overview

"Presentment" is a demand for acceptance of a draft made to the drawee, a demand for payment of an instrument made to the drawee or other party obliged to pay, or a demand for payment of a note or accepted draft payable at a bank made to the bank [*Com. Code § 3501(a)*]. Unless excused or waived [*see Com. Code §§ 3502(e), 3504(a)*; *see also § 55.130*], presentment for acceptance is necessary to enforce the obligations of the drawer and endorsers of an instrument in that the instrument must be duly presented before it can be dishonored and the drawer and endorsers must have notice of the dishonor, unless the notice is excused, before their obligations are enforceable [*see Com. Code §§ 3502 (dishonor), 3503 (notice of dishonor), 3504(b) (excuse of notice of dishonor)*]. If an instrument states that it is "payable through" or "payable at" a bank identified in the instrument, the instrument may be presented for payment only by or through the bank. That bank is designated as a collecting bank and the statement does not by itself authorize the bank to pay the instrument [*Com. Code § 4106*].

[2] Manner of Presentment

Presentment may be made at the place of payment of the instrument and must be made there if the instrument is payable at a bank in the United States. Presentment may be made by any commercially reasonable means, including an oral, written, or electronic communication, and is effective when the demand for payment or acceptance is received by the person to whom it is made. Presentment may be made to any one of two or more makers, acceptors, drawees, or other payors [*Com. Code § 3501(b)(1)*].

The person to whom presentment is made may demand that the person making presentment exhibit the instrument and give reasonable identification; evidence of authority may also be demanded if the presentment is made on behalf of another person. The person making presentment can also be required to sign a receipt on the instrument for any payment made or surrender the instrument if paid in full [*Com. Code § 3501(b)(2)*]. Presentment may be treated as occurring on the next business day after the day of presentment if it is made after an established cutoff hour not earlier than 2 p.m. [*Com. Code § 3501(b)(4)*].

For an outline of the procedure for presentment and acceptance, see § 55.131.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentPresentmentCommercial Law
(UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsPlace of Payment



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22-55 California Legal Forms--Transaction Guide § 55.42

§ 55.42 Acceptance

"Acceptance" is the drawee's signed agreement to pay a draft as presented. The acceptance must be written on the draft, and may consist of the drawee's signature alone [*Com. Code § 3409(a)*]. A signature may be made manually or by means of a device or machine and may be made by the use of any name, including a trade or assumed name, or by a word, mark, or symbol [*Com. Code § 3401(b)*]. Acceptance may be made at any time and becomes effective on delivery of the accepted draft for that purpose or when notification pursuant to instructions is given [*Com. Code § 3409(a)*].

A drawee may (but is not required to) accept a draft even though it has not been signed by the drawer, is otherwise incomplete, is overdue, or has been previously dishonored [*Com. Code § 3409(b)*; *see § 55.43*]. If a draft is payable at a fixed period after sight and the acceptance is not dated, the holder may complete the acceptance by supplying a date in good faith [*Com. Code § 3409(c)*]. A person entitled to demand acceptance may consent to a late acceptance [*see Com. Code § 3502(f)*].

Certification (that is, certification by the bank that funds have been reserved to make payment) of a check is acceptance. A bank has no obligation to certify a check, and refusal to certify is not dishonor of a check [*Com. Code § 3409(d)*; *see § 55.43*].

If the terms of the drawee's acceptance vary from the terms of the draft in any way, the holder may refuse the acceptance and treat the draft as dishonored. In that case, the drawee is entitled to cancel the acceptance [*Com. Code § 3410(a)*]. However, the terms of a draft are not varied by an acceptance to pay at a particular bank or place in the United States unless the acceptance makes payment there mandatory [*Com. Code § 3410(b)*]. If a holder agrees to an acceptance that varies the terms of the draft, each drawer and endorser who does not expressly assent to the acceptance is discharged [*Com. Code § 3410(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesAcceptance



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22-55 California Legal Forms--Transaction Guide § 55.43

§ 55.43 Dishonor

[1] Overview

An instrument is "dishonored" when presentment is duly made but acceptance or payment is refused or cannot be obtained within the time allowed [see *Com. Code § 3502*; see also §§ 55.131, 55.132]. Dishonor also occurs when presentment is excused and the instrument is not duly accepted or paid [*Com. Code § 3502(e)*; see *Com. Code § 3504* (waiver or excuse of presentment)]. The return of an instrument for lack of proper endorsement is not dishonor; nor is refusal of payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule [*Com. Code § 3501(b)(3)*].

Subject to any necessary notice of dishonor [see § 55.44], the holder has a right to enforce the obligations of the drawers and endorsers after an instrument is dishonored [see *Com. Code § 3503(a)*]. The rules governing dishonor of various instruments are enumerated below.

[2] Dishonor of Note

If a note is payable on demand, the note is dishonored if presentment is duly made to the maker and the note is not paid on the day of presentment [*Com. Code § 3502(a)(1)*]. If a note is not payable on demand and it is payable at or through a bank, or the terms of the note require presentment, the note is dishonored if presentment is duly made and the note is not paid on the day it becomes payable or on the day of presentment, whichever is later [*Com. Code § 3502(a)(2)*]; otherwise, the note is dishonored if it is not paid on the day it becomes payable [*Com. Code § 3502(a)(3)*].

[3] Dishonor of Unaccepted Check

If a check is duly presented to the payor bank otherwise than for immediate payment over the counter, the check is dishonored if the payor bank makes timely return of the check, sends timely notice of dishonor or nonpayment, or becomes accountable for the amount of the check [*Com. Code § 3502(b)(1)*; see *Com. Code § 4302* (payor bank's responsibility for late return of item)].

[4] Dishonor of Unaccepted Draft Other Than Check

An unaccepted draft payable on demand is dishonored if presentment is duly made to the drawee and the draft is not paid on the day of presentment [*Com. Code § 3502(b)(2)*]. If a draft is payable on a date stated in the draft and it is presented to the drawee for payment, the draft is dishonored if payment is not made on the date stated or the day of presentment, whichever is later. If the draft is presented for acceptance before the day it becomes payable, it is dishonored if it is not accepted on the day of presentment [*Com. Code § 3502(b)(3)*]. If a draft is payable on elapse of a period of time after sight or acceptance, the draft is dishonored if it is presented for acceptance and it is not accepted on the day of presentment [*Com. Code § 3502(b)(4)*]. In the case of an unaccepted documentary draft, payment or acceptance may be delayed without dishonor until no later than the close of the third business day of the drawee following the day on which payment or acceptance is required [*Com. Code § 3502(c)*].

[5] Dishonor of Accepted Draft

If a draft is payable on demand, it is dishonored if presented to the acceptor for payment and it is not paid on the day of presentment [*Com. Code § 3502(d)(1)*]. If the draft is not payable on demand, it is dishonored if it is presented to the acceptor for payment and it is not paid on the day it becomes payable or the day of presentment, whichever is later [*Com. Code § 3502(d)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentDishonorCommercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentPresentment



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22-55 California Legal Forms--Transaction Guide § 55.44

§ 55.44 Notice of Dishonor

Notice of dishonor is necessary to enforce the obligation of an endorser [*Com. Code § 3503(a)*]. Failure to give notice of dishonor discharges the liability of the endorser [*Com. Code § 3415(c)*; *see Com. Code § 3503*]. Notice of dishonor is also necessary to enforce the obligation of a drawer to pay a dishonored draft that was accepted by an acceptor other than a bank; failure to give this notice of dishonor discharges the liability of the drawer [*Com. Code §§ 3414(d), 3415(c), 3503(a)*]. Notice of dishonor may be excused under certain circumstances, as may delay in giving notice [*see Com. Code § 3504(b), (c)*; *see also § 55.130*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentDishonorCommercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentExcused Presentment & Notice



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22-55 California Legal Forms--Transaction Guide § 55.45

§ 55.45 Discharge From Liability

[1] Overview

The obligation of a party to pay an instrument can be discharged by an act or agreement with the party that would discharge an obligation to pay money under a simple contract [*Com. Code § 3601(a)*], by payment [*Com. Code § 3602(a)*; see [2], *below*], or by tender of payment [*Com. Code § 3603*; see [3], *below*]. A party's obligation to pay an instrument is not discharged by payment or otherwise against a person who acquired the rights of a holder in due course without notice of the discharge [*Com. Code § 3601(b)*].

[2] Discharge by Payment

The obligation to pay is discharged to the extent payment is made by or on behalf of the party obliged to pay and to a person entitled to enforcement of the instrument, even if the payment is made with knowledge of a claim of another person to the instrument [*Com. Code § 3602(a)*; see *Com. Code § 3306* (claims); see also *Com. Code § 3310* (payment by check or note)]. However, if a claim to the instrument is enforceable against the person receiving payment, payment will not discharge the obligation of the payor if the payor either (1) had knowledge that the payment was prohibited by injunction or similar process, or (2) in the case of an instrument other than a cashier's check, teller's check, or certified check, accepted from the claimant indemnity against loss resulting from the refusal to pay the person entitled to enforcement [*Com. Code § 3602(b)(1)*]. Payment does not discharge the liability of a payor who knows that the instrument is stolen and pays a person the payor knows is in wrongful possession of the instrument [*Com. Code § 3602(b)(2)*].

[3] Discharge Through Tender of Payment

The effect of tender made to a person entitled to enforcement is governed by the principles of law applicable to tender of payment under a simple contract [*Com. Code § 3603(a)*]. For discussion of tender of payment under a contract, see the Legal Background to Ch. 77, *Discharge of Obligations*. If tender of payment is made to a person entitled to enforcement and the tender is refused, the obligation of an endorser or accommodation party having a right of recourse is discharged to the extent of the amount of the tender [*Com. Code § 3603(b)*]. The tender of payment of the amount due

on an instrument to a person entitled to enforcement discharges the party tendering payment from all subsequent liability for interest [*Com. Code* § 3603(c)]. Tender is deemed to have been made if presentment is required and the obligor is able and ready to pay on the due date at every place of payment stated in the instrument [*Com. Code* § 3603(c)].

[4] Discharge Resulting From Act of Party Entitled to Enforcement

The agreement of a person entitled to enforcement not to sue or other renunciation of rights by a signed writing discharges the obligation of a party to pay. The obligation is also discharged by other intentional voluntary acts, including surrender of the instrument to the party obliged to pay, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge [*Com. Code* § 3604(a)]. The discharge of an obligation to pay, which discharge results from the agreement, renunciation, or other voluntary act of a person entitled to enforcement, does not discharge the obligation of an endorser (or drawer having the obligations of an endorser) or accommodation party having a right of recourse against the discharged party [*see Com. Code* § 3605(a), (b)]. However, under certain circumstances, the obligation of an endorser (or drawer having the obligations of an endorser) or accommodation party will be discharged if the actions of a person entitled to enforcement affect any right of recourse. If a person entitled to enforcement extends the payment due date or otherwise agrees to a material modification of a party's obligation, this discharges an endorser (or drawer having the obligations of an endorser) or accommodation party to the extent that the modification caused loss with respect to any right of recourse against the party whose obligation was modified [*Com. Code* § 3605(c), (d)]. If a person entitled to enforcement impairs the value of an interest in collateral securing the obligation of a party to pay, the obligation of an endorser or accommodation party having a right of recourse against the obligor is discharged to the extent of the impairment [*Com. Code* § 3605(e)] and the obligation of a party jointly and severally liable is discharged to the extent liability is increased by the impairment [*Com. Code* § 3605(f)].

[5] Effect of Fraudulent Alteration

The fraudulent alteration [*see Com. Code* § 3407(a) ("alteration" defined)] of an instrument discharges any party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration [*Com. Code* § 3407(b)]. However, a payor bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration, may enforce rights according to the instrument's original terms or according to the instrument's terms as completed if an incomplete instrument was altered by an unauthorized completion [*Com. Code* § 3407(c)]. No other alteration discharges a party [*Com. Code* § 3407(b)]. For discussion of what constitutes an alteration, see *Section 55.23*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Discharge & PaymentDischargeCommercial Law (UCC)Negotiable Instruments (Article 3)Discharge & PaymentPaymentCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesForgery & FraudCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesParty Obligations



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22-55 California Legal Forms--Transaction Guide §§ 55.46-55.49

[Reserved]

§§ 55.46[Reserved]



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22-55 California Legal Forms--Transaction Guide § 55.50

§ 55.50 Limitations on Requesting Credit Card Information in Negotiable Instrument Transactions

In general, a person accepting a negotiable instrument as payment for retail goods or services may not do any of the following [*Civ. Code § 1725(a)*]:

- Require the person paying with a negotiable instrument to provide a credit card as a condition of acceptance of the negotiable instrument, or record the number of the credit card [*Civ. Code § 1725(a)(1)*].
- Require, as a condition of acceptance of the negotiable instrument, or cause the person paying with a negotiable instrument, to sign a statement agreeing to allow his or her credit card to be charged to cover the negotiable instrument if returned as no good [*Civ. Code § 1725(a)(2)*].
- Record a credit card number in connection with any part of the transaction [*Civ. Code § 1725(a)(3)*].
- Contact a credit card issuer to determine if the amount of credit available to the person paying with a negotiable instrument will cover the amount of the negotiable instrument [*Civ. Code § 1725(a)(4)*].

This prohibition does not prevent a retailer from requiring the production of reasonable forms of positive identification, other than a credit card, as a condition of accepting the negotiable instrument [*Civ. Code § 1725(c)(1)*], or from requesting, but not requiring, a purchaser to voluntarily display a credit card as an indication of creditworthiness or as additional identification [*Civ. Code § 1725(c)(2)*]. The retailer can record only the type of credit card, issuer of the card, and expiration date of the card [*Civ. Code § 1725(c)(2)*]. All retailers who request the display of credit cards from customers must post signs to explain, or train employees to inform customers, that displaying credit cards is not required [*Civ. Code § 1725(c)(2)(A), (B)*].

It is permissible to request a credit card number as a condition of cashing a negotiable instrument that is being used solely to receive cash back from the person; to request a credit card number in lieu of requiring a deposit; to verify the purchaser's name, address, and telephone number; and to request the credit card number if the negotiable instrument is

being used to make a payment on that credit card account [*Civ. Code* § 1725(c)(3)-(6)].

Anyone intentionally violating these prohibitions is subject to civil penalties and injunctions [*Civ. Code* § 1725(e)-(g)]. For a discussion of similar limitations in credit card transactions, see Ch. 46, *Credit Card and Other Open-End Credit Transactions* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesAcceptance



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22-55 California Legal Forms--Transaction Guide § 55.51

§ 55.51 Check Cashing Businesses

[1] Definition

For purposes of *Civ. Code § 1789.30 et seq.*, a "check casher" is a person or entity that for compensation engages, in whole or in part, in the business of cashing checks, warrants, drafts, money orders, or other commercial paper serving the same purpose [*Civ. Code § 1789.31(a)*]. "Check casher" does not include the following [*Civ. Code § 1789.31(a)*]:

- A state or federally chartered bank, savings association, credit union, or industrial loan company; or
- A retail seller engaged primarily in the business of selling consumer goods, including consumables, to retail buyers that cashes checks or issues money orders for a minimum flat fee not exceeding \$2 as a service to its customers that is incidental to its main purpose or business.

[2] Permit Requirements

The owner of a check casher's business must obtain a permit from the Department of Justice to conduct a check casher's business [*Civ. Code § 1789.37(a)*]. Applications must be in writing, be signed by the applicant; if an individual or by a member or officer authorized to sign if the applicant is a corporation or other entity, and state the business name, business address, type of business, and whether the applicant intends to enter into deferred deposit agreements [*Civ. Code § 1789.37(b)*; see *Civ. Code § 1789.37(c), (d), (f)* (fees; permit renewal; uniform forms for applications and permits)]. Each applicant must be fingerprinted [*Civ. Code § 1789.37(b)*]. An application for a permit to conduct a check cashier's business will be denied if the applicant has a felony conviction involving dishonesty, fraud, or deceit, if the crime is substantially related to the qualifications, functions, or duties of a person engaged in the business of check cashing [*Civ. Code § 1789.37(e)*].

[3] Posting of Fee Schedule and Other Information

Every check casher must post a complete, detailed, and unambiguous schedule of all fees for the following, as applicable to the services provided [*Civ. Code § 1789.30(a)(1)*; see *Civ. Code § 1789.30(a)(2), (b)(2)* (cashier's reporting

requirements for check, or checks, exceeding \$10,000, cashed on or after January 1, 2006]):

- Cashing checks, drafts, money orders, or other commercial paper serving the same purpose.
- The sale or issuance of money orders.
- The initial issuance of any identification card.

Each check casher must also post a list of valid identification that is acceptable in lieu of identification provided by the check casher [*Civ. Code § 1789.30(a)(1)*].

The above information must be clear, legible, and in letters not less than a half inch in height. The information must be posted in a conspicuous location in the unobstructed view of the public within the check casher's premises [*Civ. Code § 1789.30(a)(1)*].

Failure to post information as required, or the imposition of fees or identification requirements contrary to the information posted, constitutes an unfair business practice within the meaning of *Bus. & Prof. Code § 17200* [*Civ. Code § 1789.32*].

[4] Transaction Requirements; Limitations on Fees

A check casher must not charge a fee for cashing a payroll check or government check in excess of the greatest of the following [*Civ. Code § 1789.35(a)*]:

- 3 percent of the face amount of the check, if identification is provided by the customer;
- 3.5 percent of the face amount of the check, without the provision of identification; or
- \$3.

Identification is limited to a California driver's license, a California identification card, or a valid U.S. military identification card [*Civ. Code § 1789.35(a)*].

A check casher may charge a fee for cashing a personal check, as posted pursuant to *Civ. Code § 1789.30* [see [3], above], for immediate deposit in an amount not to exceed 12 percent of the face value of the check [*Civ. Code § 1789.35(d)*].

A check casher may charge a fee of no more than \$10 to set up an initial account and issue an optional identification card for providing check cashing services. A replacement optional identification card may be issued at a cost not to exceed \$5 [*Civ. Code § 1789.35(b)(1)*]. After March 15, 2004, no fee may be charged for deferred deposit transactions [*Civ. Code § 1789.35(b)(2)*; for discussion of deferred deposits, see [6], below].

A check casher must provide a receipt to the customer for each transaction [*Civ. Code § 1789.35(c)*].

[5] Penalties for Violation; Civil Remedies

Any person who is injured by any violation of *Civ. Code § 1789.35* [see [4], above] may bring an action for the recovery of damages, an equity proceeding to restrain and enjoin those violations, or both. The amount awarded may be up to three times the damages actually incurred, but in no event less than the amount paid by the aggrieved consumer to a person subject to *Civ. Code § 1789.35*. If the plaintiff prevails, the plaintiff must be awarded reasonable attorney's fees

and costs. If a court determines by clear and convincing evidence that a breach or violation was willful, the court, in its discretion, may award punitive damages in addition to the amounts set forth above [*Civ. Code* § 1789.35(g)]. In addition, a willful violation of *Civ. Code* § 1789.35 is a misdemeanor [*Civ. Code* § 1789.35(f)].

[6] Deferred Deposit Transactions (Payday Loans)

[a] Governing Law

Effective December 31, 2004, payday loans (whether made by check-cashing businesses or by others) are governed by the California Deferred Deposit Transaction Law, a specialized statute dealing with these types of transactions [*Fin. Code* § 23000 *et seq.*].

Payday lenders make small, short-term loans to individuals who receive regular paychecks. Instead of signing a promissory note, on receiving the loan amount, the borrower hands the lender a personal check covering the loan amount plus the lender's transaction fee--which together may not exceed \$300, under California law--and the lender holds that check until an agreed due date, which may not be more than 31 days away, under California law [*Fin. Code* § 23035(a)]. The due date usually is the borrower's next payday, or the payday after next. On the due date, the lender may deposit the borrower's check, or present it to the borrower's bank for payment. When the lender operates a check cashing business (which often is the case), if the borrower brings a paycheck to be cashed on the due date, the lender could retain the loan amount (plus a check cashing fee) and hand over the remainder along with the borrower's personal check that covered the loan.

A deferred deposit transaction is defined as one in which the lender refrains from depositing a personal check written by a customer until a specific date, pursuant to a written agreement for a fee or other charge, as provided in *Fin. Code* 23035 [*Fin. Code* § 23001(a)].

[b] Transaction Requirements

A lender licensed under the Deferred Deposit Transaction law [*see Fin. Code* § 23005] may defer the deposit of a personal check written by a customer for up to 31 days, subject to the statutory requirements. The face amount of the check must not exceed \$300 [*Fin. Code* § 23035(a)].

Before entering into a deferred deposit transaction, the lender must distribute to customers a notice that includes, but need not be limited to, all of the following [*Fin. Code* § 23035(c)]:

- Information about charges for deferred deposit transactions.
- That if the customer's check is returned unpaid, the customer may be charged an additional fee of up to \$15.
- That the customer cannot be prosecuted in a criminal action in conjunction with a deferred deposit transaction for a returned check or be threatened with prosecution.
- The Department of Corporation's toll-free telephone number for receiving calls regarding customer complaints and concerns.
- That the licensee may not accept any collateral in conjunction with a deferred deposit transaction.
- That the check is being negotiated as part of a deferred deposit transaction made in accordance with *Fin. Code* § 23035 and is not subject to the provisions of *Civ. Code* § 1719 (imposing liability, including

treble damages, for passing a check on insufficient funds).

- That no customer may be required to pay treble damages if this check does not clear.

This notice must be in at least 10-point type and be written and available in the same language as principally used in any oral discussions or negotiations leading to execution of the deferred deposit agreement [*Fin. Code § 23035(f)*].

In addition, the lender must post, clearly and conspicuously, in the public's unobstructed view, in letters not less than half an inch high, a notice, stating [*Fin. Code § 23035(d)*]:

- That the lender cannot use the criminal process against a consumer to collect any deferred deposit transaction.
- The schedule of all charges and fees, with an example of all charges and fees that would be charged on at least a \$100 and a \$200 deferred deposit transaction, payable in 14 days and 30 days, respectively, giving the corresponding annual percentage rate.

Each deferred deposit must be made pursuant to a written agreement that has been signed by the customer and by the lender or its authorized representative [*Fin. Code § 23035(a)*].

The written agreement must contain all of the following [*Fin. Code § 23035(e)*; see *Fin. Code § 23035(h)* (prohibited provisions); see also Ch. 45, *Consumer Installment Loans and Credit Sales*, for discussion of Truth in Lending Act disclosures]:

- A full disclosure of the total amount of any fees charged for the deferred deposit transaction, expressed both in dollars and as an annual percentage rate (APR), as required under the Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] and regulations [*12 C.F.R. § 226.1 et seq.*].
- A clear description of the customer's payment obligations as required under the Truth in Lending Act and regulations.
- An itemization of the amount financed, as required under the Truth in Lending Act and regulations.
- The lender's name, address, and telephone number.
- The customer's name and address.
- The date to which deposit of the check has been deferred (due date).
- The payment plan, or extension, if applicable [*see Fin. Code § 23036(c)*].
- Any returned-check charges that could be applied.
- A statement that the customer cannot be prosecuted or threatened with prosecution to collect.
- A statement that the lender cannot accept collateral in connection with the transaction.
- A statement that the lender cannot make a deferred deposit transaction contingent on the purchase of another product or service.

- Signature spaces for the signatures of the customer and the lender.

If the lender sells or otherwise transfers the debt at a later date, the agreement must also contain a disclosure that any debt or checks held or transferred in a deferred deposit transaction made in accordance with *Fin. Code § 23035* are not subject to the provisions of *Civ. Code § 1719* (imposing liability, including treble damages, for passing a check on insufficient funds) and that no customer may be required to pay treble damages if a check is dishonored [*Fin. Code § 23035(e)*].

The agreement must be in at least 10-point type and be written and available in the same language as principally used in any oral discussions or negotiations leading to execution of the deferred deposit agreement [*Fin. Code § 23035(g)*].

A lender may not charge a fee for a deferred deposit transaction that exceeds 15 percent of the face amount of the check [*Fin. Code § 23036(a)*].

A fee not to exceed \$15 may be charged for the return of a dishonored check by a depository institution. This single fee charged is the exclusive charge for a dishonored check. No fee may be added for late payment [*Fin. Code § 23036(e)*]. No amount in excess of the amounts authorized by *Fin. Code § 23036* may be directly or indirectly charged by a lender pursuant to a deferred deposit agreement [*Fin. Code § 23036(f)*]. A lender may allow an extension of time, or a payment plan, for repayment of an existing deferred deposit transaction but may not charge any additional fee or charge of any kind in conjunction with the extension or payment plan [*Fin. Code § 23036(b)*].

A lender must not enter into an agreement for a deferred deposit with a customer during the period of time that an earlier written agreement for a deferred deposit for the same customer is in effect [*Fin. Code § 23036(c)*].

[c] Customer's Immunities

A customer cannot be prosecuted in a criminal action in conjunction with a deferred deposit transaction for a returned check or be threatened with prosecution [*see Fin. Code § 23035(c)(3)*].

A customer is not subject to the provisions of *Civ. Code § 1719* (imposing liability, including treble damages, for passing a check on insufficient funds) and may not be required to pay treble damages if a check is dishonored [*see Fin. Code § 23035(c)(6)*].

[d] Penalties for Misconduct; Civil Remedies

If the lender willfully charges, contracts for, or receives any amount other than, or in excess of, the charges or fees permitted by the Deferred Deposit Transaction Law [*Fin. Code § 23000 et seq.*], the deferred deposit transaction contract is void, and the lender has no right to collect or receive the principal amount provided in the transaction, or any charges, or fees, in connection with the transaction [*Fin. Code § 23060(a)*].

If the lender willfully violates any provision of the Deferred Deposit Transaction Law [*Fin. Code § 23000 et seq.*], the deferred deposit transaction contract is void, and no one has the right to collect or receive any amount provided in the transaction, or any charges, or fees in connection with the transaction [*Fin. Code § 23060(b)*].

Any person who is injured by any violation of the Deferred Deposit Transaction Law [*Fin. Code § 23000 et seq.*; *see [a]-[c] above*] may bring an action for the recovery of damages, an equity proceeding to restrain and enjoin those violations, or both. The amount awarded may be up to three times the damages actually incurred, but in no event less than the amount paid by the aggrieved consumer to a person subject to *Fin. Code § 23064*. If the plaintiff prevails, the plaintiff must be awarded reasonable attorney's fees and costs. If a court determines by clear and convincing evidence that a breach or violation was willful, the court, in its discretion, may award punitive damages in addition to the

amounts set forth above. On application, the court may also grant equitable relief, including, but not limited to, a claim for restitution and disgorgement [*Fin. Code* § 23064].

The rights, remedies, and penalties established by the Deferred Deposit Transaction Law [*Fin. Code* § 23000 *et seq.*] are cumulative to the rights, remedies, or penalties established under other laws. It is not necessary to exhaust administrative remedies in order to pursue the civil remedies provided for in this law [*Fin. Code* § 23064.5].

Deferred deposits made pursuant to a permit issued under former *Civ. Code* § 1789.37 before December 31, 2004, are subject to and enforceable under *Civ. Code* §§ 1789.30-1789.37, which governed deferred deposits prior to 2005 [*Fin. Code* § 23102].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral OverviewContracts LawNegotiable InstrumentsGeneral OverviewGovernmentsState & Territorial GovernmentsLicenses



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CHAPTER 55 NEGOTIABLE INSTRUMENTS

PART II. LEGAL BACKGROUND

E. Limitations on Retailers

22-55 California Legal Forms--Transaction Guide §§ 55.52-55.99

[Reserved]

§§ 55.52[Reserved]



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A. Client Interview--Facts and Documents

22-55 California Legal Forms--Transaction Guide § 55.100

§ 55.100 Facts and Documents Related to Negotiable Instruments in General

[1] Facts

1. Nature of underlying transaction, for example:

- a. Purchase and sale of goods.
- b. Purchase and sale of real property.

NOTE:

Real estate financing and the promissory notes used in that type of financing are covered in Ch. 25, *Real Estate Loans* , and Ch. 25A, *Security Interests for Real Estate Financing* .

c. Commercial loan or credit involving auxiliary documents, such as:

- (1) Documents of title (warehouse receipts or bills of lading).
- (2) Letters of credit.
- (3) Drafts.

d. Consumer loan or credit.

e. Secured or unsecured transaction.

NOTE:

For coverage of secured transactions, see Ch. 42, ***Secured Transactions*** . Commercial loans are covered in Ch. 43, ***Commercial Loans*** . For coverage of consumer loan transactions, see Ch. 45, ***Consumer Installment Loans and Credit Sales*** .

2. Names, titles, and addresses of parties or officers of parties authorized to sign or endorse negotiable instruments.

[2] Documents

1. Financial reports relating to obligated parties:

NOTE:

Although these documents ordinarily will not be needed in the actual preparation of a negotiable instrument, they should be required by any lender to determine the financial soundness of a prospective borrower or guarantor.

- a. Copies of financial statements for preceding years:

- (1) Balance sheets.

- (2) Profit and loss statements.

- b. Credit reports on obligated parties.

2. Copies of documents previously used in similar transactions between same parties:

NOTE:

These documents may be helpful as guides to drafting new or revised documents for use in a current transaction. Consultation with the client with these documents in hand may also reveal problems that new documents can be drafted to cure.

- a. Promissory notes.

- b. Drafts and accompanying documents.

- c. Bills of lading.

- d. Warehouse receipts.

- e. Letters of credit.

- f. Security agreements.

- g. Financing statements.

3. Copy of proposed or existing underlying contract or other obligation involved in current transaction.

4. Copies of instruments proposed for use in current transactions between same parties.

5. If any party is to execute documents in representative capacity, copy of that person's authority to do so:

a. Corporate or partnership resolution.

NOTE:

See Ch. 5, *Directors' Meetings, Actions, and Resolutions* , for resolution forms.

b. Power of attorney.

NOTE:

For a power of attorney to execute negotiable instruments, see Ch. 98, *Powers of Attorney*

.

c. Will and any implementing court orders.

d. Trust agreement.

e. Other document of authority.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Overview



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PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

22-55 California Legal Forms--Transaction Guide § 55.101

§ 55.101 Facts Related to Promissory Notes

1. Date on which borrower will require funds.

2. Amount to be borrowed.

3. Maturity date.

4. Payment arrangements:

NOTE:

For promissory notes containing examples of the following types of payment arrangements, see *Sections 55.200-55.206*.

a. Lump sum amount and due date.

b. Fully amortized installment amounts and dates.

c. Partially amortized installment amounts, installment dates, and date and amount of final "balloon" payment.

5. Whether payment is to be subject to acceleration:

NOTE:

For examples of complete notes containing acceleration provisions, see *Sections 55.201-55.203*. Individual acceleration provisions are *set forth in Section 55.231*.

- a. In event of default.
- b. On occurrence of other event.

6. Location where note will be:

- a. Executed.
- b. Payable.

NOTE:

There is no requirement that a negotiable instrument state the place of payment [*see Com. Code § 3111*]. However, the parties may wish to agree on a place of payment that is mutually convenient. Moreover, since presentment may be made at the place of payment (and must be made there if the instrument is payable at a bank in the United States) a place of payment should be stated in order to specify the place of presentment [*see Com. Code § 3501(b)(1)*].

7. Whether note is to be secured by:

- a. Personal obligation of borrower.
- b. Collateral security under either:
 - (1) Security agreement covering personal property.

NOTE:

Complete notes providing for collateral are set forth in *Sections 55.205 and 55.206*. Additional collateral provisions are included in *Section 55.300*.

- (2) Deed of trust or mortgage covering real estate.

8. Whether note is to be further secured by obligation of accommodation party or guarantor.

NOTE:

For discussion of accommodation and guaranty, see *Section 55.30[4][a], [b]*. For a checklist of relevant facts, see *Section 55.103*. The procedures involved are set forth in *Section 55.121*. An accommodation and a guarantee of collection of a note are contained in *Section 55.321[2]*.

9. Which acts of debtor will constitute default, for example:

- a. Failure to make timely payment of principal and interest.
- b. Filing of petition for bankruptcy.
- c. Filing application for receivership.

10. Whether late charge provisions are desired.

NOTE:

For late charge provisions, see *Sections 55.202 and 55.240*.

11. Whether prepayment is to be permitted or penalized.

NOTE:

For prepayment provisions to include in a promissory note, see *Sections 55.250* (prepayment penalty) and *55.251* (prepayment permitted).

12. Whether time extension provisions are desired.

NOTE:

For a provision under which a time extension can be granted, see *Section 55.260*.

13. Whether payment is to be limited to particular fund or source.

NOTE:

For discussion of such a limitation as a condition and its effect on negotiability, and a provision limiting payment to the assets of some of the more common forms of businesses (partnership, unincorporated association, trust, or estate), see *Section 55.270*.

14. Whether payment is to be in United States or foreign currency.

NOTE:

A provision for payment in a foreign currency is illustrated in *Section 55.271*.

15. Name or names of payees, and, if more than one payee, whether payment will be to:

NOTE:

A provision for payment to alternate payees is set forth in *Section 55.280*; a provision for payment to joint payees is illustrated in *Section 55.281*.

a. Alternative payees.

b. All payees jointly.

16. If multiple borrowers are involved, whether they will be jointly, severally, or jointly and severally liable.

NOTE:

See *Section 55.290* for discussion of the liability of multiple makers.

17. Whether collection cost provisions are desired.

18. Whether presentment, notice of dishonor, and protest are to be waived.

NOTE:

Failure to make presentment or to give notice of dishonor as required may be a defense to a maker, drawer, or endorser [*see Com. Code § 3501(a)(3)(B)*]. Thus, waiver is commonly used in negotiable instruments.

19. Place where loan proceeds are to be paid or deposited, either:

a. Address of payee.

b. Name and address of payee's bank.

20. Whether statute of limitations is to be waived.

NOTE:

For a waiver provision, see *Section 55.323*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsNegotiable & Nonnegotiable InstrumentsCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsPlace of Payment



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A. Client Interview--Facts and Documents

22-55 California Legal Forms--Transaction Guide § 55.102

§ 55.102 Facts Related to Drafts

NOTE:

Ordinarily, drafts are used as the medium of payment for goods or services under a contract between a buyer and a seller or for goods in export-import transactions. Drafts used in export-import transactions are set forth in Ch. 56, *Letters of Credit and Electronic Fund Transfers* .

1. Date on which draft is to be issued.

2. Name and address of drawer.

NOTE:

The drawer is the party who signs the draft as a person ordering payment, generally the seller.

3. Name and address of payee.

NOTE:

The payee is the party to whom payment is to be made, generally the seller.

4. Name and address of drawee or payor.

NOTE:

The drawee is the party ordered in the draft to make payment, generally the buyer.

5. Amount of draft.

6. Place where draft is to be issued.

7. Time when draft is to be paid, either:

a. At sight or at will of holder.

b. On specific date.

c. At specific time after sight.

8. Terms for acceptance:

a. Receipt by drawee of documents of title.

b. Receipt by drawee of documents of title and certification of quantity or quality of goods.

9. If draft is issued in connection with letter of credit:

NOTE:

A letter of credit (whether domestic or international) is issued by a bank or other issuer that agrees to honor drafts or other payment demands on compliance with the conditions stated in the credit. Ordinarily, a seller will require a letter of credit as an assurance that any drafts drawn to facilitate the transaction will be accepted. For coverage of letters of credit as they are used in international transactions, see Ch. 56, ***Letters of Credit and Electronic Fund Transfers*** .

a. Amount of credit.

b. Date of issuance.

c. Date of expiration.

d. Name and address of party who will receive payment of drafts drawn against credit.

e. Name and address of bank issuing credit.

f. Name and address of advising or confirming bank.

NOTE:

An advising bank is a bank that gives notification of the issuance of a letter of credit by another bank [*Com. Code* § 5102(a)(1)].

A confirming bank is a bank that promises either to honor a credit issued by another bank, or that the credit will be honored by the issuer or a third bank [*Com. Code* § 5102(a)(4)]. By confirming a credit, a confirming bank becomes directly obligated on the credit to the extent of its confirmation [*Com. Code* § 5107(a)].

g. Name and address of party requesting issue of letter of credit, if other than party receiving payment of

drafts drawn against letter.

h. Whether letter is revocable or irrevocable.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Letters of Credit (Article 5) General Overview Commercial Law (UCC) Letters of Credit
(Article 5) Issuers General Overview



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A. Client Interview--Facts and Documents

22-55 California Legal Forms--Transaction Guide § 55.103

§ 55.103 Facts Related to Accommodation and Guarantee of Collection Agreements

NOTE:

For general coverage of suretyship law [*see Civ. Code §§ 2787-2855*] and procedure, see Ch. 79, ***Suretyship, Guaranty, and Indemnity***. For a guide to the procedures applicable to accommodation and guarantees of negotiable instruments, see *Section 55.121*. Accommodation and guarantee of collection agreements are set forth in *Section 55.321*.

1. Whether individual will be asked to sign either as:

a. Accommodation party.

NOTE:

An accommodation party is one who signs an instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument [*Com. Code § 3419(a)*]. For discussion of the liability of an accommodation party, see *Section 55.30[4]*.

b. Guarantor of collection.

NOTE:

A guarantor is one whose signature and accompanying words to an instrument unambiguously indicate that he or she guarantees collection rather than payment of the obligation [*Com. Code § 3419(d)*]. For discussion of the liability of a guarantor, see *Section 55.30[4][b]*.

2. Name, address, and telephone number of accommodation party or guarantor of collection.

3. Whether accommodation party or guarantor is:

- a. Party to instrument (for example, maker or drawer, endorser, or acceptor).
- b. Third party.

4. Whether accommodation or guaranty is to be absolute or conditional.

NOTE:

For alternative provisions and related discussion, see *Section 55.321*.

5. Date on which accommodation or guaranty is to be executed.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesAccommodationCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesParty Obligations



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22-55 California Legal Forms--Transaction Guide §§ 55.104-55.109

[Reserved]

§§ 55.104[Reserved]



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PART III. TRANSACTION GUIDE

B. Preliminary Determinations

22-55 California Legal Forms--Transaction Guide § 55.110

§ 55.110 Determinations for Use of Negotiable Instruments in General

NOTE:

Notes, drafts, checks, certificates of deposit, and demand drafts are negotiable instruments [*Com. Code § 3104(e)-(k)*], as are orders that fall within the definition of check and are otherwise negotiable but not payable to bearer or to order at the time they are issued or first come into possession of the holder [*Com. Code § 3104(c)*; *see Com. Code §§ 3103(a)(6)* ("order" defined), *3104(f)* ("check" defined)].

1. Should instrument be drafted in negotiable or nonnegotiable form?

NOTE:

All instruments, whether negotiable or nonnegotiable, may be transferred [*see Com. Code § 3203(b)*]. However, negotiation is a special form of transfer, the importance of which lies in the fact that it makes the transferee a holder [*see Com. Code § 1201(b)(21)*]. Only a holder of a negotiable instrument may become a holder in due course [*see Com. Code § 3302(a)*; *see also § 55.33*]. A holder in due course takes an instrument free of claims of a property right or possessory right to the instrument by any person [*Com. Code § 3306*], free of all defenses of parties to the instrument with whom the holder has not dealt [*Com. Code § 3305(b)*], and free of most defenses of parties to the instrument [*Com. Code § 3305(a)(1), (b)*]. This feature renders negotiable instruments readily transferrable and, therefore, more readily acceptable in commercial transactions than nonnegotiable instruments, for which there can be no holder in due course [*see Com. Code § 3302(a)*; *see also Gentner v. Wells Fargo Bank* (1999) 76 Cal. App. 4th 1165, 1168-1170, 90 Cal. Rptr. 2d 904 (finding payee of check to be holder in due course under § 3302)]. For discussion of the rights of holders and holders in due course, see §§ 55.31 through 55.33.

2. What type of instrument is required to accomplish payment?

a. Draft:

NOTE:

A draft is a written instruction to pay money signed by the person instructing payment [*Com. Code* §§ 3103(a)(6), 3104(e)]. A draft is not necessarily drawn on a bank or payable on demand [*see Com. Code* § 3104(e)]. For further discussion, see § 55.13[3], and Hart & Willier, *Forms and Procedures Under the Uniform Commercial Code*, P 31.08[3] (Matthew Bender).

(1) Bill of exchange (draft to be used in international transactions).

(2) Documentary draft.

NOTE:

A documentary draft is a draft that requires accompanying documents, securities, or other papers be received by the payor before acceptance or payment [*Com. Code* § 4104(a)(6)]. For further discussion, see *Section 55.13[3][b]*.

(3) Trade acceptance.

NOTE:

A trade acceptance is a draft drawn by a seller of goods against the purchaser (the drawee) rather than a bank. The payee may be the drawer or a third party. Acceptance is made by the purchaser. However, the seller generally does not present the trade acceptance to the purchaser for acceptance and payment. Rather, the seller usually raises cash from it by endorsing and transferring it. For further discussion, see *Section 55.13[3][c]*.

b. Check.

NOTE:

A check is a draft (other than a documentary draft) drawn on a bank and payable on demand [*Com. Code* § 3104(f); *see* § 55.13[4]].

3. If extension of credit is involved, what type of note should be used to evidence the promise to make payment and the terms of the promise?

NOTE:

A note (also known as a promissory note) is a promise to make payment [*Com. Code* § 3104(e)]. For further discussion of promissory notes and examples of basic note terms, see *Section 55.200*.

a. Time note.

NOTE:

A time note is an express promise to pay the amount of money stated at a specified future date [*see* F. Hart & W. Willier, *Bender's U.C.C. Service, Commercial Paper*, ch. 1A, *Types of Money Paper Currently in Use* (Matthew Bender)]. For an example of a time note, see *Section 55.200 [2]*, first alternative.

b. Short-term promissory note.

NOTE:

A short-term promissory note is a simple unsecured time note that has a maturity not exceeding nine months. A short-term promissory note is drafted with that time limit because a note with a maturity not exceeding nine months is exempt from the registration and prospectus requirements of the federal Securities Act of 1933 [*see* 15 U.S.C. § 77c(a)(3)]. For coverage of debt securities, see Ch. 6J, *Issuance of Debt Securities* .

c. Demand note.

NOTE:

A demand note is payable on demand, that is, immediately after its issuance. It is used to extend credit as long as the maker performs the obligation involved, such as making installment payments. A demand note may be used in conjunction with a formal or informal performance agreement between the maker and the payee. For an example of a demand note, see *Section 55.200[2]*, second alternative.

A demand note is to the payee's advantage if the maker's credit is likely to become unreliable, because default by the maker need not occur before the payee may demand payment [*see* F. Hart & W. Willier, *Bender's U.C.C. Service, Commercial Paper*, ch. 1A, *Types of Money Paper Currently in Use* (Matthew Bender)].

d. Bearer note.

NOTE:

An instrument is payable to bearer if it (1) states it is payable to bearer, to the order of bearer, or to the person in possession; (2) does not state a payee; or (3) states that it is payable to cash, to the order of cash, or otherwise indicates that it is not payable to an identified person [*Com. Code* § 3109(a)]. A single note could qualify as both a "demand" and a "bearer" note.

e. Interest-included installment note with interest payable with each installment on remaining balance.

NOTE:

For an example of such a note, see *Section 55.200 [2]*, third alternative.

f. Installment note providing for payment of principal and interest:

(1) In installments until stated date.

(2) For specified number of installments with balance remaining unpaid at that time due in lump sum ("balloon payment").

NOTE:

For a balloon payment note, see *Section 55.204*.

g. Straight or interest-only note with principal payable in lump sum ("balloon payment") on maturity of note.

h. Discounted note payable in:

NOTE:

A discounted note is one in which interest is predetermined and deducted from the principal before disbursement of the principal to the borrower. For an example of a discounted note, see *Section 55.200 [2]*, fourth alternative.

(1) Lump sum.

(2) Installments.

i. Interest-extra note with provision for payment of principal and interest in separate installments.

j. Variable-rate note.

NOTE:

A variable-rate note provides for changes in interest rates based on extraneous factors such as the cost of funds or the consumer price indices. Such notes may be used only in connection with real estate loans [*see Civ. Code §§ 1916.5(b)(1), 1916.7(b), 1916.8*]. These loans are covered in Volume 5A, Ch. 25, ***Real Estate Loans***.

4. Should money be invested through use of certificate of deposit?

NOTE:

A certificate of deposit is an instrument containing acknowledgment by a bank of receipt of the depositor's money and a promise to repay it [*Com. Code § 3104(j)*]. For further discussion of certificates of deposit, see *Section 55.13[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)EnforcementHolders in Due CourseGeneral

OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions &

DefinitionsDefinitionsNegotiable & Nonnegotiable InstrumentsCommercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer & IndorsementNegotiation



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PART III. TRANSACTION GUIDE

B. Preliminary Determinations

22-55 California Legal Forms--Transaction Guide § 55.111

§ 55.111 Determinations for Use of Promissory Notes

1. What interest rate is legally applicable?

NOTE:

For discussion of the interest rates that are legal in California, see *Section 55.200[1][f][x]*.

2. Should note contain acceleration provisions?

NOTE:

For discussion of the legal consequences of acceleration provisions, see *Section 55.231[1]*.

3. Should note specify place of payment?

NOTE:

If the instrument does not state a place for payment, it is payable at the maker's business or residence, if there is no place of business [*Com. Code § 3111*]. If an instrument states that it is "payable through" or "payable at" a bank identified in the instrument, the instrument may be presented for payment only by or through the bank; that bank is designated as a collecting bank and the statement does not by itself authorize the bank to pay the instrument [*Com. Code § 4106*].

4. Should note be secured by either:

a. Security agreement.

NOTE:

A security agreement is used to secure the payment of a note with personal property or fixtures as collateral. For coverage of secured transactions, see Volume 9, Ch. 42, ***Secured Transactions***.

b. Deed of trust or mortgage on real property used as security.

NOTE:

Real estate financing is covered in Volume 5A, Chapters 25, ***Real Estate Loans***, and 25A, ***Security Instruments for Real Estate Financing***.

5. Should note contain late charge provisions?

NOTE:

For discussion of the law applicable to late charges, see *Section 55.202[1][b]*.

6. Should note contain provisions permitting or penalizing prepayment?

NOTE:

For discussion of prepayment, see *Sections 55.250 and 55.251*, and Volume 5A, Ch. 25A, ***Security Instruments for Real Estate Financing***.

7. Should note include time extension provisions?

NOTE:

For discussion of time extensions, see *Section 55.260[1][b]*.

8. Should note limit payment to a particular fund or source?

NOTE:

A negotiable instrument may be limited to a particular fund or source without making it conditional and, thus, nonnegotiable [*Com. Code § 3106(b)*]. For discussion of such a limitation as a condition and a provision limiting payment to the assets of some of the more common types of business organizations, see *Section 55.270*.

9. What statute of limitations period applies and can it be waived?

NOTE:

For discussion of the statutes of limitations applicable to notes, and a waiver of the statute, see *Section 55.323*.

10. Will instrument be secured by obligations of accommodating party or guarantor of collection?

NOTE:

For discussion of the obligation of an accommodation party or guarantor, see *Section 55.30[4][a]*, *[b]* and *55.32[1]*. For a procedural guide to accommodation or guaranty, see *Section 55.121*.

11. Must note contain consumer protection notices or legends?

NOTE:

For discussion of consumer protection notices, see *Section 55.200[1][h]*. For further discussion, see Volume 9, Ch. 45, ***Consumer Installment Loans and Credit Sales***.

12. Should note contain confession of judgment provision?

NOTE:

For discussion of the legal restrictions on confession of judgment provisions and the consequences of their use, see *Section 55.200[1][f][vi]*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsNegotiable & Nonnegotiable InstrumentsCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsPlace of PaymentCommercial Law (UCC)Secured Transactions (Article 9)General Overview



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22-55 California Legal Forms--Transaction Guide §§ 55.112-55.119

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 55 NEGOTIABLE INSTRUMENTS

PART III. TRANSACTION GUIDE

C. Procedural Guide

1. Negotiation Procedures

22-55 California Legal Forms--Transaction Guide § 55.120

§ 55.120 Procedural Guide to Endorsement and Delivery of Negotiable Instruments

NOTE:

The requirements for negotiability [*see Com. Code § 3104(a)*] are discussed in *Section 55.21*. The following checklist covers the procedures for negotiation of an instrument. In general, an instrument payable to order is negotiated by delivery with any necessary endorsement, while an instrument payable to bearer may be negotiated by delivery alone [*Com. Code § 3201(b)*].

The procedures for endorsement and delivery of negotiable instruments are *covered in Section 55.120*. The procedures for endorsement by an accommodation party or guarantor of collection are *set forth in Section 55.121*. Post-negotiation procedures are *outlined in Sections 55.130-55.132*.

NOTE:

In the absence of restrictive language [*see P 6, below*], an endorser is obliged on dishonor, and any necessary notice of dishonor, to pay the unaccepted instrument according to its terms as of the time of the endorsement, or as of the time of completion if the endorser endorsed an incomplete instrument, to the holder or any subsequent endorser who fulfilled an obligation to pay the instrument [*Com. Code § 3415(a)*]. The liability of an endorser of a check is discharged if the check is not presented for payment or given to a depository bank for collection within 30 days after the day the endorsement was made [*Com. Code § 3415(e)*]. For further discussion of endorsement, see *Section 55.24[2]*.

1. Have payee or holder sign as endorser [*Com. Code § 3204(a)*; *see Com. Code § 3204(b)*]:

- a. By or on behalf of holder.
- b. On instrument or on paper affixed to instrument.

NOTE:

An endorsement may be placed anywhere on an instrument or on an attachment to the instrument. The UCC contains no rules on the subject, except by implication that unless there is an unambiguous indication that the signature is made in some other capacity, it is an endorsement [*see Com. Code § 3204(a)*].

In practice, endorsements appear on the reverse of checks and other negotiable instruments partly to avoid any implication that the signature is made in any other capacity and partly to provide room for signatures to appear in order from the first endorser to the last.

c. Using individual, trade, or assumed name, by either [*see Com. Code § 3401(b)*]:

(1) Handwritten signature.

(2) Any word, mark, or symbol (made manually or by means of a device or machine) in lieu of written signature.

d. If signature is by mark, have mark witnessed by another person who signs instrument as witness and is clearly identified as such.

NOTE:

A mark is a "signature" if the signer's name is written near it by a person who writes his or her own name as a witness [*see Civ. Code § 14*].

A writing may be authenticated by anyone who saw the writing executed, including a subscribing witness [*Evid. Code § 1413*]. Although authentication is not required by the UCC [*see Com. Code § 3401(b)*], a person paying an instrument or taking it for value must exercise ordinary care in paying or taking the instrument insofar as the validity of a signature is concerned [*see Com. Code §§ 3404* (impostors), 3405 (fraudulent endorsement by employee), 3406 (forgery); *see also Newman v. Wells Fargo Bank* (2001) 87 Cal. App. 4th 73, 83-85, 104 Cal. Rptr. 2d 310 (complaint alleging that bank allowed plaintiff's employees to cash or deposit checks in their personal accounts despite suspicious circumstances indicating fraud stated cause of action under *Com. Code § 3405(b)*)].

e. If signature is made by an authorized representative [*see Com. Code § 3401(a)(2)*], either:

NOTE:

For discussion of the liability of an authorized representative and a power of attorney authorizing a representative to sign an instrument, see Ch. 98, **Powers of Attorney** .

(1) By signature of representative, followed by "Agent," "Representative," or the like, followed by name of principal.

(2) By signature of representative without more.

NOTE:

Although the signature of the representative alone is a valid endorsement [*see Com. Code § 3402(a)*], ordinarily it is not recommended. A representative or agent should not endorse an instrument in his or her own name without indication of representative status because he or she may become personally

obligated unless (1) the form of the signature shows unambiguously that it is made in a represented capacity, or (2) the represented person is identified in the instrument [*see Com. Code § 3402(b)(2)*]. However, a signor is not liable on a check if his or her signature is made without indication of representative capacity as long as the signature is an authorized signature of the represented person [*Com. Code § 3402(c)*].

(3) By signature of principal's name.

2. Do not include as part of endorsement any words conveying less than entire instrument.

NOTE:

The transfer of less than the entire instrument is not a negotiation and operates only as a partial assignment [*see Com. Code § 3203(d)*].

3. If desired, use words of accommodation or guarantee:

NOTE:

The liability of an endorser who uses such words [*see Com. Code § 3419*] is discussed in *Section 55.321[1]*.

4. If payee's name is misspelled on the instrument, or is otherwise incorrect, have payee either [*see Com. Code § 3204(d)*]:

- a. Sign name as it appears in instrument.
- b. Sign name as it appears as well as his or her correct name.

NOTE:

A payor may require that both names be signed [*Com. Code § 3204(d)*].

5. If negotiation of instrument by particular person is desired, use special endorsement (that is, specify by name person to whom or to whose order endorsement makes instrument payable) [*see Com. Code § 3205(a)*].

NOTE:

Regardless of whether a negotiable instrument originates in order or bearer form, it may be changed from one form to the other by use of the appropriate words as part of a special endorsement when the instrument is transferred [*see Com. Code § 3205*].

Examples of special endorsements include "Pay" a named party, "Pay to the order of" a named party, or "Pay to" a named party "or order," each signed by the endorser.

When specially endorsed, an instrument becomes payable to the identified person and may be negotiated only by the endorsement of that person [*Com. Code § 3205(b)*]. A special endorsement is particularly useful in guarding against loss or theft of an instrument because only the person named may endorse and cash the instrument.

An endorsement that specifies no particular person (for example, the endorser's signature, without more) is an endorsement in blank. An instrument payable to order and endorsed in blank becomes payable to the bearer and may be negotiated by delivery alone until specially endorsed [*Com. Code § 3205(b)*]. A holder may convert a blank endorsement into a special endorsement by writing above the signature of the

endorser words identifying the person to whom the instrument is made payable [*Com. Code § 3205(c)*].

6. Use restrictive endorsement to [*Com. Code § 3206*]:

NOTE:

An endorsement that limits payment to a particular person or otherwise prohibits further transfer or negotiation does not prevent further transfer or negotiation of the instrument [*Com. Code § 3206(a)*]. An endorsement stating a condition on the right of the endorsee to receive payment does not affect the enforceability of the instrument by the endorsee, and the condition may be disregarded by a person paying the instrument or taking it for value or collection [*Com. Code § 3206(b)*]. If an instrument is endorsed to the endorsee as an agent, trustee, or other fiduciary, that restriction does not affect a subsequent transferee or payor of the instrument unless the transferee or payor knows that the fiduciary dealt with the instrument or its proceeds in breach of the fiduciary duty [*Com. Code § 3206(d)*; *see Com. Code § 3307* (notice of breach of fiduciary duty)].

However, if an endorsement includes the words "pay any bank" or is in blank or to a particular bank "for deposit" or "for collection" or otherwise indicates the purpose of having the instrument collected by a bank for the endorser or for a particular account, transferees (other than intermediary banks) must pay or apply proceeds in accordance with the endorsement or the instrument will be considered converted [*Com. Code § 3206(c)*; *see Com. Code § 4201(b)*]. An endorsement "for deposit only," although restrictive, is also a blank endorsement because it does not specify where or for whose benefit the checks are to be deposited [*Spencer v. Sterling Bank* (1998) 63 Cal. App. 4th 1055, 1059-1060, 74 Cal. Rptr. 2d 576 (bank's acceptance for collection of cashiers' checks endorsed "for deposit only," for deposit to third party's trust account, was not violation of restrictive indorsement)].

a. Impose conditions.

NOTE:

Examples include: "Transfer of this instrument is conditioned on receipt of Bill of Sale in due form of certain goods by _____ Co." or "Pay to the order of" a named party "for the benefit of" another named party.

b. Specify method or purpose of deposit or collection:

(1) "For collection" or "For collection only."

NOTE:

This type of instruction is ordinarily used when there is reason to suspect that the account on which the instrument is drawn does not have sufficient funds to pay its face amount in order to ensure eventual payment and to avoid return of the item with the notation "insufficient funds" and subsequent renegotiation. Although "collection" is not defined in the UCC, in banking practice it is an instruction by the endorser (usually the payee of a check) not to credit the endorser's account with the proceeds until the endorser's bank receives credit for the amount of the instrument from the party upon whom it is drawn through the latter's bank. The duties of a collecting bank are set forth in *Com. Code §§ 4201-4216*.

(2) "For deposit" or "For deposit only."

NOTE:

Under the statutory scheme, an endorsement "for deposit only," although restrictive, is also a blank endorsement because it does not specify where or for whose benefit the checks are to be deposited [*Spencer v. Sterling Bank* (1998) 63 Cal. App. 4th 1055, 1059-1060, 74 Cal. Rptr. 2d 576 (bank's acceptance for collection of cashiers' checks endorsed "for deposit only," for deposit to third party's trust account, was not violation of restrictive indorsement); *cf. Nordin v. Eagle Rock State Bank* (1934) 139 Cal. App. 584, 594, 34 P.2d 490 (endorsement constituted instruction that instrument was payable to depositor for credit to his account only)].

(3) "Pay any bank."

NOTE:

This type of endorsement is generally used by intermediary banks rather than by individuals. If an instrument is endorsed in this fashion, only a bank can acquire the rights of a holder unless the instrument (1) has been returned to the customer initiating collection, or (2) has been specially endorsed by the bank to other than a bank [Com. Code § 4201(b)].

7. Have maker, drawer, or endorser deliver instrument to holder.

NOTE:

A negotiable instrument payable to order is negotiated by delivery with any necessary endorsement. If it is payable to bearer, it is negotiated by delivery alone [Com. Code § 3201(b)]. "Delivery" means voluntary transfer of possession [Com. Code § 1201(b)(15)]. For further discussion, see § 55.24[1].

8. If payee is supplier of retail goods or services, do not [Civ. Code § 1725(a)]:

a. Require person paying with negotiable instrument to provide credit card as condition of acceptance of negotiable instrument, or record credit card number.

b. Require, as condition of acceptance of negotiable instrument, person paying with negotiable instrument to allow credit card to be charged to cover negotiable instrument if returned as no good.

c. Record credit card number in connection with any part of transaction.

d. Contact credit card issuer to determine if amount of credit available will cover amount of negotiable instrument.

NOTE:

A retailer may require the production of reasonable forms of positive identification, other than a credit card, as a condition of accepting a negotiable instrument [Civ. Code § 1725(c)(1)], and may request, but not require, a purchaser to voluntarily display a credit card as an indication of creditworthiness or as additional identification [Civ. Code § 1725(c)(2)]. If so used, the only information that can be recorded is the type of credit card, issuer of the card, and expiration date [Civ. Code § 1725(c)(2)]. All retailers who request the display of credit cards from customers must post signs stating, or train employees to inform customers, that displaying credit cards is not required [Civ. Code § 1725(c)(2)].

It is permissible to request a credit card (1) as a condition of cashing a negotiable

instrument that is being used solely to receive cash back; (2) in lieu of requiring a deposit; or (3) if the negotiable instrument is being used to make a payment on that credit card account [*Civ. Code* § 1725(c)(3)-(6)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsGeneral
OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer & IndorsementGeneral
OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer &
IndorsementIndorsementCommercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer &
IndorsementNegotiation



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1. Negotiation Procedures

22-55 California Legal Forms--Transaction Guide § 55.121

§ 55.121 Procedural Guide to Signature by Accommodation Party

NOTE:

An accommodation party is one who signs an instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument; the party receiving the benefit of the value given is the accommodated party [*Com. Code § 3419(a)*; *see Quality Wash Group V, Ltd. v. Hallak* (1996) 50 Cal. App. 4th 1687, 1701-1702, 58 Cal. Rptr. 2d 592 (determination of status as accommodation party or accommodated party)]. For discussion of the liability of an accommodation party, see § 55.30[4][a]. A guarantor is one whose signature to an instrument and its accompanying words unambiguously indicate that the party is guaranteeing collection rather than payment of the obligation of another party [*Com. Code § 3419(d)*]. For discussion of the liability of a guarantor, see § 55.30[4][b].

Surety obligations are governed by *Civ. Code § 2787 et seq.* For discussion of surety obligations, see Ch. 79, ***Suretyship, Guaranty, and Indemnity***. For discussion of the use and effect of guarantor and accommodation party endorsements, see Bender's U.C.C. Service, Commercial Paper, Ch. 13, ***Suretyship and Commercial Paper*** (Matthew Bender).

1. Advise payee or endorsee that if there are questions concerning creditworthiness of maker, drawer, prior endorser of an instrument, payment may be further assured by:

- a. Obtaining specific words of guarantee of collection [*see P 2, below*].
- b. Asking accommodation party to sign instrument [*see P 3, below*].

2. To condition guarantor's liability, have guarantor write "I guarantee collection" or its equivalent with

his or her signature.

NOTE:

When unambiguous words of guarantee accompany the signature of a party to an instrument, the signer will be obliged to pay a person entitled to enforce the instrument only if (1) execution of judgment against the other party is returned unsatisfied, (2) the other party is insolvent or in an insolvency proceeding, (3) the other party cannot be served with process, or (4) it is otherwise apparent payment cannot be obtained from the other party [*Com. Code § 3419(d)*].

3. To condition accommodation party's liability, have party seeking accommodation ask third party (whose credit rating is superior to that of existing or proposed party to instrument) to sign instrument as accommodation party [*see Com. Code § 3419(a)-(c)*]:

NOTE:

The accommodation party is obliged to pay in the capacity in which he or she signs [*Com. Code § 3419(b)*]. A person signing an instrument is presumed to be an accommodation party if the signature is an anomalous endorsement or is accompanied by words indicating that the signer is acting as a surety or guarantor with respect to the obligation of another party to the instrument [*Com. Code § 3419(c)*; *see Com. Code § 3205(d)*].

In an action to enforce the obligation of an accommodation party to pay an instrument, the accommodation party may assert any defense or claim in recoupment that the accommodated party could assert against the person entitled to enforce the instrument. However, the defenses of discharge in insolvency proceedings, infancy, and lack of legal capacity are not available to the accommodation party [*Com. Code § 3305(d)*; *see* Bender'S U.C.C. Service, Commercial Paper, Ch. 13, ***Suretyship and Commercial Paper*** (Matthew Bender)].

a. Advise accommodation party that he or she may sign as:

(1) Maker or drawer.

(2) Endorser.

(3) Acceptor.

b. Advise accommodation party that he or she is liable in capacity in which he or she signed, even if taker knows of accommodation [*see Com. Code § 3419(b), (c)*].

NOTE:

For discussion of discharge from liability, see § 55.45.

c. Advise accommodation party that he or she is entitled to reimbursement from accommodated party, if he or she pays instrument [*Com. Code § 3419(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesAccommodationCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesParty Obligations



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22-55 California Legal Forms--Transaction Guide §§ 55.122-55.129

[Reserved]

§§ 55.122[Reserved]



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2. Post-Negotiation Procedures

22-55 California Legal Forms--Transaction Guide § 55.130

§ 55.130 Procedural Guide to Excuse of Presentment and of Notice of Dishonor

1. Is presentment excused because [*Com. Code § 3504(a)*]:

a. It cannot be accomplished by use of reasonable diligence?

b. Maker or acceptor has repudiated obligation to pay?

c. Maker or acceptor is:

(1) Dead?

(2) In insolvency proceedings?

d. Presentment is unnecessary to enforce obligations of endorsers or drawers?

e. Presentment has been waived by drawer or endorser?

NOTE:

Presentment is excused if the drawer or endorser has waived it or otherwise has no reason or right to require that the instrument be paid or accepted [*Com. Code § 3504(a)*].

f. Drawer instructed drawee not to pay or accept draft?

g. Drawee is not obliged to drawer to pay draft?

2. Is notice of dishonor excused because [*Com. Code § 3504(b)*]:

- a. Instrument's terms make notice unnecessary?
 - b. Notice has been waived by party whose obligation is being enforced?
3. Is delay in giving notice of dishonor excused because [*Com. Code* § 3504(c)]:
- a. Delay was caused by circumstances beyond control of person giving notice; and
 - b. Person giving notice exercised reasonable diligence after cause of delay ceased?

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentDishonorCommercial Law
(UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentExcused Presentment & Notice



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2. Post-Negotiation Procedures

22-55 California Legal Forms--Transaction Guide § 55.131

§ 55.131 Procedural Guide to Presentment and Acceptance

NOTE:

"Presentment" is a demand for acceptance or payment of an instrument [*see Com. Code § 3501(a)*].

"Acceptance" is the drawee's signed agreement to pay a draft or check as presented [*Com. Code § 3409(a)*; *see Com. Code § 3408*]. Unless excused or waived [*see Com. Code § 3504*; *see also § 55.130*], presentment for acceptance is necessary to enforce the obligations of the drawer and endorsers of an instrument in that the instrument must be duly presented before it can be dishonored, and the drawer and endorsers must have notice of the dishonor, unless the notice is excused, before their obligations are enforceable [*see Com. Code §§ 3502 (dishonor), 3503 (notice of dishonor), 3504(b) (excuse of notice of dishonor)*]. For further discussion of presentment and acceptance, see § 55.40-55.42.

1. If presentment has not been excused, make presentment to enforce obligations of drawer and endorsers [*see Com. Code § 3408*].

NOTE:

For a checklist to use in determining whether presentment has been excused, see § 55.130.

2. Make presentment to any of parties listed below or to any one of two or more of these parties, as appropriate [*see Com. Code § 3501(b)(1)*]:

a. Maker.

b. Acceptor.

c. Drawee.

d. Any other payor.

3. Make presentment at [*see Com. Code § 3501(b)(1)*]:

a. Place of payment specified in instrument.

b. If no place is stated, at address of drawee or maker. If no address is stated, at place of business of drawee or maker, or if there is no place of business, at residence of drawee or maker [*see Com. Code § 3111*].

c. If instrument is payable at bank in United States, at that bank.

4. Make presentment by any commercially reasonable means, including [*Com. Code § 3501(b)(1)*]:

a. Oral communication.

b. Written communication.

c. Electronic communication.

NOTE:

Presentment is effective when the demand for payment is received by the person to whom it is made [*Com. Code § 3501(b)(1)*].

5. Make presentment within applicable time period [*see Com. Code § 3502*]:

a. Time required by or specified in instrument.

b. On or after date payment is due, if no time is specified in instrument.

NOTE:

A bank is under no obligation to its checking account customer to pay a check drawn on the customer's account (other than a certified check) if it is presented more than six months after its date. However, the bank may charge the customer's account for a payment made thereafter in good faith [*Com. Code § 4404*]. Furthermore, a bank may charge a check against an account if it is presented for acceptance before the date of the check unless the customer has given notice to the bank, describing the check with reasonable certainty [*Com. Code § 4401(c)*].

6. Advise holder that presentment may be treated as occurring on business day immediately following day of presentment [*Com. Code § 3501(b)(4)*].

NOTE:

This rule applies if presentment is made after an established cutoff hour not earlier than 2 P.M. [*Com. Code § 3501(b)(4)*].

7. Have presentment made by or on behalf of holder [*see Com. Code § 3501(a)*].

8. Present following, if required by party to whom presentment is made [*see Com. Code § 3501(b)(2)*]:

- a. Instrument.
- b. Reasonable identification of person making presentment.
- c. Evidence of authority to make presentment, if made for another.

9. Advise holder that person making presentment may be required to [*see Com. Code § 3501(b)(2)*]:

- a. Sign receipt on instrument for any partial payment made.
- b. Surrender instrument if paid in full.

10. If draft is involved, obtain drawee's acceptance in form of drawee's signed agreement to pay draft as presented, written on draft [*see Com. Code § 3409(a)*].

NOTE:

For discussion of acceptance, see § 55.42. Certification (that is, certification by a bank that funds have been reserved to make payment) of a check is acceptance [*see Com. Code § 3409(d)*]. The drawee's acceptance may consist of his or her signature alone [*Com. Code § 3409(a) see Com. Code § 3401(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentDishonorCommercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentExcused Presentment & NoticeCommercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentPresentmentCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesAcceptance



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2. Post-Negotiation Procedures

22-55 California Legal Forms--Transaction Guide § 55.132

§ 55.132 Procedural Guide to Dishonor and Notice of Dishonor

NOTE:

An instrument is dishonored when presentment is duly made but acceptance or payment is refused or cannot be obtained within the time allowed [*see Com. Code § 3502; see also § 55.131*]. Dishonor also occurs when presentment is excused and the instrument is not duly accepted or paid [*Com. Code § 3502(e); see Com. Code § 3504* (waiver or excuse of presentment)]. The return of an instrument for lack of proper endorsement is not dishonor; nor is refusal of payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule [*Com. Code § 3501(b)(3)*].

The rules governing dishonor of various instruments are *covered in § 55.43[2] through [5]*. A procedural guide for presentment is outlined in § 55.131. Acceptance is discussed in § 55.42.

1. Advise holder that dishonor occurs if [*see Com. Code § 3502(a)-(e)*]:

- a. Note payable on demand is not paid on day of presentment.
- b. Note not payable on demand but payable at or through bank, or whose terms require presentment, is not paid on day it becomes payable or day of presentment, whichever is later.
- c. Note is not paid on day it becomes payable, if Paragraphs a and b, *above*, do not apply.
- d. Payor bank:
 - (1) Makes timely return of check.

(2) Sends timely notice of dishonor.

(3) Becomes accountable for amount of check.

NOTE:

These rules apply if a check is duly presented to the payor bank otherwise than for immediate payment over the counter [*see Com. Code § 3502(b)(1)*].

e. Draft (other than check) is duly presented to drawee or acceptor and is not paid on day of presentment.

f. Instrument is not duly accepted or paid, if presentment is excused.

2. Advise holder that presumption of dishonor and of any notice of dishonor is created by:

a. Document purporting to be protest [*Com. Code § 3505(a)(1)*].

b. Stamp or writing of drawer, payor bank, or presenting bank stating that acceptance has been refused [*Com. Code § 3505(a)(2)*].

c. Book or record of drawee, payor bank, or collecting bank, kept in usual course of business, showing dishonor [*Com. Code § 3505(a)(3)*].

3. If dishonor has occurred and notice of dishonor has not been excused [*see § 55.130*], have any person give notice [*Com. Code § 3503(b)*].

NOTE:

Notice of dishonor is necessary to enforce the obligation of an endorser after dishonor has occurred [*Com. Code § 3503(a)*]. Failure to give notice of dishonor discharges the liability of the endorser [*Com. Code § 3415(c)*; *see Com. Code § 3503*]. Notice of dishonor is also necessary to enforce the obligation of a drawer to pay a dishonored draft that was accepted by an acceptor other than a bank; failure to give this notice of dishonor discharges the liability of the drawer [*Com. Code §§ 3414(d), 3415(c), 3503(a)*].

For further discussion of dishonor and notice of dishonor, see §§ 55.43 and 55.44. For a notice of dishonor, see § 55.340.

4. Give notice to following, as appropriate:

a. Any maker [*see Com. Code § 3502(a)(1), (2)*].

b. Any drawer [*see Com. Code § 3502(b)(2), (3)*].

c. Any acceptor of draft payable at bank [*see Com. Code § 3502(d)(1), (2)*].

d. Any other payor [*see Com. Code § 3501(b)(1)*].

5. Give notice of dishonor within following time limits [*see Com. Code § 3503(c)*]:

a. For instrument taken for collection by collecting bank:

(1) If notice is given by bank, before midnight of banking day following banking day on which bank received notice.

(2) If notice is given by any other person, within 30 days following day on which person receives notice.

b. For any other instrument, within 30 days following day on which dishonor occurs.

6. Give notice of dishonor by any commercially reasonable means, including [*Com. Code § 3503(b)*]:

a. Oral communication.

b. Written communication.

c. Electronic communication.

7. If draft or check has been dishonored, advise drawer that he or she may (but is not required to):

a. Waive dishonor and re-present draft [*see Com. Code § 3504(b)*].

b. Demand payment in cash [*see Civ. Code § 1719*]:

NOTE:

The act of making, drawing, or delivering a check, draft, or order with intent to defraud, together with the knowledge that the maker or drawer has insufficient funds to pay it, is a criminal act, punishable by imprisonment [*Penal Code § 476a(a)*] or participation in a bad check diversion program, if a program has been established in the county involved [*see Penal Code § 1001.60 et seq.*].

(1) If draft or check has been dishonored because maker instructed drawee to stop payment, use form in § 55.342.

NOTE:

A demand for payment of an instrument that was dishonored because of a stop payment order must be in substantially the form specified by statute [*Civ. Code § 1719(c)*]. *Section 55.342* illustrates the statutory form.

(2) If draft or check has been dishonored for reason other than stop payment order, use *form in § 55.341*.

8. Advise payee that following statutes of limitation apply to commencement of action to enforce payment [*see Com. Code §§ 3118, 3119*]:

a. For note payable at definite time, within six years after due date or accelerated due date.

b. For note payable on demand:

(1) Within six years, if demand for payment is made to maker.

(2) Within 10 years, if:

(a) No demand for payment is made to maker; and

(b) Neither principal nor interest has been paid for continuous 10-year period.

NOTE:

The above rules are subject to the following exceptions. An action to enforce payment of a certified check, teller's check, cashier's check, or traveler's check must be commenced within three years after demand for payment is made to the acceptor or issuer [*Com. Code § 3118(d)*]. An action to enforce payment of a certificate of deposit must be commenced within six years after demand for payment is made to the maker, but if the instrument states a due date and the maker is not required to pay before that date, the six-year period begins when a demand for payment is in effect and the due date has passed [*Com. Code § 3118(e)*]; **see** *Com. Code § 3304(a), (c)* (when instrument payable on demand is overdue); **see also** *Com. Code § 3304(b), (c)* (when instrument payable at definite time is overdue)].

c. For accepted draft (other than certified check), within six years after [*see Com. Code § 3118(f)*]:

(1) Due date, if draft is payable at a definite time.

(2) Date of acceptance, if draft is payable on demand.

9. Advise payee of three-year statute of limitations for commencement of action for indemnity or contribution (unless governed by other law) for:

a. Conversion [*see Com. Code § 3118(g)*].

b. Breach of warranty [*see Com. Code § 3118(g)*].

c. Enforcement of obligation, duty, or right arising under Division 3 of the Commercial Code and not governed by *Com. Code § 3118* [*see Com. Code § 3118(g)*].

d. Enforcement of obligation, duty, or right arising under Division 4 of the Commercial Code [*see Com. Code § 4111*; *see also Edward Fineman Company v. Superior Court* (1998) 66 Cal. App. 4th 1110, 1125-1126, 78 Cal. Rptr. 2d 478 (three-year statute of limitations set forth in *Com. Code § 4111* applied retroactively to unauthorized checks drawn on company's payroll checking account during two-year period in question and barred recovery for those checks)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentDishonorCommercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentExcused Presentment & Notice



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C. Procedural Guide

2. Post-Negotiation Procedures

22-55 California Legal Forms--Transaction Guide §§ 55.133-55.139

[Reserved]

§§ 55.133[Reserved]



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D. Related and Subsequent Procedures

22-55 California Legal Forms--Transaction Guide § 55.140

§ 55.140 Responsibility of Payor Bank for Handling of Checks or Drafts

1. Advise drawer with respect to establishment and conduct of checking account:

a. Advise drawer that checking account is established through use of signature card.

NOTE:

A bank signature card is a contract that authorizes the bank to impose charges for its services and to determine those charges unilaterally. However, that right is subject to the bank's duty of good faith and fair dealing in setting and varying the charges [*Perdue v. Crocker National Bank* (1985) 38 Cal. 3d 913, 924, 216 Cal. Rptr. 345, 702 P.2d 503] .

b. Advise drawer to obtain information concerning bank charges [see 12 C.F.R. pt. 230 (Regulation DD); see also Stats. 1993, ch. 107, § 3].

c. Advise drawer that unconscionable bank charges might not be upheld, and that charges will be judged on basis of:

- (1) Justification for charge.
- (2) Commercial setting of signature card and charge.
- (3) Purpose of signature card and charge.
- (4) Effect of signature card and charge.

NOTE:

A court can refuse to enforce an unconscionable provision in a contract. However, an

allegation that the fee set by the bank exceeds its cost or a fair value does not state a cause of action for unconscionability; it does require an inquiry into the commercial setting, purpose, and effect of such a provision [*Civ. Code § 1670.5; Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 925-926, 216 Cal. Rptr. 345, 702 P.2d 503*]. Thus, a court will give the parties a reasonable opportunity to show the circumstances of the transaction and look to the basis and justification for the price in order to determine unconscionability [*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 926-929, 216 Cal. Rptr. 345, 702 P.2d 503*].

d. Advise drawer that fees for processing checks returned for insufficient funds are not penalties.

NOTE:

Although penalties (that is, charges that are disproportionate to the anticipated damages for breach of contract) are invalid [*see, e.g., Civ. Code § 1671(b)* (unreasonable liquidated damages invalid)], writing a check on insufficient funds is not a breach of contract and thus the fee charged for processing the check is not a penalty [*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 931-932, 216 Cal. Rptr. 345, 702 P.2d 503*].

2. Advise payor institution not to transfer funds from depositor's account without authorization from depositor (except setoff for debt it claims from depositor) [*see Fin. Code §§ 40500, 40501*].

NOTE:

Banks, savings and loan associations, credit unions, or other financial institutions that maintain demand deposit accounts (including NOW accounts) may not release funds from those accounts without the depositor's authorization or unless authorized to do so by law. This prohibition does not apply to any setoff for a debt the institution claims is owed to it by the customer [*Fin. Code § 40501*].

3. If check (other than certified check) is presented to payor bank more than six months after its date, advise drawer that [*see Com. Code § 4404*]:

- a. Bank is not obligated to pay; but that
- b. Bank may pay in good faith and charge drawer's account.

4. Advise drawer that bank may charge item that is properly payable against customer's account even though charge creates overdraft [*see Com. Code § 4401(a)*].

NOTE:

An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and the bank [*Com. Code § 4401(a)*]. However, a customer is not liable for an overdraft if the customer neither signed the item nor benefited from its proceeds [*Com. Code § 4401(b)*].

5. If check or draft is wrongfully dishonored by payor bank, advise drawer that he or she may recover from bank damages proximately caused by wrongful dishonor [*see Com. Code § 4402*].

6. If check or draft has been fraudulently altered, and honored in good faith by payor bank in favor of holder, advise drawer that bank had right to charge drawer's account according to either [*Com. Code § 3407(c); see Com. Code §§ 3115, 4401(d)*]:

- a. Original terms of altered item.

b. Terms of item as completed, unless bank had notice that completion was improper.

7. If check is paid on forged endorsement, advise drawer or bank that check has been converted [see *Com. Code* § 3420].

NOTE:

When a bank makes payment on a check drawn on another bank to a person who forges the payee's name and then collects the amount involved from the drawee bank, the drawer has a cause of action against the paying/collecting bank for conversion [*Tedesco v. Crocker National Bank* (1983) 148 Cal. App. 3d 1211, 1216, 196 Cal. Rptr. 534 ; *see* *Cooper v. Union Bank* (1973) 9 Cal. 3d 371, 107 Cal. Rptr. 1, 507 P.2d 609] . Note, however, that, if the payee has not endorsed the check, conversion liability does not arise when the person who deposited the check had authority to do so [*see, e.g., In re Bartoni-Corsi Produce, Inc.* (9th Cir. 1997) 130 F.3d 857, 863 (when sole director and sole shareholder approved sale of all corporate assets to corporation formed to purchase assets and authorized agents to deposit checks payable to selling corporation into bank account of purchasing corporation, depository bank was not liable for conversion because payee no longer owned checks and agents had implied actual authority to make deposits)].

Absent extraordinary circumstances, a collecting bank does not owe a duty of care to a non-customer, particularly when the bank has met its statutory duties as set forth in *Com. Code* § 4202(a) [*Karen Kane Inc. v. Bank of America NT&SA* (1998) 67 Cal. App. 4th 1192, 1202-1203, 79 Cal. Rptr. 2d 712] . In a case in which a clothing manufacturer wrote numerous checks over several years to fictitious vendors for merchandise it never received, based on an employee's submission of fraudulent invoices, the manufacturer brought a negligence action against the check cashing service that cashed those checks and the bank that deposited the checks into the service's account. The court of appeal found that because the checks were not forged or improperly endorsed, and did not indicate that maker was being defrauded, neither the check cashing service nor the bank had a duty to inquire of the maker if a valid transaction supported the checks before accepting them. The circumstances were not extraordinary enough to give rise to a duty of inquiry by a bank complying with its statutory duties, when in fact they were not even sufficient to constitute notice of fraud to the maker of the checks [*Karen Kane Inc. v. Bank of America NT&SA* (1998) 67 Cal. App. 4th 1192, 1202-1203, 79 Cal. Rptr. 2d 712] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesBank AccountsGeneral OverviewBanking LawBank ActivitiesBank AccountsDeposit AccountsGeneral OverviewBanking LawBank ActivitiesBank AccountsDeposit AccountsLiabilityCommercial Law (UCC)Bank Deposits & Collections (Article 4)Customer-Bank RelationsGeneral Overview



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22-55 California Legal Forms--Transaction Guide § 55.141

§ 55.141 Prevention of Payment on Death or Incompetence of Drawer of Check or Draft

1. If drawer dies or becomes incompetent, advise drawer's personal representative (such as executor, administrator, or guardian) to notify drawer's bank immediately [*see Com. Code § 4405*].

NOTE:

Neither death nor incompetence revokes the payor or collecting bank's authority to accept, pay, or collect an item until the bank knows of the death or an adjudication of incompetence and has reasonable opportunity to act on it [*Com. Code § 4405(a)*].

2. If drawer dies, immediately order bank to stop payment, even if bank has been notified of death [*see Com. Code § 4405(b)*], using following procedures:

NOTE:

Even with knowledge of death, a bank may pay or certify checks drawn on or before that date for 10 days after death unless the bank receives a stop payment order by a person claiming an interest in the account [*Com. Code § 4405(b)*; *see Fin. Code §§ 852, 952*; *see also Chazen v. Centennial Bank (1998) 61 Cal. App. 4th 532, 541, 71 Cal. Rptr. 2d 462 (Fin. Code §§ 952, 953 codify well-established principle that bank has no duty to monitor trust accounts for breaches of fiduciary duty)*].

a. Have drawer's estate obtain and serve on office of bank at which deposit is carried either [*see Fin. Code § 952*]:

(1) Court order restraining payment; or

(2) Surety bond required by bank.

b. If account is joint account payable to survivor or survivors [*see Prob. Code § 5130* ("joint account" defined)], and if more than one survivor remains, prevent further withdrawals by other survivors by having at least one of them give notice to bank prohibiting further withdrawals [*see Prob. Code § 5405(c)*; *Fin. Code § 852*].

3. If drawer is incompetent, immediately inform bank of incompetence, using following procedures:

a. Have drawer's guardian or other personal representative obtain and serve on office of bank at which deposit is carried either [*see Fin. Code § 952*]:

(1) Court order restraining payment; or

(2) Surety bond required by bank.

b. If account has other drawers, prevent further withdrawals by those drawers by having at least one of them give notice to bank prohibiting further withdrawals [*see Fin. Code § 852*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral OverviewBanking LawBank ActivitiesBank AccountsDeposit AccountsJoint AccountsCommercial Law (UCC)Bank Deposits & Collections (Article 4)Customer-Bank RelationsGeneral OverviewCommercial Law (UCC)Bank Deposits & Collections (Article 4)Customer-Bank RelationsStop Payment Orders



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22-55 California Legal Forms--Transaction Guide § 55.142

§ 55.142 Stopping Payment of Checks and Closing Account

NOTE:

A customer or any person authorized to draw on an account may stop payment on any item drawn on the customer's account or close the account. If the signature of more than one person is required to draw on an account, any of these persons may stop payment or close the account [*Com. Code § 4403(a)*].

The customer has the burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a stop-payment order or order to close an account. The loss from payment of an item contrary to a stop-payment order may include damages for dishonor of subsequent items [*Com. Code § 4403(c)*; *see Com. Code § 4402(b)* (damages)].

1. Advise party ordering payment stopped that bank must receive stop order in time and manner that affords bank reasonable opportunity to act on order before any action is taken by bank with respect to item [*see Com. Code § 4403(a)*].

2. Advise party ordering payment stopped that stop-order [*see Com. Code § 4403(b)*]:

a. Is effective for six months; but

b. Lapses after 14 calendar days if original order was oral and was not confirmed in writing within that period.

NOTE:

A stop-payment order may be renewed for additional six-month periods by giving a writing to the bank within the period in which the stop-payment order is effective [*Com. Code § 4403(b)*]. Even though a bank ordinarily will not honor a check that is over six

months old, it may do so in good faith [*Com. Code § 4404*]. Therefore, it is prudent to renew a stop order if the stopped check has not yet been returned to the customer on the checking account.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesBank AccountsGeneral OverviewCommercial Law (UCC)Bank Deposits & Collections
(Article 4)Customer-Bank RelationsStop Payment Orders



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22-55 California Legal Forms--Transaction Guide §§ 55.143-55.199

[Reserved]

§§ 55.143[Reserved]



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CHAPTER 55 NEGOTIABLE INSTRUMENTS

PART IV. FORMS

A. Complete Promissory Notes

22-55 California Legal Forms--Transaction Guide § 55.200

§ 55.200 Simple Negotiable Promissory Notes

[1] Comment

[a] Use of Form

This form illustrates a number of simple negotiable promissory notes. These notes may be used in lending transactions ranging from simple intra-family loans to short-term negotiable instruments [*but see* [g], *below*]. The notes illustrated here are the following:

- A time note, payable to order or to bearer, stating a promise to pay at some future date [*see* [2], First Alternative, *below*].
- A demand note, payable to order or to bearer, stating a promise to pay on demand [*see* [2], Second Alternative, *below*].
- An installment note, payable to order or to bearer, with interest payable with each installment on the remaining balance [*see* [2], Third Alternative, *below*].
- A discounted note, payable to order or to bearer, payable in installments, that is, a note under which interest is paid in a lump sum in advance with installment payment of the original balance [*see* [2], Fourth Alternative, *below*].

All of the promissory notes illustrated in this form are payable to a single payee. A provision for payment to alternative payees is set forth in § 55.280. A provision for payment to joint payees is set forth in § 55.281.

[b] Obligation of Parties

A promissory note is used to document a loan; it sets forth an unconditional promise by the debtor or maker to pay the creditor or payee the stated amount [*see Com. Code* § 3104(a); *see also* [e], *below*]. When the debtor "issues" the note,

he or she is obliged to pay the creditor or payee or any subsequent holder according to the terms of the note at the time of issue if complete or, if the debtor signed an incomplete instrument, according to its terms when completed [*see Com. Code § 3412*]. The payee is not obligated on the note unless he or she endorses it to a subsequent holder. In that case, the payee's obligation becomes that of an endorser, and the payee must pay the note if it is not paid by the debtor when due [*see Com. Code §§ 1201(b)(21), 3204, 3301, 3415*].

[c] Types of Payment Terms

Promissory notes can be categorized by the type of payment terms they use. There are three generally used types of terms. One type provides for the payment of interest during the term of the note and the lump sum payment of the face amount or principal on a specified date (a "straight" or "interest-only" note) [*see [2], First Alternative, below*].

A second type of promissory note provides for payment of principal and interest together in installments (an "interest-included installment note") [*see [2], Third Alternative, below; see also § 55.202*]. A variation of this type of note is the "interest-extra" note, that is, a note that provides for the payment of principal and interest in separate installments.

A third type of note provides for payment of the principal and interest in installments until a stated date or for a specified number of installments with the balance remaining unpaid at that time due in a lump sum (a "balloon payment"). For a form of balloon payment note, see § 55.204.

[d] Provisions Relating to Prepayment

If the maker of a note is to be permitted to prepay the note, that is, to pay the balance due at any time before maturity or a specified time, the note should include the term "on or before" immediately before the payment date. A note can be drafted to include a provision for prepayment with a prepayment penalty; for an example of a prepayment penalty provision, see § 55.250 [*see also Ch. 25A, Security Instruments for Real Estate Financing*].

[e] Requirements for Negotiability

[i] Overview

To be negotiable, a note must be in writing and signed by its maker [*Com. Code §§ 3104(a), (e), 3101(a)(9); see §§ 55.21[1], [2]*]. It must be payable either on demand or at a definite time [*Com. Code § 3104(a)(2); see [iii]-[v], below*]. In addition, it must be payable either to order or to bearer [*Com. Code § 3104(a)(1); see [vi]-[viii], below*].

Furthermore, a note must contain an unconditional promise to pay a fixed amount of money [*see § 55.21 [3], [4]*] and (except as otherwise permitted by Division 3 of the Commercial Code) may not contain any other undertaking by the maker [*Com. Code § 3104(a)(3)*].

The notes illustrated in this form are unconditional. The addition of certain conditions or other permitted language will not render these notes nonnegotiable [*see Com. Code § 3106; see also [f], below; §§ 55.21[3], 55.201[1][b], [c]*].

[ii] Signature

No one is liable on an instrument unless his or her signature appears on it [*Com. Code § 3401(a)*]. A "signature" may be made manually or by means of a device or machine and may be made by the use of any name, including a trade or assumed name, or by a word, mark or symbol [*Com. Code § 3401(b); see Com. Code § 3308* (determining validity of signature)]. A person paying an instrument or taking it for value must exercise ordinary care in paying or taking the instrument insofar as the validity of a signature is concerned [*see Com. Code §§ 3404* (impostors), 3405 (fraudulent endorsement by employee), 3406 (forgery); *see also Newman v. Wells Fargo Bank (2001) 87 Cal. App. 4th 73, 83-85,*

104 Cal. Rptr. 2d 310 (complaint alleging that bank allowed plaintiff's employees to cash or deposit checks in their personal accounts despite suspicious circumstances indicating fraud stated cause of action under *Com. Code* § 3405(b)).

A signature may be made by an agent or representative [*Com. Code* § 3401(a)(2)]. If a representative signs the name of the represented person or the name of the signer, the represented person is bound by the signature to the same extent as if the signature were on a simple contract. If the represented person is bound, the signature of the representative is the "authorized signature of the represented person" [*Com. Code* § 3402(a); see *Com. Code* § 3402(b), (c) (liability of representative)]. If the signature of more than one person is required to constitute the authorized signature of an organization, the signature of the organization is unauthorized if one of the requisite signatures is lacking [*Com. Code* § 3403(b); see *Edward Fineman Company v. Superior Court* (1998) 66 Cal. App. 4th 1110, 1124-1125, 78 Cal. Rptr. 2d 478 (amendment to *Com. Code* § 3403 providing that signature of organization is unauthorized if multiple signatures are required and one of required signatures is lacking was clarification of existing law and therefore operated retroactively)]. Unless ratified (or as otherwise permitted by Divisions 3 and 4 of the Commercial Code), an unauthorized signature is ineffective except in favor of a person who in good faith pays for the instrument or takes it for value [*Com. Code* § 3403(a); see *Com. Code* § 3403(c) (civil or criminal liability for unauthorized signature unaffected by ratification)]. For a form for ratification of an unauthorized signature, see § 55.320.

[iii] When Payment Is to Be Made

A note must be payable either on demand or at some specified definite time [*Com. Code* § 3104(a)(2); see [iv], [v], *below*]. However, presentment, that is, a demand for payment of a note made to the party obliged to pay or to a bank, if the note is payable at a bank [*Com. Code* § 3501(a)], may be treated as occurring on the next business day after the day of presentment if it is made after an established cutoff hour not earlier than 2 P.M. [*Com. Code* § 3501(b)(4)]. In addition, Federal Reserve regulations, operating circulars, and clearinghouse rules govern all agreements made under Divisions 3 and 4 of the Commercial Code whether or not specifically assented to by all interested parties [*Com. Code* § 3102(c); see *Com. Code* § 4103(b); see also 12 C.F.R. §§ 210.1-210.15 (collection of checks and other items by Federal Reserve Banks), 229.1-229.42 (availability of funds and collection of checks)].

[iv] Notes Payable on Demand

When a note is made payable on demand, it is payable at sight or at the will of the holder, and need not specify a time for payment [see *Com. Code* § 3108(a)].

If the note states simply that it is payable on demand, it is payable within a reasonable time after demand [*Lepori v. Hilson* (1930) 109 Cal. App. 295, 297, 293 P. 86] . If it is made payable on demand "after date, without grace," it is due in accordance with its terms (that is, on demand at any time after its date) [see *Rottman v. Hevener* (1921) 54 Cal. App. 474, 478, 202 P. 329] .

The parties may make a demand note subject to parol terms that affect the maturity date. For example, a note payable on demand that was executed with contemporaneous correspondence between the parties indicating that demand would not be made if monthly installments were made became due and payable only after the maker failed to make the payments and the holder demanded payment [see *Bank of America Etc. Ass'n v. Schumacher* (1935) 6 Cal. App. 2d 651, 653, 45 P.2d 239] . Evidence of collateral oral agreements bearing on the maturity date of a demand note is excluded only when the fact finder is likely to be misled [*Birsner v. Bolles* (1971) 20 Cal. App. 3d 635, 637, 97 Cal. Rptr. 846 ; see *Com. Code* § 2202].

[v] Notes Payable at Definite Time

A note payable at a definite time is payable (1) on elapse of a definite period of time after sight or acceptance; (2) at a

fixed date or dates; or (3) at a time or times readily ascertainable at issue, subject to certain rights of prepayment, acceleration, and extension [*Com. Code § 3108(b)*; see § 55.13 [3][a]]. Furthermore, if a note payable at a fixed date is also payable on demand before that date, it is payable on demand until the fixed date and becomes payable at a definite time on the fixed date [*Com. Code § 3108(c)*].

[vi] To Whom Payment Is to Be Made

The person to whom a note is initially payable is determined by the intent of the person signing as or on behalf of the issuer, whether authorized or not [*Com. Code § 3110(a)*]. If the issuer's signature is made by an automated device, the payee is determined by the intent of the person who identified the payee [*Com. Code § 3110(b)*]. The note is payable to the person intended by the signer even if that person is identified incorrectly in the instrument [*Com. Code § 3110(a)*]. Furthermore, a person to whom a note is payable may be identified in any way, including by name, identifying number, office, or account number [*Com. Code § 3110(c)*; see *Com. Code § 3110(c)(1)* (instruments payable to accounts identified only by numbers); see also *Com. Code § 3110(c)(2)* (instruments payable to entities other than natural persons)]. If a note is payable to two or more persons alternatively, it is payable to any of them and may be enforced by any or all of them in possession of the instrument. If a note is payable to two or more persons not alternatively, it is payable to all of them and may be enforced only by all of them. If a note payable to two or more persons is ambiguous on this issue, it is payable to the persons alternatively [*Com. Code § 3110(d)*].

A note must be payable either to bearer or to order [*Com. Code § 3104(a)(1)*].

[vii] Notes Payable to Bearer

A note is payable to bearer if (1) it states that it is payable to bearer, to the order of bearer, or to the person in possession; (2) does not state a payee; or (3) states that it is payable to cash, to the order of cash, or otherwise indicates that it is not payable to an identified person [*Com. Code § 3109(a)*].

A note payable to an identified person may become payable to bearer if it is endorsed in blank [*Com. Code § 3109(c)*; see *Com. Code § 3205(b)* (blank endorsement); see also § 55.24[2][b]].

A note payable to bearer is negotiated by delivery [*Com. Code § 3201(b)*]. "Delivery" is the voluntary transfer of possession [*Com. Code § 1201(b)(15)*].

[viii] Notes Payable to Order

A note that is not payable to bearer is payable to order if it is payable (1) to the order of an identified person or (2) to an identified person or order. This type of note is payable to the identified person [*Com. Code § 3109(b)*].

A note payable to bearer may become payable to order if it is specially endorsed [*Com. Code § 3109(c)*; see *Com. Code § 3205(a)* (special endorsement); see also § 55.24[2][b]].

A note payable to order is negotiated by endorsement and delivery [*Com. Code § 3201(b)*]. "Delivery" is the voluntary transfer of possession [*Com. Code § 1201(b)(15)*]. For discussion of endorsement, see § 55.24[2].

[f] Conditions and Omissions That Do Not Affect Negotiability

[i] Overview

A promise is unconditional and, thus, a note is negotiable [see *Com. Code § 3104(a)*] unless it (1) states an express condition to payment; (2) states that the promise is governed by another writing; or (3) states that related rights or obligations are stated in another writing [*Com. Code § 3106(a)*]. However, reference to another writing does not of

itself make the promise conditional [*Com. Code § 3106(a)*]. Furthermore, a note that is conditionally issued or that is issued for a special purpose is binding on its maker or drawer, although failure of the condition or special purpose is a defense [*Com. Code § 3105(b)*].

[ii] Collateral, Prepayment, and Acceleration

Negotiability is unaffected by a statement of rights or reference to another writing, with respect to collateral, prepayment, or acceleration [*see Com. Code § 3106(a), (b)*]. For discussion of collateral and a sample collateral note with alternative statements describing collateral, see § 55.205. For detailed discussion of the legal requirements relating to collateralized borrowing, see Ch. 25A, *Security Instruments for Real Estate Financing*, and Ch. 42, *Secured Transactions*. For further discussion of the effects of acceleration on negotiability, see § 55.201[1][c]. For an acceleration provision if collateral is promised but not given, see § 55.231[2], fourth alternative. For discussion of prepayment and an example of a provision for a prepayment penalty, see § 55.250.

[iii] Payment Limited to Particular Source

Negotiability is unaffected by the condition that payment be limited to a particular source or fund [*see Com. Code § 3106(b)*].

[iv] Countersignature

Negotiability is unaffected by requiring a countersignature by a person whose specimen signature appears on the note [*see Com. Code § 3106(c)*]. However, if that person fails to countersign the note, that failure is a defense to the obligation of the issuer, although it does not prevent a transferee of the note from becoming its holder [*Com. Code § 3106(c)*].

[v] Statement Required by Law Relating to Holder's Rights

Negotiability is unaffected by a note's containing a statement required by applicable statutory or administrative law that the rights of the holder or transferee are subject to the claims and defenses of the original payee [*see Com. Code § 3106(d)*].

[vi] Confession of Judgment

Confession of judgment is expressly permitted by California law [*see Code Civ. Proc. §§ 1132-1134*] except in automobile conditional sales contracts [*Civ. Code § 2983.7(b)*]. However, a note that authorizes confession of judgment before maturity is not negotiable [*see Com. Code § 3106*]. For discussion of confession of judgment, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

[vii] Restrictive Endorsements

An endorsement that limits payment to a particular person or otherwise prohibits further transfer or negotiation does not prevent negotiation of the note [*Com. Code § 3206(a)*]. An endorsement stating a condition to the right of the endorsee to receive payment does not affect the enforceability of the note by the endorsee and the condition may be disregarded by a person paying the note or taking it for value or collection [*Com. Code § 3206(b)*]. If an endorsement is endorsed to the endorsee as an agent, trustee, or other fiduciary, that restriction does not affect a subsequent transferee or payor of the note unless the transferee or payor knows that the fiduciary dealt with the note or its proceeds in breach of the fiduciary duty [*Com. Code § 3206(d)*; *see Com. Code § 3307* (notice of breach of fiduciary duty)].

However, if an endorsement includes the words "pay any bank," is in blank or to a particular bank "for deposit" or "for collection," or otherwise indicates a purpose of having the note collected by a bank for the endorser or for a particular

account, transferees (other than intermediary banks) must pay or apply proceeds in accordance with the endorsement or the note will be considered converted [*Com. Code* § 3206(c); *see Com. Code* § 4201]. Under the statutory scheme, an endorsement "for deposit only," although restrictive, is also a blank endorsement because it does not specify where or for whose benefit the checks are to be deposited [*Spencer v. Sterling Bank* (1998) 63 Cal. App. 4th 1055, 1059-1060, 74 Cal. Rptr. 2d 576 (bank's acceptance for collection of cashiers' checks endorsed "for deposit only," for deposit to third party's trust account, was not violation of restrictive indorsement)].

[viii] Place of Payment

Negotiability is unaffected by whether or not a note specifies a place of payment [*see Com. Code* § 3111]. Except as otherwise permitted by Division 4 of the Commercial Code, a note is payable at the place of payment stated in the note. If no place is stated, the place of payment is the place of business of the drawer or maker, or if there is no place of business, at the residence of the drawer or maker [*Com. Code* § 3111].

[ix] Interest

Unless otherwise provided, a note is not payable with interest [*Com. Code* § 3112(a)]. If interest is payable, it is payable from the date of the note [*see Com. Code* § 3112(a)] and may be expressed as a fixed or variable rate or amount of money [*Com. Code* § 3112(b)]. If the amount of interest payable cannot be ascertained from its description, it is payable at the judgment rate in effect at the place of payment and at the time interest first accrues [*Com. Code* § 3112(b); *see Civ. Code* § 3287; *Code Civ. Proc.* §§ 685.010-685.030]. The rate of interest specified in the contract, if any, remains chargeable after a breach until the contract is superseded by a verdict or other new obligation [*Civ. Code* § 3289(a)]. For contracts entered into after January 1, 1986 that do not specify a legal rate of interest chargeable after breach, the obligation bears interest at the rate of 10 percent per year [*Civ. Code* § 3289(b); *see Civ. Code* §§ 1805.1, 3289.5 (Unruh Act restrictions on retail installment sales)]. Interest accrues at the rate of 10 percent per year on the principal amount of a money judgment remaining unsatisfied [*Code Civ. Proc.* § 685.010(a); *but see Civ. Code* § 3287(b) (interest on awarded damages at discretion of court)].

The maximum interest rate that may be charged by a lender in California depends on the type of lender. The California Constitution limits the rate to 10 percent per year but permits the California Legislature to pass statutory exemptions [*see Cal. Const. art. XV, § 1*]. Exemptions enacted by the Legislature include the following:

- Automobile installment loans [*see Civ. Code* § 2982(j)].
- Retail installment sales and accounts [*see Civ. Code* §§ 1805.1, 1803.3, 1810.2].
- Real estate brokers [*see Civ. Code* § 1916.1; *see, e.g., Park Terrace Ltd. v. Teasdale* (2002) (100 Cal. App. 4th 802, 805-806, 122 Cal. Rptr. 2d 797 (finding exemption for loans arranged by licensed real estate broker applicable))].
- Qualified securities [*see Corp. Code* § 25116].
- Securities broker-dealers [*see Corp. Code* § 25211.5].
- Lending institutions acting as fiduciaries [*see Fin. Code* §§ 1504, 6515(c); *see, e.g., Jones v. Wells Fargo Bank* (2003) 112 Cal. App. 4th 1527, 1534-1535, 5 Cal. Rptr. 3d 835 (loan and forbearance agreement made by national bank fell within *Fin. Code* § 1504 exemption)]].
- Foreign banks [*see Fin. Code* § 1716].

- Lending institution holding companies [see *Fin. Code* §§ 3707, 7675].
- Credit unions [see *Fin. Code* § 14901].
- Industrial loan companies [see *Fin. Code* §§ 18191, 18212].
- Pawnbrokers [see *Fin. Code* §§ 21200, 21200.5, 21201.4].
- Personal property brokers [see *Fin. Code* §§ 22451, 22451.1].
- Consumer finance licensees [see *Fin. Code* § 24451].
- Insurers [see *Ins. Code* § 1100.1].

For additional discussion, see California Forms of Pleading and Practice, Ch. 568, *Usury* (Matthew Bender).

[x] Dates

The negotiability of a note is unaffected by the fact that it is undated, antedated, or postdated. If a note is undated, the date is the date of issue or, if unissued, the date the note comes into possession of the holder [*Com. Code* § 3113(b)]. If a note is antedated or postdated, the date determines the time of payment if the note is payable at a fixed period after the date [*Com. Code* § 3113(a)]. A note payable on demand is not payable before the date of the note [*Com. Code* § 3113(a)].

[xi] Contradictory Terms

Contradictory terms do not render a note nonnegotiable. If a note contains contradictory terms, typewritten terms prevail over printed ones, handwritten terms prevail over both typewritten and printed terms, and words prevail over numbers [see *Com. Code* § 3114].

[g] Securities Aspects of Negotiable Instruments

The simple notes provided by this form can be used by business clients for short-term lending or borrowing. Although notes that are used in this way are commonly referred to as negotiable instruments, they are financial assets [see *Com. Code* § 8102(a)(9) ("financial asset" defined)] if they are held in a securities account [see *Com. Code* § 8103(d)]. Writings that are securities certificates [see *Com. Code* § 8102(a)(16) ("security certificates" defined)] are governed by Commercial Code Division 8 rather than Division 3, even if they meet the requirements of Division 3 [*Com. Code* § 8103(d)]. Negotiable investment securities and the application of securities laws to debt securities are covered in Ch. 6J, *Issuance of Debt Securities*, and Ch. 6K, *Nonissuer Transactions in Investment Securities*.

[h] Consumer Protection Notices

The notes in this chapter are not intended to be used in consumer transactions, and must be substantially modified to be suitable for such use. This is because of numerous federal and California requirements that govern the contents and format of documents used in consumer transactions. For example, a note given in connection with the purchase of a consumer product [see *Civ. Code* § 1802.6] must either include or be accompanied by a notice concerning the liability of any cosigner or guarantor [see *Civ. Code* § 1799.91; see also Ch. 45, *Consumer Installment Loans and Credit Sales*]. As an additional example, a note executed in connection with a debt arising from a purchase money loan or financed sale in an interstate consumer credit transaction must contain a notice stating that the holder is subject to the claims and defenses that the debtor could have asserted against the seller [see 16 C.F.R. § 433.2; see also Ch. 45, *Consumer Installment Loans and Credit Sales*].

The Unruh Act, governing retail installment sales [see *Civ. Code* §§ 1801-1812.20], imposes a number of requirements, including the requirement that a promissory note must be included within the body of the underlying retail installment contract [*Civ. Code* § 1803.2(a)]. In addition, the federal Truth in Lending Act, governing consumer credit cost disclosure [see 15 U.S.C. §§ 1601-1667e], requires numerous disclosures in connection with consumer credit transactions. Both of these statutes are covered in Ch. 45, *Consumer Installment Loans and Credit Sales*.

[2] FORM

Simple Negotiable Promissory Notes

[EITHER for time note--interest only:]

INTEREST-ONLY TIME NOTE PAYABLE TO ORDER OR TO BEARER

_____ [city, state]

_____ [If prepayment is to be permitted: On or before _____ (date) or
 _____ (number) days after the date of this Note or, if prepayment is not to be permitted:
 _____ (number) days after sight], _____ [I or we jointly] promise to pay
 _____ [to the order of _____ (name of payee) or to _____ (name of payee), or to order], or
 to bearer, the principal sum of \$_____, with interest at the rate of _____ percent
 per year (computed on the basis of a 360-day year), payable _____ [specify how or when payable, e.g.,
 monthly on the _____ day of each month, beginning on the _____ day of _____ (month, year) or
 together with payment of the principal sum of this Note].

MAKER

_____ [signature of maker]
 [typed name]

[OR, for demand note--interest only:]

INTEREST-ONLY DEMAND NOTE

_____ [city, state]

\$_____ [amount borrowed] [date]

_____ [On demand or On sight or On presentation], _____ [I or we jointly] promise to
 pay _____ [to the order of _____ (name of payee) or to _____ (name of payee), or to
 order], or to bearer, the sum of \$_____ together with interest at the rate of _____
 percent per year (computed on the basis of a 360-day year) from _____ [date], payable
 _____ [specify how or when payable, e.g., monthly on the _____ day of each month, beginning
 on the _____ day of _____ (month, year) or together with payment of the principal sum of this Note].

MAKER

_____ [signature of maker]
 [typed name]

[OR, for installment note--interest on unpaid balance:]

INSTALLMENT NOTE WITH INTEREST ON UNPAID BALANCE

_____ [city, state]

\$ _____ [amount borrowed] [date]

For value received, _____ [I or we jointly] promise to pay to the order of _____ [name of payee], or to bearer, the principal sum of \$ _____ in the following manner: \$ _____ on _____ [date], and \$ _____ on the _____ day of each month after that until the entire amount is paid, with interest on the unpaid balance at the rate of _____ percent per year (computed on the basis of a 360-day year), payable with each installment of principal.

MAKER

_____ [signature of maker]
 [typed name]

[OR, for discount note payable in installments:]

DISCOUNTED INSTALLMENT NOTE

_____ [city, state]

\$ _____ [amount borrowed] [date]

_____ [I or We jointly] promise to pay to the order of _____ [name of payee], or to bearer, the principal sum of \$ _____ in the following manner: \$ _____ on _____ [date], and \$ _____ on the _____ day of each month after that until the entire amount is paid.

MAKER

_____ [signature of maker]
 [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Truth in Lending General Overview Commercial Law (UCC) Negotiable Instruments (Article 3) General Provisions & Definitions Characteristics Payable on Demand or at Definite Time Commercial Law

(UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsNegotiable & Nonnegotiable
InstrumentsCommercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer &
IndorsementNegotiationCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesParty
ObligationsCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesSignatures



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 55 NEGOTIABLE INSTRUMENTS

PART IV. FORMS

A. Complete Promissory Notes

22-55 California Legal Forms--Transaction Guide § 55.201

§ 55.201 Simple Unsecured Promissory Note With Acceleration on Default

[1] Comment

[a] Use of Form

This form is a simple unsecured time note subject to acceleration. It is drafted as an interest-only note; that is, it provides for payment of interest in installments and for payment of principal at maturity. For a note providing for payment of both interest and principal in installments, see § 55.202.

This note may be used when the parties wish to specify a simple obligation to pay a stated sum at a stated time with interest at a stated rate, subject to acceleration under specified conditions.

For discussion of the requirements for negotiability, conditions and omissions that do not affect negotiability, when and to whom payment is to be made, interest, and required consumer protection notices, see § 55.200[1].

For an example of a secured installment note with interest, see § 55.202. The form in § 55.203 is a secured discount note subject to acceleration.

This note should not be used in consumer transactions without substantial modification [*see* § 55.200[1][h]]. For discussion of requirements applicable to consumer transactions, including retail installment sales (the Unruh Act) [*see* *Civ. Code* §§ 1801-1812.20] and consumer credit cost disclosure (the federal Truth in Lending Act) [*see* 15 U.S.C. §§ 1601-1667e], see Ch. 45, *Consumer Installment Loans and Credit Sales* .

[b] Effect of Conditions on Negotiability

For a note to be negotiable, the promise to pay must be unconditional [*Com. Code* § 3104(a)]. A promise is unconditional unless it (1) states an express condition to payment; (2) states that the promise or order is governed by another writing; or (3) states that related rights or obligations are stated in another writing [*Com. Code* § 3106(a)]. However, a reference to another writing, including a reference to another writing for rights relating to collateral,

prepayment, or acceleration [*Com. Code § 3106(b)*], does not of itself make the promise conditional [*Com. Code § 3106(a)*]. In addition, a promise or order is not made conditional because payment is limited to a particular source [*Com. Code § 3106(b)*]; because the promise or order requires a countersignature by a person whose signature appears on the promise or order as a condition to payment [*Com. Code § 3106(c)*]; or at the time it is issued or comes into possession by the holder, the promise or order contains a statement required by applicable law that the rights of the holder or transferee are subject to the claims and defenses of the issuer against the original payee [*Com. Code § 3106(d)*].

[c] Effect of Acceleration Terms on Negotiability

To be negotiable, a note must be payable either on demand or at a definite time [*Com. Code § 3104(a)(2)*]. A note is payable at a definite time even if it is subject to rights of acceleration [*Com. Code § 3108(b)(2)*]; therefore, the negotiability of the note is unaffected [*see Com. Code § 3104(a)(2)*; *see also Com. Code § 1309* (Official Comment)]. However, if a note provides that the payee may accelerate payment "at will," or when the party "deems itself insecure," or words of similar import, the party has power to do so only if that party in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against which the power has been exercised [*Com. Code § 1309*].

In addition, to be negotiable, a note may not state that it is subject to or governed by any other agreement [*see Com. Code § 3106(a)(2)*]. However, if an otherwise unconditional promise simply refers to a separate agreement or specifically refers to a separate agreement for acceleration rights, it is not thereby made conditional [*Com. Code § 3106(a), (b)*].

This form contains an acceleration clause reciting incidents generally viewed as incidents of default as well as grounds for acceleration [*see [2], P 2, below*]. Default is not defined under the Uniform Commercial Code [*see Com. Code § 9601 et seq.*], although the ordinary meaning of the word "default," when used with respect to a contractual obligation, is failure of performance, specifically the failure to observe a promise or discharge an obligation (for example, the failure to pay interest and principal on a debt when due) [*Bradbury v. Thomas* (1933) 135 Cal. App. 435, 443, 27 P.2d 402] .

Note provisions referring to the terms of a separate written agreement that bear on the maturity (acceleration) of the note are illustrated in § 55.230[2]. Other examples of acceleration clauses are set forth in § 55.231[2]. *Section 55.202[2]* illustrates an acceleration provision for a secured installment note. *Section 55.207[2]* illustrates an acceleration provision for use if the maker defaults on any of the notes in a series. For a due-on-sale acceleration clause used in real estate transactions and related discussion, see Ch. 25A, *Security Instruments for Real Estate Transactions* .

[d] Attorneys' Fees

In any contract action, if the contract provides for attorneys' fees to be awarded either to one of the parties or to the prevailing party, the party determined to be the party prevailing on the contract [*see Civ. Code § 1717(b)(1)* ("party prevailing on the contract" defined)], whether or not he or she is the party specified in the contract, will be entitled to reasonable attorneys' fees. In certain situations, there may be no "party prevailing on the contract" [*see Civ. Code § 1717(b)(1), (2)*; *see also Jackson v. Homeowners Association Monte Vista Estates-East* (2001) 93 Cal. App. 4th 773, 779-780, 782, 113 Cal. Rptr. 2d 363 (parties who agreed on record and in written settlement agreement that trial court would determine prevailing party in action and amount of attorney fee award before dismissal of action could and did waive provisions of *Civ. Code § 1717(b)(2)*, which provides there will be no prevailing party when an action is dismissed pursuant to settlement); *Sears v. Baccaglio* (1998) 60 Cal. App. 4th 1136, 1154-1155, 70 Cal. Rptr. 2d 769 (reviewing legislative history of *Civ. Code § 1717* and finding that party can fail to recover net monetary judgment and still prevail for purposes of collecting fees in action founded on contract)]. A court may deny a contractual claim for attorneys' fees by a defendant who has been voluntarily dismissed from a suit prior to trial [*see Santisas v. Goodin*

(1998) 17 Cal. 4th 599, 602, 608, 71 Cal. Rptr. 2d 830 (examining recovery of attorney fees incurred defending action when plaintiff has voluntarily dismissed action before trial); *see also Topanga and Victory Partners, LLP v. Toghia* (2002) 103 Cal. App. 4th 775, 778, 127 Cal. Rptr. 2d 104 (defendant who was not party to contract but was sued for breach of contract and other causes of action may not recover attorney fees incurred in defending noncontract causes of action when plaintiff has filed voluntary dismissal with prejudice); *Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal. App. 4th 443, 446, 118 Cal. Rptr. 2d 475 (holding that defendant was not prevailing party when plaintiffs obtained their litigation objective through settlement with other defendants)].

A provision for attorneys' fees will be construed to apply to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of representation is stated in the contract [Civ. Code § 1717(a)]. The attorneys' fees provision in this form [see [2], P 3, below] is specifically applicable to the entire contract.

The attorneys' fees clause in this form provides for an award of attorneys' fees only in a contract action, not in a tort action [see Civ. Code § 1717]. Because the right of the parties to provide for attorneys' fees under Code Civ. Proc. § 1021 is not limited to contract actions [*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal. App. 4th 1338, 1341, 5 Cal. Rptr. 2d 154], inadvertently broad wording in an attorneys' fees clause may result in an undesirable award of attorneys' fees in any action "arising under" a contract, whether a tort action or contract action [see *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal. App. 4th 1338, 1341-1344, 5 Cal. Rptr. 2d 154]. This form is drafted so as to prevent an award of attorneys' fees in a tort action.

For further discussion and other attorneys' fees provisions, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

[e] Waiver of Defense or Counterclaim

Paragraph 4 of this form includes a waiver of any defense or counterclaim in any litigation, which rights are expressly waived except as provided by law. This provision may not be used if the note is drafted in connection with a debt arising from a purchase money loan or financed sale in an interstate consumer credit transaction. That type of note must contain a notice stating that the holder is subject to the claims and defenses that the debtor could have asserted against the seller [see 16 C.F.R. § 433.2; *see also* Ch. 45, *Consumer Installment Loans and Credit Sales*].

[f] Notice of Cosigner or Guarantor Liability

A note given in connection with a retail installment contract (commonly, the purchase of a consumer product) [see Civ. Code § 1802.6] must either include or be accompanied by a notice concerning the liability of any cosigner or guarantor [see Civ. Code § 1799.91]. For a form for the required notice, see Ch. 45, *Consumer Installment Loans and Credit Sales*.

[2] FORM

Simple Unsecured Promissory Note With Acceleration on Default

UNSECURED NOTE SUBJECT TO ACCELERATION

_____ [city, state]

\$_____ [amount borrowed] [date]

Time Note

1. _____ [Period of time] after date, for value received, _____ [name of maker] ("Maker") promises to pay to the order of _____ [name of payee] ("Payee") the principal sum of \$_____, together with interest at the rate of _____ percent per year until maturity and at _____ [specify higher rate, e.g., the maximum legal rate] after maturity payable _____ [specify how or when payable, e.g., monthly on the _____ day of each month, beginning on the _____ day of _____ (month, year) or together with payment of the principal sum of this Note].

Acceleration

2. (a) This Note and all other obligations, direct or contingent, of any Maker or endorser of this Note to the Payee will become due and payable immediately, without presentment or notice, if:

(1) Maker fails to make the required payment when due.

(2) Maker or any endorser, surety, or guarantor of this Note:

(i) Fails, after demand, to furnish financial information or to permit inspection of any books or records.

(ii) Suspends business.

(iii) Becomes insolvent or offers settlement to any creditors.

(iv) Files a petition in bankruptcy, either voluntary or involuntary.

(v) Institutes any proceeding under any bankruptcy or insolvency laws relating to the relief of debtors.

(vi) Gives notice of any intended bulk sale.

(vii) Makes an assignment for the benefit of creditors.

(viii) Mortgages, pledges, assigns, or transfers any accounts receivable or other property, in trust or otherwise, without the written consent of the Payee.

(ix) Makes any false statement or representation orally or in writing, fails to furnish information, or fails to permit inspection of any books or records on demand of Payee.

(x) Fails to pay any obligation when due.

(xi) _____ [If maker, endorser, surety, or guarantor is an individual: Dies or if maker, endorser, surety, or guarantor is a corporation: Is dissolved or its capital becomes impaired].

(3) Payee discovers that any misrepresentation was made to Payee on behalf of Maker to obtain credit or an extension of credit.

(4) Any legal action is commenced against Maker or any endorser, surety, or guarantor, including:

(i) Entry of judgment.

(ii) Issuance of a writ of attachment, order of garnishment, order or subpoena in supplementary proceedings, execution, or similar process.

(5) A receiver is appointed for Maker or any endorser, surety, or guarantor.

(b) At its option, the Payee may accelerate the maturity of the Note to become due immediately if, in the sole opinion of Payee, the financial responsibility of Maker becomes unsatisfactory or the obligation evidenced by this Note [*add if applicable*: or any other obligation of any Maker, endorser, surety or guarantor] is in jeopardy.

Attorneys' Fees

3. Maker and each endorser agree that if any _____ [legal action or *specify more limited provision, e.g.,* legal action based in contract law] is necessary to enforce or collect this Note for nonpayment at maturity, the prevailing party will be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision is applicable to the entire Agreement.

Waivers

4. Maker waives the right to interpose any defense, set-off, or counterclaim of any nature or description, which rights are expressly waived except as provided by law.

Governing Law

5. This Note will be governed by the laws of the State of California, including the Uniform Commercial Code in force in the State of California.

MAKER

_____ [*signature of maker*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection General Overview Commercial Law (UCC) Negotiable Instruments (Article 3) General Provisions & Definitions General Overview Commercial Law (UCC) Negotiable Instruments (Article 3) General Provisions & Definitions Characteristics Payable on Demand or at Definite Time Commercial Law (UCC) Negotiable Instruments (Article 3) General Provisions & Definitions Characteristics Unconditional Order & Promise



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 55 NEGOTIABLE INSTRUMENTS

PART IV. FORMS

A. Complete Promissory Notes

22-55 California Legal Forms--Transaction Guide § 55.202

§ 55.202 Secured Installment Note With Interest

[1] Comment

[a] Use of Form

This form is a secured installment note with provisions for payment in equal installments of principal and interest. The form provides two alternatives for providing for the payment of interest. The first alternative provides for interest on the unpaid balance, while the second provides for interest to be aggregated and amortized over all installments.

For discussion of the requirements for negotiability, conditions and omissions that do not affect negotiability, when and to whom payment is to be made, interest, and required consumer protection notices, see § 55.200[1]. For discussion of how a separate agreement or acceleration terms can affect negotiability, see § 55.201[1][b], [c].

[b] When Installment Note Is Overdue

If a note's principal is payable in installments and a due date has not been accelerated, the note becomes overdue on default [*Com. Code § 3304(b)(1)*]. For a discussion of default, see § 55.201[1][c].

[c] Late Charges

This form provides for a late charge [*see [2], P 2, below*]. Late charge provisions compensate the payee or holder for its administrative expenses and the cost of money wrongfully withheld, and encourage the maker to make timely future payments [*Garrett v. Coast & Southern Fed. Sav. & Loan Assn. (1973) 9 Cal. 3d 731, 739-740, 108 Cal. Rptr. 845, 511 P.2d 1197*]. Because a late charge provision imposes an additional charge on the maker upon default, it is subject to the requirements of *Civ. Code § 1671*, which prescribes the requirements for a valid liquidated damages provision [*see Garrett v. Coast & Southern Fed. Sav. & Loan Assn. (1973) 9 Cal. 3d 731, 738, 108 Cal. Rptr. 845, 511 P.2d 1197* ; *see Weber, Lipshie & Co. v. Christian (1997) 52 Cal. App. 4th 645, 656-657, 60 Cal. Rptr. 2d 677* (partners' liquidated damages provision, that damages to accounting firm for loss of fees from breach of covenant would be measured by doubling firm's time charges for clients lost due to breach for 12 months immediately preceding their loss,

was enforceable)].

In general, a liquidated damages clause is valid unless the party seeking to invalidate it can establish that it was unreasonable under the circumstances existing at the time the contract was made [*Civ. Code* § 1671(b); *see, e.g., Ridgley v. Topa Thrift and Loan Assn.* (1998) 17 Cal. 4th 970, 979-981, 73 Cal. Rptr. 2d 378, 953 P.2d 484 (promissory note clause that imposed charge of six months' interest if borrowers prepaid loan principal, and provided that charge would not be imposed six months after execution of note unless borrowers had made late interest payment or otherwise defaulted, held to be unenforceable penalty for late payment)]. However, this rule does not apply if the liquidated damages are sought from either (1) a party to a contract for the retail purchase or rental of personal property or services primarily for that party's personal, family, or household use; or (2) a party to a lease of real property to be used as a dwelling by that party or that party's dependents [*Civ. Code* § 1671(c)]. In these situations, a liquidated damages provision is void, although the parties may agree in the contract on an amount that will be presumed to be the amount of damages for breach if, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage [*Civ. Code* § 1671(d)]. In addition, *Civ. Code* § 1671 is inapplicable if any other statute prescribes a rule or standard for determining the validity of a provision for liquidated damages [*Civ. Code* § 1671(a)]. Special statutes govern loans on single family owner-occupied dwellings [*see Civ. Code* § 2954.4], automobile sales finance [*see Civ. Code* § 2982], credit unions [*see Fin. Code* § 15001], industrial loan companies [*see Fin. Code* § 18631], and personal property brokers [*see Fin. Code* § 22400(a)(5)]. These statutes should be consulted for variations of the late charge provision set forth in this form [*see* [2], P 2, *below*].

Late charges on real property loans secured by deeds of trust are limited to either (1) 6 percent of the installment due that is applicable to payment of interest and principal or (2) \$5, whichever is greater [*see Civ. Code* § 2954.4(a)]. A late charge may not be imposed in this type of loan unless the installment is more than 10 days overdue [*Civ. Code* § 2954.4(b)]. For a late charge provision to use in a note underlying a real estate loan transaction, *see* Ch. 25A, *Security Interests for Real Estate Financing*. For a generally applicable liquidated damages provision, *see* Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

A late charge expressed simply as a percentage of the overdue amount would entail some risk of being found unreasonable [*see, e.g., Poseidon Dev., Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal. App. 4th 1106, 1115, 62 Cal. Rptr. 3d 59]. It would be safer to adapt the formula in *Civ. Code* § 2954.4(a) by specifying a maximum charge or simply to set the charge as a specified amount (which can be reasonably projected from the actual anticipated administrative costs that the charge is intended to cover).

[2] FORM

Secured Installment Note With Interest

SECURED INSTALLMENT NOTE WITH INTEREST

_____ [city, state]

\$ _____ [amount borrowed] [date]

Installment Note

[First alternative; interest on unpaid balance--short form:]

1. I promise to pay to the order of _____ [name of payee] the sum of \$ _____, in the

following manner: the first installment of \$_____ on _____[*date*], and installments of \$_____ on the _____ day of each successive month until the entire amount is paid, with interest on the unpaid balance at a rate of _____ percent per year, payable with each installment of principal.

[OR]

[*Second alternative; interest aggregated and amortized over all installments--long form:*]

1. (a) For value received, [I or we], the undersigned [Maker or Makers jointly and severally], promise to pay to the order of _____[*name of payee*] ("Payee"), at its office at _____[*address*], at the times specified below, the sum of \$_____ (the "Principal"), together with interest at the rate of _____ percent per year (computed on the basis of a 360-day year).

(b) The Principal and the aggregate of the interest on the Principal will be payable in [*number*] equal successive monthly installments in the aggregate amount of \$_____ each. The first installment will be paid on the _____ day of [*month, year*], and subsequent installments will be paid on the same day of each successive month until all the payments have been made.

[*Continue with the following:*]

Late Charge

2. Maker agrees that if any installment payment provided for in this Note is [late or in default or unpaid] for at least [*e.g.*, 10] days, it would be impracticable or extremely difficult to fix the actual damages resulting to the Payee. Therefore, Maker agrees to pay to the Payee the sum of \$_____ on default, as liquidated damages and not as a penalty, to compensate the Payee for the expenses of administering the default. Only one late charge will be collected on any installment, regardless of the period during which it remains in default. [*Add if applicable:* The aggregate of the late charges collected in connection with this loan, including renewal, will not exceed _____ percent of the loan.]

Acceleration

3. (a) At its option, the Payee of this Note may determine that Maker is in default and may, consequently, accelerate the maturity of all installments, making the unpaid balance of the Note (the total of the unpaid monthly installments and any unpaid fines that have been charged) due immediately without presentment for payment or any notice, if:

(1) Maker fails to pay an installment when due.

(2) Maker or any endorser, surety, or guarantor of this Note:

(i) Fails, after demand, to furnish financial information or to permit inspection of any books or records.

(ii) Suspends business.

- (iii) Becomes insolvent or offers settlement to any creditors.
- (iv) Files a petition in bankruptcy, either voluntary or involuntary.
- (v) Institutes any proceeding under any bankruptcy or insolvency laws relating to the relief of debtors.
- (vi) Gives notice of any intended bulk sale.
- (vii) Makes an assignment for the benefit of creditors.
- (viii) Mortgages, pledges, assigns, or transfers any accounts receivable or other property, in trust or otherwise, without the written consent of the Payee.
- (ix) Makes any false statement or representation orally or in writing, fails to furnish information, or fails to permit inspection of any books or records on demand of the Payee.
- (x) Fails to pay any obligation when due.
- (xi) _____ [If maker, endorser, surety, or guarantor is an individual:
Dies or if maker, endorser, surety, or guarantor is a corporation: Is dissolved or its capital becomes impaired].

(3) Payee discovers that any misrepresentation was made to Payee on behalf of Maker to obtain credit or an extension of credit.

(4) Any legal action is commenced against Maker or any endorser, surety, or guarantor, including:

- (i) Entry of judgment.
- (ii) Issuance of a writ of attachment, order of garnishment, order or subpoena in supplementary proceedings, execution, or similar process.

(5) A receiver is appointed for Maker or any endorser, surety or guarantor.

(b) The Payee of this Note, at its option, may accelerate the maturity of all installments to become due immediately if it considers the security underlying this Note to be unsatisfactory or insufficient and the Maker does not, on demand, furnish additional collateral or make payment on account satisfactory to the Payee.

(c) The Payee of this Note, at its option, may accelerate the maturity of all installments to become due immediately if, in the sole opinion of the Payee, the financial responsibility of Maker becomes unsatisfactory.

Disposition of Collateral on Default

4. Any collateral given to the Payee at any time will be deemed security for the payment of this Note [add if applicable: and any other liabilities of the undersigned to the Payee]. In case of default in payment of this Note [add if applicable:; or any other notes of the undersigned, whether as maker, co-maker, or endorser, held by the Payee], or in case the collateral declines in value or otherwise becomes unsatisfactory to the Payee, the Payee is authorized to dispose of all or

any part of the collateral security property at public or private sale, without advertisement, or notice to the Maker, which rights are expressly waived. At such a sale, the Payee may purchase any or all of the property free of any claim or right of redemption of the Maker, which rights are expressly waived except as provided by law. Neither the sale of the collateral nor the application of its proceeds will prejudice any other rights of Payee against Maker.

Collection Costs

5. Maker agrees to pay the expenses incurred in any lawful attempt to enforce this Note, including the cost of retaking and keeping any collateral or other security property for this Note specified in any agreements.

Attorneys' Fees

6. Maker agrees that if any [legal action or *specify more limited provision, e.g.,* legal action based in contract law] is necessary to enforce this Note for nonpayment at maturity, the prevailing party will be entitled to reasonable attorneys' fees in addition to any other relief that party may be entitled to. This provision is applicable to the entire Note.

Extension of Time for Payment

7. No extension of time for payment of all or any part of the amount owing on this Note will affect the liability of the Maker or any surety, guarantor, or endorser of this Note. The Maker and all sureties, guarantors, endorsers, severally waive presentment for payment, notice of nonpayment, and notice of dishonor of this Note.

MAKER

_____ [signature of maker]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsGeneral
OverviewContracts LawTypes of ContractsInstallment Contracts



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 55 NEGOTIABLE INSTRUMENTS

PART IV. FORMS

A. Complete Promissory Notes

22-55 California Legal Forms--Transaction Guide § 55.203

§ 55.203 Secured Discount Note Subject to Acceleration

[1] Comment

[a] Use of Form

This form is a secured discount note with provision for acceleration on specified events of default. A discount note is one in which the amount of interest has been precomputed and deducted from the amount borrowed, and which provides for repayment of the full amount borrowed.

For discussion of the requirements for negotiability, conditions and omissions that do not affect negotiability, when and to whom payment is to be made, interest, and required consumer protection notices, see § 55.200 [1]. For discussion of how a separate agreement or acceleration terms can affect negotiability, see § 55.201[1][b], [c]. Paragraph 2 of this form includes a late charge provision. For discussion of late charges, see § 55.202[1][b].

[b] Notes Made Payable at Bank

If a note is made payable at a bank in the United States, it must be presented at an office or branch of the bank designated in the note [see *Com. Code § 3501(b)(1)*]. For coverage of the procedures involved in presentment, see § 55.131.

[c] Payees' Right of Setoff

This form includes an optional provision permitting a bank or savings and loan association to exercise a right of setoff against the maker's bank account [see [2], P 6(c), *below*]. However, any setoffs for a debt must not result in an aggregate balance of less than \$1,000 in a customer's account [see *Fin. Code §§ 864(b), 6660(b)*; see also *Martin v. Wells Fargo Bank (2001) 91 Cal. App. 4th 489, 499-500, 110 Cal. Rptr. 2d 653* (under *Fin. Code § 864*, "debt" is interest-bearing obligation or obligation which by its terms is payable in installments, which has not been reduced to judgment, arising from extension of credit to natural person primarily for personal, family, or household purposes; "extension of credit" within meaning of statute occurs when bank grants right to incur debt by issuing credit card, and

bank may setoff debts incurred in use of business credit card without compliance with that section)]. For further discussion, see *Ch. 102A, Personal Property Liens, § 102A.345*].

[2] FORM

Secured Discount Note Subject to Acceleration

SECURED DISCOUNT NOTE SUBJECT TO ACCELERATION

_____ [city, state]

\$_____ [amount borrowed] [date]

Installment Note

1. (a) [Add if applicable: For value received,] [I or we], the undersigned [("Maker") or ("Makers")] jointly and severally, promise to pay to the order of _____ [name of payee] ("Payee"), at _____ [address of payee], _____ [city, state], the sum of \$ _____ (the "Principal"). The proceeds of this Note will be the Principal less a charge computed on that amount for the period from this date to and including the last of the installment payments at a rate of _____ percent per year (computed on the basis of a 360-day year). [Add if applicable: If this Note is signed by more than one maker, the makers will be jointly and severally liable.]

(b) The Principal will be payable in [number] equal successive monthly installments in the aggregate amount of \$ _____ each. The first installment will be paid on the _____ day of [month, year], and subsequent installments will be paid on the same day of each successive month until all the payments have been made.

Late Charge

2. The undersigned agrees that if any installment payment provided for in this Note is [late or in default or unpaid] for at least [e.g., 10] days, it would be impracticable or extremely difficult to fix the actual damages resulting to the Payee. Therefore, Maker agrees to pay to Payee the sum of \$ _____ on any default, as liquidated damages and not as a penalty, to compensate the Payee for the expenses of administering the default. Only one late charge will be collected on any installment, regardless of the period during which it remains in default. [Add if applicable: The aggregate of the late charges collected in connection with this loan, including renewal, will not exceed _____ percent of the loan.]

Time Extensions

3. Acceptance by Payee of any installment after any default will not operate to extend the time of payment of any amount remaining unpaid, or constitute a waiver of any of the other rights of the Payee under this Note.

Collateral

4. As collateral security for the payment of this Note, Payee will at all times have a lien on and right of offset against [

describe collateral].

Acceleration

5. (a) At its option, Payee may declare a default on this Note and all liabilities of Maker to Payee under this Note will become due immediately without presentment for payment, notice of nonpayment, or notice of dishonor, which rights are expressly waived, if:

(1) Maker fails to make a payment when due.

(2) Maker or any endorser, surety, or guarantor of this Note:

(i) Fails, after demand, to furnish financial information or to permit inspection of any books or records.

(ii) Suspends business.

(iii) Becomes insolvent or offers settlement to any creditors.

(iv) Files a petition in bankruptcy, either voluntary or involuntary.

(v) Institutes any proceeding under any bankruptcy or insolvency laws relating to the relief of debtors.

(vi) Gives notice of any intended bulk sale.

(vii) Makes an assignment for the benefit of creditors.

(viii) Mortgages, pledges, assigns, or transfers any accounts receivable or other property, in trust or otherwise, without the written consent of the Payee.

(ix) Makes any false statement or representation orally or in writing, fails to furnish information, or fails to permit inspection of any books or records on demand of the Payee.

(x) Fails to pay any obligation when due.

(xi) _____ [*If maker, endorser, surety, or guarantor is an individual:
Dies or if maker, endorser, surety, or guarantor is a corporation: Is dissolved or its
capital becomes impaired*].

(3) Payee or holder discovers that any misrepresentation was made to Payee on behalf of Maker to obtain credit or an extension of credit.

(4) Any legal action is commenced against Maker or any endorser, surety, or guarantor, including:

(i) Entry of judgment.

(ii) Issuance of a writ of attachment, order of garnishment, order or subpoena in supplementary proceedings, execution, or similar process.

(5) A receiver is appointed for Maker, endorser, surety or guarantor.

(b) At its option, Payee may accelerate the maturity of this Note to become due immediately if it considers the security underlying the Note to be unsatisfactory or insufficient and the Maker does not, on demand, furnish additional collateral or make payment on account that is satisfactory to the Payee.

(c) At its option, Payee may accelerate the maturity of the Note to become due immediately if, in the sole opinion of the Payee, the financial responsibility of the Maker becomes unsatisfactory or the obligation evidenced by this Note *[add if applicable: or any other obligation of any maker, endorser, or guarantor]* is in jeopardy.

Disposition of Collateral

6. (a) On the occurrence of any of the events that give rise to default under Paragraph 5 of this Note *[add if applicable:, or that give rise to a claim asserted by Payee against Maker, for any reason whatsoever]*, Payee will have the right to sell all or part of the collateral described in Paragraph 4 at public or private sale, without advertisement or notice to the Maker, which rights are expressly waived, and Payee retains the right to purchase at the sale any collateral security free from any right of redemption on the part of any of Maker.

(b) In the event of a sale of collateral security, Payee may apply the proceeds, after deduction of all expenses, to the payment of the Principal, whether or not due, in proportion and sequence as Payee may determine in its sole discretion, returning any remaining balance to Maker. Neither the sale of that collateral nor the application of its proceeds will prejudice the rights of Payee against Maker with respect to any amounts that remain unpaid on this Note.

[Optional:]

(c) At its option at any time and without notice, Payee may appropriate and apply to the payment of the amount owing on this Note, in proportion and sequence as Payee in its sole discretion may determine, any deposit balances or sums credited by or due from Payee to the Maker. Maker agrees that Payee may take any of these actions without formal assertion or enforcement of any rights or liens.

[Continue with the following:]

Waiver of Rights by Maker

7. Maker and all sureties, guarantors, and endorsers of this Note severally waive presentment for payment, notice of nonpayment, notice of dishonor, and any notices in connection with the delivery, presentment, acceptance, performance, default, or enforcement of this Note, and consent to any extensions of time, renewals, releases of liens, waivers, or modifications that may be made by Payee to any party to this Note.

Waivers or Modifications by Payee

8. No extension of time for payment of any amount owing on this Note will affect the liability of Maker or any surety, guarantor, or endorser of this Note. No delay by the Payee or holder in exercising any right under this Note will operate as a waiver of that right; nor will any single or partial exercise of any right preclude other or further exercise of the

right, or the exercise of any other right under this Note or otherwise as permitted by law. No waiver or modification of the terms of this Note will be valid unless in writing, signed by the Payee of this Note. Any waiver or modification will be valid only to the extent set forth in the writing.

Collection Costs

9. Maker agrees to pay the expenses incurred in any lawful attempt to enforce this Note, including the cost of retaking and keeping any collateral or other security property for this Note specified in any agreements.

Attorneys' Fees

10. Maker agrees that if any [legal action *or specify more limited provision, e.g.,* legal action based in contract law] is necessary to enforce this Note for nonpayment at maturity, the prevailing party will be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision is applicable to the entire Note.

MAKER

_____ [signature of maker]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsGeneral

OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsPlace of Payment



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 55 NEGOTIABLE INSTRUMENTS

PART IV. FORMS

A. Complete Promissory Notes

22-55 California Legal Forms--Transaction Guide § 55.204

§ 55.204 Corporate Note Providing for Payment of Principal and Interest in Installments With Final Balloon Payment

[1] Comment

[a] Use of Form

This form is a short-form note that provides for repayment in installments of both principal and interest on the unpaid balance and a final payment of the remaining balance (a "balloon payment"). It includes a provision for acceleration on default. This form is drafted to be used between a payee and a corporate maker and includes language indicating the authority of corporate officers to execute the note. However, it may also be used by individuals in transactions other than consumer credit sale transactions.

For discussion of the requirements for negotiability, conditions and omissions that do not affect negotiability, when and to whom payment is to be made, interest, and required consumer protection notices, see § 55.200[1]. For discussion of how a separate agreement or acceleration terms can affect negotiability, see § 55.201[1][b], [c]. For a sample secured installment note with interest, see § 55.202[2].

[b] Notice Requirements for Balloon Payment Notes Secured by Certain Real Property Security Instruments

Special notice requirements apply to balloon payment notes secured by real property security instruments that cover one to four residential units if (1) at least one of them is or is to be occupied by the maker when the loan is made, and (2) the loan period exceeds one year [*Civ. Code* § 2924i(a)]. Before the final payment is due, the payee or holder must send the maker a notice containing the name and address of the person to whom payment is to be made, the date and amount (or a good faith estimate of the amount) of the payment and, if applicable, the maker's right to refinance the final payment [*Civ. Code* § 2924i(c)]. This notice requirement does not apply to open-end credit transactions as defined by Regulation Z [see 12 C.F.R. §§ 226.1-226.30], transactions by arrangers of credit [see *Civ. Code* § 2956 (requirement for disclosures by arrangers of credit)], or residential construction loans [*Civ. Code* § 2924i(b)]. For a form of balloon payment notice, see Ch. 25A, *Security Interests for Real Estate Financing* .

Other notice requirements apply to balloon payments in retail installment contracts [see *Civ. Code* § 1807.3(a)]. Because this form is not intended for use in consumer transactions [see § 55.200[1][h]], it does not contain those disclosures. For discussion of the disclosures required in consumer credit transactions, see Ch. 45, *Consumer Installment Loans and Credit Sales* .

[2] FORM

Corporate Note Providing for Payment of Principal and Interest in Installments With Final Balloon Payment

PRINCIPAL AND INTEREST IN INSTALLMENTS WITH FINAL BALLOON PAYMENT

_____ [city, state]

_____ [date]

Name of Maker: _____ Corporation.

Loan No.: _____.

Amount Borrowed: \$_____.

Interest Rate: _____ percent per year.

Maturity date: _____.

Installment Note

1. For value received, the undersigned _____ [name] Corporation ("Maker") promises to pay to the order of _____ [name of Payee] ("Payee"), at _____ [address of payee's office], the principal sum of \$_____, with interest at the rate of _____ percent per year (computed on the basis of a 360-day year) on the unpaid balance of that principal sum until paid. The undersigned further promises to pay that principal sum and interest in installments as follows: the first installment of \$_____ on _____ [date] and [number of installments] successive monthly installments of \$_____ on the [day] of each month, until all installment payments have been made, on which date the entire balance of unpaid principal and interest will be due and payable.

Allocation of Payments

2. Each installment, when paid, will be credited first to the interest then due, and the remainder will be credited to principal. Interest will cease to accrue on the principal so credited.

Acceleration

3. If Maker fails to make any installment payment or portion of a payment when due, all unpaid principal, together with accrued interest, will become immediately due and payable at the option of the Payee of this Note, without notice.

Collection Costs

4. Maker agrees to pay the expenses incurred in any lawful attempt to collect the amount due pursuant to this Note.

Attorneys' Fees

5. Maker agrees that if any [legal action *or specify more limited provision, e.g.,* legal action based in contract law] is necessary to enforce this Note, the prevailing party will be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision is applicable to the entire Note.

[Optional; use if collateral is given:]

Security Interest

6. A _____ [describe instrument, *e.g.,* deed of trust or financing statement] dated _____ secures the indebtedness evidenced by this Note.

[Continue with the following:]

The undersigned corporation has authorized the officers whose signatures appear below to execute this Note.

MAKER

_____ [name of corporation]

By _____ [signature]
[typed name and title]

By _____ [signature]
[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Corporations Directors & Officers Scope of Authority General Overview Real Property Law Financing Mortgages & Other Security Instruments Nonconventional Mortgages



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 55 NEGOTIABLE INSTRUMENTS

PART IV. FORMS

A. Complete Promissory Notes

22-55 California Legal Forms--Transaction Guide § 55.205

§ 55.205 Collateral Note With Alternative Statements Describing Collateral

[1] Comment

[a] Use of Form

This form is a secured note with alternative descriptions of the collateral used to secure the note. This note should be used when the parties wish to include a provision regarding collateral in the note [*see [b], below*]. For discussion of the requirements for negotiability, conditions and omissions that do not affect negotiability, when and to whom payment is to be made, interest, and required consumer protection notices, *see* § 55.200[1]. For discussion of how a separate agreement or acceleration terms can affect negotiability, *see* § 55.201[1][b], [c].

[b] Collateral

Negotiability is unaffected by a statement of rights, or reference to another writing, with respect to collateral. Thus, a negotiable note may provide for collateral to secure the obligation of the note or any other obligation of the maker [*see Com. Code § 3106(a), (b)*]. Furthermore, a note may permit the holder to sell or otherwise dispose of collateral in the event of a default [*see Com. Code § 9610*]. Thus, a note may permit the holder to take such action prior to maturity; for example, a note may provide for sale of collateral if the maker defaults by failing to make an installment payment [*see Com. Code § 9607(a)*].

A note may also include a promise or power to use reasonable care to maintain or protect the collateral [*see Com. Code § 9207(a)*; *see also Com. Code § 9610(b)*]. Further, a note may include a promise to supply additional collateral on demand when the holder deems itself insecure or after the occurrence of a stated condition [*see Com. Code § 9204(a)* (after-acquired collateral)]. However, the holder may exercise that power only on the good faith belief that the prospect of payment or performance is impaired [*see Com. Code § 1309*]. Such terms frequently are accompanied by a provision for acceleration if the collateral is not given [*see Com. Code § 1309* (option to accelerate at will)].

Provisions for collateral are advisable if the holder needs to be protected from default by the maker. For discussion of this type of transaction and the legal requirements for dealing with collateralized borrowing, *see* Ch. 25A, *Security*

Instruments for Real Estate Financing, and Ch. 42, *Secured Transactions*. For further discussion of the effects of acceleration on negotiability, see § 55.201[1][c]. For an acceleration provision if collateral is promised but not given, see § 55.231[2], fourth alternative.

[2] FORM

Collateral Note With Alternative Statements Describing Collateral

SECURED NOTE

_____ [city, state]

\$_____ [amount borrowed] [date]

Time Note

1. On _____ [date], I, the undersigned _____ [name] ("Maker"), promise to pay to the order of _____ [name of payee] ("Payee") the sum of \$_____, plus interest at the rate of _____ percent per year (computed on the basis of a 360-day year), at _____ [place or address].

Initial Collateral

2. To secure payment of this Note [add if applicable:; and of any past, present, or future liabilities of Maker to the Payee, regardless of how acquired by the Payee], Maker has _____ [given a secured interest in or given a secured interest in and delivered to Payee] the following property: _____ [describe collateral] ("collateral"), the market value of which is agreed to be \$_____ on the date this Note is executed.

Additional Collateral

3. (a) In case of a decline in the market value of all or any part of the collateral, the holder may demand that additional collateral of quality and value satisfactory to the holder be provided and delivered to the holder to secure payment of this Note. Failure on the part of Maker to deliver that additional collateral on demand will cause this Note to become due and payable on demand.

(b) Any deposit or other sums at any time credited by or due from the holder to Maker, and any securities or other property of Maker in the possession of the holder, may at all times be treated as additional collateral for the payment of this Note and any other liabilities of Maker referred to in this Note, and may at any time be applied against the amount due or to become due.

Collection or Protection of Collateral

4. The Payee has no duty with respect to the collection or protection of the collateral held under this Note or of any income from the collateral, or with respect to the preservation of any rights pertaining to that collateral beyond the safe custody of it.

Rights of Payee on Default

5. In case of default in payment of this Note, Payee will have all rights in the collateral given by the California Commercial Code. The waiver of any default, or the remedying of any default in a reasonable manner, will not operate as a waiver of any other default or of the default remedies available to the Payee.

Execution of Documents

6. If any collateral delivered by Maker to Payee is released to Maker before full payment of the Note, Maker agrees to execute any documents required to continue the Payee's security interest in the collateral.

Acceleration

7. Payee may accelerate the due date of this Note and demand immediate payment at any time Payee, in good faith, believes that the prospect of payment is impaired.

Waiver of Certain Rights by Maker

8. Maker and all sureties, guarantors, and endorser of this Note severally waive presentment for payment, notice of nonpayment, notice of dishonor, and any notices in connection with the delivery, presentment, acceptance, performance, default, or enforcement of this Note, and consent to any extensions of time, renewals, releases of liens, waivers, or modifications that may be made by Payee to any party to this Note.

Assent to Extensions, Substitutions, and Releases

9. Each party to this Note, whether as Maker, endorser, surety, or otherwise, assents to any extension or postponement of the time of payment or other indulgence and to any substitution, exchange, or release of collateral permitted by the Payee. In addition, each party agrees that any collateral deposited with Payee in connection with this Note may be held as collateral security for any other direct or indirect liability of Maker to Payee, due or to become due or that may later be contracted.

Collection Costs

10. If this Note is not paid in full when it becomes due, Maker agrees to pay all lawful collection costs.

Attorneys' Fees

11. Maker agrees that if any [legal action or *specify more limited provision, e.g., legal action based in contract law*] is necessary to enforce this Note, the prevailing party will be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision is applicable to the entire Note.

[Optional:]

Security Interest

12. A [*describe instrument, e.g., deed of trust or security agreement*] dated _____ secures the indebtedness evidenced by this Note.

[*Continue with the following:*]

MAKER

_____ [*signature of maker*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsGeneral
OverviewCommercial Law (UCC)Secured Transactions (Article 9)General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 55 NEGOTIABLE INSTRUMENTS

PART IV. FORMS

A. Complete Promissory Notes

22-55 California Legal Forms--Transaction Guide § 55.206

§ 55.206 Promissory Note Referring to Agreement Securing Note

[1] Comment

[a] Use of Form

This form is a note to be used when the parties wish to refer to a separate written agreement affecting the note. A separate written agreement referred to in a promissory note is commonly executed at the same time as the note itself, as part of the same transaction.

The separate writing is most often an agreement creating or providing for a security interest such as a mortgage [*see* Ch. 25A, *Security Interests for Real Estate Financing*] or security agreement [*see* Ch. 42, *Secured Transactions*]. However, it may be any type of contract except one that states the rights and obligations with respect to the note, states that it governs the note, or states that the note is subject to its terms [*see Com. Code § 3106(a)*]. For a sample note in a series of notes that refers to the other notes in that series, *see § 55.207*.

For discussion of the requirements for negotiability, conditions and omissions that do not affect negotiability, when and to whom payment is to be made, interest, and required consumer protection notices, *see § 55.200[1]*. For discussion of how a separate agreement or acceleration terms can affect negotiability, *see § 55.201[1][b], [c]*. For discussion of the effect of a late charge provision, either in the note or in the separate agreement, *see § 55.202[1][c]*.

[b] Effect on Negotiability of Reference to Separate Agreement

A simple reference to another writing does not make a promise conditional and, therefore, does not affect the negotiability of a note [*Com. Code § 3106(a)*]. In addition, a note may refer to a separate agreement for rights regarding collateral, prepayment, or acceleration [*Com. Code § 3106(b)*]. However, as discussed in [a], *above*, a note is rendered nonnegotiable if (1) it states that it is subject to or governed by a separate written agreement or (2) its rights and obligations are stated in a separate writing [*Com. Code § 3106(a)*].

[2] FORM

Promissory Note Referring to Agreement Securing Note

THIS NOTE IS SECURED BY A SECURITY AGREEMENT EXECUTED CONTEMPORANEOUSLY WITH THIS NOTE

_____ [city, state]

\$[amount borrowed] [date]

Time Note

1. [Specify time, e.g., 90] days after date, [I or we], the undersigned [("Maker") or ("Makers")], promise to pay to the order of _____ [name of payee] ("Payee") the sum of \$_____ at [place of payment].
[Add if applicable: Makers agree that they will be jointly and severally bound by the terms of this Note.]

Security Agreement

2. A security agreement dated _____ secures the indebtedness evidenced by this Note.

Acceleration

3. (a) All liabilities of the undersigned to the Payee, including this Note, will, at the option of the Payee, mature and become due and payable immediately without presentment or notice, which rights are expressly waived, if:

(1) Maker fails to make the required payment when due.

(2) Maker or any endorser, surety, or guarantor of this Note:

(i) Fails, after demand, to furnish financial information or to permit inspection of any books or records.

(ii) Suspends business.

(iii) Becomes insolvent or offers settlement to any creditors.

(iv) Files a petition in bankruptcy, either voluntary or involuntary.

(v) Institutes any proceeding under any bankruptcy or insolvency laws relating to the relief of debtors.

(vi) Gives notice of any intended bulk sale.

(vii) Makes an assignment for the benefit of creditors.

(viii) Mortgages, pledges, assigns, or transfers any accounts receivable or other property, in trust or otherwise, without the written consent of the Payee.

(ix) Makes any false statement or representation orally or in writing, fails to furnish information, or fails to permit inspection of any books or records on demand of the Payee.

(x) Fails to pay any obligation when due.

(xi) _____ [If maker, endorser, surety, or guarantor is an individual:
Dies or if maker, endorser, surety, or guarantor is a corporation: Is dissolved or its
capital becomes impaired].

(3) Payee or holder discovers that any misrepresentation was made to payee on or behalf of Maker to obtain credit or an extension of credit.

(4) Any legal action is commenced against Maker or any endorser, surety, or guarantor, including:

(i) Entry of judgment.

(ii) Issuance of a writ of attachment, order of garnishment, order or subpoena in supplementary proceedings, execution, or similar process.

(5) A receiver is appointed for Maker, endorser, surety or guarantor.

(b) At its option, Payee may accelerate the maturity of this Note to become due immediately if it considers the security underlying the Note to be unsatisfactory or insufficient and the Maker does not, on demand, furnish additional collateral or make payment on account that is satisfactory to the Payee.

(c) At its option, Payee may accelerate the maturity of the Note to become due immediately if, in the sole opinion of the Payee, the financial responsibility of the Maker becomes unsatisfactory or the obligation evidenced by this Note [add if applicable: or any other obligation of any maker, endorser, or guarantor] is in jeopardy.

Collection Costs

4. If this Note is not paid in full when it becomes due, Maker agrees to pay all lawful collection costs.

Attorneys' Fees

5. Maker agrees that if any [legal action or *specify more limited provision, e.g., legal action based in contract law*] is necessary to enforce this Note, the prevailing party will be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision is applicable to the entire Note.

MAKER

_____ [signature of maker]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsGeneral

OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions &
DefinitionsCharacteristicsGeneral Overview



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CHAPTER 55 NEGOTIABLE INSTRUMENTS

PART IV. FORMS

A. Complete Promissory Notes

*22-55 California Legal Forms--Transaction Guide § 55.207***§ 55.207 Note in Series of Notes With Provision for Acceleration of All Notes on Default of Any in Series****[1] Comment--Use of Form**

This form is a simple time note that is one in a series of notes. Its principal feature is its provision for acceleration of all of the notes in the series on default by the maker on any one note in the series. It also refers to the other notes in the series.

For discussion of the requirements for negotiability, conditions and omissions that do not affect negotiability, when and to whom payment is to be made, interest, and required consumer protection notices, see § 55.200[1]. For discussion of how a separate agreement or acceleration terms can affect negotiability, see § 55.206[1].

[2] FORM**Note in Series of Notes With Provision for Acceleration of All Notes on Default of Any in Series**

SINGLE NOTE AS PART OF A SERIES

_____ [city, state]

\$[amount borrowed] [date]

Time Note

1. On _____ [date], I, the undersigned ("Maker"), promise to pay to the order of _____ [name of payee] ("Payee") the principal sum of \$_____, with interest at the rate of _____ percent per year (computed on the basis of a 360-day year).

Note Part of Series of Notes

2. This Note is No. _____ of a series of [*specify number*] notes, all in the same principal amount but maturing on successive dates.

Acceleration of All Notes

3. On default in the payment of any note in this series, the remaining notes will, at the option of the Payee, become immediately due and payable without notice.

MAKER

_____ [*signature of maker*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsGeneral Overview



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PART IV. FORMS

A. Complete Promissory Notes

22-55 California Legal Forms--Transaction Guide §§ 55.208-55.219

[Reserved]

§§ 55.208[Reserved]



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CHAPTER 55 NEGOTIABLE INSTRUMENTS

PART IV. FORMS

B. Individual Provisions for Promissory Notes

1. Interest Provisions

22-55 California Legal Forms--Transaction Guide § 55.220

§ 55.220 Interest and Discount Provisions

[1] Comment

[a] Use of Form

This form contains various provisions that set forth ways in which interest or discount provisions can be stated without affecting the negotiability of the note [see *Com. Code § 3104(a)*; see also [b], *below*]. For discussion of how interest is payable, see [c], *below*. For a discussion of default, see *Section 55.201[1][c]*. For a list of acts resulting in default, see *Section 55.202[2]*, Paragraph 3.

[b] Effect of Interest and Discount Provisions on Negotiability

Negotiability is unaffected by whether or not a note calls for the payment of interest or other charges [see *Com. Code § 3104(a)*], provided that all other requirements for negotiability are met [see *Com. Code § 3104(a)*; see also § 55.200[1][e] (requirements for negotiability)]. Thus, for example, a stated discount of the principal for early payment or an additional interest charge for late payment does not render a note nonnegotiable [see *Com. Code § 3104(a)*].

[c] How Interest Is Payable

Unless a note provides otherwise, it is not payable with interest [*Com. Code § 3112(a)*]. However, if a note provides that interest is payable, it is payable from the date of the note [*Com. Code § 3112(a)*] and may be expressed as a fixed or variable rate or rates or amount of money [*Com. Code § 3112(b)*]. If the amount of interest payable cannot be ascertained from its description, it is payable at the judgment rate in effect at the place of payment and at the time interest first accrues [*Com. Code § 3112(b)*; see *Civ. Code § 3287*; *Code Civ. Proc. §§ 685.010-685.030*]. The rate of interest specified in the contract, if any, remains chargeable after a breach until the contract is superseded by a verdict or other new obligation [*Civ. Code § 3289(a)*]. For contracts entered into after January 1, 1986 that do not specify a legal rate of interest chargeable after breach, the obligation bears interest at the rate of 10 percent per year [*Civ. Code § 3289(b)*; see *Civ. Code §§ 1805.1, 3289.5*(Unruh Act restrictions on retail installment contracts)]. Interest accrues at the

rate of 10 percent per year on the principal amount of a money judgment remaining unsatisfied [*Code Civ. Proc.* § 685.010(a); *but see Civ. Code* § 3287(b) (interest on awarded damages at discretion of court)]. For further discussion of interest rates, see *Section 55.200* [1][f][x].

[2] FORM

Interest and Discount Provisions

Interest

[First alternative; stated interest only:]

_____[Insert promissory terms, e.g., On or before _____ (date)], I, the undersigned ("Maker"), promise to pay to the order of _____[name of payee] ("Payee") the principal sum of \$_____, with interest at the rate of _____ percent per year (computed on the basis of a 360-day year).

[OR]

[Second alternative; installment payment of principal and interest on unpaid balance:]

_____[Insert promissory terms, e.g., On or before _____ (date)], I, the undersigned ("Maker"), promise to pay to the order of _____[name of payee] ("Payee") the principal sum of \$_____ in the following manner: \$_____ on _____[date], and \$_____ on the _____ day of each successive month until the entire amount is paid, with interest on the unpaid balance of _____ percent per year (computed on the basis of a 360-day year) payable with each installment of principal.

[OR]

[Third alternative; differing rates of interest before or after default or specified date:]

_____[Insert promissory terms, e.g., On or before _____ (date)], I, the undersigned ("Maker"), promise to pay to the order of _____[name of payee] ("Payee") the principal sum of \$_____, with interest from the date of this Note until _____[Maker defaults or Maker commits an act of default as defined in this Note or _____ (date)], at the rate of _____ percent per year (computed on the basis of a 360-day year), and after _____[default or _____ (date)], at the rate of _____ percent per year (computed on the basis of a 360-day year).

[OR]

[Fourth alternative; discount for payment before, and addition for payment after, date fixed for payment:]

_____[Insert promissory terms, e.g., On or before _____ (date)], I, the undersigned ("Maker"), promise to pay to the order of _____[name of payee] ("Payee") the principal sum of

\$_____, with interest from the date of this Note at the rate of _____ percent per year (computed on the basis of a 360-day year), but with a discount of _____ percent of the principal amount if paid before _____ [date], or an additional interest charge of _____ percent per year if this Note is paid after that date.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsGeneral
OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions &
DefinitionsCharacteristicsGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General
Provisions & DefinitionsDefinitionsNegotiable & Nonnegotiable Instruments



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B. Individual Provisions for Promissory Notes

1. Interest Provisions

22-55 California Legal Forms--Transaction Guide § 55.221

§ 55.221 Provision for Interest on Unpaid Interest

[1] Comment--Use of Form

This form is a provision that provides for the accrual of interest on unpaid interest. It may be added to any note other than a discount note and should be included immediately after any provision for the payment of interest. For discussion of interest rates, see *Section 55.200*[f][x].

[2] FORM

Provision for Interest on Unpaid Interest

Interest on Unpaid Interest

If interest is not paid as provided in this Note, the amount of interest unpaid will bear interest at _____[the same rate as applicable to the principal sum of this Note or the maximum legal rate]. The unpaid interest, so compounded, will not exceed an amount equal to simple interest on the unpaid principal at the maximum rate permitted by law.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsCharacteristics



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B. Individual Provisions for Promissory Notes

1. Interest Provisions

22-55 California Legal Forms--Transaction Guide § 55.222

§ 55.222 Provision for Allocation of Payments to Principal and Interest

[1] Comment--Use of Form

This form is a provision for use in any interest-bearing installment promissory note to specify how payments are to be allocated between principal and interest. If used, it should be included immediately after any provisions governing repayment of principal and payment of interest.

[2] FORM

Provision for Allocation of Payments to Principal and Interest

Allocation of Payments

Each payment will be credited first to the interest then due. The remainder of each payment will then be credited to the outstanding principal, and interest will cease to accrue against any amounts so credited.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsGeneral
OverviewContracts LawNegotiable InstrumentsDischarge & PaymentPaymentInterest



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B. Individual Provisions for Promissory Notes

1. Interest Provisions

22-55 California Legal Forms--Transaction Guide §§ 55.223-55.229

[Reserved]

§§ 55.223[Reserved]



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B. Individual Provisions for Promissory Notes
2. Provisions for Acceleration by Payee or Holder

22-55 California Legal Forms--Transaction Guide § 55.230

§ 55.230 Reference to Separate Written Agreement Bearing on Maturity

[1] Comment

[a] Use of Form

This form contains various provisions that refer to a separate written agreement affecting the note and provide the terms of that separate agreement that, in this sample, relate to acceleration of the maturity of the note. A separate agreement referred to in a promissory note is commonly executed at the same time as the note itself, as part of the same transaction.

The separate writing is most often an agreement creating or providing for a security interest such as a mortgage [see vol. 5A, ch. 25A, *Security Interests for Real Estate Financing*] or security agreement [see vol. 9, ch. 42, *Secured Transactions*]. However, it may be any type of contract except one that states the rights and obligations with respect to the note, that states that it governs the note, or that the note is subject to its terms [see *Com. Code § 3106(a)*].

For additional acceleration provisions for use in notes, see *Section 55.231[2]*.

[b] Effect on Negotiability of Reference to Separate Agreement

A simple reference to another writing does not make a promise conditional and, therefore, does not affect the negotiability of a note [*Com. Code § 3106(a)(3)*]. In addition, a note may refer to a separate agreement for rights regarding collateral, prepayment, or acceleration [*Com. Code § 3106(b)*]. However, as discussed in [a], above, a note is rendered nonnegotiable if (1) it states that it is subject to or governed by a separate written agreement or (2) its rights and obligations are stated in a separate writing [*Com. Code § 3106(a)*].

[2] FORM

Reference to Separate Written Agreement Bearing on Maturity

Reference to Separate Agreement

[First alternative; reference to security agreement with statement that maturity may be accelerated as provided in the security agreement:]

This Note is given in connection with a security agreement between Maker and Payee, and the maturity of this Note may be accelerated as provided in that security agreement.

[OR]

[Second alternative; reference to security agreement and description of effect of its terms:]

This Note is secured by a security agreement between Maker and Payee dated _____, and the Payee is entitled to the benefits of the collateral security described in that security agreement. Under the conditions stated in the security agreement, the entire principal of this Note will become payable before the maturity date stated in this Note at the option of the Payee.

[OR]

[Third alternative; reference to other terms, statement of their effect, quotation of other terms:]

On Maker's failure to pay any payment when due or to perform any obligation contained in this Note or in the _____ *[specify separate agreement, e.g., security agreement that secures this Note]*, or if any statement made by Maker in any document related to this transaction is false or misleading, then Maker will be in default under this Note and all principal and accrued interest will, at Payee's option and without notice, become due and payable immediately. Reference is made to the *[specify separate agreement]* for rights relating to acceleration of the indebtedness evidenced by this Note, including *[specify pertinent clause]*, which provides as follows: "*[quote clause verbatim]*." *[Add if applicable: Notwithstanding any provision in this Note or the _____ (specify separate agreement) relating to Payee's right to accelerate payment, Payee will not exercise its right to declare all sums due, if _____ (specify terms).]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsCharacteristicsUnconditional Order & Promise



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B. Individual Provisions for Promissory Notes

2. Provisions for Acceleration by Payee or Holder

22-55 California Legal Forms--Transaction Guide § 55.231

§ 55.231 Acceleration Clause in Note Payable at Definite Time

[1] Comment

[a] Use of Form

This form contains a number of alternative acceleration clauses for use in promissory notes payable at a definite time. The appropriate clause may be substituted for any existing acceleration clause in a promissory note or added to a note that does not contain an acceleration clause.

[b] Effect of Acceleration Terms on Negotiability

To be negotiable, a note must be payable either on demand or at a definite time [*Com. Code § 3104(a)(2)*]. A note is payable at a definite time even if it is subject to rights of acceleration [*Com. Code § 3108(b)(2)*]; therefore, the negotiability of the note is unaffected by inclusion of an acceleration clause [*see Com. Code § 3104(a)(2)*; *see also Com. Code § 1309* (Official Comment)]. However, if a note provides that the payee or holder may accelerate payment "at will," or when the party "deems itself insecure," or words of similar import, the party has power to do so only if that party in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against which the power has been exercised [*Com. Code § 1309*].

In addition, to be negotiable, a note may not state that it is subject to or governed by any other agreement [*see Com. Code § 3106(a)*]. However, if an otherwise unconditional promise simply refers to a separate agreement or specifically refers to a separate agreement for acceleration rights, it is not conditional [*Com. Code § 3106(a), (b)*]. For detailed discussion of the requirements for negotiability, *see § 55.200[1][e]*.

[c] Effect of Acceleration on Purchaser's Status as Holder in Due Course

A holder in due course is a holder who, among other things, takes an instrument without notice that there is any defense or claim against it [*see Com. Code §§ 3302(a)(2), 3306*; *see also Com. Code § 3305* (defenses)]. Thus, notice that an

instrument (in this case, a note) is overdue prevents a purchaser from taking it as a holder in due course [*see Com. Code § 3302(a)(2)*].

A person has "notice" of a fact when that person has actual knowledge of it, has received notice or notification of it, or has reason to know that it exists based on all the facts and circumstances known at the time in question [*Com. Code § 1202(a)*]. The filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument to one who would otherwise be a holder in due course [*Com. Code § 3302(b)*]. To be effective, notice must be received at a time and in a manner that will afford a reasonable opportunity to act on it [*Com. Code § 3302(f)*].

A note becomes overdue on the day after the accelerated due date, if a due date with respect to principal has been accelerated [*see Com. Code § 3304(b)(3)*]. Thus, there is notice that an instrument is overdue if the purchaser has received notification, knows, or has reason to know that acceleration has been made and the note remains unpaid [*see Com. Code § 3304(b)*; *see also Com. Code § 1202(a)* (notice)].

[d] Payment Due on Acceleration

Unless a note provides a different time for payment on acceleration, payment is overdue on the day after the accelerated due date [*Com. Code § 3304(b)(3)*].

[2] FORM

Acceleration Clause in Note Payable at Definite Time

Acceleration

[First alternative; unqualified option on part of payee to accelerate at will:]

Payee has the unqualified option to accelerate the due date of this Note at will.

[OR]

[Second alternative; payee's right to accelerate when it deems itself insecure:]

Whenever Payee deems its position as the obligee under this Note to be insecure, it may immediately demand payment of the Note.

[OR]

[Third alternative; acceleration when payee deems prospect of payment to be impaired:]

Payee may accelerate the due date of this Note and demand immediate payment whenever Payee believes in good faith that the prospect of payment is impaired.

[OR]

[Fourth alternative; acceleration on default if elected by payee:]

Payee may accelerate the maturity of this Note to become due immediately, at its option, if it considers the security underlying the Note to be unsatisfactory or insufficient and the Maker does not, on demand, furnish additional collateral or make payment on account that is satisfactory to the Payee.

[OR]

[Fifth alternative; acceleration of all installments on failure to pay single installment:]

On default, Maker must immediately pay the entire amount remaining unpaid under this Note to Payee, if payee so elects.

[OR]

[Sixth alternative; acceleration of all installments on failure to pay single installment:]

All installments will become due and payable, at the option of the payee, if any installment of principal or interest is not paid when due.

[OR]

[Seventh alternative; acceleration of all notes in series of notes on default in payment of any note in series, with waiver of notice:]

On default in the payment of any note in this series, the remaining notes, at the option of the Payee, will become due and payable immediately without notice.

[OR]

[Eighth alternative; acceleration on occurrence of specified events:]

This Note and all other obligations, direct or contingent, of any Maker or endorser of this Note to Payee will become due and payable immediately, without presentment or notice, if:

(1) Maker fails to make the required payment when due.

(2) Maker or any endorser, surety, or guarantor of this Note:

(a) Fails, after demand, to furnish financial information or to permit inspection of any books or records.

(b) Suspends business.

- (c) Becomes insolvent or offers settlement to any creditors.
 - (d) Files a petition in bankruptcy, either voluntary or involuntary.
 - (e) Institutes any proceeding under any bankruptcy or insolvency laws relating to the relief of debtors.
 - (f) Gives notice of any intended bulk sale.
 - (g) Makes an assignment for the benefit of creditors.
 - (h) Mortgages, pledges, assigns or transfers any accounts receivable or other property, in trust or otherwise, without the written consent of the Payee.
 - (i) Makes any false statement or representation orally or in writing, fails to furnish information, or fails to permit inspection of any books or records on demand of the Payee.
 - (j) Fails to pay any obligation when due.
 - (k) _____ [*If maker, endorser, surety or guarantor is an individual: Dies or if Maker, endorser, surety or guarantor is a corporation: Is dissolved or its capital becomes impaired*].
- (3) Payee discovers that any misrepresentation was made to Payee on behalf of Maker to obtain credit or an extension of credit.
- (4) Any legal action is commenced against Maker or any endorser, surety, or guarantor, including:
- (a) Entry of judgment.
 - (b) Issuance of a writ of attachment, order of garnishment, order or subpoena in supplementary proceedings, execution, or similar process.
- (5) A receiver is appointed for Maker or any endorser, surety, or guarantor.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)EnforcementHolders in Due CourseGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsCharacteristicsGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsCharacteristicsPayable on Demand or at Definite Time



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2. Provisions for Acceleration by Payee or Holder

22-55 California Legal Forms--Transaction Guide §§ 55.232-55.239

[Reserved]

§§ 55.232[Reserved]



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B. Individual Provisions for Promissory Notes

3. Late Charge Provisions

22-55 California Legal Forms--Transaction Guide § 55.240

§ 55.240 Late Charge Provision

[1] Comment

[a] Use of Form

This form is a note provision that imposes a charge on the maker if payment is made after the due date specified elsewhere in the note. Late charge provisions compensate the payee for its administrative expenses and the cost of money wrongfully withheld, and encourage the maker to make timely future payments [*Garrett v. Coast & Southern Fed. Sav. & Loan Assn.* (1973) 9 Cal. 3d 731, 739-740, 108 Cal. Rptr. 845, 511 P.2d 1197] . The provision in this form is designed to accomplish those purposes.

A late charge expressed simply as a percentage of the overdue amount would entail some risk of being found unreasonable [see, e.g., *Poseidon Dev., Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal. App. 4th 1106, 1115, 62 Cal. Rptr. 3d 59] . It would be safer to adapt the formula in *Civ. Code § 2954.4(a)* [see [b][ii], below] by specifying a maximum charge or simply to set the charge as a specified amount (which can be reasonably projected from the actual anticipated administrative costs that the charge is intended to cover).

[b] Validity of Late Charges

[i] Requirement of Reasonableness

Liquidated damages provisions in contracts other than certain purchase and lease agreements [see *Civ. Code § 1671(c), (d)*] and contracts subject to other statutes that prescribe the rules for liquidated damages [see *Civ. Code § 1671(a)*; see also *§ 55.202[1][c]*] are valid unless the party seeking to invalidate the provision establishes that it was unreasonable under the circumstances existing when the contract was made [*Civ. Code § 1671(b)*]; see *Ridgley v. Topa Thrift and Loan Assn.* (1998) 17 Cal. 4th 970, 979-981, 73 Cal. Rptr. 2d 378, 953 P.2d 484 (promissory note clause that imposed charge of six months' interest if borrowers prepaid loan principal, and provided that charge would not be imposed six months after execution of note unless borrowers had made late interest payment or otherwise defaulted, held to be

unenforceable penalty for late payment); *Weber, Lipshie & Co. v. Christian* (1997) 52 Cal. App. 4th 645, 656-657, 60 Cal. Rptr. 2d 677 (partners' liquidated damages provision, that damages to accounting firm for loss of fees from breach of covenant would be measured by doubling firm's time charges for clients lost due to breach for 12 months immediately preceding their loss, was enforceable)].

[ii] Real Property Secured Transactions

Late charges on real property loans secured by deeds of trust on single-family owner-occupied dwellings are limited to either (1) 6 percent of the installment due that is applicable to payment of interest and principal, or (2) \$5, whichever is greater [see *Civ. Code* § 2954.4(a)]. A late charge may not be imposed on a loan secured by a mortgage or deed of trust unless the installment is more than 10 days overdue [see *Civ. Code* § 2954.4(b)]. For a late charge provision to use in a note underlying a real estate loan transaction, see Ch. 25A, *Security Instruments for Real Estate Financing*. For a generally applicable liquidated damages provision, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

[2] FORM

Late Charge Provision

Late Charge

If any monthly installment or any part of any monthly installment is not paid when due, [the undersigned *or* Maker] will pay a sum equal to _____ percent of the monthly installment, or the sum of \$_____ [specify *reasonable amount*], whichever is greater, as damages for the time the money is withheld, plus administrative costs reasonably related to collecting and accounting for that installment. [The undersigned *or* Maker] understands that actual damages will be extremely difficult and impracticable to ascertain if any monthly installment or any part of any monthly installment is not paid when due. [Add if applicable: The aggregate of the late charges collected in connection with this loan, including renewal, may not exceed _____ percent of the loan.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsDischarge & PaymentPaymentGeneral OverviewContracts LawNegotiable InstrumentsDischarge & PaymentPaymentTime for Payment



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3. Late Charge Provisions

22-55 California Legal Forms--Transaction Guide §§ 55.241-55.249

[Reserved]

§§ 55.241[Reserved]



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B. Individual Provisions for Promissory Notes

4. Provisions for Prepayment by Maker

22-55 California Legal Forms--Transaction Guide § 55.250

§ 55.250 Provision for Prepayment Penalty

[1] Comment

[a] Use of Form

This form is a provision for a prepayment penalty. If the provision is used, the payee will be entitled to additional compensation if the maker pays the loan in advance.

This form should be used in a note only when the note limits payments to a specified amount. It should not be used if the note permits the maker to pay the specified installment amount "or more." In the absence of an "or more" provision, the payee or holder is not required to accept early payment [*see Record Etc. Co. v. Pageman Hold. Corp. (1954) 42 Cal. 2d 227, 232, 266 P.2d 1* (when money is to be paid at specified time, creditor is not required to accept it before that time)].

[b] Right to Prepay

In general, unless the parties agree to permit prepayment [*see § 55.251 (form)*] or prepayment is provided for by statute [*see Civ. Code § 1490*], there is no right to prepay a loan [*Williams v. Fassler (1980) 110 Cal. App. 3d 7, 10, 167 Cal. Rptr. 545*]. In the absence of any applicable statutory provisions, the parties to a note are free to impose prepayment penalties that are reasonable at the time the instrument is executed [*Williams v. Fassler (1980) 110 Cal. App. 3d 7, 13, 167 Cal. Rptr. 545*; *see Civ. Code § 1671(b)*; *see also Ridgley v. Topa Thrift and Loan Assn. (1998) 17 Cal. 4th 970, 979-981, 73 Cal. Rptr. 2d 378, 953 P.2d 484* (promissory note clause that imposed charge of six months' interest if borrowers prepaid loan principal, and provided that charge would not be imposed six months after execution of note unless borrowers had made late interest payment or otherwise defaulted, held to be unenforceable penalty for late payment)].

Statutes allow for prepayment penalties on real estate loans [*see Bus. & Prof. Code § 10242.6; Civ. Code §§ 1916.5(a)(5), 2954.9; 12 U.S.C. § 1701j-3*]. For more detailed discussion of prepayment rights and penalties, see Ch.

25A, *Security Interests for Real Estate Financing* .

[2] FORM

Provision for Prepayment Penalty

Prepayment Penalty

Maker may pay the principal sum of this Note in full at any time by paying the principal sum, all interest accrued on the principal to the date of payment, and _____ [*specify method of computing prepayment penalty, e.g.,*
_____ (*number*) months' unearned interest] as consideration for the right to make payment at any time.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Discharge & PaymentPaymentContracts LawNegotiable
InstrumentsDischarge & PaymentPaymentGeneral Overview



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4. Provisions for Prepayment by Maker

22-55 California Legal Forms--Transaction Guide § 55.251

§ 55.251 Provision Permitting Prepayment by Maker

[1] Comment

[a] Use of Form

This form is a provision permitting the maker to prepay the loan underlying the maker's note. The effect of this provision is to modify any due date specified in the note and, thus, to define the time when the maker can be discharged from liability on the note. For discussion of the right to prepay a note, see *Section 55.250[1][b]*. For a provision permitting a time extension, see *Section 55.260*. For a provision for a prepayment penalty, see *Section 55.250*.

[b] Discharge From Liability

The obligation of a party to a note is discharged to the extent of that party's payment to the payee or holder [*see Com. Code § 3602(a)*]. If tender of payment is made to a person entitled to enforcement and the tender is refused, the obligation of an endorser or accommodation party having a right of recourse is discharged to the extent of the amount of the tender [*Com. Code § 3603(b)*]. The tender of payment of the amount due on an instrument to a person entitled to enforcement discharges the party tendering payment from all subsequent liability for interest [*Com. Code § 3603(c)*]. For further discussion of payment and tender of payment, see *Section 55.45[1]through [3]*.

[2] FORM

Provision Permitting Prepayment by Maker

Prepayment by Maker

[First alternative; maker's right to prepay without penalty:]

Maker reserves the right at any time to pay all installments remaining due on this Note with interest to the time of

payment, and with no penalty.

[OR]

[Second alternative; prepayment of discounted note with refund of discounted interest:]

Maker has the right at any time to pay all installments due on this Note. If all installments are prepaid, Maker will be entitled to a refund of the proportionate amount of interest deducted in discounting this Note.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Discharge & PaymentGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)Discharge & PaymentDischargeCommercial Law (UCC)Negotiable Instruments (Article 3)Discharge & PaymentPayment



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4. Provisions for Prepayment by Maker

22-55 California Legal Forms--Transaction Guide §§ 55.252-55.259

[Reserved]

§§ 55.252[Reserved]



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5. Provisions Permitting Time Extension

22-55 California Legal Forms--Transaction Guide § 55.260

§ 55.260 Provision for Extension of Note Payable at Definite Time

[1] Comment

[a] Use of Form

This form is a provision for payment of a note at a definite time subject to extension of the time for payment. A note is payable at a definite time and is, therefore, negotiable [*see Com. Code § 3104(a)(2)*] even if it is subject to extension [*Com. Code § 3108(b)*; *see [b], below*].

[b] Time Extension

A note is payable at a definite time if it is payable at a definite time subject to extension (1) at the option of the payee or holder; (2) to a further definite time at the option of the maker; or (3) automatically on or after a specified act or event [*Com. Code § 3108(b)(4)*].

A payee may not extend an instrument over the objection of a maker or acceptor or other party who tenders payment when due [*see Com. Code § 3603(b)* (tender of payment)].

[2] FORM

Provision for Extension of Note Payable at Definite Time

Time Extension

[First alternative; indefinite extension at payee's option:]

The due date of this note may be extended for any period of time at the option of the Payee. If an extension is granted, it must be noted on the reverse side of this Note with the new due date clearly indicated.

[OR]

[Second alternative; extension to specified date at maker's option:]

The date on which this Note is payable may be extended until _____, at the option of the Maker *[add if applicable: by giving written notice to the Payee at least _____ (e.g., five) days before the current due date]*.

[Third alternative; automatic time extension to specified date on occurrence of specified act or event:]

The date on which this Note is payable will be extended until _____, automatically if *[specify act or event]*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsCharacteristicsPayable on Demand or at Definite Time



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5. Provisions Permitting Time Extension

22-55 California Legal Forms--Transaction Guide §§ 55.261-55.269

[Reserved]

§§ 55.261[Reserved]



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6. Provisions for Limiting Source or Type of Payment

22-55 California Legal Forms--Transaction Guide § 55.270

§ 55.270 Provision Limiting Source of Payment to Particular Fund or Source

[1] Comment

[a] Use of Form

This form is a provision for use in a note when payment is to be limited to a particular fund or source. This situation commonly arises when the maker is a partnership, unincorporated association, trust, or estate, and payment is to be limited to the maker's assets. However, the fifth and sixth alternatives in the form [*see* [2], *below*] are payment-limiting provisions for use if the maker is an entity other than one of those mentioned above or a natural person.

[b] Effect of Statement on Negotiability

To be negotiable, a note must be unconditional [*see Com. Code § 3104(a)*]. A promise contained in a note that is otherwise unconditional is not made conditional because payment is limited to a particular fund or source [*Com. Code § 3106(b)*].

[2] FORM

Provision Limiting Source of Payment to Particular Fund or Source

Payment Limited to Specified Source or Assets

[First alternative; partnership:]

This Note is issued by _____ [*name of partnership*] ("Maker"), a [limited or general] partnership.
Payment of this Note is limited to payment out of the entire assets of that partnership.

[OR]

[*Second alternative; unincorporated association:*]

This Note is issued by _____ [*name of unincorporated association*] ("Maker"), an unincorporated association. Payment of this Note is limited to payment out of the entire assets of that unincorporated association.

[OR]

[*Third alternative; trust:*]

This Note is issued by _____ [*name of trustee*] as trustee of the _____ [*name of trust*] Trust ("Maker"). Payment of this Note is limited to payment out of the entire assets of that trust.

[OR]

[*Fourth alternative; estate:*]

This Note is issued by _____ [*name of executor or administrator*] as _____ [*executor of the will or administrator of the estate*] of, and on behalf of, the estate of _____ [*name of decedent*] ("Maker"). Payment of this Note is limited to payment out of the entire assets of that estate.

[OR]

[*Fifth alternative; other types of business entities:*]

This Note is issued by _____ [*name of entity*] ("Maker"), [a or an] [*type of business entity*]. Payment of this Note is limited to the following [source or sources or assets]: [*specify source or assets*].

[OR]

[*Sixth alternative; natural person:*]

This Note is issued by _____ [*name of natural person*] ("Maker"). Payment of this Note is limited to the following _____ [source or sources or assets]: _____ [*specify source or assets*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsCharacteristicsGeneral Overview



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6. Provisions for Limiting Source or Type of Payment

22-55 California Legal Forms--Transaction Guide § 55.271

§ 55.271 Provision for Payment in Foreign Currency

[1] Comment

[a] Use of Form

This form is a provision for payment in a foreign currency. It includes an optional provision specifying that the medium of payment is the foreign currency specified. Both of these provisions should be used if the maker intends the payee to receive the foreign currency specified. If the optional provision specifying that the foreign currency is the medium of payment is not included, the order may be satisfied by payment of the equivalent amount in dollars [*see Com. Code § 3107*].

[b] Effect of Provision on Negotiability

To be negotiable, a note or other negotiable instrument must be payable in a fixed amount of money [*Com. Code § 3104(a)*]. "Money" is a medium of exchange currently authorized by a government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between countries [*Com. Code § 1201(b)(24)*]. Thus, an instrument expressing the amount to be paid in pounds sterling, francs, lire, or other recognized currency of a foreign government is negotiable even though payable in the United States [*see Com. Code § 1201(b)(24)*; *see also Com. Code § 3107*]. However, unless the instrument provides otherwise, an instrument that states the amount payable in foreign money may be paid in the foreign money or in the equivalent amount in dollars calculated by using the current bank-offered spot rate for the purchase of dollars at the place of payment on the day on which the instrument is paid [*Com. Code § 3107*].

[2] FORM

Provision for Payment in Foreign Currency

Payment in Foreign Currency

On or before _____[*date*], I, the undersigned ("Maker"), promise to pay to the order of _____[*name of payee*] ("Payee") the principal sum of _____[*specify amount and type of currency, e.g., £20,000 (Pounds Sterling)*]. [*Add if applicable: The medium of payment will be _____ (specify, e.g., Pounds Sterling).*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsCharacteristicsGeneral Overview



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6. Provisions for Limiting Source or Type of Payment

22-55 California Legal Forms--Transaction Guide §§ 55.272-55.279

[Reserved]

§§ 55.272[Reserved]



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7. Provisions Describing Payees

22-55 California Legal Forms--Transaction Guide § 55.280

§ 55.280 Provision for Payment to Alternative Payees

[1] Comment

[a] Use of Form

This form is a provision for use in a promissory note or other negotiable instrument payable to order rather than to bearer when payment is to be made to alternative payees [*see Com. Code § 3110(d)*; *see also Com. Code § 1201(b)(5)* ("bearer" defined)]. For a provision for payment to joint payees, *see § 55.281*.

[b] Negotiability of Instrument Payable to Two or More Persons

To be negotiable, an instrument must be payable either to order or to bearer [*Com. Code § 3104(a)(1)*]. An instrument not payable to bearer is payable to order if it is payable to the order of an identified person or to an identified person or order [*Com. Code § 3109(b)*; *see Com. Code § 3109(a)* (payable to bearer)]. An instrument payable to bearer may become payable to order if it is specially endorsed [*Com. Code § 3109(c)*; *see Com. Code § 3205(a)* (special endorsement)]. A negotiable instrument may be made payable to one or more persons jointly or in the alternative, but not in succession [*Com. Code § 3103(a)(6)*].

[c] Rights of Alternative Payees

If an instrument is payable to two or more persons in the alternative, it is payable to any of them and may be negotiated, discharged, or enforced by any or all payees in possession of the instrument. If an instrument is payable to two or more persons other than in the alternative, it is payable to all of them, and may be negotiated, discharged, or enforced only by all of them. If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively [*Com. Code § 3110(d)*]. An instrument payable to order is negotiated by transfer of possession of the instrument and its endorsement by the holder [*see Com. Code § 3201(b)*].

[2] FORM**Provision for Payment to Alternative Payees**

Time Note

On or before _____[*date*], I, the undersigned ("Maker"), promise to pay to the order of _____[*name of first alternative payee*] or _____[*name of second alternative payee*] ("Payees") the sum of \$_____, with interest at the rate of _____ percent per year (computed on the basis of a 360-day year).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsCharacteristicsGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsCharacteristicsPayable to Order or Bearer



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7. Provisions Describing Payees

*22-55 California Legal Forms--Transaction Guide § 55.281***§ 55.281 Provision for Payment to Two Payees Jointly****[1] Comment****[a] Use of Form**

This form is a provision for use in a promissory note or other negotiable instrument payable to order rather than to bearer when payment is to be made to two payees jointly. For discussion of the negotiability of an instrument payable to two or more persons, see *Section 55.280[1][b]*. For a provision for payment to alternative payees, see *Section 55.280*.

[b] Rights of Joint Payees

If an instrument is payable to two or more persons but is not made payable in the alternative, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them [*Com. Code § 3110(d)*]. However, if an instrument that is payable to several persons is negotiated by one of them, the obligation is extinguished [*see Civ. Code 1475*]. Furthermore, if an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively [*Com. Code § 3110(d)*]. For discussion of the rights of alternate payees, see *Section 55.280 [1][c]*.

[2] FORM**Provision for Payment to Two Payees Jointly**

Time Note

On or before _____[*date*], I, the undersigned ("Maker"), promise to pay to _____[*name of first joint payee*] and _____[*name of second joint payee*] ("Payees"), or to their order, the sum of \$_____, with interest at the rate of _____ percent per year (computed on the basis of a 360-day year).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsCharacteristicsGeneral
OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions &
DefinitionsCharacteristicsPayable to Order or BearerCommercial Law (UCC)Negotiable Instruments (Article 3)General
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7. Provisions Describing Payees

22-55 California Legal Forms--Transaction Guide § 55.282

§ 55.282 Provision for Payment to Representative

[1] Comment

[a] Use of Form

This form contains a number of alternative provisions for use if a note or other negotiable instrument is to be payable to (1) a trust, an estate, or a representative of either; (2) an agent or representative of a named or identified person; (3) a fund or organization that is not a legal entity; or (4) an office or officer [*see [b], below*]. Although a negotiable instrument may be made payable to an entity itself, the following provisions designate (by name and description) the individual payee to whom an instrument made payable to an entity is actually paid.

[b] Negotiable Instruments Payable to Entity or Representative

[i] Trust, Estate, or Representative of Trust or Estate

An instrument made payable to a trust, an estate, or a person described as the representative of a trust or an estate is payable to the trustee, the representative, or a successor of either, whether or not the beneficiary or estate is also named [*Com. Code § 3110(c)(2)(A)*].

[ii] Agent or Representative

An instrument made payable to a person described as the agent or representative of a named or identified person is payable to the represented person, the representative, or a successor of the representative [*Com. Code § 3110(c)(2)(B)*].

[iii] Fund or Organization That Is Not Legal Entity

An instrument made payable to a fund or organization that is not a legal entity is payable to the representative of the members of that fund or organization [*Com. Code § 3110(c)(2)(C)*].

[iv] Office or Person Holding Office

An instrument made payable to an office or to a person described as holding an office is payable to the named person, the incumbent of the office, or a successor of the incumbent [*Com. Code § 3110(c)(2)(D)*].

[c] Negotiable Instrument Payable to Party Intended by Signer

The person to whom an instrument is initially payable is determined by the intent of the person signing as or on behalf of the issuer, whether authorized or not [*Com. Code § 3110(a)*]. The instrument is payable to the person intended by the signer even if that person is identified incorrectly in the instrument [*Com. Code § 3110(a)*]. Furthermore, a person to whom an instrument is payable may be identified in any way, including by name, identifying number, office, or account number [*Com. Code § 3110(c)*; see *Com. Code § 3110(c)(1), (2)* (instruments payable to account numbers and various entities); see also [b], above].

[2] FORM**Provision for Payment to Representative**

Payment to Representative

[*First alternative; payment to trust or its trustee:*]

I promise to pay to the order of _____ [the _____ (*name of trust*) Trust or _____ (*name of trustee or successor*), _____ (*trustee or specify other designation*) of the _____ (*name of trust*) Trust], the sum of \$_____.

[OR]

[*Second alternative; payment to estate or its representative:*]

I promise to pay to the order of _____ [the estate of _____ (*name of testator*) or _____ (*name of representative or successor*), _____ (*representative or specify other designation*) of the estate of _____ (*name of testator*)], the sum of \$_____.

[OR]

[*Third alternative; payment to represented person or agent or representative:*]

I promise to pay to the order of _____ [*name of agent or representative or successor*], [*specify, e.g., agent or representative*] of _____ [*name of represented person*], the sum of \$_____.

[OR]

[*Fourth alternative; payment to fund or organization not a legal entity:*]

I promise to pay to the order of _____ [*name of fund or organization*], the sum of
\$_____.

[OR]

[*Fifth alternative; payment to office or officer:*]

I promise to pay to the order of [*title of officer, e.g., the President of the San Francisco Foundation or name and title of officer, incumbent, or successor, e.g., Janice Wilcox, President of the San Francisco Foundation*], the sum of
\$_____.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsCharacteristicsGeneral
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22-55 California Legal Forms--Transaction Guide §§ 55.283-55.289

[Reserved]

§§ 55.283[Reserved]



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8. Provisions Governing Liability for Payment

22-55 California Legal Forms--Transaction Guide § 55.290

§ 55.290 Provision for Liability of Multiple Makers

[1] Comment

[a] Use of Form

This form contains alternative provisions for specifying the liability of multiple makers. An obligation imposed on several persons, or a right created in favor of several persons, is presumed to be joint, not several [*Civ. Code § 1431*]. However, if the parties receive some benefit from the consideration, the promise is presumed to be joint and several [*see Civ. Code §§ 1659, 1660; see also [b], below*]. The three alternatives in this form provide for joint and several liability, joint liability, or several liability.

[b] Liability of Multiple Makers

An obligation imposed on several persons may be joint, several, or joint and several [*Civ. Code § 1430*]. In the context of a note or other negotiable instrument, unless an instrument specifies otherwise, two or more persons who have the same liability on an instrument as makers, drawers, acceptors, endorsers, or anomalous endorsers are jointly and severally liable in the capacity in which they sign [*Com. Code § 3116(e)*], even if the body of the instrument contains such words as "I promise to pay" [*see Civ. Code § 1660* (promise made in singular but executed by several persons presumed joint and several)].

[c] "Joint," "Several," and "Joint and Several" Defined

If an obligation is "joint," each of the joint obligors is bound to render the same performance to the obligee [*Chun v. Chun* (1987) 190 Cal. App. 3d 589, 597, 235 Cal. Rptr. 553 ; *see* Restatement of Contracts, § 17]. If the obligation is "several," each obligor is responsible only for his or her own individual promise, and not for the promises of others [*Douglas v. Bergere* (1949) 94 Cal. App. 2d 267, 271, 210 P.2d 727] . A "joint and several" obligation can be treated as either joint or several [*see Aitken v. Stewart* (1933) 129 Cal. App. 38, 48, 18 P.2d 988] .

[d] Right of Contribution

Since a "joint and several" obligation can be treated as either joint or several [*see* [c], *above*], if a note fails to specify that the parties are only severally liable, a party who satisfies more than his or her share of a claim against two or more obligated parties may require a proportionate contribution from all other obligated parties [*Civ. Code* § 1432]. On the other hand, if a note specifies several liability only, each comaker is liable only to the extent of his or her portion of the debt [*see Civ. Code* § 1432].

Furthermore, unless the parties agree otherwise, or unless one is an accommodation party, a party having joint and several liability who pays the instrument is entitled to receive contribution from any party having the same joint and several liability, in accordance with applicable law. Discharge of one party having joint and several liability by a person entitled to enforce the instrument does not affect the right of a party with joint and several liability to receive contribution from the discharged party [*Com. Code* § 3116(b)].

[2] FORM**Provision for Liability of Multiple Makers**

Liability of Makers

[First alternative; joint and several liability:]

The undersigned shall all be deemed makers, and shall be jointly and severally liable as makers.

[OR]

[Second alternative; joint liability only:]

[If more than one person executes this instrument as maker, those persons *or* The undersigned makers] shall be jointly liable on this instrument and not severally liable.

[OR]

[Third alternative; several liability only:]

The undersigned shall all be deemed makers; however, each shall only be severally liable, and not jointly liable, as makers.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsMultiple Signatories



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8. Provisions Governing Liability for Payment

22-55 California Legal Forms--Transaction Guide §§ 55.291-55.299

[Reserved]

§§ 55.291[Reserved]



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9. Provisions Related to Collateral

22-55 California Legal Forms--Transaction Guide § 55.300

§ 55.300 Description or Designation of Collateral

[1] Comment

[a] Use of Form

This form contains alternate provisions that may be used to describe or designate collateral. Provisions for collateral are advisable if the payee needs to be protected from default by the maker. For discussion of this type of transaction and the legal requirements for dealing with collateralized borrowing, see Ch. 25A, *Security Instruments for Real Estate Financing*, and Ch. 42, *Secured Transactions*.

[b] Effect of Collateral Provisions on Negotiability

The negotiability of an instrument is not affected by a statement that collateral has been given to secure the borrower's obligation on the instrument or any other obligation of the borrower [*see Com. Code § 3106(a), (b)*]. Negotiability is also unaffected by a further statement that in the event of default on any obligation, the holder may sell or otherwise dispose of the collateral [*see Com. Code § 3106(a), (b)*].

[c] Effect of Provisions Requiring Additional Collateral

The third and fourth alternatives in this form require the maker to provide additional collateral when demanded by the holder of the note if the original collateral declines in value or becomes unsatisfactory to the holder. A note may include a promise to supply additional collateral on demand when the holder deems itself insecure or after the occurrence of a stated condition [*see Com. Code § 9204(a)* (after-acquired collateral)]. However, the holder may exercise that power only on the good faith belief that the prospect of payment or performance is impaired [*see Com. Code § 1309*]. Such terms are frequently accompanied by a provision for acceleration if the collateral is not given [*Com. Code § 1309* (option to accelerate at will)]. For a form for this type of acceleration provision, see § 55.231[2], fourth alternative. For further discussion of collateral and for a sample collateral note with alternative statements describing collateral, see § 55.205.

[2] FORM**Description or Designation of Collateral****Collateral**

[First alternative; description of collateral given as a security interest to payee to secure current and future obligations:]

To secure payment of this Note, and of any other current or future liabilities of Maker to the Payee of this Note, regardless of how acquired by the Payee, Maker has given a security interest in *[add if applicable: and delivered to Payee]* the following property: _____ *[describe property]*.

[OR]

[Second alternative; general designation of collateral, valued in excess of amount of note, given to secure current obligation:]

To secure payment of this Note, Maker has given a security interest in *[add if applicable: and delivered to Payee]* certain property currently of a value in excess of the amount of this Note.

[OR]

[Third alternative; securities given as collateral, with agreement to provide additional securities if those given as collateral decline in value:]

To secure payment of this Note, Maker has given a security interest in *[add if applicable: and delivered to Payee]* certain securities. Maker agrees to provide to the Payee, on demand, additional securities that meet the Payee's satisfaction, if the market value of any of the securities given as collateral declines, if any change occurs in the marketability of those securities, or if the securities are deemed unsatisfactory to the Payee.

[OR]

[Fourth alternative; designation of collateral given to secure note, with right of maker to demand additional collateral if designated collateral declines in value:]

To secure payment of this Note, Maker has given a security interest in *[add if applicable: and delivered to Payee]* certain property. If the market value of any of this property declines in value, the Payee may demand that Maker provide to the Payee a security interest in *[add if applicable: and deliver to Payee]* additional property of quality and value satisfactory to the Payee. The failure of Maker to provide additional property to the Payee will cause this Note to become due and payable on demand.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsCharacteristicsGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsNegotiable & Nonnegotiable Instruments



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9. Provisions Related to Collateral

22-55 California Legal Forms--Transaction Guide §§ 55.301-55.309

[Reserved]

§§ 55.301[Reserved]



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B. Individual Provisions for Promissory Notes

10. Waiver of Presentment and Notice of Dishonor

22-55 California Legal Forms--Transaction Guide § 55.310

§ 55.310 Provision for Waiver of Presentment and Notice of Dishonor

[1] Comment

[a] Use of Form

This form is a waiver of presentment and notice of dishonor. Because both presentment and notice of dishonor are necessary to enforce the obligations of the maker or endorser [*see Com. Code §§ 3502 (dishonor), 3503 (notice of dishonor)*], this type of waiver is commonly used in notes or other negotiable instruments. This form is drafted to use in a promissory note; however, it may be used by an endorser to a note, draft, or check.

[b] Presentment

[i] Overview

"Presentment" is a demand for acceptance of a draft made to the drawee, a demand for payment of an instrument made to the drawee or other party obliged to pay, or a demand for payment of a note or accepted draft payable at a bank made to the bank [*Com. Code § 3501(a)*]. "Acceptance" is the drawee's signed promise to honor a draft or check as presented [*Com. Code § 3409(a)*]. For further discussion of acceptance, see § 55.42.

Unless excused or waived [*see Com. Code §§ 3502(e), 3504(a); see also [ii], below*], presentment for acceptance is necessary to enforce the obligations of the drawer and endorsers of an instrument, because the instrument must be duly presented before it can be dishonored and the drawer and endorsers must have notice of the dishonor, unless the notice is excused, before their obligations are enforceable [*see Com. Code §§ 3502 (dishonor), 3503 (notice of dishonor), 3504(b) (excuse of notice of dishonor); see also [c], below*]. If an instrument states that it is "payable through" or "payable at" a bank identified in the instrument, the instrument may be presented for payment only by or through the bank; that bank is designated as a collecting bank and the statement does not by itself authorize the bank to pay the instrument [*Com. Code § 4106*].

[ii] Waiver or Excuse

Presentment for payment or acceptance of an instrument is excused when the drawer or endorser whose obligation is being enforced has waived presentment or otherwise has neither reason nor right to require that the instrument be paid or accepted [*Com. Code § 3504(a)*]. Waiver of presentment is also a waiver of notice of dishonor [*Com. Code § 3504(b)*].

Presentment is also excused if any of the following conditions exist [*Com. Code § 3504(a)*]:

- The person entitled to present the instrument cannot with reasonable diligence make presentment;
- The maker has repudiated an obligation to pay the instrument, or is dead or in insolvency proceedings;
- The terms of the instrument provide that presentation is not necessary to enforce the obligation of the maker or endorser;
- The drawer instructed the drawee not to pay or accept the instrument; or
- The drawee was not obliged to the drawer to pay the instrument.

[c] Dishonor

"Dishonor" occurs when presentment is duly made but acceptance or payment is refused or cannot be obtained within the time allowed [*see Com. Code § 3502; see also §§ 55.131, 55.132*]. Dishonor also occurs when presentment is excused and the instrument is not duly accepted or paid [*Com. Code § 3502(e); see Com. Code § 3504* (waiver or excuse of presentment); *see also [b][ii], above*]. The return of an instrument for lack of proper endorsement is not dishonor; nor is refusal of payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule [*Com. Code § 3501(b)(3)*].

Subject to any necessary notice of dishonor [*see [d], below*], the holder has a right to enforce the obligations of the drawers and endorsers after an instrument is dishonored [*see Com. Code § 3503(a)*]. The rules governing dishonor of instruments are discussed in § 55.43[2]-[5].

[d] Notice of Dishonor**[i] Overview**

Notice of dishonor is necessary to enforce the obligation of an endorser [*Com. Code § 3503(a)*]. Failure to give notice of dishonor discharges the liability of the endorser [*Com. Code § 3415(c); see Com. Code § 3503*]. Notice of dishonor is also necessary to enforce the obligation of a drawer to pay a dishonored draft that was accepted by an acceptor other than a bank; failure to give this notice of dishonor discharges the liability of the drawer [*Com. Code §§ 3414(d), 3415(c), 3503(a)*]. Notice of dishonor may be excused under certain circumstances, as may delay in giving the notice [*see Com. Code § 3504(b), (c); see also [ii], below*]. For a form for a notice of dishonor, see § 55.340.

[ii] Waiver or Excuse of Notice or Delay in Giving Notice

Notice of dishonor is excused if the party whose obligation is being enforced waives notice [*Com. Code § 3504(b)(2)*]. A waiver of presentment is also a waiver of notice of dishonor [*Com. Code § 3504(b)(2)*]. Notice of dishonor is also excused if, by the terms of the instrument, notice is not necessary to enforce the obligation of a party to pay the instrument [*Com. Code § 3504(b)(1)*].

Delay in giving notice of dishonor is excused if the delay was caused by circumstances beyond the control of the person giving notice and that person exercised reasonable diligence after the cause of delay ceased to operate [*Com. Code* § 3504(c)].

[2] FORM

Provision for Waiver of Presentment and Notice of Dishonor

Waiver of Presentment and Notice of Dishonor

The undersigned ("Maker") and all endorsers, sureties, and guarantors of this instrument jointly and severally waive presentment and notice of dishonor.

[OR]

All parties to this instrument jointly and severally waive presentment and notice of dishonor.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentDishonorCommercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentExcused Presentment & NoticeCommercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentPresentment



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B. Individual Provisions for Promissory Notes

10. Waiver of Presentment and Notice of Dishonor

22-55 California Legal Forms--Transaction Guide §§ 55.311-55.319

[Reserved]

§§ 55.311[Reserved]



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C. Liability of Parties

*22-55 California Legal Forms--Transaction Guide § 55.320***§ 55.320 Ratification of Unauthorized Signature****[1] Comment****[a] Use of Form**

This form is a ratification of an unauthorized signature of an individual. An "unauthorized" signature is a signature made without actual, implied, or apparent authority. The term includes a forgery [*Com. Code § 1201(b)(41)*].

[b] Effect of Ratification

Unless ratified (or as otherwise permitted by Divisions 3 and 4 of the Commercial Code), an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays for the instrument or takes it for value [*Com. Code § 3403(a)*].

Although an unauthorized signature may be ratified for all purposes related to a note or other negotiable instrument, ratification does not affect the civil or criminal liability of the person who made the unauthorized signature [*Com. Code § 3403(c)*].

[2] FORM**Ratification of Unauthorized Signature**

RATIFICATION OF UNAUTHORIZED SIGNATURE

_____ [date]

To: _____ [name of payee or holder]

_____ [address]

This is to give notice that the undersigned ratifies the signature on a _____ [check or note or draft] [add

if applicable: drawn on _____ (*name of financial institution*),] numbered _____,
dated _____, and payable to _____ in the sum of \$_____. This
ratification is strictly limited to the particular instrument described above, and will not be construed as a grant of any
authority to the person signing to issue or execute instruments in the future. All rights against that person are reserved.

_____ [*capacity in which person signs*]

_____ [*signature of person ratifying*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)EnforcementProof of SignatureCommercial Law
(UCC)Negotiable Instruments (Article 3)Party LiabilitiesSignatures



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22-55 California Legal Forms--Transaction Guide § 55.321

§ 55.321 Guarantee of Payment and Guarantee of Collection

[1] Comment

[a] Use of Form

This form contains provisions for the guarantee of payment and guarantee of collection of a note. The first and second alternatives are formal guarantees of payment made by an accommodation party; the third and fourth alternatives are guarantees of collection [*see Com. Code § 3419(a)-(c), (e)* (guarantee of payment), (d) (guarantee of collection)]. For discussion of the differences between an accommodation party and a guarantor of collection, see [b], *below*.

For general coverage of suretyship law [*see Civ. Code § 2787 et seq.*] and procedure, see Ch. 79, *Suretyship, Guaranty, and Indemnity*. For a guide to the procedures applicable to accommodation and guarantees of collection of negotiable instruments, see § 55.121.

[b] Accommodation Party or Guarantor

An "accommodation party" is one who signs a note or other negotiable instrument, incurring liability on the instrument without being a direct beneficiary of the value given for the instrument [*Com. Code § 3419(a)*; *see Quality Wash Group V, Ltd. v. Hallak* (1996) 50 Cal. App. 4th 1687, 1701-1702, 58 Cal. Rptr. 2d 592 (determination of status as accommodation party or accommodated party); *see also § 55.30[4]*]. The accommodation party is obliged to pay in the capacity, such as maker, drawer, acceptor, or endorser, in which he or she has signed, even though the taker knows of the accommodation [*Com. Code § 3419(b), (c)*]. A person signing an instrument is presumed to be an accommodation party if the signature is an anomalous endorsement or is accompanied by words indicating that the signer is acting as a surety or guarantor with respect to the obligation of another party to the instrument [*Com. Code § 3419(c)*; *see § 55.30[4][a]*].

If the signature of a party to an instrument is accompanied by words unambiguously indicating that the party is guaranteeing collection rather than payment of the obligation of another party, the signer is a "guarantor of collection," not an accommodation party. The signer will be obliged to pay a person entitled to enforce the instrument only if

execution of judgment against the other party is returned unsatisfied, the other party is insolvent or in an insolvency proceeding, the other party cannot be served with process, or it is otherwise apparent payment cannot be obtained from the other party [*Com. Code § 3419(d)*; *see § 55.30[4][b]*].

[c] Enforcement of Accommodation

The obligation of an accommodation party may be enforced notwithstanding any statute of frauds, and whether or not the accommodation party receives consideration for the accommodation [*Com. Code § 3419(b)*]. In addition, except as otherwise provided in *Com. Code § 3605*, the obligation of an accommodation party to pay the note is not affected by the fact that the person enforcing the obligation had notice when the note was taken that the accommodation party signed the note for accommodation [*Com. Code § 3419(c)*].

Special rules govern whether surety obligations must be in writing [*see Civ. Code §§ 2793, 2794*].

[2] FORM

Guarantee of Payment and Guarantee of Collection

GUARANTEE OF PAYMENT OR GUARANTEE OF COLLECTION OF NOTE

[First alternative; short form guarantee of payment by accommodation party:]

Guarantee of Payment by Accommodation Party

_____ [date]

I guarantee payment of the note dated _____, between the maker, _____ [name of maker], and the _____ [payee or holder], _____ [name of payee or holder].

ACCOMMODATION PARTY

_____ [signature of accommodation party]
[typed name]

[OR]

[Second alternative; long form guarantee of payment by accommodation party:]

Guarantee of Payment by Accommodation Party

_____ [date]

1. I, the undersigned ("Accommodation Party"), guarantee payment of the note dated _____, between the maker, _____ [name of maker], and the _____ [payee or holder], _____ [name of payee or holder], [add if applicable: and all taxes and insurance premiums and any other sums that may become due and payable under and by virtue of the provisions of any security instrument securing that note].

Right of Direct Action

2. The Accommodation Party further agrees that the payee or holder may proceed against the Accommodation Party directly and independently of the maker, and that the discharge of the obligation of a party to pay a note does not discharge the obligation of the Accommodation Party having a right of recourse against the discharged party.

ACCOMMODATION PARTY

_____ [signature of accommodation party]
[typed name]

[OR]

[Third alternative; short form of guarantee of collection:]

Guarantee of Collection

_____ [date]

I guarantee collection of the note dated _____, between the maker, _____ [name of maker], and the _____ [payee or holder], _____ [name of payee or holder].

GUARANTOR OF COLLECTION

_____ [signature of guarantor of collection]
[typed name]

[OR]

[Fourth alternative; long form guarantee of collection:]

Guarantee of Collection

_____ [date]

I, the undersigned ("Guarantor of Collection"), guarantee collection of the note dated _____, between the maker, _____ [name of maker], and the _____ [payee or holder], _____ [name of payee or holder], if (1) execution of judgment against the maker, drawer, acceptor, or endorser has been returned unsatisfied; (2) the maker, drawer, acceptor, or endorser is insolvent or in an insolvency proceeding; (3) the maker, drawer, acceptor, or endorser cannot be served with process; or (4) it is otherwise apparent that payment cannot be obtained from the maker, drawer, acceptor, or endorser.

GUARANTOR OF COLLECTION

_____ [*signature of guarantor of collecti on*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsGeneral
OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesGeneral OverviewCommercial
Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesAccommodation



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C. Liability of Parties

22-55 California Legal Forms--Transaction Guide § 55.322

§ 55.322 Discharge of Party From Liability With Reservation of Rights Against Other Parties

[1] Comment

[a] Use of Form

This form is a discharge from liability by the payee or holder of a note or other negotiable instrument of a party who is obliged to pay. The form includes an optional reservation of rights against other parties that should be used by a payee or holder if there are other parties who may be held liable [*see Com. Code § 3605(b), (i)*]. The language contained in this form should be placed directly on the instrument itself, because no discharge of any party is effective against a subsequent holder in due course without notice of the discharge [*Com. Code § 3601(b); see Com. Code § 1202(a)* ("notice" defined)].

[b] Discharge From Liability

A payee or holder may release one party while expressly reserving his or her rights against other parties [*see Com. Code § 3605(b), (i)*]. Furthermore, no discharge is effective against a subsequent holder in due course unless he or she had notice of the discharge when he or she took the instrument [*Com. Code § 3601(b); see Com. Code § 1202(a)* ("notice" defined)]. For further discussion of discharge from liability, see § 55.45.

[2] FORM

Discharge of Party From Liability With Reservation of Rights Against Other Parties

DISCHARGE FROM LIABILITY

[*Add if applicable:* For valuable consideration,] I, the undersigned ("Payee") discharge _____ [*name of party discharged*] from any liability in connection with this instrument. [*Add if applicable:* I reserve all rights against all other parties to this instrument.]

Executed on _____[*date*], at _____[*city and state*].

PAYEE

_____ [*signature of payee or holder*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Discharge & PaymentDischargeCommercial Law
(UCC)Negotiable Instruments (Article 3)Discharge & PaymentDischarge of Secondary ObligorsCommercial Law
(UCC)Negotiable Instruments (Article 3)Party LiabilitiesParty Obligations



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22-55 California Legal Forms--Transaction Guide § 55.323

§ 55.323 Provision Waiving Statute of Limitations for Additional Four-Year Period

[1] Comment

[a] Use of Form

This form is a provision that may be included in any note or other negotiable instrument when the payee or holder wishes to extend the statute of limitations on written agreements for an additional period [*see Code Civ. Proc. §§ 336a, 337(1); see also [b], below*].

[b] Statutes of Limitations

Actions on most written contracts must be brought within four years [*see Code Civ. Proc. § 337(1); but see Filet Menu, Inc. v. Cheng* (1999) 71 Cal. App. 4th 1276, 1282-1284, 84 Cal. Rptr. 2d 384 (statute may be tolled by plaintiff's out-of-state travel unrelated to interstate commerce pursuant to *Code Civ. Proc. § 351*)]. The statute of limitations on corporate bonds, notes, and debentures is six years [*see Code Civ. Proc. § 336a*]. In addition, the Commercial Code enumerates the statutes of limitation that apply to particular negotiable instruments. For coverage of the statutes of limitations that apply to the commencement of an action to enforce payment of notes, checks, certificates of deposit, drafts and to the commencement of an action for indemnity or contribution, see § 55.132, Paragraphs 8 and 9 [*see Com. Code § 3118*]. These statutory periods may be waived, but no single waiver is effective for more than an additional four-year period [*see Code Civ. Proc. § 360.5*]. However, four-year waivers may be made successively [*see Code Civ. Proc. § 360.5*].

[2] FORM

Provision Waiving Statute of Limitations for Additional Four-Year Period

Waiver of Statute of Limitations

Maker waives the operation and effect of the statute of limitations as it applies to this Note with respect to any action on

this Note to the extent permitted by law.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsStatutes of Limitations



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22-55 California Legal Forms--Transaction Guide §§ 55.324-55.329

[Reserved]

§§ 55.324[Reserved]



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D. Transfer and Assignment of Negotiable Instruments

22-55 California Legal Forms--Transaction Guide § 55.330

§ 55.330 Assignment of Negotiable Instruments

[1] Comment

[a] Use of Form

This form is a simple assignment of a note or other negotiable instrument. It is designed for use when the instrument is negotiable but negotiation is not intended or desired. Transfer without negotiation is used when the instrument itself is sold (for example, to a factor who lends money to producers and dealers, often on the security of accounts receivable) or is used as collateral, and the parties intend the transaction to be governed by the terms of the assignment agreement.

Although a negotiable instrument is usually transferred by negotiation, it may be assigned by a simple transfer [*see Com. Code § 3203; see also § 55.20*]. Transfer of less than the entire instrument operates as a partial assignment, rather than a negotiation [*Com. Code § 3203(c); see F. Hart & W. Willier, Bender's U.C.C. Service, Commercial Paper, Ch. 3, Transfer of Commercial Paper (Matthew Bender)*].

For discussion of the requirements an instrument must meet to be negotiable, see § 55.21. For coverage of the process of negotiation and the forms for endorsement used in that process, see § 55.120.

[b] Transfer of Instruments

[i] Rights Transferred

The transfer of an instrument, whether or not the transfer is a negotiation, gives the transferee any right of the transferor to enforce the instrument, including any rights as a holder in due course, with one exception: A transferee who has engaged in fraud or illegality affecting the instrument cannot acquire the rights of a holder in due course by transfer [*Com. Code § 3203(b)*]. However, the transfer of less than an entire instrument is not a negotiation and the transferee only has the rights of a partial assignee [*Com. Code § 3203(d)*].

[ii] When Transfer Occurs

Transfer of a note or other negotiable instrument occurs when the instrument is delivered by a person, not its issuer, in order to give the person receiving delivery the right to enforce the instrument [*Com. Code § 3203(a)*]. "Delivery" is the voluntary transfer of possession [*Com. Code § 1201(b)(15)*].

[c] Warranties of Transferor

[i] Overview

The warranties enumerated in regard to the presentment and transfer of instruments [*see [ii]-[iv], below*] cannot be disclaimed with respect to checks [*Com. Code §§ 3416(c), 3417(e)*]. Notice of a claim for breach must be given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, or the liability of the warrantor will be discharged to the extent of any loss caused by the delay in giving notice [*Com. Code §§ 3416(c), 3417(e)*]. The cause of action for breach of warranty accrues when the claimant has reason to know of the breach [*Com. Code §§ 3416(d), 3417(f)*; *see Com. Code §§ 3416(b), 3417(b), (d)(2)* (damages)].

[ii] Warranties on Presentment of Unaccepted Draft

Any person who presents an unaccepted draft to the drawee for payment or acceptance and any prior transferor warrant to the drawee who pays or accepts the instrument in good faith that he or she is entitled to enforce the draft or is authorized to obtain payment or acceptance on behalf of a person so entitled [*Com. Code § 3417(a)(1)*]. The warrantor also warrants that the draft has not been altered and that he or she has no knowledge that the signature of the drawer is unauthorized [*Com. Code § 3417(a)(2), (3)*]. If the draft is a demand draft, the warrantor also warrants that creation of the draft according to the terms on its face was authorized by the person identified as the drawer [*Com. Code § 3417(a)(4)*; *see Com. Code § 3417(h)* (exception for transferor as transferee when transferor does not give warranty under applicable conflict of law rules)].

[iii] Warranties on Presentment of Dishonored Draft or Other Obligation

If a dishonored draft is presented for payment to the drawer or an endorser, or any other instrument is presented for payment to a party obliged to pay, and payment is made in good faith, the person obtaining payment and a prior transferor warrant that the warrantor is, or was at the time of transfer, a person entitled to enforce the instrument or authorized to obtain payment on behalf of a person entitled to enforcement [*Com. Code § 3417(d)(1)*].

[iv] Warranties of Transferor for Consideration

A person who transfers an instrument for consideration warrants to the transferee (and, if the transfer is by endorsement, to any subsequent transferee) that he or she is entitled to enforce the instrument, that all signatures are authentic and authorized, and that the instrument has not been altered [*Com. Code § 3416(a)(1)-(3)*]. In addition, the transferor warrants that the instrument is not subject to a defense or claim in recoupment of any party that can be asserted against the warrantor, and that he or she has no knowledge of any insolvency proceedings against the maker or acceptor, or against the drawer of an unaccepted instrument [*Com. Code § 3416(a)(4), (5)*]. An additional warranty to each transferee of a demand draft [*see Com. Code § 3104(k)* ("demand draft" defined); *see also § 55.13[6]*] is that the draft was authorized by the bank customer on whose account the draft is drawn [*Com. Code § 3416(a)(6)*; *see Com. Code § 3416(e)* (exception for transferor as transferee when transferor does not give warranty under applicable conflict of law rules)].

[2] FORM

Assignment of Negotiable Instruments

ASSIGNMENT OF NEGOTIABLE INSTRUMENT

_____ [date]

For value received, I assign to [name of assignee], Assignee, [all my rights or a security interest in _____ (all or specify portion or percentage) of my rights] in a [note or draft] dated _____, [made or drawn] by _____ [name of maker or drawer] and payable to _____ [name of payee] in the amount of \$_____.

[Add following to avoid giving transferee specifically enforceable right to transferor's endorsement:]

THIS TRANSFER IS NOT TO OPERATE AS A NEGOTIATION OF THE INSTRUMENT DESCRIBED IN THIS ASSIGNMENT OR TO GIVE THE TRANSFEREE THE RIGHT TO COMPEL ITS NEGOTIATION.

[Continue with the following:]

ASSIGNOR

_____ [signature of assignor]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer &

IndorsementNegotiationCommercial Law (UCC)Negotiable Instruments (Article 3)Negotiation, Transfer &

IndorsementTransfersCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesWarranties



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D. Transfer and Assignment of Negotiable Instruments

22-55 California Legal Forms--Transaction Guide §§ 55.331-55.339

[Reserved]

§§ 55.331[Reserved]



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E. Collection of Negotiable Instruments

22-55 California Legal Forms--Transaction Guide § 55.340

§ 55.340 Written Notice of Dishonor

[1] Comment

[a] Use of Form

This form is a notice of dishonor, that is, a notice that presentment of a note or other negotiable instrument has been duly made but acceptance or payment has been refused or has not been obtained within the time allowed [*see Com. Code § 3502*]. The form is also a notice that, if presentment has been waived or excused, the instrument has not been duly accepted or paid [*see Com. Code § 3502(e)*; *see also Com. Code § 3504* (waiver or excuse of presentment)].

Notice of dishonor is sufficient if it reasonably identifies the instrument and indicates that the instrument has been dishonored or has not been paid or accepted. Return of an instrument by a bank for collection is sufficient notice of dishonor [*see Com. Code § 3503(b)*]. For a list of writings that create a presumption of dishonor and of notice of dishonor (and are admissible as evidence of such), *see Section 55.132*, Paragraph 2.

If the instrument that has been dishonored is a check, draft, or order, this form may be used together with the demand for payment in cash *set forth in Section 55.341* [*see Civ. Code § 1719*]. If the check has been dishonored because the maker instructed the drawee to stop payment, use the demand for payment in *Section 55.342*.

[b] Presentment

"Presentment" is a demand for acceptance of a draft made to the drawee, a demand for payment of an instrument made to the drawee or other party obliged to pay, or a demand for payment of a note or accepted draft payable at a bank made to the bank [*Com. Code § 3501(a)*]. "Acceptance" is the drawee's signed promise to honor a draft or check as presented [*Com. Code § 3409(a)*]. For discussion of acceptance, *see Section 55.42*.

Unless excused or waived [*see Com. Code §§ 3502(e), 3504(a)*], presentment for acceptance is necessary to enforce the obligations of the drawer and endorsers of an instrument, because the instrument must be duly presented before it can be dishonored and the drawer and endorsers must have notice of the dishonor, unless the notice is excused, before their

obligations are enforceable [*see Com. Code §§ 3502 (dishonor), 3503 (notice of dishonor), 3504(b) (excuse of notice of dishonor)*]. If an instrument states that it is "payable through" or "payable at" a bank identified in the instrument, the instrument may be presented for payment only by or through the bank; that bank is designated as a collecting bank and the statement does not by itself authorize the bank to pay the instrument [*Com. Code § 4106*]. For discussion of waiver or excuse of presentment, see *Section 55.310[1][b][ii]*.

[c] Dishonor

Dishonor occurs when presentment is duly made but acceptance or payment is refused or cannot be obtained within the time allowed [*see Com. Code § 3502; see also §§ 55.131, 55.132*]. Dishonor also occurs when presentment is excused and the instrument is not duly accepted or paid [*Com. Code § 3502(e); see Com. Code § 3504 (waiver or excuse of presentment); see also § 55.310[1][b][ii]*]. The return of an instrument for lack of proper endorsement is not dishonor; nor is refusal of payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule [*Com. Code § 3501(b)(3)*].

Subject to any necessary notice of dishonor [*see [d], below*], the holder has a right to enforce the obligations of the drawers and endorsers after an instrument is dishonored [*see Com. Code § 3503(a)*]. The rules governing dishonor of various instruments are covered in *Section 55.43[2]through [5]*.

[d] Notice of Dishonor

[i] Overview

Notice of dishonor is necessary to enforce the obligation of an endorser [*Com. Code § 3503(a)*]. Failure to give notice of dishonor discharges the liability of the endorser [*Com. Code § 3415(c); see Com. Code § 3503*]. Notice of dishonor is also necessary to enforce the obligation of a drawer to pay a dishonored draft that was accepted by an acceptor other than a bank; failure to give this notice of dishonor discharges the liability of the drawer [*Com. Code §§ 3414(d), 3415(c), 3503(a)*]. Notice of dishonor may be excused under certain circumstances, as may delay in giving the notice [*see Com. Code § 3504(b), (c); see also [iv], below*].

[ii] How Notice Is Given

Notice of dishonor may be given by any person. It may be given by any commercially reasonable means, including oral, written, or electronic communication [*Com. Code § 3503(b)*].

[iii] When Notice Is Given

With respect to an instrument taken for collection by a collecting bank, a notice of dishonor must be given by the bank before midnight of the next business day following the banking day on which the bank receives notice of dishonor of the instrument. With respect to an instrument taken for collection by any other person, a notice of dishonor must be given within 30 days following the day on which the person receives notice of dishonor. With respect to any other instrument, notice of dishonor must be given within 30 days following the day on which dishonor occurs [*Com. Code § 3503(c)*].

[iv] Waiver or Excuse of Notice or Delay in Giving Notice

Notice of dishonor is excused if the party whose obligation is being enforced waives notice. A waiver of presentment is also a waiver of notice of dishonor. Notice of dishonor is also excused if, by the terms of the instrument, notice is not necessary to enforce the obligation of a party to pay the instrument [*Com. Code § 3504(b)*].

Delay in giving notice of dishonor is excused if the delay was caused by circumstances beyond the control of the person

giving notice and that person exercised reasonable diligence after the cause of delay ceased to operate [*Com. Code* § 3504(c)].

[2] FORM

Written Notice of Dishonor

NOTICE OF DISHONOR

_____ [date]

_____ [name of person liable on instrument]

_____ [street address]

_____ [city, state, zip]

This is to give notice, pursuant to Division 3 of the California Commercial Code, that a [note or draft or check] dated _____, [made or drawn] by _____ [name], payable to _____ [name], or order, in the sum of \$ _____ with interest, [add if applicable: payable at _____ (place) on _____ (date),] was duly presented for [payment or acceptance] by the payee or holder of that instrument to [specify party by name and/or description, e.g., the maker] [add if applicable: at the place designated in the instrument], that [payment or acceptance] was refused, and that the instrument has been dishonored.

PAYEE

_____ [signature of payee or holder]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentDishonorCommercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentExcused Presentment & NoticeCommercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentPresentment



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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 55 NEGOTIABLE INSTRUMENTS

PART IV. FORMS

E. Collection of Negotiable Instruments

22-55 California Legal Forms--Transaction Guide § 55.341

§ 55.341 Demand for Cash Payment of Dishonored Instrument

[1] Comment

[a] Use of Form

This form is a demand for cash payment of the amount of a dishonored check, draft, or order. The demand is made by the payee on the maker, drawer, or the person who delivered the instrument. If the payee wishes to take advantage of certain civil remedies [*see § 55.341[1][b], below*], the demand must be delivered to the maker by certified mail [*see Civ. Code § 1719(a)(2); see also Civ. Code § 1719(i)* (assignee of payee or holder of check also may take advantage of available civil remedies)].

This form should not be used to demand payment of a check that has been dishonored because the maker instructed the drawee to stop payment. A statutory form must be used for that type of demand [*see Civ. Code § 1719(c), (d)*]. A demand notice that satisfies the statutory requirements is *found in § 55.342*.

[b] Right to Recovery for Dishonored Instrument

Any person who passes a check on insufficient funds (*see below*) is liable to the payee for the amount of the check plus a service charge not to exceed \$25 for the first check passed to that payee on insufficient funds and not to exceed \$35 for each subsequent check passed to that payee on insufficient funds [*Civ. Code § 1719(a)(1)*]. In addition, penal sanctions may be applied [*see § 55.341[1][d], below*].

Moreover, any person who passes a check on insufficient funds may be liable to the payee for damages equal to three times the amount of the check if a written demand for payment containing specified information [*see § 55.341[1][c], below*] is mailed by certified mail to the person who passed the check [*Civ. Code § 1719(a)(2)*]. In addition, penal sanctions may be applied [*see § 55.341[1][d], below*]. The person who passed the check must, within 30 days from the date the written demand was mailed, pay the amount of the check plus the amount of any service charge and the cost of mailing the written demand for payment [*Civ. Code § 1719(a)(2)*]. Otherwise, the person is liable for the amount of the check plus treble damages (that is, three times the amount of the check, up to a maximum of \$1,500 damages, or at least

\$100), less any partial payments toward the amount of the check or the service charge that the person made within the 30-day period [*Civ. Code* § 1719(a)(2)].

When a person becomes liable for treble damages for a check that is the subject of a written demand, however, that person is no longer liable for any service charge for that check or any costs to mail the written demand [*Civ. Code* § 1719(a)(2); *Imperial Merchant Servs., Inc. v. Hunt* (2009) 47 Cal. 4th 381, 97 Cal. Rptr. 3d 464, 212 P.3d 736] .

In any event, a person is not liable for the service charge under *Civ. Code* § 1719(a)(1) if either (1) at any time, the person presents the payee with written confirmation by that person's financial institution that the check was returned to the payee by the financial institution because of an error on the part of that institution [*Civ. Code* § 1719(a)(4)] or (2) the person presents the payee with written confirmation that his or her account had insufficient funds as a result of a delay in the regularly scheduled transfer or posting of a direct deposit of a social security or government benefit assistance payment [*Civ. Code* § 1719(a)(5)]. Furthermore, a person is not liable for the service charge, costs to mail the written demand, or treble damages under *Civ. Code* § 1719(a)(1), (2), if he or she stops payment in order to resolve a good faith dispute with the payee [*Civ. Code* § 1719(a)(3)]. For discussion of what constitutes a "good faith dispute," see § 55.342[1][b][iii].

A drawer also is liable for damages and costs only if all of the requirements of *Civ. Code* § 1719 are met [*Civ. Code* § 1719(j)(1)]. In any case, the drawer is not liable more than once on each check [*Civ. Code* § 1719(j)(2)].

To "pass a check on insufficient funds" means to make, utter, draw, or deliver any check, draft, or order for the payment of money on any bank, depository, person, firm, or corporation that refuses to honor the instrument because (1) of lack of funds or credit in the account to pay the check, (2) the person who wrote the check does not have an account with the drawee, or (3) the person who wrote the check instructed the drawee to stop payment on the check [*Civ. Code* § 1719(a)(6)].

The statutory damages prescribed in *Civ. Code* § 1719 are exclusive in the sense that the payee or an assignee, on recovering a service charge pursuant to that code section, may not also recover prejudgment interest under *Civ. Code* § 3287. If, after a proper demand, the service charge is not paid (together with the amount of the check and the cost of mailing the demand), and the payee or assignee sues for treble damages instead, then in that case as well, prejudgment interest may not be recovered [*Imperial Merchant Servs., Inc. v. Hunt* (2009) 47 Cal. 4th 381, 97 Cal. Rptr. 3d 464, 212 P.3d 736] .

In lieu of pursuing the statutory relief authorized in *Civ. Code* § 1719, if the check was taken as payment of an obligation, the payee or an assignee may seek damages for breach of the underlying obligation [see *Com. Code* § 3310(b)(3)], and in that case, prejudgment interest may be claimed [*Imperial Merchant Servs., Inc. v. Hunt* (2009) 47 Cal. 4th 381, 97 Cal. Rptr. 3d 464, 212 P.3d 736 ; see *Com. Code* § 3302 (interest is recoverable)].

[c] Required Information and Form of Demand

To receive recovery for a dishonored instrument [see § 55.341[1][b], above], the payee must make a written demand for payment by certified mail. The demand must inform the recipient of the provisions of *Civ. Code* § 1719, the amount of the check, and the amount of the service charge payable to the payee [*Civ. Code* § 1719(a)(2)]. The relevant statutory provisions of *Civ. Code* § 1719 are included in the language of this form [see § 55.341[2], below].

[d] Criminal Penalty for Worthless Check

Making, drawing, or delivering a check, draft, or order with intent to defraud and knowledge that the maker or drawer has insufficient funds to pay it is a crime [see *Penal Code* § 476a(a)]. If the check has been protested (that is, dishonored) on the ground of insufficient funds, the notice of protest (that is, dishonor) is admissible as proof of

presentation, nonpayment, and dishonor, and is presumptive evidence of knowledge of the insufficiency [*Penal Code* § 476a(c)].

[2] FORM

Demand for Cash Payment of Dishonored Instrument

DEMAND FOR PAYMENT IN CASH

_____ [*name of drawer or person delivering instrument*]

_____ [*address*]

_____ [*date*]

Please take notice that payment of the [check or draft or order] number _____, dated _____, in the amount of \$_____ and [signed or delivered] by you has been refused by _____ [*name of drawee*] _____ [for lack of funds or for lack of credit to pay or because _____ (you have or the maker has) no account with the drawee].

As permitted by *California Civil Code Section 1719*, I demand that you pay me, within 30 days, in cash, \$_____, which is the sum of the following:

\$_____, which is the amount of that [check or draft or order], plus

\$[*amount of service charge, not to exceed \$25 for first check passed on insufficient funds or \$35 for each subsequent check passed on insufficient funds*], which is the amount of the service charge, plus

\$_____, which is the cost to mail this written demand for payment.

If you fail pay that aggregate amount in full within 30 days from the date this written demand was mailed to you, you will be liable, instead, under *Civil Code Section 1719*, for the amount of the [check or draft or order], minus any partial payments made toward the amount of the [check or draft or order] or the service charge within 30 days of the written demand, plus damages equal to three times the amount of the amount of the [check or draft or order], which shall not be less than \$100 or more than \$1,500.

However, you are not liable for the service charge under *Civil Code Section 1719(a)(1)* if either (1) at any time, you present me with written confirmation by your financial institution that the [check or draft or order] was returned to me by the financial institution because of an error on the part of that institution or (2) at any time, you present me with written confirmation that your account had insufficient funds as a result of a delay in the regularly scheduled transfer or posting of a direct deposit of a social security or government benefit assistance payment.

If you have stopped payment to resolve a good faith dispute with me, you are not liable for the service charge, costs to mail this written demand, or treble damages under *Civil Code Section 1719(a)(1), (2)*.

PAYEE

_____ [*signature of payee*]

[*typed name*]

NOTICE TO DRAWER

_____ [*date*]

To: _____ [name of drawer]

_____ [Name of payee] is the payee of a check you wrote for \$ _____. The check was not paid because [of lack of funds *or* of lack of credit to pay *or* you have no account with the drawee], and the payee demands payment. You may have a good faith dispute as to whether you owe the full amount. If you do not have a good faith dispute with the payee and fail to pay the payee the full amount of the check in cash, a service charge not to exceed \$25 for the first check passed on insufficient funds and not to exceed \$35 for each subsequent check passed on insufficient funds, and the costs to mail this notice within 30 days after this notice was mailed, you could be sued and held responsible to pay at least both of the following:

(1) The amount of the check.

(2) Damages of at least \$100 or, if higher, three times the amount of the check, up to \$1,500.

To make payment, contact the payee at:

_____ [name of payee]

_____ [street address]

[telephone number]

You may wish to contact a lawyer to discuss your legal rights and responsibilities.

_____ [signature of sender of notice]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentGeneral OverviewContracts
LawNegotiable InstrumentsDischarge & PaymentPaymentGeneral OverviewContracts LawNegotiable
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DIVISION III: COMMERCIAL TRANSACTIONS

CHAPTER 55 NEGOTIABLE INSTRUMENTS

PART IV. FORMS

E. Collection of Negotiable Instruments

22-55 California Legal Forms--Transaction Guide § 55.342

§ 55.342 Demand for Cash Payment of Check Subject to Stop Payment Order

[1] Comment

[a] Use of Form

This form is a demand for payment of a check that has been dishonored because the drawer has instructed the drawee to stop payment. It is the statutory form set forth in *Civil Code Section 1719(c)*. A demand for payment of an instrument that has been dishonored because of a stop payment order must be in substantially the form specified by statute [*Civ. Code § 1719(c)*]. This form should be used instead of the *form in Section 55.341* when an instrument has been dishonored because of a stop payment order. Special demand provisions apply when the payee of the dishonored check is a municipal court [*see Civ. Code § 1719(g)*].

For discussion of the provisions of *Civil Code Section 1719* relating to instruments dishonored for reasons other than a stop payment order, see *Section 55.341[1]*.

[b] Action for Damages

[i] Written Demand Required

The payee of a dishonored check, including one dishonored because the drawer ordered the drawee to stop payment, is entitled to the amount of the check and a service charge not to exceed \$25 for the first check passed to that payee on insufficient funds and not to exceed \$35 for each subsequent check passed to that payee on insufficient funds [*Civ. Code § 1719(a)(1)*]. Moreover, the payee of a dishonored check may be entitled to damages equal to three times the amount of the check if a written demand for payment containing specified information [*see [2], below*] is mailed by certified mail to the person who passed the check [*Civ. Code § 1719(a)(2)*]. The person who passed the check must, within 30 days from the date the written demand was mailed, pay the amount of the check plus the amount of any service charge and the costs to mail the written demand for payment [*Civ. Code § 1719(a)(2)*]. Otherwise, the person is liable for the amount of the check plus treble damages (that is, three times the amount of the check, up to a maximum of \$1,500 damages, or at least \$100), less any partial payments toward the amount of the check or the service charge that the

person made within the 30-day period [*Civ. Code* § 1719(a)(2)]. However, there is no such cause of action if the drawer stops payment in order to resolve a good faith dispute with the payee [*Civ. Code* § 1719(a)(3)].

[ii] Existence of Good Faith Dispute; Burden of Proof

The payee of a check on which payment has been stopped by order of the maker is entitled to the a service charge, costs to mail the written demand, or treble damages provided by *Civil Code Section 1719(a)* only if the payee proves by clear and convincing evidence that there was no good faith dispute [*Civ. Code* § 1719(a)(3)]. A "good faith dispute" exists if the court finds that the drawer had a reasonable belief that he or she was legally entitled to withhold payment. Grounds for entitlement to withhold payment include, but are not limited to, the following: services were not rendered; goods were not delivered; goods or services were faulty, not as promised, or otherwise unsatisfactory; or there was an overcharge. Whether a good faith dispute exists is determined by the trier of fact [*Civ. Code* § 1719(b)].

[iii] Evidence of Written Demand

A court may not award damages or costs under *Civil Code Section 1719* for a stop payment unless the court receives into evidence a copy of the written demand that has been sent to the drawer and a signed certified mail receipt showing delivery, or attempted delivery if refused, of the written demand to the drawer's last known address [*Civ. Code* § 1719(d)].

[iv] Reasonable Effort to Reconcile Dispute

To recover damages because the drawer instructed the drawee to stop payment, the payee must show to the satisfaction of the trier of fact that he or she made a reasonable effort to reconcile and resolve the dispute before going to court [*Civ. Code* § 1719(e)].

[2] FORM

Demand for Cash Payment of Check Subject to Stop Payment Order

NOTICE TO DRAWER

_____ [date]

To: _____ [name of drawer]

_____ [Name of payee] is the payee of a check you wrote for \$_____. The check was not paid because you stopped payment, and the payee demands payment. You may have a good faith dispute as to whether you owe the full amount. If you do not have a good faith dispute with the payee and fail to pay the payee the full amount of the check in cash plus a service charge not to exceed \$25 for the first check passed on insufficient funds and not to exceed \$35 for each subsequent check passed on insufficient funds, and the costs to mail this notice, within 30 days after this notice was mailed, you could be sued and held responsible to pay at least both of the following:

(1) The amount of the check.

(2) Damages of at least \$100 or, if higher, three times the amount of the check, up to \$1,500.

If the court determines that you do have a good faith dispute with the payee, you will not have to pay the service charge, treble damages, or mailing costs. If you stopped payment because you had a good faith dispute with the payee, you should try to work out your dispute with the payee. You can contact the payee at:

_____ *[name of payee]*

_____ *[street address]*

[telephone number]

You may wish to contact a lawyer to discuss your legal rights and responsibilities.

_____ *[signature of sender of notice]*

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsDishonor & PresentmentGeneral OverviewContracts LawNegotiable
InstrumentsEnforcementDuties & Liabilities of PartiesGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 56 LETTERS OF CREDIT AND ELECTRONIC FUND TRANSFERS

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Commercial Documentary Letter of Credit

§ 56.202 Traveler's Letter of Credit

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[b] Payment Under Traveler's Letter of Credit

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Traveler's Letter of Credit

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Disclosures by Financial Institution Accompanying Distribution of Unsolicited Access Device

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Demand for Resolution of Erroneous Electronic Fund Transfer



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CHAPTER 56 LETTERS OF CREDIT AND ELECTRONIC FUND TRANSFERS

22-56 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers letters of credit and electronic fund transfers. The Legal Background discusses the purposes and uses of letters of credit, particularly as they relate to international sales transactions. Included are discussions of Division 5 of the Uniform Commercial Code (UCC) (generally referred to in this chapter as the Uniform Commercial Code Letters of Credit, or UCC--Letters of Credit) and the International Chamber of Commerce Publication entitled "Uniform Customs and Practice for Documentary Credits" (generally referred to in this chapter as the UCP) [see § 56.15]. The Legal Background also discusses methods of accomplishing and evidencing electronic transfers of funds under the Uniform Commercial Code and the federal Electronic Fund Transfer Act.

The Transaction Guide contains lists of facts and documents to be gathered in letter of credit and electronic fund transfer transactions, as well as determinations to be made by the parties. Procedural guides giving step-by-step guides to letter of credit and fund transfer procedures are also included.

The Forms section illustrates various letter of credit forms, along with credit applications and a bill of exchange used in letter of credit transactions. Error resolution forms are provided for use in electronic fund transfers. The forms also include the disclosures that banks must provide to consumers under the federal Electronic Fund Transfer Act.

Drafts and other negotiable instruments are covered in Chapter 55, *Negotiable Instruments*. For discussion of other forms of business financing, see Chapters 42, *Secured Transactions*, and 43, *Business Loans*. Sales of goods under the Uniform Commercial Code are discussed in Chapter 52, *Sales of Goods Under the Uniform Commercial Code*.



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§ 56.01 California Statutes

Discriminatory language in documents evidencing transfer of funds or credit constitutes unlawful restraint of trade.
Bus. & Prof. Code §§ 16721.5, 16721.6.

Debit card holder not liable for losses resulting from loss or theft of petroleum card key after issuer's receipt of notice of loss or theft. *Civ. Code § 1747.03(b).*

Distinction between sureties and guarantors abolished. *Civ. Code § 2787.*

Commercial Code Division 1, General Provisions. *Com. Code § 1101 et seq.*
Definitions. *Com. Code § 1201.*

Commercial Code Division 2, Sales. *Com. Code § 2101 et seq.*
Definitions of "letter of credit" and "confirmed credit." *Com. Code § 2325.*
Anticipatory repudiation. *Com. Code § 2610.*
Definition of "person in position of a seller." *Com. Code § 2707.*
Seller's incidental damages. *Com. Code § 2710.*

Commercial Code Division 3, Negotiable Instruments. *Com. Code § 3101 et seq.*

Application and definitions. *Com. Code §§ 3102, 3103.*

Provisions relating to negotiable instruments. *Com. Code §§ 3104-3119.*
Drafts. *Com. Code § 3108.*
Acceptance. *Com. Code § 3409.*
Warranties on presentation and transfer. *Com. Code §§ 3416, 3417.*
Time for payment or acceptance. *Com. Code § 3502.*

Commercial Code Division 4, Bank Deposits and Collections. *Com. Code § 4101 et seq.*
Warranties of customer and collecting bank. *Com. Code § 4207.*
Liability for late return of dishonored draft. *Com. Code § 4302.*

Commercial Code Division 5, Letters of Credit. *Com. Code § 5101 et seq.*
General provisions and definitions. *Com. Code §§ 5101-5103.*
Form requirements and consideration. *Com. Code §§ 5104, 5105.*
Time of issuance; amendment, cancellation, or revocation; duration. *Com. Code § 5106.*
Rights and duties of confirmer, nominated person, and advisor. *Com. Code § 5107.*
Rights and obligations of issuer; standard practices. *Com. Code § 5108.*
Effect of forgery or material fraud on honor of presentation. *Com. Code § 5109.*
Warranties. *Com. Code § 5110.*
Remedies for improper dishonor or repudiation. *Com. Code § 5111.*
Transfers. *Com. Code § 5112.*
Rights and obligations of successor of beneficiary. *Com. Code § 5113.*
Limitations on action. *Com. Code § 5115.*
Governing law and forum. *Com. Code § 5116.*
Subrogation. *Com. Code § 5117.*

Commercial Code Division 7, Documents of Title, including warehouse receipts and bills of lading. *Com. Code § 7101 et seq.*
Provisions relating to negotiation. *Com. Code § 7501.*
Warranties on negotiation or transfer. *Com. Code § 7507.*
Warranties of collecting bank or intermediary. *Com. Code § 7508.*

Commercial Code Division 8, Investment Securities. *Com. Code § 8101 et seq.*
Definition of "security." *Com. Code § 8102(a)(15).*
Warranties on transfer of investment security. *Com. Code § 8108.*
Provisions relating to indorsement. *Com. Code § 8304.*

Commercial Code Division 9, Secured Transactions. *Com. Code § 9101 et seq.*

Commercial Code Division 11, Funds Transfers. *Com. Code § 11101 et seq.*

Issuance and acceptance of payment order. *Com. Code § 11201 et seq.*

Execution of sender's payment order by receiving bank. *Com. Code § 1130 et seq.*

Payment. *Com. Code § 11401 et seq.*

Miscellaneous provisions. *Com. Code § 11501 et seq.*

Effect of misleading statement or conduct. *Evid. Code § 623.*

Time limit on bank's acceptance of drafts. *Fin. Code § 1224.*

Automated teller machine customer safety standards. *Fin. Code § 13000 et seq.*

Right or interest acquired in letter of credit not subject to state tax lien. *Gov. Code § 7170(c)(4)(H).*

Letter of credit as improvement security. *Gov. Code § 66499.*

Letter of credit as building permit security. *Health & Safety Code § 19835.*



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§ 56.02 Federal Sources

[1] United States Code

Electronic Fund Transfer Act. *15 U.S.C. § 1693 et seq.*

General provisions and definitions. *15 U.S.C. §§ 1693-1693b, 1693k, 1693l.*

Terms, conditions, and documentation of transfers. *15 U.S.C. §§ 1693c, 1693d.*

Preauthorized transfers. *15 U.S.C. § 1693e.*

Error resolution. *15 U.S.C. § 1693f.*

Liability of consumer and institution. *15 U.S.C. §§ 1693g, 1693h.*

Issuance of card. *15 U.S.C. § 1693i.*

Suspension of obligations. *15 U.S.C. § 1693j.*

Criminal and civil liability. *15 U.S.C. §§ 1693m, 1693n.*

Miscellaneous provisions. *15 U.S.C. §§ 1693o-1693r.*

Fraud and related acts in use of access devices. *18 U.S.C. § 1029.*

Export Administration Act of 1979. *50 U.S.C. App. § 2401 et seq.*

[2] Regulations

Electronic fund transfers. *12 C.F.R. § 205.1 et seq.*

Issuance of access device. *12 C.F.R. § 205.5.*

Consumer's liability for unauthorized transfers. *12 C.F.R. § 205.2(a)(2).*

Disclosure of terms and conditions. *12 C.F.R. § 205.7.*

Documentation of transfers. *12 C.F.R. § 205.9.*

Preauthorized transfers. *12 C.F.R. § 205.10.*

Error resolution. *12 C.F.R. § 205.11(a).*

Model disclosure forms. *12 C.F.R. pt. 205, app. A.*



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§§ 56.03[Reserved]



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§ 56.05 Law Reviews and Periodicals

Carlson & Widen, *Letters of Credit, Voidable Preferences, and the "Independence" Principle*, 54 *Bus. Law.* 1661 (1999).

Baxter, *Letters of Credit and the Powerine Preference Trap*, 53 *Bus. Law.* 65 (1997).

Ronner, *Destructive Rules of Certainty and Efficiency: A Study in the Context of Summary Judgment Procedure and the Uniform Customs and Practice for Documentary Credits*, 28 *Loy. L.A. L. Rev.* 619 (1995).

Barnes, *Defining Good Faith Letter of Credit Practices*, 28 *Loy. L.A. L. Rev.* 101 (1994).

Harfield, *Guaranties, Standby Letters of Credit, and Ugly Ducklings*, 26 *UCC L.J.* 195 (1994).

Moringiello, *Silencing the Loose Cannon: The Need for the Bankruptcy Code to Recognize Letters of Credit*, 27 *Loy. L.A. L. Rev.* 619 (1994).

Note: *Western Security Bank v. Beverly Hills Business Bank: The Vanishing Utility of Letters of Credit in Real Estate Transactions*, 31 *San Diego L. Rev.* 775 (1994).

Bergsten, *A New Regime for International Independent Guarantees and Standby Letters of Credit: The UNCITRAL Draft Convention on Guaranty Letters*, 27 *Int'l Law.* 859 (1993).

Murray, *Letters of Credit and Forged and Altered Documents: Some Deterrent Suggestions*, 98 *Com. L. J.* 504 (1993).

Barnes & Bernes, *Letters of Credit*, 48 *Bus. Law.* 1635 (1993).

Boss, *Suretyship and Letters of Credit: Subrogation Revisited*, 34 *Wm. & Mary L. Rev.* 1139 (1993).

Steiner, *A Letter of Credit Primer for Real Estate Lawyers*, 28 *Real Prop. Prob. & Tr. J.* 125 (1993).

Dolan, *The Correspondent Bank in the Letter-of-Credit Transaction*, 109 *Banking L.J.* 396 (1992).

Macintosh, *Letters of Credit: Curbing Bad-Faith Dishonor*, 25 *UCC L.J.* 3 (1992).

Meyer, *The Challenge of Electronic Commerce; Finding Your Way on a Paperless Trail*, 78 *A.B.A. J.* 85 (Mar. 1992).

Arzt, *Punitive Damages for Wrongful Dishonor or Repudiation of a Letter of Credit*, 24 *UCC L.J.* 39 (1991).

Avidon, *The Prime Motor Inns Case and its Impact on Indentures, Trustees, Bondholders, and Letters of Credit*, 108 *Banking L.J.* 491 (1991).

Byrne, *Fundamental Issues in the Unification and Harmonization of Letter of Credit Law*, 37 *Loy. L.A. L. Rev.* 1 (1991).

Givray, *Letter of Credit (Uniform Commercial Code Annual Survey)*, 46 *Bus. Law.* 1579 (1991).

Gruner, *Electronic Commercial Practices: Introduction*, 46 *Bus. Law.* 1777 (1991).

Hotchkiss, *Strict Compliance in Letter-of-Credit Law: How Uniform Is the Uniform Commercial Code?* 23 *UCC L.J.* 288 (1991).

Patrikis, *Article 4A: The New Law of Funds Transfers and the Role of Counsel*, 23 *UCC L.J.* 219 (1991).

Pawlowic, *Standby Letters of Credit: Review and Update*, 23 *UCC L.J.* 391 (1991).

Rodenberg, *Letters of Credit in Bankruptcy: Can the Independence Doctrine Survive Preference Attacks?* 96 *Com. L.J.* 431 (1991).

Rosenblith, *Letter-of-Credit Practice: Revisiting Ongoing Problems*, 23 *UCC L.J.* 120 (1991).

Ballen, *Beyond Enactment of Article 4A: The Next Step*, 45 *Bus. Law.* 1509 (1990).

Ballen, *Duties of the Beneficiary Bank*, 45 *Bus. Law.* 1467 (1990).

Ballen, *The Need for Article 4A*, 45 *Bus. Law.* 1399 (1990).

Baxter, *Proper and Improper Execution of Payment Orders*, 45 *Bus. Law.* 1447 (1990).

Baxter, *The Interrelationship of Article 4A With Other Law*, 45 *Bus. Law.* 1485 (1990).

Byrne, *An Examination of U.C.C. Article 5 (Letters of Credit)*, 45 *Bus. Law.* 1521 (1990).

Colon, *Letters of Credit in Times of Business and Bank Failures*, 107 *Banking L.J.* 6 (1990).

French, *Unauthorized and Erroneous Payment Orders*, 45 *Bus. Law.* 1425 (1990).

Fry, *Basic Concepts in Article 4A: Scope and Definitions*, 45 *Bus. Law.* 1401 (1990).

Givray, *Letters of Credit (Uniform Commercial Code Annual Survey)*, 45 *Bus. Law*. 2381 (1990).

Goldstein, *Electronic Fund Transfers*, 45 *Bus. Law*. 1957 (1990).

Goldstein, *Federal Versus State Adoption of Article 4A*, 45 *Bus. Law*. 1513 (1990).

Nelson, *Settlement Obligations and Bank Insolvency*, 45 *Bus. Law*. 1473 (1990).

Givray, *Letters of Credit (Uniform Commercial Code)*, 44 *Bus. Law*. 1567 (1989).

Goldstein, *Electronic Fund Transfers (Consumer Financial Services)*, 44 *Bus. Law*. 1081 (1989).

Kruger, *The Letter of Credit Was Not Prepayment of a Contested Amount*, 71 *J. Tax'n* 76 (1989).

McLaughlin, *On the Periphery of Letter-of-Credit Law: Softening the Rigors of Strict Compliance*, 106 *Banking L.J.* 4 (1989).

McLaughlin, *Structuring Commercial Letter-of-Credit Transactions to Safeguard the Interests of the Buyer*, 21 *UCC L.J.* 318 (1989).

Byrne, *Letters of Credit (Uniform Commercial Code Annual Survey)*, 43 *Bus. Law*. 1353 (1988).

Dolan, *Letter-of-Credit Disputes Between the Issuer and its Customer: The Issuer's Rights Under the Misnamed Bifurcated Standard*, 105 *Banking L.J.* 380 (1988).

Effros, *A Banker's Primer on the Law of Electronic Funds Transfers*, 105 *Banking L.J.* 510 (1988).

Weintraub, *Release of Standby Letter of Credit as a Defense to a Preference Action*, 21 *UCC L.J.* 183 (1988).



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§ 56.06 Annotations

Annot., What Is "Documentary Draft" Under UCC § 4-104(1)(f), 65 A.L.R.4th 1095 (1988) .

Annot., What Is a Letter of Credit Under UCC §§ 5-102, 5-103, 44 A.L.R.4th 172 (1986) .

Annot., What Constitutes Fraud or Forgery Justifying Refusal to Honor, or Injunction Against Honoring, Letter of Credit Under UCC § 5-114(1)(2), 25 A.L.R.4th 239 (1983) .

Annot., What Is a "Branch" Under 12 USCS Sec. 36(f) Which a National Banking Association May Retain, Establish, or Operate, 52 A.L.R. Fed. 649 (1981) .

Annot., Damages Recoverable for Wrongful Dishonor of Letter of Credit Under UCC § 5-115, 2 A.L.R.4th 665 (1980)

Annot., Maintenance of Computer Terminal in Retail Store for Purpose of Effecting Transfer of Funds Between Financial Institution and Its Depositors as Conduct of Banking Business by Store, 73 A.L.R.3d 1282 (1976) .



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§ 56.07 Text References

[1] Matthew Bender Sources

California Legal Forms(Matthew Bender).

Ch. 42, *Secured Transactions* .

Ch. 43, *Business Loans* .

Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

Ch. 55, *Negotiable Instruments* .

Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

Ch. 77, *Discharge of Obligations* .

Ezer, International Exporting Agreements, Ch. 10, *Securing the Price: Letters of Credit* (Matthew Bender).

Hart & Willier, Bender' S U.C.C. Forms Procedures, Art. 5, *Letters of Credit* (Matthew Bender).

Hart & Willier, Bender'S U.C.C. Service, Commercial Paper(Matthew Bender).

Ch. 1A, *Types of Money Paper Currently in Use*.

Ch. 16, *Electronic Fund Transfers*.

Ch. 17, *Fund Transfers Under Article 4A*.

McCullough, Letters of Credit(Matthew Bender).

Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 5C, *Letters of Credit and Commercial Paper* (Matthew Bender).

[2] Additional Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 136-139, 141, 142 (10th ed. 2005).



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§§ 56.08[Reserved]



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PART II. LEGAL BACKGROUND
A. Letters of Credit
1. Nature, Characteristics, and Governing Law

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§ 56.10 Letter of Credit

[1] Definition

A "letter of credit" is a definite undertaking that satisfies the form requirements of *Com. Code § 5104* by an issuer (usually a financial institution), made at the request or for the account of an applicant (usually a buyer of goods or, in some cases, a financial institution), to honor a documentary presentation by payment or delivery of an item of value [*Com. Code § 5102(a)(10)*; see *Com. Code § 5104* (form requirements); § 56.30[1]; see also *Com. Code § 5102(b)* ("value" defined)]. A "document" includes a "draft" or other demand for payment (including documents of title, investment securities, certificates, or invoices) (1) that is presented in either a written or nonpaper medium permitted by the letter of credit or, unless prohibited by the letter of credit, by the standard practice observed by financial institutions that regularly issue letters of credit [see *Com. Code § 5108(e)*], and (2) that is capable of being examined for compliance with the terms and conditions of letters of credit [*Com. Code § 5102(a)(6)*; see *Com. Code § 5102* (UCC Comment 11) (document may be "draft" under *Com. Code § 5102(a)(6)*, even though it is not "draft" or negotiable instrument under *Com. Code § 3104(e)*); see also § 56.14]. A document may not be oral [*Com. Code § 5102(a)(6)*]. This definition of "document" contemplates the use of electronic media [*Com. Code § 5102* (UCC Comment 2)].

The issuer agrees to make payments under the letter of credit to a beneficiary (usually a seller of goods) only if the beneficiary complies with the terms and conditions specified in the letter of credit, usually by presenting documents [see *Com. Code §§ 5102(a)(10), 5104*]. A letter of credit transaction involves at least three parties and three separate and independent relationships between (1) the issuer and the beneficiary, created by the letter of credit, (2) the customer and the beneficiary, created by a contract or promissory note, with the letter of credit securing the customer's obligations to the beneficiary under the contract or note, and (3) the customer and the issuer, created by a separate contract under which the issuer agrees to issue the letter of credit for a fee and the customer agrees to reimburse the issuer for any amounts paid out under the letter of credit [*DBJJJ, Inc. v. National City Bank* (2004) 123 Cal. App. 4th 530, 534, 19 Cal. Rptr. 3d 904 ; *Western Security Bank v. Superior Court* (1997) 15 Cal. 4th 232, 239 n.3, 62 Cal. Rptr. 2d 243, 933 P. 2d 507] . For definitions and roles of the parties in a letter of credit transaction, see § 56.11.

A letter of credit may be revocable or irrevocable [see *Com. Code* § 5106(a)].

[2] Use

A commercial letter of credit is used to facilitate commercial transactions between reluctant parties, both of whom are hesitant to rely solely on the promises of the other. The primary purpose of a letter of credit is to provide an assurance to the beneficiary of prompt payment against documents, that is, to provide a method of payment, through banking channels, that defines the terms and conditions on which payment will be made, and that, within the strict limits of those terms and conditions, engages the full primary responsibility of a bank to make the payment [*Paramount Export Co. v. Asia Trust Bank, Ltd.* (1987) 193 Cal. App. 3d 1474, 1476 n.1, 238 Cal. Rptr. 920] . In a typical letter of credit transaction, the issuing bank issues the letter of credit after the customer (or "applicant" [see *Com. Code* § 5102(a)(2); § 56.11[1]]) has completed the letter of credit application, signed the security agreement that is attached to the application, and made provisions to pay the issuer for amounts paid under the credit. The issuer then forwards the credit to an advising or confirming bank, which sends the beneficiary an advice or confirmation of the credit. After obtaining the necessary documents to fulfill the credit, the beneficiary presents the documents, draft, and letter of credit for payment at the confirming bank. For definitions and roles of the parties in a letter of credit transaction, see § 56.11.

[3] Governing Provisions of Uniform Commercial Code

The Letters of Credit Division of the UCC (generally referred to in this chapter as the UCC Letters of Credit) [see *Com. Code* § 5101 *et seq.*] applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit [Com. Code § 5103(a)].

The UCC deals with some, but not all, of the rules and concepts of letters of credit. The UCC is not intended to codify all of the law on letters of credit, but to reiterate some fundamental theories underlying letters of credit and to present a framework for future development [Com. Code § 5101 (UCC Comment); see *Wichita Eagle & B. Pub. Co., Inc. v. Pacific Nat. Bank, San Francisco* (9th Cir. 1974) 493 F.2d 1285, 1286] . The fact that a rule is stated in the UCC does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified [Com. Code § 5103(b); see [4], below]. With limited exceptions [see § 56.30[4]], the effect of this division may be varied by agreement or by a provision stated or incorporated by reference in an undertaking [see Com. Code § 5103(c)]. Otherwise, if there is a conflict between the UCC--Letters of Credit and Division 3 of the Commercial Code [Com. Code 3102 *et seq.* , (negotiable instruments), Division 4 [Com. Code § 4101 *et seq.* (bank deposits and collections)], or Division 9 [Com. Code § 9101 *et seq.* (secured transactions)], the UCC Letters of Credit will govern [Com. Code § 5116(d)].

The current version of the UCC--Letters of Credit, effective January 1, 1997, governs letters of credit (and transactions associated with those letters of credit) issued on or after that date [stats. 1996, ch. 176 § 14]. Any transaction, right, obligation, or interest associated with a letter of credit that was issued before January 1, 1997 is governed by prior law [Stats. 1996, ch. 176 § 15].

The UCC--Letters of Credit was revised to conform to the existing version of the Uniform Customs and Practice for Documentary Credits (UCP), a private international agreement of banking practices that is followed by banks in most countries that engage in international commerce [see Com. Code § 5101, (UCC Comment); see also § 56.15]. The changes generally make letters of credit less costly and more reliable [see, e.g., Com. Code § 5104 (form requirements); § 56.30] and tend to favor the issuing bank [see, e.g., Com. Code § 5111(b), (c) (precluding punitive and consequential damages if issuer wrongfully dishonors draft or demand presented under letter of credit); Com. Code § 5115 (setting one year statute of limitations after expiration date of letter of credit, or date cause of action accrues, for actions under Division 5)].

[4] Governing Provisions of Other Bodies of Law

In addition to the UCP [see [3], *above*], the UCC--Letters of Credit is supplemented by many rules of statutory and common law [see *Com. Code* §§ 1103(b), 5102(c); *Com. Code* § 5103 (UCC Comment 2)]. For example, federal bankruptcy law applies to letters of credit with respect to applicants and beneficiaries that are in bankruptcy [*Com. Code* § 5101 (UCC Comment); see, e.g., *Hamada v. Far East National Bank* (9th Cir. 2002) 291 F.3d 645, 650-651 (bank that issued letter of credit unsuccessfully claimed right of statutory subrogation under Bankruptcy Code); see also California Forms of Pleading and Practice, Ch. 307, *Insolvency* (Matthew Bender)], and regulations of the Federal Reserve Board and the Comptroller of the Currency govern requirements for banks that issue letters of credit and describe how letters of credit are to be treated for purposes of calculating asset risk and for loan limitations [*Com. Code* § 5101 (UCC Comment)]. In addition, anti-boycott and similar laws may affect the issuance and performance of letters of credit [see *Com. Code* § 5101 (UCC Comment) ("All these laws are beyond the scope of Article 5, but in certain circumstances they will override Article 5.")]. Letters of credit may also be governed by the draft Convention on Independent Guarantees and Standby Letters of Credit [see *Com. Code* § 5101 (UCC Comment)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Letters of Credit (Article 5)General OverviewCommercial Law (UCC)Letters of Credit (Article 5)Definitions



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§ 56.11 Parties

[1] Applicant

The person at whose request or for whose account a letter of credit is issued is generally referred to as the "applicant." A person who requests a letter of credit for another also qualifies as an "applicant" if the person making the request agrees to reimburse the issuer [*Com. Code § 5102(a)(1)*; *see Com. Code § 5102(a)(9)* (issuer defined as bank or other person that issues letter of credit, excluding individuals making agreements for personal, family, or household purposes); [3], *below*]. "Applicants" are sometimes called "customers" or "account parties." As a condition of the bank's acceptance of an application for a letter of credit, the applicant agrees to pay the bank the amount honored under the letter of credit, plus interest and any transaction fees.

In general, the applicant gives the bank a security interest in the documents and goods involved in the transaction as security for the credit [*see Com. Code § 8102(a)(15)* ("security" defined); *see also § 56.200[2]* (security agreement)].

[2] Beneficiary

The person who, by terms of the letter of credit, is entitled to have its complying presentation honored is referred to as the "beneficiary" [*Com. Code § 5102(a)(3)*; *see Com. Code § 5102(a)(8)* (honor defined as performance of issuer's undertaking to pay or deliver item of value); *Com. Code § 5102(a)(12)* (presentation defined as delivery of document to issuer for honor); *see also Com. Code §§ 3303, 4211, 5102(b)* ("value" defined)]. A person to whom drawing rights (that is, the right to demand payment under the credit) have been transferred under a transferable letter of credit also qualifies as a beneficiary [*Com. Code § 5102(a)(3)*; *see § 56.40*]. Generally, the beneficiary is the person who is selling goods to the applicant and in whose favor the credit is issued. To obtain payment, the beneficiary must present the documents specified in the credit to the issuer or confirmer [*see [3], [5], below*]. However, the beneficiary must comply with the terms of the credit only if he or she seeks payment; there is no separate obligation requiring the beneficiary to comply [*see McCullough, Letters of Credit, Ch. 4, The Relationship Between the Beneficiary and the Issuer* (Matthew Bender)].

In the absence of a provision in a letter of credit requiring separate presentment to the confirming bank, the beneficiary need apply only to the issuing bank to obtain payment, and not the confirming bank [*Northern Trust Co. v. Community Bank* (9th Cir. 1989) 873 F.2d 227, 229 (construing former *Com. Code* § 5107(2), substantively similar to *Com. Code* § 5107(a))].

In a "standby" letter of credit, the buyer, rather than the seller, is usually the beneficiary. For further discussion of standby letters of credit, see § 56.13[12].

A beneficiary's contingent interest in a nontransferable executory letter of credit is not property of the beneficiary subject to attachment by a party in other litigation. Because executory letters of credit are not "instruments" as defined by *Com. Code* § 9102(a)(47), they are not tangible personal property [see *Code Civ. Proc.* § 481.225], and no method of levy exists to attach them [*Studwell, Inc. v. Korean Exchange Bank* (1997) 55 Cal. App. 4th 1185, 1191-1193, 64 Cal. Rptr. 2d 538] .

[3] Issuer

"Issuer" means a bank or other person who issues a letter of credit, but does not include an individual who makes an agreement for personal, family, or household purposes [*Com. Code* § 5102(a)(9); see *Com. Code* § 5102 (UCC Comment 5) (rationale for excluding consumers from definition of issuer)]. When the letter of credit is issued by a bank, the bank is referred to as the "issuing bank." The applicant applies to the "issuer" for issuance of the letter of credit. On approval of the application, the issuer will issue the credit. On proper presentation of documents by the "beneficiary," the issuer (or the "confirmer" [see [5], below], if there is one) will honor the credit and pay drafts or demands.

The primary obligation of the issuer is to pay drafts or demands under the credit. Thus, an issuer must honor a presentation [see *Com. Code* § 5102(a)(12) ("presentation" defined as delivery of document to issuer for honor)] that, according to the standard practice of financial institutions that regularly issue letters of credit, appears on its face strictly to comply with the terms and conditions of the letter of credit [*Com. Code* § 5108(a); see *Com. Code* § 5109 (forgery or material fraud); see also *Com. Code* 5108(e) (standard practice)].

The issuer's obligation, however, does not include responsibility for:

- The performance or nonperformance of the underlying contract or other transaction [*Com. Code* § 5108(f)(1)];
- Any act or omission of others [*Com. Code* § 5108(f)(2); see, e.g., *San Diego Gas & Elec. Co. v. Bank Leumi*, 42 Cal. App. 4th 928, 938, 50 Cal. Rptr. 2d 20 (1996) (standby letter of credit issuer may not dishonor letter based on beneficiary's failure to mitigate damages in dispute arising from underlying contract)]; or
- Observance or knowledge of any usage of any particular trade, other than the standard practice of financial institutions that regularly issue letters of credit [*Com. Code* § 5108(f)(2); see *Com. Code* § 5108(e) (explicit deference to standard practice of financial institutions that regularly issue letters of credit)].

Even if an advisor gives incorrect advice as to the terms of a credit it has been authorized to advise, the credit is enforceable as issued [*Com. Code* § 5107(c); see *Com. Code* § 5102(a)(1), 5107(c) (advisor undertakes to advise issuer and beneficiary accurately of terms of letter of credit); [4], below].

For discussion of an issuer's duty to honor drafts or payments presented under a letter of credit, see § 56.50[2]. For

discussion of an issuer's duties and rights regarding a revocable letter of credit, see § 56.13[3].

[4] Advisor

A person who, at the request of an issuer, confirmer, or other advisor, notifies the beneficiary that a letter of credit has been issued, confirmed, or amended, is an "advisor" [*Com. Code § 5102(a)(1)*]. A person who notifies a transferee beneficiary of the terms of a letter of credit, confirmation, amendment, or advice also has the rights and duties of an advisor [*see Com. Code § 5107(d)*]. The terms in any notice to a transferee beneficiary may differ from the terms in any notice to a transferor beneficiary to the extent permitted by the letter of credit, confirmation, amendment, or advice received by the person who so notifies [*Com. Code § 5107(d)*].

An advisor that is not a "confirmer" [*see Com. Code § 5102(a)(4)*] ("confirmer" defined as nominated person who undertakes to honor presentation under letter of credit issued by another); [5], *below*] is not obligated to honor or give value for a presentation [*Com. Code § 5107(c)*; *H. Ray Baker, Inc. v. Associated Banking Corp.* (9th Cir. 1979) 592 F.2d 550, 553 (advising bank assumes no duty of payment unless it confirms credit at request of the issuing bank, thereby becoming independently liable to beneficiary)]. By advising a letter of credit, the advisor assumes a duty to the issuer and to the beneficiary to accurately advise the issuer and the beneficiary of terms of letter of credit [*Com. Code § 5107(c)*]. However, beyond determining the apparent authenticity of the letter of credit (for example, by "testing" the telex that comes from the purported issuer), the advisor has no duty to investigate the accuracy of the message it has received from the issuer [*Com. Code § 5107* (UCC Comment 2)]. Further, by proper agreement, the advisor may disclaim this obligation [*Com. Code § 5107* (UCC Comment 2)].

Although an advisor ordinarily has no duty to investigate the factual basis for statements presented by the beneficiary, if the advisor is also an assignee of the proceeds, it has a direct interest in the payment on the letter of credit. By countersigning the statements presented by the beneficiary, the advisor acts in its own interest rather than the interest of the beneficiary. If the statements are false, the advisor shares liability with the beneficiary [*Pubali Bank v. City Nat. Bank* (9th Cir. 1982) 676 F.2d 1326, 1329 1330 , *aff'd*, 777 F.2d 1340 (1985) ; *see Com. Code § 5107* (UCC Comment 3)].

[5] Confirmer

A nominated person who undertakes to honor a presentation under a letter of credit issued by another, at the issuer's request or with its consent, is referred to as a "confirmer" [*Com. Code § 5102(a)(4)*; *see Com. Code § 5102(a)(11)*] (nominated person is one whom issuer designates to pay or otherwise to give value under letter of credit and undertakes by agreement or custom and practice to reimburse); *see also Com. Code § 5107(b)* (nominated person who is not confirmer is not obliged to honor or otherwise give value for a presentation)]. When a person assumes the status of a confirmer, the beneficiary may apply for payment to either the issuer or the confirmer, at its option.

A confirmer is directly obligated on the letter of credit, and has the obligations of an issuer, to the extent of its confirmation. The confirmer also acquires the rights of an issuer [*Com. Code § 5107(a)*; *see [3], above*]. In addition, the confirmer has rights against and obligations to the issuer, as if the issuer were an applicant and the confirmer had issued the letter of credit at the request and for the account of the issuer [*Com. Code § 5107(a)*]. Unless otherwise indicated in the letter of credit, the confirmer should be viewed as an issuer of a parallel letter of credit for the account of the original issuer [*Com. Code § 5107(a)* (UCC Comment 1)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Letters of Credit (Article 5)General OverviewCommercial Law (UCC)Letters of Credit (Article 5)Confirmer, Nominated Person & AdviserCommercial Law (UCC)Letters of Credit (Article

5) Issuance General Overview Commercial Law (UCC) Letters of Credit (Article 5) Issuers General Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 56 LETTERS OF CREDIT AND ELECTRONIC FUND TRANSFERS
PART II. LEGAL BACKGROUND
A. Letters of Credit
1. Nature, Characteristics, and Governing Law

22-56 California Legal Forms--Transaction Guide § 56.12

§ 56.12 Letter of Credit Distinguished From Other Instruments and Transactions

[1] Label on Document Not Conclusive

Whether or not a document is a letter of credit is not determined by its label [*see Com. Code § 5102* (UCC Comment 6)]. Courts may look beyond the title or description of a letter of credit to the intent of the parties to determine the nature of the instrument [*Wichita Eagle & B. Pub. Co., Inc. v. Pacific Nat. Bank, San Francisco* (9th Cir. 1974) 493 F.2d 1285, 1286 (instrument labeled "letter of credit" held to be ordinary guarantee contract); *see Com. Code § 5102* (UCC Comment 6) (approving conclusion in *Wichita Eagle*)].

When a document labeled "letter of credit" requires the issuer to pay not on presentation of documents, but rather on the determination of an extrinsic fact (such as an applicant's failure to perform a construction contract), and when that condition appears to be fundamental and would, if ignored, leave no obligation to the issuer under the document, the issuer's undertaking is not a letter of credit [*Com. Code § 5102* (UCC Comment 6)]. Rather, it is likely some form of suretyship [*see* [4], *below*] or other contractual obligation [*see* [2], [5], *below*].

Although the UCC recognizes that certain nondocumentary conditions may be included in a letter of credit without destroying its status as a letter of credit [*see Com. Code § 5108(g)* (if document meeting statutory definition of letter of credit contains nondocumentary conditions, issuer must disregard those conditions and treat them as if they were not stated)], the undertaking is not a letter of credit when the nondocumentary condition is fundamental to the issuer's obligation [*Com. Code § 5102* (UCC Comment 6)].

[2] Contract

While a letter of credit has some of the characteristics of a contract between the issuer and the beneficiary, it is not properly classified as a contract [*see* McCullough, Letters of Credit, Ch. 4, *The Relationship Between the Beneficiary and the Issuer* (Matthew Bender); *see also* § 56.11 [2], [3] ("beneficiary" and "issuer" defined)]. A bilateral contract requires several elements, including consideration, a bargained-for exchange of promises, and a meeting of minds, while a unilateral contract consists of a promise by one party that becomes binding only if the other party performs [*see*

McCullough, Letters of Credit, Ch. 4, *The Relationship Between the Beneficiary and the Issuer* (Matthew Bender)]. A letter of credit, in contrast, does not require consideration [*Com. Code* § 5105]. The issuer and the beneficiary rarely, if ever, negotiate the terms of the credit; and the issuer and the beneficiary are generally unknown to each other before the applicant [*see* § 56.11[1] ("applicant" defined)] applies for the credit. Further, the promise of the issuer is binding whether or not there is actual performance by any other party.

Notwithstanding this, a letter of credit transaction will often include (or be based on) several contracts. First, the applicant and the beneficiary will have a contract for the underlying sale or other transaction that is the subject matter of the letter of credit [*see* [3], *below*]. In addition, the applicant and the issuer will have a contract for the issuance of the credit [*see* § 56.200[2] (security agreement in application for letter of credit)]. However, the credit itself is distinct from either of these contracts.

[3] Underlying Obligation

The UCC recognizes the letter of credit as independent of the underlying contract of sale or other transaction between the applicant and the beneficiary [*see Com. Code* § 5103 (UCC Comment 1)]. This "first rule" of letter of credit law is referred to as the "independence principle" [*see Com. Code* § 5103 (UCC Comment 1)].

Accordingly, the issuer's rights and obligations to a beneficiary or a nominated person are independent of the existence, performance, on nonperformance of the contract or other arrangement underlying the letter of credit, including contracts between the issuer and the applicant and between the applicant and the beneficiary [*Com. Code* § 5103(d); *see Com. Code* § 5108(f)(1), (2) (issuer's obligation to applicant does not include responsibility for performance or nonperformance of underlying contract or for act or omission of others); *see, e.g., San Diego Gas & Elec. Co. v. Bank Leumi* (1996) 42 Cal. App. 4th 928, 938, 50 Cal. Rptr. 2d 20 (standby letter of credit issuer may not dishonor letter based on beneficiary's failure to mitigate damages in dispute arising from underlying contract); *see also Studwell, Inc. v. Korean Exchange Bank* (1997) 55 Cal. App. 4th 1185, 1195-1196, 64 Cal. Rptr. 2d 538]. Consequently, an issuer must honor a presentation [*see Com. Code* § 5102(a)(12) (presentation defined as delivery of document to issuer for honor)] that, according to the standard practice of financial institutions that regularly issue letters of credit, appears on its face strictly to comply with the terms and conditions of the letter of credit [*Com. Code* § 5108(a); *see Com. Code* § 5109 (forgery or material fraud); *see also Com. Code* 5108(e) (standard practice)].

A letter of credit creates an absolute, independent obligation, and payment must be made on presentation of proper documents, regardless of any dispute between the buyer and seller in the underlying transaction of sale [*First Empire Bank v. Federal Deposit Ins. Corp.* (9th Cir. 1978) 572 F.2d 1361, 1366, cert. denied, 452 U.S. 906 (1981)] .

[4] Suretyship Obligation

A suretyship obligation is one in which the surety or guarantor promises to answer for the debt, default, or miscarriage of another. A letter of credit is not a form of suretyship obligation [*Civ. Code* § 2787]. A letter of credit is distinguishable from a suretyship because it is a primary obligation between the issuer and the beneficiary [*see* § 56.11[2], [3] ("issuer" and "beneficiary" defined)], not a promise to pay the debt of another [*see Lumbermans Acceptance Co. v. Security Pacific Nat. Bank* (1978) 86 Cal. App. 3d 175, 178, 150 Cal. Rptr. 69]. Generally, a surety's liability for an obligation is secondary to, and derivative of, the liability of the principal for that obligation. By contrast, the liability of the issuer of a letter of credit to the beneficiary is direct and independent of the underlying transaction between the beneficiary and the issuer's customer [*Western Security Bank v. Superior Court* (1997) 15 Cal. 4th 232, 246-247, 62 Cal. Rptr. 2d 243, 933 P.2d 507] .

[5] Negotiable Instrument

A letter of credit is not a negotiable instrument. Under the UCC, a negotiable instrument must:

- Be a written order or promise to pay money signed by the person giving the order or promising to pay [*Com. Code § 3103(a)(6), (9)*];
- Contain an unconditional promise or order to pay a fixed amount of money [*Com. Code § 3104(a)*];
- Be payable to bearer or to order at the time it is issued or first comes into possession of the holder [*Com. Code § 3104(a)(1)*];
- Be payable on demand or at a definite time [*Com. Code § 3104(a)(2)*]; and
- Not state any other undertaking or instruction by the drawer or maker other than to pay money, with limited exceptions [*see Com. Code § 3104(a)(3)*].

A letter of credit is not payable to order or to bearer, and is not an unconditional promise to pay. Further, it generally contains conditions that must be fulfilled before payment, such as the presentation of documents.

[6] Agency Agreement

A letter of credit is not an agency agreement. A bank or other person that issues a letter of credit acts as a principal, and not as agent for its customer (the "applicant"). The credit that the issuer agrees to issue is its own, even though the issuer expects to be paid by its customer before or immediately after it makes the disbursement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsGeneral
OverviewCommercial Law (UCC)Letters of Credit (Article 5)General OverviewCommercial Law (UCC)Letters of
Credit (Article 5)Formal RequirementsCommercial Law (UCC)Letters of Credit (Article 5)IssuersObligation
Independence



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DIVISION III: COMMERCIAL TRANSACTIONS
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PART II. LEGAL BACKGROUND
A. Letters of Credit
1. Nature, Characteristics, and Governing Law

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§ 56.13 Types of Letters of Credit

[1] Clean

The conditions that the beneficiary must fulfill to obtain payment under a letter of credit can vary greatly, depending on the nature of the underlying transaction. If the letter of credit requires only presentation of a draft or demand for payment and no other documents, it is known as a "clean" or "traveler's" letter of credit. A traveler's letter of credit, designed to allow the holder to obtain funds anywhere in the world merely by the presentation of a draft or demand, is the only true form of clean letter of credit. However, with general use of credit cards and automated teller machines, the traveler's letter of credit has been rendered largely obsolete. In practice, virtually all commercial letters of credit require documents other than a draft or demand for payment, and are therefore "documentary" letters of credit [*see* [2], *below*; *see also* Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 5C, *Letters of Credit and Commercial Paper* (Matthew Bender)].

The 1963 version of the UCC Letters of Credit, repealed effective January 1, 1997, applied to a clean letter of credit only if the credit conspicuously stated that it is a letter of credit or is entitled as a letter of credit [former *Com. Code* § 5102(1)(c); *see* Stats. 1963, ch. 819 § 5101]. The form requirements for a letter of credit under the current law specify only that a letter of credit may be issued in any form that is a record [*see Com. Code* § 5102(a)(14) (record defined as information inscribed on a tangible medium, or stored in an electronic or other medium, and retrievable in perceivable form)] and is authenticated [*see Com. Code* § 5104 (UCC Comment 2) (authentication in this section is authentication only of identity of issuer, confirmer, or advisor)] (1) by a signature or (2) in accordance with the agreement of the parties or with the standard practice of financial institutions that regularly issue letters of credit [*Com. Code* § 5104; *see Com. Code* § 5108(e) (standard practice); *see also* § 56.30[1]]. Note, however, that courts may look beyond the title or description of a letter of credit to the intent of the parties to determine the nature of the instrument [*Wichita Eagle & B. Pub. Co., Inc. v. Pacific Nat. Bank, San Francisco* (9th Cir. 1974) 493 F.2d 1285, 1286 (instrument labeled "letter of credit" held to be ordinary guarantee contract)].

The Uniform Customs and Practice for Documentary Credits (UCP) [*see* § 56.15] does not apply to "clean" letters of

credit.

For a "clean" or "traveler's" letter of credit, see § 56.202.

[2] Documentary

If a letter of credit requires the presentation of documents in addition to a draft or demand for payment, it is a "documentary" or "commercial" letter of credit. For most letters of credit, the additional documents are documents of title and shipping documents. For "standby" letters of credit [see § 56.13[12] ("standby letter of credit" defined)], the additional documents may be certificates of default. The UCC--Letters of Credit applies to documentary letters of credit [see *Com. Code* § 5102(a)(6)]. The Uniform Customs and Practice for Documentary Credits (UCP) [see § 56.15], incorporated into most letters of credit, also applies to documentary credits.

[3] Revocable

A letter of credit may be either revocable or irrevocable. A revocable credit is one that can be revoked without incurring liability. A letter of credit is revocable only if it so provides [*Com. Code* § 5106(a)]. Unless otherwise agreed, after a revocable credit is established, it may be canceled or amended by the issuer at any time without consent from the applicant, confirmer, or beneficiary [see *Com. Code* § 5106(b); see § 56.32[2]]. Despite this power to revoke, however, the issuer may still be liable to a nominated person [see *Com. Code* § 5102(a)(11) (nominated person is one whom issuer designates to pay or otherwise to give value under letter of credit and undertakes by agreement or custom and practice to reimburse)] who has relied on the credit in negotiating or honoring drafts drawn on the credit [*Com. Code* § 5106 (UCC Comment 3)]. Revocable credits are the exception rather than the norm [UCP, art. 6 (Comment)].

[4] Irrevocable

An irrevocable credit is one that cannot be revoked without incurring liability. Except to the extent that a letter of credit provides that it is revocable [see [3], *above*], or that the issuer may amend or cancel the letter without the consent of the beneficiary, applicant, or confirmer, the rights and obligations of a beneficiary, applicant, confirmer, or issuer are not affected by any amendment or cancellation to which that person has not consented [*Com. Code* § 5106(b)]. A letter of credit is issued and becomes enforceable against the issuer when the issuer sends (or otherwise transmits) the letter of credit to the prospective advisor or the beneficiary [*Com. Code* § 5106(a); see *Com. Code* § 1201(b)(36) ("send" defined)].

After an irrevocable credit is issued, the rights and obligations of the beneficiary, applicant, confirmer, or issuer are not affected by an amendment or cancellation to which that person has not consented [see *Com. Code* § 5106(b); see § 56.32[1]].

The duration of an irrevocable letter of credit is discussed in § 56.31[2].

[5] Confirmed

A letter of credit is confirmed when the "advisor" [see § 56.11[4] (definition)] makes itself liable to the "beneficiary" [see § 56.11[2] (definition)], thereby becoming the "confirmer" [see § 56.11[5] (definition)]. When a letter of credit has been confirmed, the beneficiary can seek payment from either the confirmer or the issuer [see § 56.11[3] (definition)]. The confirmer becomes directly obligated on the letter of credit and acquires the rights of an issuer, to the extent of its confirmation [*Com. Code* § 5107(a); see *H. Ray Baker, Inc. v. Associated Banking Corp.* (9th Cir. 1979) 592 F.2d 550, 553]. The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant [see § 56.11[1] (definition)] and the confirmer had issued the letter of credit at the request of the issuer [*Com. Code* § 5107(a)].

A confirmed credit is always irrevocable [see Ezer, *International Exporting Agreements*, Ch. 10, *Securing the Price: Letters of Credit* (Matthew Bender)].

[6] Unconfirmed

A letter of credit is unconfirmed if the advisor [see § 56.11[4] (definition)] informs the beneficiary of the letter of credit by sending the beneficiary an advice of credit but does not make itself liable to the beneficiary. When a letter of credit is unconfirmed, the beneficiary can seek payment only from the issuer. An advisor that is not a confirmer [see § 56.11[5] (definition)] is not obligated to honor or give value for a presentation [Com. Code § 5107(c); *H. Ray Baker, Inc. v. Associated Banking Corp.* (9th Cir. 1979) 592 F.2d 550, 553 (advising bank assumes no duty of payment unless it confirms credit at request of the issuing bank, thereby becoming independently liable to beneficiary); see Com. Code § 5102(a)(12) (presentation defined as delivery of document to issuer for honor); see also Com. Code §§ 3303, 4211, 5102(b) ("value" defined)]. For discussion of the duties of advisors, refer to § 56.11[4].

An unconfirmed credit can be revocable or irrevocable [see Ezer, *International Exporting Agreements*, Ch. 10, *Securing the Price: Letters of Credit* (Matthew Bender)].

[7] General and Special

Historically, a "general" letter of credit allowed the beneficiary to seek payment from any bank that wished to accept the risk. A "special" letter of credit was specifically addressed to the particular bank from which the beneficiary had to seek payment. The distinction between general and special letters of credit has been abolished in California [see Com. Code § 5103; see also former Com. Code § 5103 (California Comment 1)].

[8] Straight and Negotiation

A "straight" letter of credit restricts payment to a specified bank, called the "paying bank," generally in the beneficiary's locale. A straight letter of credit requires presentation of the drafts and documents on or before the expiration date at the office of the paying bank.

A "negotiation" letter of credit does not restrict payment to any particular bank. The beneficiary under a negotiation credit may present the draft and documents for payment to any bank for payment. An bank that is the advisor [see § 56.11[4]] may also be the negotiating bank. For a form of negotiation letter of credit, see § 56.201.

[9] Simple and Revolving

A "simple" credit is one that applies to an isolated transaction and is exhausted after one payment under that transaction. A "revolving" credit is used when the buyer is a regular customer of the seller and the credit is maintained at a certain level even though payments are made periodically for various transactions [see Ezer, *International Exporting Agreements*, Ch. 10, *Securing the Price: Letters of Credit* (Matthew Bender)].

[10] Divisible

A "divisible" letter of credit permits partial shipments and partial transfer of the benefits of the credit. Unless otherwise specified, every credit is divisible and may be used in portions, at the discretion of the beneficiary [see Ezer, *International Exporting Agreements*, Ch. 10, *Securing the Price: Letters of Credit* (Matthew Bender)]. For a request for partial transfer of credit, see § 56.211.

[11] Notation

A "notation" credit is a credit that specifies that any person purchasing or paying drafts drawn or demands for payment

made under the credit must note the amount of the draft or demand on the letter of credit or advise of credit [see *Datapoint Corp v. M & I Bank* (W.D. Wis. 1987) 665 F. Supp. 722, 726-727]. A notation credit is generally employed when the letter of credit is intended for roving use. The notation is required by each person who draws against the credit so that the current status of the credit appears on its face. For further discussion of notation credits, see McCullough, Letters of Credit, Ch. 4, *The Relationship Between the Beneficiary and the Issuer* (Matthew Bender).

[12] Standby

A "standby" letter of credit, also known as a "bank guarantee," is used to secure the obligation of a party in any type of transaction. It is the obligation of the issuer to pay the beneficiary on the failure of the applicant to perform under a contract, functioning in the same way as a guarantee or surety bond. A standby letter of credit is generally made effective by the beneficiary's presenting documents evidencing a failure to perform.

In addition, standby letters of credit can serve as alternative forms of security to assure performance in a variety of fields [see, e.g., *Health & Safety Code § 19835(b)* (letter of credit as security for issuance of building permit)].

Several important differences distinguish standby letters of credit from other letters of credit. First, the purpose of a standby credit is as a form of guarantee or security, and not as a payment mechanism. Second, in a standby credit, the buyer is the beneficiary, while in most other letters of credit, the seller is the beneficiary. Third, the triggering of payment is simpler than in other letters of credit. In standard letters of credit, payment is made on presentation of documents specified in the credit that relate to an underlying transaction. To obtain payment under a standby credit, the beneficiary generally need only certify in writing that the seller has defaulted [see Ezer, *International Exporting Agreements*, Ch. 10, *Securing the Price: Letters of Credit* (Matthew Bender)].

For an irrevocable standby letter of credit, see § 56.204.

[13] Subdivision Improvement Guarantee

A "subdivision improvement guarantee" is a type of "standby" letter of credit [see [12], *above*] that is given to a local government to ensure that necessary subdivision improvements such as streets, gutters, and sidewalks are completed by a developer. This type of letter of credit can be used in place of other forms of guarantee, such as performance bonds, escrow accounts, and special assessments [see, e.g., *Gov. Code § 66499(a)(3)* (letter of credit as security for construction improvements)]. The letter of credit, in favor of the government entity, is obtained by the developer from a bank in an amount sufficient to cover the cost of the improvements. For further discussion and a form for a subdivision improvement guarantee letter of credit, see Rabkin & Johnson, *Current Legal Forms with Tax Analysis*, Ch. 5C, *Letters of Credit and Commercial Paper* (Matthew Bender).

[14] Back-to-Back

A "back-to-back" letter of credit differs from a standard letter of credit in that at least two separate letters of credit are issued. In the first credit, the applicant (buyer) is the beneficiary. The applicant gives this letter of credit to the issuer in exchange for a substantially identical letter of credit for a lesser amount in favor of the seller. The credit pledged by the applicant is the "backing" or "master" credit. The corresponding credit issued in favor of the seller is the "subsidiary" or "secondary" credit.

All of the credits in a chain of back-to-back credits should be checked carefully to ensure that they are identical in all respects, except for price and parties. An inconsistency arising in the middle of the chain may result in an issuer's refusal to pay on that credit. Because back-to-back credits rest on a common base of security (an assignment of the right to proceeds is an essential part of a back-to-back credit), failure of one link will jeopardize the entire transaction.

The use of back-to-back credits allows each party in the transaction to conceal from its buyer the identity of its seller. For further discussion of back-to-back credits, see McCullough, Letters of Credit, Ch. 4, *The Relationship Between the Beneficiary and the Issuer* (Matthew Bender).

[15] Purchase

A "purchase" letter of credit is used in local purchase transactions when the buyer wishes to purchase goods from an undetermined seller. This credit allows the buyer to shop for favorable terms and prices. The buyer signs an application for the credit and, after approval, the bank issues a credit to the buyer. For further discussion and a form of purchase letter of credit, see Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 5C, *Letters of Credit and Commercial Paper* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Letters of Credit (Article 5)General OverviewCommercial Law (UCC)Letters of Credit (Article 5)DefinitionsCommercial Law (UCC)Letters of Credit (Article 5)IssuanceGeneral Overview



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22-56 California Legal Forms--Transaction Guide § 56.14

§ 56.14 Drafts (Bills of Exchange) in Letter of Credit Transactions

[1] In General

A "draft" (also known as a "bill of exchange") is a direction or order from one person to pay a specified sum of money to another person [see Black's Law Dictionary (5th ed., 1979) at 443; *People v. Norwood* (1972) 26 Cal. App. 3d 148, 154, 103 Cal. Rptr. 7]. Drafts are commonly used as a means of seeking payment under a letter of credit. To obtain payment, the beneficiary [see § 56.11[2] (definition)] presents the draft, the documents complying with the letter of credit, and the beneficiary's copy of the letter of credit, to the confirming bank. If the documents and draft comply with the terms of the credit, the bank will pay the draft.

"Draft" as used in the UCC--Letters of Credit does not have the same meaning that it has in Division 3 of the Commercial Code [Com. Code § 5102 (UCC Comment 11); see Com. Code § 3101 et seq. (negotiable instruments)]. For example, a document may be a draft under the UCC--Letters of Credit, even though it does not meet the more restrictive language of Division 3 [see Com. Code §§ 3103(a)(6), 3104(a) (excluding from definition of negotiable instrument drafts or orders and notes or promises that are not payable to bearer to order)] and, therefore, does not qualify as a draft under Com. Code § 3104(e) [Com. Code § 5102 (UCC Comment 11)].

For a bill of exchange that can be drafted as a sight or time bill, see § 56.220.

[2] Sight Draft

A sight draft is a draft that is payable on demand, at sight, or on presentation [see Black's Law Dictionary (5th ed., 1979), at 443]. The sight draft and accompanying documents are usually presented for payment before the buyer has received the goods. This works to the seller's advantage, since payment can be had under the credit as soon as the seller presents documents evidencing shipment to the confirming bank, and the seller does not have to wait until the buyer has had time to accept the goods.

Sight drafts generally must be paid by the close of business on the day of presentment [see Com. Code § 3502(a); see

also *Com. Code § 5108(e)* (explicit deference to standard practice of financial institutions that regularly issue letters of credit); *Com. Code § 5108* (UCC Comment 2)]. However, an issuer to which a document (a draft or other demand for payment) [see *Com. Code § 5102(a)(6)* (definition)] is presented under a letter of credit may, without dishonor [*Com. Code § 5102(a)(5)* (dishonor defined as failure timely to honor or take interim action, such as to accept draft, that may be required by letter of credit)] of the draft, demand, or letter of credit, defer honor [*Com. Code § 5102(a)(8)* (definition); § 56.50[2]] for a "reasonable time," not exceeding seven business days after the issuer's receipt of documents [*Com. Code § 5108(b)(1)*; see § 56.50[3]]. The issuer may further defer honor if the letter of credit so provides [*Com. Code § 5108(b)(2)*; see *Com. Code § 5108* (UCC Comment 2)].

[3] Time Draft

A time draft is a draft that is payable a specified number of days after presentation [see *Black's Law Dictionary* (5th ed., 1979), at 443; see also *Com. Code § 3108(b)*]. Under a letter of credit, a time draft is a draft that the buyer (or issuer) accepts by signing and thereby promising to pay on maturity at some future date.

The purpose of a time draft is to delay payment to the seller until the goods have arrived. This gives the buyer time to determine that the goods conform to the contract and to resell the goods, providing funds to reimburse the issuing bank. A time draft must first be presented to the drawee to set the maturity date, unless the date is otherwise stated in the draft. The draft is presented for payment when the time specified in the draft has expired [see McCullough, *Letters of Credit*, Ch. 1, *Introduction to Commercial and Standby Letters of Credit* (Matthew Bender)].

For letters of credit relating to import or domestic goods transactions, commercial banks are restricted to accepting drafts or bills of exchange having not more than six months' sight to run [*Fin. Code § 1224*].

[4] Documentary Draft

A "documentary draft" is a draft [see [1], *above* ("draft" defined)] to be presented for acceptance or payment if specified documents, certain securities [see *Com. Code § 8102*], or other certificates or statements are to be received by the drawee or other payor before acceptance or payment of the draft [*Com. Code § 4104(a)(6)*]. Any draft under a letter of credit presented with accompanying documents is a documentary draft.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Letters of Credit (Article 5)General OverviewCommercial Law (UCC)Letters of Credit (Article 5)DefinitionsCommercial Law (UCC)Letters of Credit (Article 5)IssuersObligationsGeneral OverviewCommercial Law (UCC)Letters of Credit (Article 5)IssuersObligationsTime Limitations & Notice



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22-56 California Legal Forms--Transaction Guide § 56.15

§ 56.15 Uniform Customs and Practice for Documentary Credits (UCP)

[1] Nature

The Uniform Customs and Practice for Documentary Credits (UCP) is a private international agreement of banking practices that is followed by banks in most countries that engage in international commerce. The UCP is not a codification of law, but rather a compilation of current commercial customs and practices. Most letters of credit incorporate the UCP by reference, and most applications for letters of credit state that the parties agree to be bound by the terms of the UCP.

The UCP is published by the International Chamber of Commerce (ICC) and is revised periodically. The current version of the UCP became effective on January 1, 1994. Copies of the UCP are available from the ICC. For the full text of the most recent revision of the UCP, see McCullough, Letters of Credit, Appendix C (Matthew Bender).

[2] Scope

The application of the UCP is not as broad as that of the UCC Letters of Credit [see § 56.10[3]]. First, the UCP applies only to documentary letters of credit [UCP art. 1; see § 56.13[2]]. It does not apply to "clean" letters of credit [see § 56.13[1]]. Second, the UCP relates only to banking practice and customs, and therefore does not apply to credits issued by persons other than banks. The UCC Letters of Credit applies to a wider variety of letters of credit, including clean letters of credit, regardless of the nature of the issuer [see § 56.10[3]].

In addition, because the UCP is not the binding law of any jurisdiction, it applies only by agreement. In practice, virtually all commercial letters of credit explicitly state that they incorporate and are governed by the UCP.

[3] Incorporation in Letter of Credit

An application for a commercial letter of credit, and the letter of credit itself, usually state that the letter of credit will be subject to, and the parties to the credit will be governed by, the UCP. When a letter of credit contains this provision, the

parties should look to the UCP for guidance, and a court will interpret the letter of credit under the provisions of the UCP if a dispute arises between them.

[4] Relationship Between UCC and UCP

[a] In California

Because the UCC--Letters of Credit is quite short and has no rules on many issues affecting liability in letters of credit transactions, law beyond the UCC--Letters of Credit will often determine rights and liabilities in letter of credit transactions [*Com. Code § 5103* (UCC Comment 2); *see § 56.10 [4]*]. Even within letter of credit law, the UCC--Letters of Credit is far from comprehensive, dealing only with "certain" rights of the parties [*Com. Code § 5103* (UCC Comment 2)]. Particularly with respect to the issuer's standards of performance [*see Com. Code § 5108(e)* (explicit deference to standard practice of financial institutions that regularly issue letters of credit)], parties and courts routinely turn to customs and practice such as the UCP [*see Com. Code § 5103* (UCC Comment 2)]. When the UCP is adopted [*see [1], above*], but its provisions conflict with the UCC--Letters of Credit, the UCP terms are permissible contractual modifications, except where variation is expressly prohibited [*Com. Code § 5103(c)*; *Com. Code § 5103* (UCC Comment 2); *see Com. Code § 1302(a)* (variation of California Commercial Code by agreement); *see § 56.30[4]*].

Normally, the UCC "should not be considered to conflict with practice except when a rule stated in the UCP... is different from a rule explicitly stated in Article 5" [*Com. Code § 5103* (UCC Comment 2)]. Thus, if California law applies to a transaction, a provision in a letter of credit stating that the UCP governs the transaction does not prevent application of the California Commercial Code [*TMTI v. Empresa Nacional de Comercializacion* (9th Cir. 1987) 829 F.2d 949, 954 ; *Com. Code § 5108* (UCC Comment 2); *see Com. Code § 5116* (UCC Comment 3) ("Where there is no conflict between Article 5 and the relevant provision of the UCP or other practice, both apply.")]. Therefore, parties to a letter of credit should expect that the courts will enforce consistent provisions of the UCP and the California Commercial Code. Parties who do not want to be governed by the nonconflicting provisions of the UCC normally must adopt either the law of a jurisdiction other than a state of the United States or explicitly state the rule that is to govern [*Com. Code § 5108* (UCC Comment 2)].

[b] In Other States

In states other than California, a letter of credit is generally governed by the local UCC even though the parties make it subject to the UCP [*Wyle v. Bank Melli of Tehran, Iran* (N.D. Cal. 1983) 577 F. Supp. 1148, 1164 ; *see Com. Code § 5108* (UCC Comment 2)]. However, other states may treat this situation differently. For example, in New York, the state version of the UCC provides that an agreement in a letter of credit to be governed by the UCP means the UCC does not apply [*Com. Code § 5116* (UCC Comment 3); *Pubali Bank v. City Nat. Bank* (9th Cir. 1985) 777 F.2d 1340, 1343] .

[5] Governing Law

[a] By Agreement

Letters of credit frequently state which jurisdiction's law will govern the letter of credit. The liability of an issuer, nominated person, or advisor is governed by the law of the jurisdiction chosen either by an agreement in the form of a record signed or otherwise authenticated by the affected parties as provided by statute [*see Com. Code § 5104*; § 56.30[1]] or by a provision in the letter of credit, confirmation, or other undertaking [*Com. Code § 5116(a)*]. Although it is possible for the parties to agree otherwise, the law normally chosen by agreement (and that provided in the absence of agreement [*see [b], below*]) is the substantive law of a particular jurisdiction, not including the choice of law principles of that jurisdiction [*Com. Code § 5116* (UCC Comment 1)]. The jurisdiction whose law is chosen need not bear any relation to the transaction [*Com. Code § 5116(a)*].

[b] By Statute Absent Agreement

In the absence of an agreement [see [a], *above*], the liability of an issuer, nominated person, or advisor is governed by the law of the jurisdiction in which the person is located [Com. Code § 5116(b)]. "The law of the jurisdiction where the person is located" means the substantive law of a particular jurisdiction, not including the choice of law principles of that jurisdiction [Com. Code § 5116 (UCC Comment 1)]. Although the statute does not state a choice of law rule for all of the issuer's possible liability (for its liability as an applicant in a suit by a confirmer, for example [see Com. Code § 5107(a); Com. Code § 5107 (UCC Comment 1); Com. Code § 5108(i)]), disputes arising from different legal obligations to honor have not been frequent because the UCP is routinely incorporated in international letters of credit. Moreover, since the UCC--Letters of Credit provides that the issuer must observe the standard practice of financial institutions that regularly issue letters of credit [see Com. Code § 5108(e)], these problems should be further minimized, at least to the extent that the same practice continues to be widely followed [see Com. Code § 5116 (UCC Comment 2)].

The person is considered to "located" at the address indicated in the person's undertaking. If more than one address is indicated, the person is located at the address from which the person's undertaking is issued. For purposes of jurisdiction and choice of law (but not enforcement of judgments), all branches of a bank are considered separate jurisdictional entities, and a bank is located where its relevant branch is located [Com. Code § 5116].

[c] When UCC--Letters of Credit Conflicts With UCP

When the letter of credit, confirmation or other undertaking [see Com. Code § 5104] expressly makes the liability of an issuer, nominated person, or advisor subject to any rules of custom and practice, such as the UCP, and those rules conflict with the UCC--Letters of Credit [see Com. Code § 5116(a), (b); [a], [b], *above*], the rules of custom and practice will govern, except to the extent that they conflict with the non-variable provisions contained in Com. Code § 5104(c) [Com. Code § 5116(c); see § 56.30[4]].

[6] Forum

Subject to existing law governing subject matter jurisdiction, the forum for settling disputes arising out of a letter of credit transaction may be chosen in the manner and with the binding effect that governing law may be chosen [Com. Code § 5116(e); Com. Code § 5116 (UCC Comment 5); see [5][a], *above*].

[7] Contents

The UCP is divided into seven major lettered parts by general topic, which are further divided into 49 articles.

Part A sets forth general rules governing letter of credit transactions and specifies which letters of credit are governed by the UCP. It also includes definitions of types of letters of credit and the important parties and documents.

Part B covers revocable and irrevocable credits and the rights and obligations of the parties to these transactions. In addition, this part discusses the notification process, including methods of issuing, advising, confirming, and amending credits. It also covers the methods of payment under a letter of credit.

Part C relates to liabilities and responsibilities of the parties, including duties in payment and in the acceptance, handling, and inspection of documents. This part also sets out limitations of liability concerning genuineness of documents, delays in transit, interruptions of business, and the actions of other banks. Part C also includes provisions pertaining to indemnity and reimbursement.

Part D sets forth guidelines for documents. This part contains provisions relating to language that should be used in credits, requirements regarding originals and copies, and dates of issuance. Specific provisions cover transport

documents, insurance documents, commercial invoices, and other documents.

Part E contains miscellaneous provisions, including definitions relating to dates, amounts, and shipment. It also includes provisions concerning partial drawings and shipments, expirations dates, issuance dates, and presentation.

Part F deals with transferable credits. It defines a transferable credit and sets forth the conditions under which a credit can be transferred. This part also covers the rights and obligations of the banks and beneficiaries involved in a transfer.

Part G covers assignment of proceeds. It explains a beneficiary's right to assignment of proceeds and distinguishes this type of assignment from an assignment of the beneficiary's right to perform under the credit.

For the full text of the most recent revision of the UCP, see McCullough, Letters of Credit, Appendix C (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Letters of Credit (Article 5) General Overview International Trade Law Letters of Credit



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22-56 California Legal Forms--Transaction Guide § 56.16

§ 56.16 Unlawful Restraints of Trade

[1] Prohibitions Against Discrimination

In California, letters of credit are subject to special rules designed to prevent discrimination on the basis of any characteristic listed in *Civ. Code § 51(b)* or defined in *Civ. Code § 51(e)* [*Bus. & Prof. Code § 16721(a)*; see *Civ. Code § 51(b)* ("All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation..."). For example, it is an unlawful restraint of trade to grant or accept a letter of credit or other document that evidences the transfer of funds or credit, if the letter of credit or other document requires a person to discriminate (or to certify that he or she has discriminated) on that basis [*Bus. & Prof. Code § 16721.5(a)(1)*]. It also is an unlawful restraint of trade to refuse to grant or accept a letter of credit or other document evidencing the transfer of funds or credit on the ground that the letter or document does not contain a provision requiring such discrimination [*Bus. & Prof. Code § 16721.5(a)(2)*].

The California rules prohibiting discrimination in letter of credit transactions apply to partnerships, associations, corporations, and governmental agencies as well as to individuals [*Bus. & Prof. Code § 16721.5(d)*]. However, they do not apply to a letter of credit that contains a provision pertaining to a labor dispute or an unfair labor practice if the letter of credit does not otherwise discriminate (or require discrimination) on a prohibited basis [*Bus. & Prof. Code § 16721.5(b)*]. Further, the California rules generally do not generally when any federal law concerning transactions in interstate and foreign commerce is applicable [see *Bus. & Prof. Code § 16721.6*; 50 U.S.C. App. §§ 2401-2420; see also [2], below].

[2] Prohibitions Against Participating in Unsanctioned Boycott

Under the federal Export Administration Act regulations [see 15 C.F.R. §§ 769.1-769.8; see also 50 U.S.C. App. §§ 2401-2420 (Export Administration Act)], it is unlawful to engage in certain discriminatory trade practices. These include [15 C.F.R. § 769.2(a)-(e)]:

- Refusing to do business with a country by participating in an unsanctioned international trade

boycott;

- Discriminating against a person on an improper basis;
- Giving out certain private information about a person;
- Giving out information about business relationships with boycotted countries or blacklisted people;
and
- Giving out private information about a person's associations with certain groups.

A letter of credit that contains any of these prohibited provisions may not be paid, honored, confirmed, or otherwise implemented by a United States person [15 C.F.R. § 769.2(f)(1)]. The term "United States person" means any person who is a United States resident or national, and includes individuals, corporations, partnerships, local, state, and federal agencies, and certain other entities [see 15 C.F.R. § 769.1(b)]. These prohibitions apply only when the beneficiary is a United States person [15 C.F.R. § 769.2(f)(6)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade General Overview Commercial Law (UCC) Letters of Credit (Article 5) General Overview



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22-56 California Legal Forms--Transaction Guide §§ 56.17-56.29

[Reserved]

§§ 56.17[Reserved]



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22-56 California Legal Forms--Transaction Guide § 56.30

§ 56.30 Requirements for Valid Letter of Credit

[1] Form

A letter of credit or a confirmation, advice, transfer, amendment, or cancellation of a letter of credit may be issued in any form that [*Com. Code § 5104*]:

- Is a record [*see Com. Code § 5102(a)(14)* (record defined as information inscribed on tangible medium, or stored in electronic or other medium, and retrievable in perceivable form)], and
- Is authenticated either by a signature or in accordance with the parties' agreement or the standard practice of financial institutions that regularly issue letters of credit. Authentication is authentication only of the identity of the issuer, confirmer, or advisor [*Com. Code § 5104* (UCC Comment 1)].

Many letters of credit are issued by electronic means. For example, SWIFT (Society for Worldwide Interbank Financial Telecommunications) is currently used to transit letters of credit from issuing to advising banks [*see Com. Code § 5104* (UCC Comment 1); UCP art. 1 (Comments)]. By declining to establish any particular medium in which the letter of credit must be established or communicated, the UCC--Letters of Credit recognizes the use (and development) of different forms of electronic media [*see Com. Code § 5104* (UCC Comment 3)].

Neither the form requirements [*see Com. Code § 5104*] nor the definition of a letter of credit [*see Com. Code § 5102(a)(10)*; § 56.10[1]] requires the inclusion of all the terms that are normally contained in a letter of credit. A letter of credit typically specifies the amount available, the expiration date [*see § 56.31[2]*], the place where presentation should be made, and the documents that must be presented to entitle a person to honor [*see § 56.50*]. However, undertakings that have the formalities required by *Com. Code § 5104* and meet the conditions specified in the statutory definition of letter of credit [*see Com. Code § 5102(a)(10)* (definition); § 56.10[1]] will be recognized as letters of credit even though they omit one or more of the items usually contained in a letter of credit [*Com. Code § 5104* (UCC Comment 1)].

[2] Completeness

A letter of credit should be complete and self-contained. Because of the independent nature of the credit engagement [see *Com. Code* § 5103 (UCC Comment 1)], an issuer must honor a presentation [see *Com. Code* § 5102(a)(12) (presentation defined as delivery of document to issuer for honor)] that, according to the standard practice of financial institutions that regularly issue letters of credit, appears on its face strictly to comply with the terms and conditions of the letter of credit [*Com. Code* § 5108(a); see *Com. Code* § 5109 (forgery or material fraud); see also *Com. Code* 5108(e) (standard practice)]. Therefore, the parties should be able to determine from the letter of credit itself, without reference to the underlying contract, what documents and actions are necessary to satisfy the credit.

[3] Statement as to Revocability

While a letter of credit may be either revocable or irrevocable [see *Com. Code* § 5106(a); see also § 56.13[3],[4]], a credit is revocable only if it so provides [*Com. Code* § 5016(a); see *Com. Code* § 2325(3) (unless otherwise agreed, "letter of credit" in contract for sale means irrevocable credit)]. This presumption of irrevocability of unlabeled letters of credit adopts the position taken by several courts [see *Com. Code* § 5106 (UCC Comment 1, citing cases)], and is the position of the current UCP [see UCP art. 6].

[4] Non-variable Provisions

With limited exceptions, the effect of the UCC--Letters of Credit may be varied by agreement or by a provision stated or incorporated by reference in an undertaking [*Com. Code* § 5103(c); see *Com. Code* § 5108 (UCC Comment 1)]. However, although the applicant and the issuer may agree to almost any provisions establishing the obligations of the issuer to the applicant [see *Com. Code* § 5103(c), *Com. Code* § 5103 (UCC Comment 2); *Com. Code* § 5108 (UCC Comment 1)], the issuer may not achieve this result by a nonnegotiated disclaimer or limitation of remedy in the letter of credit or other agreement [*Com. Code* § 5103(c)].

The nonvariable terms of the UCC include [*Com. Code* § 5103(c); see former *Com. Code* § 5114(d), repealed by Stats. 1996, ch. 497 § 7]:

- *Com. Code* § 5102(a)(9), (10) ("issuer" and "letter of credit" defined [see §§ 56.10[1], 56.11[3]]).
- *Com. Code* § 5103 (scope and changes to effect of division; rights and obligations of issuer [see §§ 56.10 [3], 56.50 [1]-[6]]).
- *Com. Code* § 5106(d) (duration of letter of credit) [see § 56.31 [2]].
- *Com. Code* § 1302(b) (limitations of obligations of good faith, diligence, reasonableness, and care prescribed by California Commercial Code) [see *Com. Code* § 5102(a)(7) (good faith defined as honesty in fact in conduct or transaction concerned)].
- *Com. Code* § 5117(d) (limitations on rights of subrogation) [see § 56.45].

[5] Consideration Not Required

Consideration is not required to issue, amend, transfer, or cancel a letter of credit, advice, or confirmation [*Com. Code* § 5105].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Letters of Credit (Article 5)General OverviewCommercial Law (UCC)Letters of Credit
(Article 5)ConsiderationCommercial Law (UCC)Letters of Credit (Article 5)Formal Requirements



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22-56 California Legal Forms--Transaction Guide § 56.31

§ 56.31 Time of Issuance and Duration

[1] Time of Issuance

A letter of credit is issued and becomes enforceable against the issuer when the issuer sends or otherwise transmits it to the prospective advisor or to the beneficiary [*Com. Code § 5106(a)*; *see Com. Code § 1201(b)(36)* ("send" defined)]. After a letter of credit is issued, the rights and obligations of the beneficiary, applicant, confirmer, and issuer are not affected by any amendment or cancellation to which that person has not consented, except to the extent that the credit provides that it is revocable or that the issuer may cancel or amend the credit without that consent [*Com. Code § 5106(b)*].

[2] Date of Expiration

If there is no stated expiration date or other provision determining its duration, a letter of credit expires one year after its stated date of issuance or, if none is stated, one year after the date on which it is issued [*Com. Code § 5106(c)*]. A letter of credit that states that it is perpetual expires five years after its stated date of issuance, or if none is stated, after the date on which it is issued [*Com. Code § 5106(d)*; *see Golden W. Ref. Co. v. Suntrust Bank* (9th Cir. 2008) 538 F.3d 1233, 2008 U.S. App. LEXIS 17573, at *11-*17 (letter of credit is perpetual, in statutory sense, only if it expresses in words that it is perpetual, but it need not use "perpetual" as long as some words in it definitively provide that it will continue in perpetuity; and this requirement is not nullified by automatic-renewal provision in letter of credit); *see also Com. Code § 5103(c)* (effect of *Com. Code § 5106(d)* cannot be varied by any agreement or undertaking); *Com. Code § 5106* (UCC Comment 4) (revocable letter of credit is not "perpetual")]. Although letters of credit should, and customarily do, specify the date on which the issuer's engagement expires [*see § 56.200[2]*], failure to specify an expiration date neither invalidates the letter of credit nor diminishes any party's obligation with respect to the credit [*see Com. Code § 5104*; *Com. Code § 5106* (UCC Comment 4)]. After the expiration date, the issuer normally has no obligation to pay [*see Com. Code § 5108(a)* (issuer's obligations and rights)].

The duration of drafts that are negotiable instruments drawn under the credit may be limited [*see Com. Code § 3108*; *see also Ch. 55, Negotiable Instruments*]. For letters of credit relating to import or domestic goods transactions,

commercial banks are restricted to accepting drafts or bills of exchange having not more than six months' sight to run [*Fin. Code* § 1224].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Letters of Credit (Article 5) Issuance General Overview Commercial Law (UCC) Letters of Credit (Article 5) Issuance Duration Commercial Law (UCC) Letters of Credit (Article 5) Issuers Obligations Time Limitations & Notice



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22-56 California Legal Forms--Transaction Guide § 56.32

§ 56.32 Amendment, Cancellation or Revocation

[1] Irrevocable Letter of Credit

After a letter of credit is issued, the rights and obligations of the beneficiary, applicant, confirmer, and issuer are not affected by any amendment or cancellation to which that person has not consented, except to the extent that the credit provides that it is revocable or that the issuer may cancel or amend the credit without that consent [*Com. Code § 5106(b)*; see *Com. Code § 5106* (UCC Comment 2) (recognized transferee beneficiary, but not assignee of proceeds, is protected by *Com. Code § 5106(b)*)]. A letter of credit is issued and becomes enforceable against the issuer when the issuer sends or otherwise transmits it to the prospective advisor or to the beneficiary [*Com. Code § 5106(a)*; see *Com. Code § 1201(b)(36)* ("send" defined)]. For an application to amend a letter of credit, see § 56.210.

[2] Revocable Letter of Credit

A revocable credit may be canceled or amended by the issuer at any time without prior notice to or consent from the applicant or beneficiary [see § 56.32[2]]. However, this right to cancel or amend does not free the issuer from a duty to reimburse a nominated person [see *Com. Code § 5102(a)(11)* (definition)] who has honored [see *Com. Code § 5102(a)(8)* (definition)] or undertaken a deferred obligation before receiving notice of the cancellation or amendment [*Com. Code § 5106* (UCC Comment 3); § 56.50[2]]. For an application to amend a letter of credit, see § 56.210.

[3] Requirements for Amendment or Cancellation

An amendment or cancellation of the terms of a credit, confirmation, or advice may be issued in any form that is a record and is authenticated either by a signature or in accordance with the agreement of the parties or the standard practice of financial institutions that regularly issue letters of credit [*Com. Code § 5104*]. Authentication in this case is authentication only of the identity of the issuer, confirmer, or advisor [*Com. Code § 5104* (UCC Comment 1)]. No consideration is necessary to amend the terms of or cancel a letter of credit [*Com. Code § 5105*]. An amendment is sought by completing an application to amend [see § 56.210]. Consent to an amendment may be either express or implied. For example, a beneficiary that tenders documents for honor that conform to an amended letter of credit, but

not to the original letter, has probably consented to the amendment. Similarly, an applicant who has procured the issuance of a transferable letter of credit has consented to its transfer and to performance under the letter of credit by a person to whom the beneficiary's rights have been duly transferred [*Com. Code § 5106* (UCC Comment 2); *see Com. Code § 5112* (UCC Comment 2)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Letters of Credit (Article 5) General Overview Commercial Law (UCC) Letters of Credit (Article 5) Issuance General Overview Commercial Law (UCC) Letters of Credit (Article 5) Issuance Amendment & Cancellation



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[Reserved]

§§ 56.33[Reserved]



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§ 56.40 Transferable Letters of Credit

A transferable letter of credit allows the beneficiary to ask a bank paying under the credit to make payment to a party other than the beneficiary [*see Com. Code § 5112* (UCC Comment 1); UCP art. 48]. This right to demand payment under a transferable letter of credit belongs to the beneficiary or a transferee designated by the beneficiary [*Com. Code § 5112*; *see* UCP art. 48 (generally prohibiting more than one transfer unless credit provides otherwise)]. For a transfer to be effective, the beneficiary must obtain the consent of the applicant [*see* McCullough, Letters of Credit, Ch. 4, *The Relationship Between the Beneficiary and the Issuer* (Matthew Bender)]. The issuance of a transferable letter of credit with the concurrence of the applicant is considered to be an agreement by the issuer and the applicant to permit a beneficiary to transfer its right to demand payment under the letter of credit and to permit a nominated person [*see Com. Code § 5102(a)(11)* (definition)] carry out that transfer without further notice to either of them [*Com. Code § 5112* (UCC Comment 1)]. The right to demand payment is distinct from the right to the proceeds of the credit, which may be assigned by the beneficiary without the consent of the applicant [*see Com. Code § 5112* (UCC Comment 2); McCullough, Letters of Credit, Ch. 4, *The Relationship Between the Beneficiary and the Issuer* (Matthew Bender); *see also* § 56.42].

In a transfer, the beneficiary transfers the rights and duties under the credit to someone else. The transferee is usually the beneficiary's supplier, who steps into the shoes of the beneficiary. The transferee ships the goods and presents the documents to the bank for payment, essentially replacing the beneficiary. For partial transfer of credit, *see* § 56.211.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC) Letters of Credit (Article 5) Assignments & Transfers



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22-56 California Legal Forms--Transaction Guide § 56.41

§ 56.41 "Transfers" and "Assignments"

Although the words "transfer" and "assignment" are synonymous for most legal purposes [see Black's Law Dictionary (5th ed., 1979) at 109], they have acquired different connotations in letter of credit transactions. Both the Uniform Commercial Code and the UCP use the term "transfer" to refer to the act by which the right to demand payment under a letter of credit is conveyed from one party (generally the beneficiary) to another (typically a supplier of the beneficiary) [Com. Code § 5112 (UCC Comment 1); UCP art. 48]. In contrast, the Commercial Code and the UCP use the term "assignment" to refer to the act by which the right to receive the proceeds of a letter of credit is conveyed from the beneficiary to another party [Com. Code § 5112 (UCC Comment 1); UCP art. 49]. Accordingly, this chapter uses the word "transfer" to refer to the conveyance of the right to draw [see § 56.42] and the word "assignment" to refer to the conveyance of the right to receive the proceeds [see § 56.43].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Letters of Credit (Article 5) Assignments & Transfers



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22-56 California Legal Forms--Transaction Guide § 56.42

§ 56.42 Transfer of Right to Demand Payment

Except as otherwise provided by statute [*see Com. Code § 5113* (rights and obligations of successor of beneficiary); § 56.44], unless a letter of credit states that it is transferable, the right of a beneficiary to draw or otherwise demand performance under a letter of credit may not be transferred [*Com. Code § 5112(a)*]. Moreover, even if a letter of credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if [*Com. Code § 5112(b)*]:

- The transfer would violate applicable law; or
- The transferor or transferee has failed to comply with any requirement stated in the letter of credit or any other requirement relating to transfer imposed by the issuer which is within the standard practice of financial institutions that regularly issue letters of credit [*see Com. Code § 5108(e)*] or is otherwise reasonable under the circumstances.

The power of the issuer to establish "requirements" under the UCC--Letters of Credit does not include the right absolutely to refuse to recognize transfers under a transferable letter of credit [*Com. Code § 5112* (UCC Comment 1)]. By contrast, the UCP provides the beneficiary with a "right of request," rather than a "right to transfer," giving the transferring bank the right to accept or decline the beneficiary's request [*see UCP, art. 49(c)*]. An issuer who wishes to retain the right to deny all transfers should not issue transferable letters of credit or should incorporate the UCP [*Com. Code § 5112* (UCC Comment 1)].

The right to demand payment under a letter of credit is commonly referred to as the "right to draw" [*see McCullough, Letters of Credit, Ch. 4, The Relationship Between the Beneficiary and the Issuer* (Matthew Bender)]. The right to demand payment under a letter of credit is distinct from the right to receive the proceeds of the credit after all of the conditions for payment have been satisfied [*see McCullough, Letters of Credit, Ch. 4, The Relationship Between the Beneficiary and the Issuer* (Matthew Bender); *see also § 56.43*].

The right to demand payment under a letter of credit is often transferred to the beneficiary's suppliers. Assume, for

example, that the beneficiary is an exporter of manufactured goods and that the applicant is a foreign buyer. Assume further that the goods have not yet been manufactured. In this situation, the beneficiary needs to finance the purchase of materials with which to complete manufacture and thus wishes to transfer the right to demand payment under the credit to a supplier or suppliers.

There are various reasons why an applicant might not want the right to demand payment under the credit to be transferable. For example, the applicant may repose special confidence in the beneficiary and not want other parties who are totally unknown to the applicant to exercise the beneficiary's rights. In some cases, the applicant may have a set-off against the beneficiary that would be rendered valueless if the beneficiary permitted some other person to demand payment under the credit. Or the applicant may simply wish to avoid unnecessarily complicating the letter of credit transaction [see McCullough, Letters of Credit, Ch. 4, *The Relationship Between the Beneficiary and the Issuer* (Matthew Bender); see also *Com. Code* § 5112 (UCC Comment 2)].

When the right to demand payment has been validly transferred, the person to whom the right has been transferred is referred to as the "transferee" [*Com. Code* § 5112(b)] or the "second beneficiary" [UCP art. 48(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Letters of Credit (Article 5)General OverviewCommercial Law (UCC)Letters of Credit (Article 5)Assignments & Transfers



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22-56 California Legal Forms--Transaction Guide § 56.43

§ 56.43 Assignment of Right to Receive Proceeds

The beneficiary may assign any proceeds to which it may be, or may become, entitled under the letter of credit, in accordance with the provisions of the applicable law, even if the letter of credit is not stated to be transferable [UCP, art. 49]. However, the beneficiary's right to perform under the credit (in contrast to its rights to the proceeds due under the credit) [see § 56.42] may not be assigned to a third party unless the letter of credit is issued in a transferable form [UCP, art. 49].

Rules relating to assignment of proceeds in the UCC--Letters of Credit were enacted by Stats. 1996, ch. 176, § 7, as *Com. Code § 5114*. However, the rules related to assignment ultimately were not included in Article 5.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Letters of Credit (Article 5)General OverviewCommercial Law (UCC)Letters of Credit (Article 5)Assignments & Transfers



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22-56 California Legal Forms--Transaction Guide § 56.44

§ 56.44 Transfers by Operation of Law

[1] Successor of Beneficiary Defined

A "successor of beneficiary" is a person who succeeds to substantially all of the rights of a beneficiary by operation of law [*Com. Code § 5102(a)(15)*]. It includes a corporation with or into which the beneficiary has merged or consolidated (even though the merger occurs partly by operation of law and partly by the voluntary action of the parties [*see Com. Code § 5102* (UCC Comment 10)]), an administrator, executor, personal representative, trustee in bankruptcy, debtor in possession, liquidator, and receiver [*Com. Code § 5102(a)(15)*]. The definition excludes certain transfers in which no part of the transfer is by operation of law, such as the sale of assets by one company to another [*Com. Code § 5102* (UCC Comment 10)].

[2] Rights of Successor Beneficiary

A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value either in the name of the beneficiary, without disclosing its status as successor [*Com. Code § 5113(a)*], or in its own name as the disclosed successor of the beneficiary [*Com. Code § 5113(b)*]. Except as otherwise provided in *Com. Code § 5113(e)*, an issuer must recognize a disclosed successor of a beneficiary as beneficiary in full substitution for its predecessor on compliance with the requirements for recognition by an issuer of a transfer of drawing rights (that is, the right to demand payment under the credit) by operation of law under the standard practice of financial institutions that regularly issue letters of credit [*see Com. Code § 5108(e)*; § 56.50[5]], or in the absence of any standard practice, by compliance with other reasonable procedures sufficient to protect the issuer [*Com. Code § 5113(b)*].

An issuer is not obliged to determine whether a purported successor is a successor of the beneficiary or whether the signature of a purported successor is genuine or authorized [*Com. Code § 5113(c)*]. Further, an issuer that has honored a purported successor's apparently complying presentation, under which the purported successor does not disclose its status as successor [*see Com. Code § 5113(a)*], has the same rights and obligations specified in *Com. Code § 5108(i)* [*see § 56.50[4]*], even if the purported successor is not the successor of the beneficiary [*Com. Code § 5113(d)*].

Documents signed in the name of a beneficiary or of a disclosed successor of a beneficiary by a person who is neither the beneficiary nor the successor of the beneficiary are forged documents for the purposes of *Com. Code* § 5109 (forgery and material fraud) [*Com. Code* § 5113(d); see § 56.50[2][c]].

A beneficiary whose name is changed after the issuance of a letter of credit has the same rights and obligations as a successor of the beneficiary [*Com. Code* § 5113(f)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Letters of Credit (Article 5)General OverviewCommercial Law (UCC)Letters of Credit (Article 5)Assignments & TransfersCommercial Law (UCC)Letters of Credit (Article 5)Definitions



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22-56 California Legal Forms--Transaction Guide § 56.45

§ 56.45 Subrogation

By itself, the UCC--Letters of Credit does not grant any right of subrogation. It grants only the right that would exist if the person seeking subrogation were a "secondary obligor." The term "secondary obligor" refers to a surety, guarantor, or other person against whom or whose property an obligee has recourse with respect to the obligations of a third party [*Com. Code § 5117* (UCC Comment 1); *see* Restatement (Third) of Surety and Guaranty § 1 (1996)]. Accordingly, an issuer that honors a beneficiary's presentation is subrogated to the rights of (1) the beneficiary to the same extent as if the issuer were a secondary obligor of the underlying transaction owed to the beneficiary, and (2) the applicant to the same extent as if the issuer were a secondary obligor of the underlying transaction owed to the applicant [*Com. Code § 5117(a)*].

An applicant that reimburses an issuer is subrogated to the rights of the issuer against any beneficiary, presenter, or nominated person to the same extent as if the applicant were the secondary obligor of the obligations owed to the issuer and has the issuer's rights of subrogation, as described above [*Com. Code § 5117(b)*; *see Com. Code § 5117(a)* (issuer's right of subrogation)].

A nominated person who pays or gives value against a draft or demand presented under a letter of credit is subrogated to the rights of [*Com. Code § 5117(b)*]:

- The issuer against the applicant to the same extent as if the nominated person were a secondary obligor of the obligation owed to the issuer by the applicant;
- The beneficiary to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the beneficiary; and
- The applicant to the same extent as if the nominated person were secondary obligor of the underlying obligation owed to the applicant.

Notwithstanding any agreement or term to the contrary, only a person who has completed its performance in a letter of credit transaction can have a right of subrogation [*Com. Code § 5117* (UCC Comment 2)]. Thus, the rights of subrogation of an issuer that honors a beneficiary's presentation and or of an applicant that reimburses an issuer [*see Com. Code § 5117(a), (b)*] do not arise until the issuer honors the letter of credit or otherwise pays. Similarly, the rights of a nominated person who pays or gives value against a draft or demand do not arise until that person pays or gives value [*Com. Code § 5117(d); see Com. Code § 5117(c)*]. Until these requirements are met, the issuer, nominated person, and the applicant do not derive, under the UCC--Letters of Credit, present or prospective rights forming the basis for a claim, defense, or excuse [*Com. Code § 5117(d)*]. This restriction is designed to preserve the independence of the letter of credit obligation [*see § 56.12 [3]*] and to insure that subrogation is not used as an offensive weapon [*Com. Code § 5117* (UCC Comment 2); *see Hamada v. Far East National Bank* (9th Cir. 2002) 291 F.3d 645, 651-653 (discussing criteria for application of equitable subrogation doctrine to issuer of letter of credit)].

The right of subrogation merely empowers the person who paid on a letter of credit to force reimbursement from a person, necessarily a party to the underlying transaction, who was primarily liable for the debt that the letter of credit secured. There is no derivative right to force contribution from another person, such as a guarantor, who was secondarily liable for that debt but never was a primary debtor [*Morgan Creek Residential v. Kemp* (2007) 153 Cal. App. 4th 675, 695, 63 Cal. Rptr. 3d 232] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Letters of Credit (Article 5)General OverviewCommercial Law (UCC)Letters of Credit (Article 5)DefinitionsCommercial Law (UCC)Letters of Credit (Article 5)IssuersGeneral Overview



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22-56 California Legal Forms--Transaction Guide §§ 56.46-56.49

[Reserved]

§§ 56.46[Reserved]



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4. Performance and Nonperformance

22-56 California Legal Forms--Transaction Guide § 56.50

§ 56.50 Presentation

[1] Compliance With Terms of Credit

To obtain payment under a letter of credit, the beneficiary or other presenter must satisfy the conditions specified in the credit, usually by presenting complying documents to the issuing or confirming bank [*see Com. Code § 5108(a), (b)*]. If the presentation appears on its face strictly to comply with the terms and conditions of the letter of credit, the presenter is entitled to have the documents honored [*Com. Code § 5108(a); see [2][a], below*].

If the parties do not specifically agree in the letter of credit to require separate presentment to the confirming bank, the beneficiary need only make timely presentment to the issuing bank to be entitled to payment [*Northern Trust Co. v. Community Bank* (9th Cir. 1989) 873 F.2d 227, 229] .

[2] Duty to Honor

[a] In General

With specified exceptions [*see Com. Code § 5019* (forgery or material fraud); [c], *below*], an issuer must honor a presentation that appears on its face to strictly comply with the terms and conditions of the letter of credit, as determined by the standard practice of financial institutions that regularly issue letters of credit [*Com. Code § 5108(a); see Com. Code § 5108(e)* (standard practice); *see also* [5], [6][b], *below*]. Except as otherwise provided by the rules for successor beneficiaries [*see Com. Code § 5113; § 56.44*], or unless otherwise agreed with the applicant, the issuer must dishonor a presentation that does not appear to so comply [*Com. Code § 5108(a); see Com. Code § 5102(a)(5)* (dishonor defined as failure timely to honor or take interim action, such as to accept draft, that may be required by letter of credit)]. A confirmer that confirms a credit takes on the same obligations as the issuer [*see Com. Code § 5107(a)*].

The issuer of a letter of credit that is subject to conditions is required to act only when the conditions have been complied with [*Banco Nacional de Credito Ejidal S.A. v. Bank of America* (N.D. Cal. 1954) 118 F. Supp. 308, 309] .

[b] Presentation by Successor Beneficiary

Honor of a purported successor beneficiary's [see *Com. Code § 5102(a)(15)* "successor of a beneficiary" defined; § 56.44[1]] apparently complying presentation, under which the purported successor does not disclose its status as successor [see *Com. Code § 5113(a)*], has the consequences specified in *Com. Code § 5108(i)* [see § 56.50[4]], even if the purported successor is not the successor of the beneficiary [*Com. Code § 5113(d)*]. However, an issuer whose rights of reimbursement are not covered by *Com. Code § 5113(d)*, or substantially similar law, and any confirmer or nominated person may decline to recognize a presentation by a disclosed successor of the beneficiary [*Com. Code § 5113(e)*].

[c] Forged or Materially Fraudulent Presentation

If a presentation is made that appears strictly on its face to comply with the terms of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or the applicant, the issuer must honor the presentation if honor is demanded by [*Com. Code § 5109(a)(1)*]:

- A nominated person [*Com. Code § 5102(a)(11)* (definition)] who has given value [*Com. Code § 3409* (definition)] in good faith [*Com. Code § 5102(a)(7)* (definition)] and without notice of forgery or material fraud;
- A confirmer [*Com. Code § 5102(a)(4)* (definition); § 56.11[5]] who has honored its confirmation in good faith;
- A holder in due course [*Com. Code § 3302* (definition)] of a draft drawn under a letter of credit which was taken after acceptance by the issuer or nominated person; or
- An assignee of the issuer or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person.

The issuer, acting in good faith, *may* honor or dishonor the presentation in any other case [*Com. Code § 5109(a)(2)*]. Thus, except when the issuer must honor a presentation as specified above [see *Com. Code § 5109(a)(1)*], the issuer has two choices: it may honor in the face of the applicant's claim of fraud or it may dishonor by showing material fraud or forgery [see *Com. Code § 5109* (UCC Comment 2)]. The fraud must be "material" [*Com. Code § 5109(a)*; see *Com. Code § 5109* (UCC Comment 1)] and must be found either in the documents or must have been committed by the beneficiary on the issuer or applicant [*Com. Code § 5109* (UCC Comment 1), citing with approval *Cromwell v. Commerce & Energy Bank (La. 1985) 464 So.2d 721, 731-733*]. Generally, fraud in a document must be material to its purchaser or must be significant to the participants of the underlying transaction [*Com. Code § 5109* (UCC Comment 1) (listing examples)]. Material fraud by a beneficiary occurs only when the beneficiary has no colorable right to expect honor and when there is no basis in fact to support its right to honor [*Com. Code § 5109* (UCC Comment 1), citing with approval *Ground Air Transfer, Inc. v. Westates Airlines, Inc. (1st Cir. 1990) 899 F.2d 1269, 1272-1273* (listing cases)].

In practice, because issuers may be liable for wrongful dishonor [see § 56.52] if they are unable to prove forgery or material fraud, presumably most issuers will chose to honor despite the applicant's claims of fraud or forgery unless the applicant procures an injunction [*Com. Code § 5109* (UCC Comment 2); see § 56.52[6]].

[3] Time Allowed for Honor or Rejection

An issuer has a reasonable time after presentation, but not beyond the end of the seventh business day of the issuer after

receipt of the documents [Com. Code § 5018(b)]:

- To honor [see Com. Code § 5102(a)(8) ("honor" of letter of credit defined)];
- To accept a draft or incur an obligation, if the letter of credit provides for honor to be completed more than seven business days after presentation;
- To give notice to a presenter of discrepancies in the presentation [see Com. Code § 5102(a)(13) (presenter defined as person making presentation as or on behalf of beneficiary or nominated person); Com. Code § 5102(a)(12) ("presentation" defined)].

The seven day period is not a safe harbor. The time within which the issuer must give notice is the lesser of a reasonable time, or seven business days [*DBJJJ, Inc. v. National City Bank* (2004) 123 Cal. App. 4th 530, 535, 542, 19 Cal. Rptr. 3d 904] . What constitutes a "reasonable time" for examination of documents is determined by reference to the behavior of those in the business of examining documents, mostly banks [Com. Code § 5108 (UCC Comment 2)]. However (absent agreement to the contrary), neither local customs nor industry norms trump governing laws or applicable commercial requirements [*DBJJJ, Inc. v. National City Bank* (2004) 123 Cal. App. 4th 530, 541-542, 19 Cal. Rptr. 3d 904 (bank could not argue that industry norms governed its conduct when those practices were inconsistent with terms of the UCP to which letters of credit were expressly subject)]. To give notice within a reasonable time, the issuer normally must give notice without delay after the examining party makes its decision [Com. Code § 5108 (UCC Comment 4); see *Esso Petroleum Canada, Div. of Imperial Oil, Ltd. v. Security Pacific Bank* (D. Or. 1989) 710 F. Supp. 275, 280-281 ; *Datapoint Corp v. M & I Bank* (W.D. Wis. 1987) 665 F. Supp. 722, 726-727] . Failure of the issuer to act within the prescribed time period constitutes dishonor [Com. Code § 5108 (UCC Comment 2)]. The issuer's time for honor or giving notice of dishonor, however, may be extended or shortened by a term in the letter of credit [Com. Code § 5108 (UCC Comment 2); see Com. Code § 5106 (time for issuer's performance may be otherwise modified or waived); § 56.50[3]].

An issuer generally is precluded from asserting any discrepancy as a basis for dishonor if timely notice is not given or if the discrepancy is not stated in a notice that is timely given [Com. Code § 5108(c); *DBJJJ, Inc. v. National City Bank* (2004) 123 Cal. App. 4th 530, 546, 19 Cal. Rptr. 3d 904 ; see *Golden W. Ref. Co. v. Suntrust Bank* (9th Cir. 2008) 538 F.3d 1233, 2008 U.S. App. LEXIS 17573, at *20-*22 ("discrepancy" in Com. Code § 5108(c) refers to "discrepancies in the presentation," mentioned in Com. Code § 5108(b)(3), which issuer is obliged to state in notice of dishonor; only those discrepancies are waived under subsection (c) if not included in notice of dishonor)]. However, failure to give the required notice, or to mention fraud, forgery, or expiration in the notice, does not preclude the issuer from asserting those elements as a basis for dishonor [Com. Code § 5108(d); see Com. Code § 5109 (forgery or material fraud)]. For discussion of the remedy for improper dishonor, see § 56.52[1].

[4] Issuer's Obligations and Rights on Honor or Rejection

An issuer that has dishonored a presentation must return the documents or hold them at the disposal of, and send advice to that effect to, the presenter [Com. Code § 5018(h)].

An issuer that has honored a presentation [Com. Code § 5108(i)]:

- Is entitled to be reimbursed by the applicant in immediately available funds not later than the day of its payment of funds;
- Takes the documents free of claims of the beneficiary or presenter;
- Is precluded from asserting a right of recourse under Com. Code §§ 3414 (drawer's obligation) and

3415 (indorser's obligation);

- Is precluded from restitution of money paid or other value given by mistake to the extent the mistake concerns discrepancies in the documents or tender which are apparent on the face of the presentation, except as otherwise provided by *Com. Code* §§ 5110 (warranties) and 5117 (subrogation) [see §§ 56.50[7], 56.45]; and
- Is discharged to the extent of its performance under the letter of credit, unless the issuer honored a presentation in which a required signature of a beneficiary is forged.

[5] "Standard Practice"

An issuer must observe the standard practice of financial institutions that regularly issue letters of credit [*Com. Code* § 5108(e)]. This standard practice includes [*Com. Code* § 5108(e) (UCC Comment 8)]:

- International practice set forth in or referenced by the UCP;
- Other practice rules published by associations of financial institutions; and
- Local and regional practice. When there are conflicting practices, the parties should indicate which practice governs their rights [*Com. Code* § 5108(e) (UCC Comment 8); see § 56.15[5], [6]]. A practice may be overridden by agreement or course of dealing [see *Com. Code* § 5108(e) (UCC Comment 8); *Com. Code* § 1303(d), (e)].

Determination of the issuer's observance of the standard practice is a matter of interpretation for the court [*Com. Code* § 5108(e); see *Com. Code* § 5108(e) (UCC Comment 1), citing, with approval, *American Coleman Co. v. Intrawest Bank of Southglenn* (10th Cir. 1989) 887 F.2d 1382, 1387 (grant of summary judgment)]. The court must offer the parties a reasonable opportunity to present evidence of the standard practice [*Com. Code* § 5108(e)]. However, a bank may not alter the terms of a letter of credit with evidence of a practice contrary to standards specified in the letter of credit [*DBJJJ, Inc. v. National City Bank* (2004) 123 Cal. App. 4th 530, 541-542, 19 Cal. Rptr. 3d 904 (bank could not prove compliance with industry norms with evidence regarding standards of the U.S. Council on International Banking when those standards were inconsistent with the terms of the UCP, to which the letter of credit was expressly subject)].

[6] Standards for Compliance

[a] In General

There are two standards for determining whether documents comply with the requirements of a letter of credit. The usual standard, and that adopted by the UCC--Letters of Credit, is the strict compliance standard, which requires absolute compliance with the terms of the credit [see [b], *below*]. However, some jurisdictions apply the substantial compliance standard [see [c], *below*]. For further discussion of these standards, see McCullough, Letters of Credit, Ch. 4, *The Relationship Between the Beneficiary and the Issuer* (Matthew Bender).

[b] Strict Compliance

The standard of strict compliance governs the issuer's obligation to the beneficiary and to the applicant [*Com. Code* § 5108(a); *Com. Code* § 5108(a) (UCC Comment 1)]. With specified exceptions [see *Com. Code* § 5109 (forgery or material fraud); § 56.50[2][c]], an issuer must honor a presentation that appears on its face to strictly comply with the terms and conditions of the letter of credit, as determined by the standard practice of financial institutions that regularly issue letters of credit [*Com. Code* § 5108(a); see *Com. Code* § 5108(e) (standard practice); see also §§ 56.50[2], [5]]. Except as otherwise provided by the rules for successor beneficiaries [see *Com. Code* § 5113; § 56.44], or unless

otherwise agreed with the applicant, the issue must dishonor a presentation that does not appear to so comply [Com. Code § 5108(a)].

This standard is intended to free the paying bank from the burden of determining whether the documents that are submitted to it show compliance with the underlying transaction. Under the strict compliance standard, the bank need only compare the documents to the requirements specified in the letter of credit. If the documents and requirements match exactly, the beneficiary has complied with the credit. Strict compliance requires not only that the documents themselves appear on their face to strictly comply, but also that the other terms of the letter of credit (those dealing with the time and place of presentation, for example) are strictly complied with [Com. Code § 5108 (UCC Comment 1)].

The 1997 California enactment of the UCC--Letters of Credit adopted the more widely applied strict compliance standard, rather than the standard that commentators have called "substantial compliance" [see Com. Code § 5108(a); Stats. 1996 ch. 497 § 7; see also [c], below]. Although prior versions of the UCC--Letters of Credit did not specify a standard, it appears from case law that California also applied the strict standard before 1997.

Paramount Export Co. v. Asia Trust Bank, Ltd. [*Paramount Export Co. v. Asia Trust Bank, Ltd.* (1987) 193 Cal. App. 3d 1474, 238 Cal. Rptr. 920] is the leading modern case on the prevailing standard in California. In that case, the court said that the doctrine of strict compliance functions to protect the bank that carries the absolute obligation to pay the beneficiary. Adherence to this rule ensures that banks, dealing only in documents, will be able to act quickly, enhancing the letter of credit's fluidity. Literal compliance with the credit therefore is essential so as not to impose an obligation on the bank that it did not undertake, and so as not to jeopardize the bank's right to indemnity from its customer. Documents nearly the same as those required are not good enough [*Paramount Export Co. v. Asia Trust Bank, Ltd.* (1987) 193 Cal. App. 3d 1474, 1480, 238 Cal. Rptr. 920] . In dictum, the court in *Paramount Export* also said that if literal compliance is the watchword for letter of credit transactions, then all parties involved must bear the risk that the literal and exacting nature of the transactions may at times operate to their disadvantage [*Paramount Export Co. v. Asia Trust Bank, Ltd.* (1987) 193 Cal. App. 3d 1474, 1484, 238 Cal. Rptr. 920] .

As used in the UCC--Letters of Credit, strict compliance is not intended to mean "slavish conformity" to a letter of credit [Com. Code § 5108 (UCC Comment 1)]. By adopting standard practice (that is, "what issuers do") as a way of measuring strict compliance [Com. Code § 5108(a); see Com. Code § 5108(e); § 56.50[5]], the statute is intended to require that certain presentations be recognized as compliant, which a layman might regard as discrepant: for example, a draft requests payment on "Letter of Credit No. 86-122-5," and the letter of credit is actually "Letter of Credit No. 86-122-S"; or a letter of credit calls for "drafts Drawn under Bank of Clarksville Letter of Credit Number 105," and a presented draft states that it is "drawn under Bank of Clarksville, Clarksville, Tennessee letter of Credit No. 105" [Com. Code § 5108 (UCC Comment 1)].

Nevertheless, under the strict compliance standard, seemingly trivial variations in descriptions sometimes have resulted in noncompliance and justified refusal to pay drafts or demands. For example, invoices for "white Java granulated sugar No. 24" and "white Java fine sugar No. 24" failed to comply with a credit calling for "white Java refined granulated sugar" and "white Java refined fine granulated sugar" [see *Crocker First Nat. Bank v. De Sousa* (9th Cir. 1928) 27 F.2d 462, 463] .

An issuer must examine documents with care so as to ascertain that on their face they appear to comply with the terms of the credit [see Com. Code § 5108(b) (issuer's duties to examine documents for discrepancies); § 56.50[1], [2]]. However, in some circumstances, standards may be established between the issuer and the applicant, either by agreement or by custom, that would free the issuer from liability that it might otherwise have [Com. Code § 5108 (UCC Comment 1)]. For example, an applicant might agree that an issuer would have no duty whatsoever to examine documents on presentations below a certain dollar amount. Or, when a transaction depended on the issuer's payment in a very short period of time, the issuer and the applicant might agree to reduce the issuer's responsibility for failure to discover discrepancies [Com. Code § 5108 (UCC Comment 1)].

[c] Substantial Compliance

The doctrine of substantial performance is based in contract law and requires only that a party substantially perform to be entitled to recovery under a contract. This standard may be satisfied by a generally acceptable performance in which the promisee gets practically what the contract called for with minor, easily-remedied, or compensable defects [see *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal. 2d 169, 186 187, 14 Cal. Rptr. 297, 363 P.2d 313] .

However, *Com. Code § 5108* is intended to mandate a strict-compliance approach [see [b], above] rather than a substantial-compliance standard, although strict compliance does not mean slavish conformity to the terms of the letter of credit [*Com. Code § 5108* (UCC Comment 1)]. For further discussion of a substantial-compliance standard and its application, see McCullough, Letters of Credit, Ch. 2, *Judicial Proceedings and the Law Applicable to Letters of Credit* (Matthew Bender).

[7] Warranties of Beneficiary on Transfer and Presentation

If its presentation is honored, the beneficiary warrants to the issuer, to any other person to whom presentation is made, and to the applicant that there is no fraud or forgery, as described in *Com. Code § 5109(a)* [*Com. Code § 5110(a)(1)*; see *Com. Code § 5109(a)*; [2][c], above]. The beneficiary further warrants to the applicant that the drawing does not violate any agreement between the applicant and the beneficiary or any other agreement intended by them to be augmented by the letter of credit [*Com. Code § 5110(a)(2)*]. These warranties are in addition to the warranties arising under *Com. Code § 3101* (negotiable instruments) [see Ch. 55, *Negotiable Instruments*], *Com. Code § 4101* (bank deposits and collections) [see California Points & Authorities, *Checks and Banks*], *Com. Code § 7101* (documents of title, including warehouse receipts and bills of lading), and *Com. Code § 8101* (investment securities) [see Ch. 42, *Secured Transactions*] because of the presentation or transfer of documents covered by any of those sections [*Com. Code § 5110(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Letters of Credit (Article 5)Forgery & FraudCommercial Law (UCC)Letters of Credit (Article 5)IssuersObligationsGeneral OverviewCommercial Law (UCC)Letters of Credit (Article 5)IssuersObligationsHonor PresentationsCommercial Law (UCC)Letters of Credit (Article 5)IssuersObligationsStrict ComplianceCommercial Law (UCC)Letters of Credit (Article 5)IssuersObligationsTime Limitations & NoticeCommercial Law (UCC)Letters of Credit (Article 5)IssuersRightsDishonorCommercial Law (UCC)Letters of Credit (Article 5)Warranties



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22-56 California Legal Forms--Transaction Guide § 56.51

§ 56.51 Excuses for Nonperformance by Beneficiary

[1] In General

The general rule is that to obtain payment under a letter of credit, the beneficiary must strictly comply with all requirements of the credit [*see* § 56.50[6][b]]. However, there are several instances in which payment may be obtained with less than strict compliance.

[2] Waiver

Generally, a beneficiary will strive for strict compliance with the terms of the letter of credit [*see* § 56.50[6][b]]. Notwithstanding this, harmless defects that are difficult to remedy and that would prevent strict compliance may arise at the last minute. If the parties choose, they can avoid this obstacle by waiving the defective performance [*see, e.g., Lectrodryer v. SeoulBank* (2000) 77 Cal. App. 4th 723, 727-728, 91 Cal. Rptr. 2d 881 (bank sought and obtained from customer a waiver of "any discrepancies" in documentation relative to letter of credit)]. Waiver is the intentional relinquishment of a known right [*Wienke v. Smith* (1918) 179 Cal. 220, 226, 176 P. 42] .

The waiver may be oral or written, but in either case, documents should be drafted to make clear what performance was waived, that the waiver was made before accepting defective performance, and that the current waiver does not waive the right to demand strict compliance in the future. For a general discussion of waiver, see Ch. 77, *Discharge of Obligations* .

[3] Estoppel

A person may be estopped to assert a fact or condition if, by reason of the person's own conduct, it would be unjust or injurious to the person's adversary to permit the person to assert the fact or condition [*Allen v. Hance* (1911) 161 Cal. 189, 196, 118 P. 527 ; *see Evid. Code* § 623]. Estoppel by conduct is composed of five elements [*Wood v. Blaney* (1895) 107 Cal. 291, 295, 40 P. 428] :

- There must have been a false representation or a concealment of material fact;
- The representation or concealment must have been made with knowledge of the facts;
- The party to whom it was made must have been ignorant of the truth of the matter;
- The representation or concealment must have been made with the intention that the other party would act on it; and
- The other party must have been induced to act on it.

If the beneficiary of a letter of credit can show that the beneficiary would suffer injustice or injury because of the issuer's representations that no defects existed in the tendered documents, the doctrine of estoppel may apply. Thus, the issuer may be estopped to assert that a defective presentation fails to comply with the credit if the issuer previously represented to the beneficiary that the documents complied with the credit and it has become too late to correct the defects without prejudice to the beneficiary. However, as a general rule, courts should not allow "the sacred cow of equity to trample the tender vines of letter of credit law" [*see Com. Code § 5109* (UCC Comment 5); *Ground Air Transfer, Inc. v. Westates Airlines, Inc.* (1st Cir. 1990) 899 F.2d 1269, 1272-1273 (cautioning against expanded that use of injunctions against honor or similar devices as threat to fundamental principle of independence in letter of credit law); *see also* § 56.52[6]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Letters of Credit (Article 5)IssuersGeneral OverviewCommercial Law (UCC)Letters of Credit (Article 5)IssuersObligationsStrict ComplianceCommercial Law (UCC)Letters of Credit (Article 5)IssuersRightsGeneral Overview



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§ 56.52 Remedies

[1] Beneficiary's Remedy for Improper Dishonor and Anticipatory Repudiation

If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary [*Com. Code § 5102(a)(3)* (definition)], successor [*Com. Code § 5102(a)(15)* (definition)], or nominated person [*Com. Code § 5102(a)(11)* (definition)] presenting on its own behalf may recover from the issuer the amount that is subject to the dishonor or repudiation [*Com. Code § 5111(a)*]. If the issuer's obligation under the letter of credit is not for the payment of money, the claimant (ordinarily the beneficiary) may obtain specific performance or, at the claimant's election, recover an amount equal to the value of performance from the issuer [*Com. Code § 5111(a)*]. In either case, the claimant may also recover incidental, but not consequential, damages [*Com. Code § 5111(a)*].

The claimant is not obliged to take action to avoid damages that might be due from the issuer for improper dishonor [*Com. Code § 5111(a)*]. This express limitation on the duty of the claimant to limit damages avoids the likelihood that the issuer would dishonor if it could rely on the burden of mitigation falling on the claimant to sell the goods and sue only for the difference between the price of the goods sold and the amount due under the letter of credit [*Com. Code § 5111* (UCC Comment 1)]. Thus, if the issuer dishonors, it takes the risk that the claimant will let the goods rot or be destroyed. Of course, the claimant may have a duty of mitigation to the applicant arising from the underlying agreement, but the issuer would not have a right to assert that duty by way of defense or setoff [*Com. Code § 5111* (UCC Comment 1); *see Com. Code § 5117(d)*; *see also § 56.45*]. If, although not obliged to, the claimant avoids damages, the claimant's recovery from the issuer must be reduced by the amount of damages avoided [*Com. Code § 5111(a)*]. The issuer has the burden of proving the amount of damages avoided.

Although in the case of repudiation, the claimant is not required to present any document as a condition of suit [*see Com. Code § 5111(a)*], if the claimant has never obtained documents necessary for a presentation conforming to the letter of credit, the claimant cannot recover for anticipatory repudiation [*Com. Code § 5111* (UCC Comment 1), citing *Decor By Nikkei Int'l, Inc. v. Federal Republic of Nigeria* (S.D. N.Y. 1980) 497 F. Supp. 893, 907-908, *aff'd*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982)] .

To the extent of its confirmation, a confirmer [*Com. Code § 5102(a)(4)* (definition); § 56.11[5]] has the liability of an issuer to a beneficiary [*Com. Code § 5102(a)(3)* (definition); see § 56.11[2]], successor [*Com. Code § 5102(a)(15)* (definition)], or nominated person [*Com. Code § 5102(a)(11)* (definition)] presenting on its own behalf, as discussed above [*Com. Code § 5111(c)*].

One court affirmed a judgment for unjust enrichment against a bank that refused to honor a prepaid letter of credit but instead allowed it to expire, claiming that the plaintiff did not comply with its terms. Although the bank's customer sent it a discrepancy waiver, the bank still refused to pay the plaintiff under the letter of credit, did not return the funds to the customer, and applied the funds to reduce its exposure on the customer's credit line with the bank. The court found that the bank was unjustly enriched when it retained for itself funds its customer used to purchase the letter of credit for the purpose of paying plaintiff, and the bank should have made those funds available to the customer for payment to the plaintiff when the letter of credit expired [*Lectrodryer v. SeoulBank* (2000) 77 Cal. App. 4th 723, 726-728, 91 Cal. Rptr. 2d 881] .

[2] Applicant's Remedies for Improper Dishonor

If an issuer wrongfully dishonors a draft or demand presented under a letter of credit, or honors a draft or demand in breach of its obligations to the applicant [*Com. Code § 5102(a)(2)* (definition); see § 56.11[1]], the applicant may recover damages resulting from the breach, including incidental, but not consequential, damages, less any amount saved as a result of the breach [*Com. Code § 5111(b)*]. What damages "result" from the improper dishonor is a matter for the courts to decide [*Com. Code § 5111* (UCC Comment 2)]. Note that an issuer found liable to its applicant may have recourse under *Com. Code § 5117* by subrogation to the applicant's claim against the beneficiary or other person [*Com. Code § 5111* (UCC Comment 2); see *Com. Code § 5117* (subrogation); see also § 56.45].

To the extent of its confirmation, a confirmer [*Com. Code § 5102(a)(4)* (definition); see § 56.11[5]] has the liability of an issuer to an applicant, as discussed above [*Com. Code § 5111(c)*].

[3] Remedies for Breach by Advisor or Nominated Person and for Breach by Issuer Other Than By Dishonor or Repudiation

If an advisor [*Com. Code § 5102(a)(1)*; see § 56.11[4]] or nominated person [*Com. Code § 5102(a)(11)*], other than a confirmer [*Com. Code § 5102(a)(4)*; see § 56.11[5]], breaches an obligation under the UCC--Letters of Credit, the person to whom the obligation is owed may recover damages resulting from the breach, including incidental, but not consequential, damages, less any amount saved as a result of the breach [*Com. Code § 5111(c)*]. This rule also applies to an issuer who breaches an obligation other than by wrongfully dishonoring or repudiating a draft or demand presented under a letter of credit (for example, by breaking its obligation as an advisor to advise the credit) or by honoring a draft or demand in breach of its obligation to the applicant [*Com. Code § 5111(c)*; see *Com. Code § 5111(a), (b)*; see also [1], [2], above]. To the extent of the confirmation, a confirmer has the liability of an issuer, as specified in *Com. Code § 5111(c)* [*Com. Code § 5111(c)*].

What damages "result" from the improper dishonor is a matter for the courts to decide [*Com. Code § 5111* (UCC Comment 2)].

[4] Issuer Entitled to Repayment

An issuer is entitled to recover from the applicant payments made under an irrevocable letter of credit when the letter is presented and paid in literal compliance with its terms, despite the fact that conditions in the underlying transaction may not have been fulfilled [*Lumbermans Acceptance Co. v. Security Pacific Nat. Bank* (1978) 86 Cal. App. 3d 175, 177 178, 150 Cal. Rptr. 69 ; see *Com. Code § 5103(d)*; see also § 56.12[3]]. This remedy is also available to a confirming

bank to the extent of its confirmation [see *Com. Code* § 5107(a)].

[5] Interest; Expenses of Litigation; Liquidated Damages

An issuer, nominated person, or advisor who is found liable under *Com. Code* § 5111(a)-(c) [see [2], [3], *above*] must pay interest on the amount owed from the date of wrongful dishonor or other appropriate date [*Com. Code* § 5111(d)]. The statute does not specify a rate of interest; it leaves that determination to the court, which normally will use the rate which typically applies in that court when interest is imposed by law [*Com. Code* § 5111 (UCC Comment 5)].

The court must award attorneys' fees and other expenses of litigation to the prevailing party in an action brought under this article [*Com. Code* § 5111(e)]. The court has discretion to determine which is the prevailing party. However, neither an issuer nor a confirmer should be treated as the "losing party," for purposes of awarding fees and expenses when an injunction is granted to the applicant over the objections of an issuer or confirmer [*Com. Code* § 5111 (UCC Comment 6)]. "Expenses of litigation" is intended to be broader than costs. For example, expenses of litigation would include travel expenses of witnesses, fees for expert witnesses, and expenses associated with taking depositions [*Com. Code* § 5111 (UCC Comment 6)].

Damages that would otherwise be payable by a party for breach of an obligation under this article may be liquidated by agreement or undertaking, but only in an amount or by a formula that is reasonable in light of the harm anticipated [*Com. Code* § 5111(f)]. The "harm anticipated" must be anticipated at the time of execution of the agreement or the issuance of the undertaking that includes the liquidated damage clause [*Com. Code* § 5111 (UCC Comment 7)].

[6] Suit for Breach of Warranties

The damages for breach of warranty under letters of credit [see *Com. Code* § 5110; see also § 56.50[7]] are not specified in *Com. Code* § 5111. Because the aggrieved party is suing on the warranties made by the beneficiaries, the suit is on the credit itself, and not on the underlying transaction [*Pubali Bank v. City Nat. Bank* (9th Cir. 1985) 777 F.2d 1340, 1343] . However, courts may find damage analogies in *Com. Code* § 2714 (buyer's damage for reach with regard to accepted goods) [see *Com. Code* § 5110 (UCC Comment 3); see also Ch. 52, *Sales of Goods Under the Commercial Code*].

[7] Injunctive Relief

[a] Against Issuer In Case of Forgery or Material Fraud

A court may enjoin the issuer from honoring a presentation (or grant similar relief against an issuer) when an applicant claims forgery or material fraud only if the court finds that [*Com. Code* § 5109(b); e.g., *Hendricks v. Bank of Am.* (9th Cir. 2005) 408 F.3d 1127, 1139-1142 (court properly issued injunction to prevent issuer from honoring beneficiary's request to draw on letter of credit, in order to prevent material fraud against plaintiff, who was liable on letter of credit)]:

- The relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;
- A beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because relief is granted;
- All of the conditions that entitle a person to relief under the law of California are met; and
- On the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for

protection under *Com. Code § 5109(a)(1)* [see § 56.50[2][c]].

The standard for injunctive relief against an issuer is high, and the burden remains on the applicant to show, by evidence, and not by mere allegation, that this type of relief is warranted [*Com. Code § 5109* (UCC Comment 4)].

Although the statute deals primarily with injunctions, against honor, it also cautions against granting "similar relief" [see *Com. Code § 5019(b)*]; and the same principles apply when the applicant (or issuer) attempts to achieve the same legal outcome by injunction against presentation [see *Ground Air Transfer, Inc. v. Westates Airlines, Inc. (1st Cir. 1990) 899 F.2d 1269, 1272* ; see also [b], below], interpleader, declaratory judgment, or attachment [*Com. Code § 5109* (UCC Comment 5) (cautioning that expanded use of any of these devices could threaten independence principle)].

[b] Against Beneficiary

A court may also issue an injunction against a beneficiary to enjoin the presentation of documents in proper circumstances, such as when a beneficiary fails to comply with conditions or warranties [see *Ground Air Transfer, Inc. v. Westates Airlines, Inc. (1st Cir. 1990) 899 F.2d 1269, 1272* ; *Mitsui Manufacturers Bank v. Texas Commerce Bank-Fort Worth (1984) 159 Cal. App. 3d 1051, 1058-1059, 206 Cal. Rptr. 218* ; *Steinmeyer v. Warner Cons. Corp. (1974) 42 Cal. App. 3d 515, 518, 116 Cal. Rptr. 57*] .

[8] Real Estate Transactions

A letter of credit is not enforceable by any party to the credit in a loan transaction in which all of the following circumstances exist [*Code Civ. Proc. § 580.7(b)*]:

- The customer is a natural person;
- The letter of credit is issued to the beneficiary to avoid a default of the existing loan; and
- The existing loan is secured by a purchase money deed of trust or purchase money mortgage on specified types of real property.

With respect to an obligation that is secured by a mortgage or deed of trust on real property or an estate for years in real property, and that is also supported by a letter of credit, neither the presentment, receipt of payment, or enforcement of a draft or demand for payment under the letter of credit by the beneficiary, nor the honor or payment of, or the demand for reimbursement or enforcement of any reimbursement obligation relating to, the letter of credit by the issuer constitutes any of the following [*Code Civ. Proc. § 580.5(b)*]:

- An action within the meaning of *Code Civ. Proc. § 726(a)*;
- A money judgment for a deficiency or a deficiency judgment within the meaning of *Code Civ. Proc. §§ 580a, 580b, 580d, or 726(b)* or its functional equivalent; or
- A violation of *Code Civ. Proc. §§ 580a, 580b, 580d, or 726*.

This is the case whether any of these actions was done either before or after the judicial or nonjudicial foreclosure of the mortgage or deed of trust or conveyance in lieu of foreclosure [*Code Civ. Proc. § 580.5(b)*].

The 1994 legislative changes to *Code Civ. Proc. § 580.5* [Stats. 1994, ch. 611, § 5] were made to confirm the independent nature of the letter of credit and to abrogate the holding in *Western Security Bank v. Superior Court* [

Western Security Bank v. Superior Court (1993) 25 Cal. Rptr. 2d 908]. In that case, the court held that presentment of a draft under a standby letter of credit issued in connection with a real property secured loan following foreclosure violated *Code Civ. Proc.* § 580d and constituted a "fraud or other defect not apparent on the face of the documents" under former *Com. Code* § 5114(2)(b).

The Legislature also intended to confirm the expectation of the parties to a contract that underlies a letter of credit, that the beneficiary will have available the value of the real estate collateral and the benefit of the letter of credit without regard to the order in which the beneficiary may resort to either [Stats. 1994 ch. 611, § 5].

The California Supreme Court held that the Legislature plainly intended that the 1994 legislation did not effect a change in the law but simply clarified and confirmed the law prior to the Court of Appeal's opinion in *Western Security Bank v. Superior Court* (1997) 15 Cal. 4th 232, 252-253, 62 Cal. Rptr. 2d 243, 933 P.2d 507].

[9] Statute of Limitation

An action to enforce a right or obligation arising under the UCC--Letters of Credit must be commenced within one year after the expiration date of the relevant letter of credit or one year after the cause of action accrues, whichever occurs later [*Com. Code* § 5115]. This limitation on actions applies not only to wrongful dishonor claims against the issuer, but also to claims against the issuer and applicant arising from the reimbursement agreement [*Com. Code* § 5115 (UCC Comment 2)].

This statute of limitation governs letters of credit (and transactions associated with those letters of credit) issued on or after January 1, 1997 [Stats. 1996, ch. 176 § 14; *see Com. Code* § 5115 (UCC Comment 3)]. If a letter of credit was issued before that date and an obligation on that letter was breached after that date, the statute of limitation is governed by prior law [Stats. 1996, ch. 176 § 15; *see Com. Code* § 5115 (UCC Comment 3)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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[Reserved]

§§ 56.53[Reserved]



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1. Funds Transfers Under Commercial Code

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§ 56.60 Scope and Application of Division

Under Division 11 of the Commercial Code, a "funds transfer" is a series of transactions initiated for the purpose of making payment to an identified party, called a "beneficiary" [*Com. Code § 11104(a)*]. A funds transfer is begun when an individual or bank, referred to as the "originator," sends a "payment order" instructing another bank to pay (or to cause another bank to pay) a fixed or determinable amount of money to the beneficiary [*Com. Code §§ 11103(a)(1), 11104(c)*]. A payment order may be sent directly to the "beneficiary's bank," or to an "intermediary bank" that issues a corresponding payment order to another "receiving bank" [*Com. Code § 11103(a)(2)-(4)* (definitions)]. The funds transfer is completed when the beneficiary's bank accepts a payment order for the benefit of the beneficiary of the originator's payment order [*Com. Code § 11104(a)*].

A payment order may be transmitted to a receiving bank orally, electronically, or in writing, either directly or by means of an agent, a "funds-transfer system" [*see Com. Code § 11105(a)(5)* (definition)], or by a communications system [*Com. Code § 11103(a)(1)*]. The payment order must not state any condition to payment other than time of payment, and the receiving bank must be reimbursed by debiting an account of, or otherwise receiving payment from, the "sender" [*Com. Code § 11103(a)(1); see Com. Code § 11103(a)(5)* (definition)]. Each sender and receiving bank involved in the funds transfer must follow specific statutory requirements in accepting or rejecting payment orders [*see §§ 56.63, 56.67*], issuing payment orders pursuant to the original order, verifying orders, receiving orders, and disbursing proper payment or credit [*see § 56.65*].

Division 11 of the Commercial Code [*see Com. Code §§ 11101-11507*] contains specific creditor process rules [*see Com. Code § 11502*], and contains its own choice of law rules [*Com. Code § 11507*]. The requirements of Division 11 of the Commercial Code do not apply to a funds transfer any part of which is governed by the federal Electronic Fund Transfer Act of 1978 [*Com. Code § 11108; see 15 U.S.C. §§ 1693-1693r; see also §§ 56.80-56.92*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Funds Transfers (Article 4A)General OverviewCommercial Law (UCC)Funds Transfers
(Article 4A)Execution of Payment OrdersCommercial Law (UCC)Funds Transfers (Article 4A)Issuance & Acceptance
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§ 56.61 Security Procedure

A payment order received by the receiving bank constitutes the "authorized" order of the person identified as the sender if that person authorized the order, or is otherwise bound by it under the law of agency [*Com. Code § 11202(a)*]. However, if the bank and the customer (the sender) have agreed that the authenticity of payment orders issued to the bank will be verified pursuant to a security procedure, a payment order is "effective" as the customer's order (regardless of whether or not the payment order is "authorized") if the order is verified pursuant to a security procedure [*see Com. Code § 11202(b)*].

A "security procedure" is a procedure established by agreement between a customer and a receiving bank for the purpose of one or both of the following [*Com. Code § 11201*]:

- Verifying that a payment order or communication amending or canceling a payment order is that of the customer; or
- Detecting error in the transmission or the content of the payment order or communication.

A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback procedures, or similar security devices; however, a comparison of a signature on a payment order or communication with an authorized specimen signature of the customer is not by itself a security procedure [*Com. Code § 11201*].

Once a bank and customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, any payment order received by the receiving bank is considered an effective payment order of the customer, whether or not authorized, provided that the security procedure satisfies two requirements. First, the security procedure must be a commercially reasonable method of providing protection against unauthorized payment orders. Second, the bank must prove that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the

customer restricting acceptance of payment orders issued in the name of the customer [*Com. Code § 11202(b)*].

The "commercial reasonableness" of a security procedure constitutes a question of law, to be resolved by considering the following factors [*Com. Code § 11202(c)*]:

- The wishes of the customer expressed to the bank;
- The size, type, and frequency of payment orders normally issued by the customer to the bank;
- Any alternative security procedures offered to the customer; and
- Security procedures in general usage by other similarly situated receiving banks and customers.

A security procedure is deemed commercially reasonable if the customer chooses that particular procedure after the bank offers, and the customer refuses, another security procedure that is commercially reasonable for that customer, and the customer expressly agrees in writing to be bound by any payment order, whether or not authorized, issued in the customer's name and accepted by the bank in compliance with the security procedure selected [*Com. Code § 11202(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 56.62 Identification of Beneficiary

A payment order must identify the beneficiary in order for the beneficiary's bank to make proper payment. If a payment order received by the beneficiary's bank refers to a name, bank account number, or other identification of a nonexistent or unidentifiable person or account, no person has rights as a beneficiary of the order and acceptance cannot occur. If only an identifying number is supplied, or a conflict between a name and identifying number arises, the Commercial Code provides a series of rules to determine the rights and obligations of the parties involved [*Com. Code § 11207(a)*; see *Com. Code §§ 11207(b)-(d), 11208*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 56.63 Acceptance of Payment Orders

In general, a receiving bank, other than a beneficiary's bank, "accepts" a payment order when it executes a payment order [*Com. Code § 11209(a)*; *but see Com. Code § 11209(d)*]. A payment order is "executed" by the receiving bank when it issues a payment order intended to carry out the payment order received by that bank [*Com. Code § 11301(a)*; *see § 56.68*]. However, a payment order issued to an originator's bank (that is, not the beneficiary's bank) cannot be accepted until the execution date [*Com. Code § 11209(d)*; *see Com. Code § 11301(b)* ("execution date" defined); *see also § 56.68*]. If the originator's bank executes the originator's payment order before the execution date and the order is subsequently canceled [*see Com. Code § 11211(b)*; *see also § 56.66*], the bank may recover from the beneficiary any payment received to the extent allowed by the law governing mistake and restitution [*Com. Code § 11209(d)*].

In general, a payment order is accepted by a beneficiary's bank at the earliest of the following times [*Com. Code § 11209(b)*; *but see Com. Code § 11209(c), (d)* (limitations on acceptance)]:

- When the bank pays the beneficiary [*see Com. Code § 11405(a), (b)*] or notifies the beneficiary of the receipt of the order or that the beneficiary's account has been credited with respect to the order, unless the notice indicates that (a) the bank is rejecting the order, or (b) funds with respect to the order may not be withdrawn or used until receipt of payment from the sender of the order;
- When the bank receives payment of the entire amount of the sender's order [*see Com. Code § 11403(a)(1), (2)* (payment of the sender's obligation)]; or
- The opening of the bank's next funds-transfer business day following the payment date of the order if, at that time, the amount of the order is fully covered by a withdrawable credit balance in an authorized account of the sender, or the bank has otherwise received full payment from the sender, unless the order was rejected within specified times [*see Com. Code § 11209(b)(3)*].

Nevertheless, acceptance by a beneficiary's bank cannot occur before the order is received by the receiving bank [*Com.*

Code § 11209(c)]. Acceptance pursuant to payment of the entire amount of the order [*see Com. Code §§ 11209(b)(2), (3), 11403(a)(1), (2)*] does not occur if the beneficiary of the payment order does not have an account with the receiving bank, the account is closed, or the receiving bank is not permitted by law to receive credits for the beneficiary's account [*Com. Code § 11209(c)*]. Finally, a payment order issued to a beneficiary's bank cannot be accepted until the payment date [*Com. Code § 11209(d)*; *see Com. Code § 11401(b)* ("payment date" defined); *see also § 56.68*]. If the originator's bank pays the beneficiary of the originator's payment order before the payment date and the order is subsequently canceled [*see Com. Code § 11211(b)*; *see also § 56.66*], the bank may recover from the beneficiary any payment received to the extent allowed by the law governing mistake and restitution [*Com. Code § 11209(d)*].

If an accepted payment order is an effective order of a customer identified as sender [*see Com. Code § 11202(b)*; *see also § 56.61*], but is not an authorized order [*see Com. Code § 11202(a)*; *see also § 56.61*], the receiving bank may limit the extent to which it is entitled to enforce or retain payment of the payment order by express written agreement [*Com. Code § 11203(a)(1)*]. The receiving bank is not entitled to enforce or retain payment of the payment order if the customer proves that the order was not caused, directly or indirectly, by a person (1) entrusted at any time with duties to act for the customer with respect to payment orders or the security procedure, or (2) who obtained access to the transmitting facilities of the customer or who obtained, from a source controlled by the customer and without authority of the receiving bank, information facilitating a breach of the security procedure, regardless of how the information was obtained or whether the customer was at fault. "Information" includes any access device, computer software, and the like [*Com. Code § 11203(a)(2)*]. These rules are equally applicable to amendments of payment orders [*Com. Code § 11203(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 56.64 Liability of Receiving Bank for Erroneous Acceptance

If a receiving bank accepts a payment order issued in the name of its customer as sender and the order is (1) not authorized and not effective [*see Com. Code § 11202; see also § 56.61*], or (2) effective, but not enforceable, in whole or in part, against the customer [*see Com. Code § 11203; see also § 56.63*], the bank must refund any payment received from the customer for the order to the extent that the bank is not entitled to enforce payment [*Com. Code § 11204(a)*]. Ordinarily, the bank must pay interest on the refundable amount, calculated from the date that the bank received payment until the date of the refund. However, the bank need not pay interest if the customer fails to (1) exercise ordinary care to determine that the order was not authorized by the customer and (2) notify the bank of the relevant facts within a reasonable time (not exceeding 90 days) after the customer received notification from the bank that the order was accepted, or that the customer's account was debited with respect to the order [*Com. Code § 11204(a)*]. Although the definition of the term "reasonable time" may be varied by agreement [*see Com. Code § 1302(b)*], the receiving bank's obligation to refund payment under *Com. Code § 11204(a)* may not otherwise be varied by agreement [*Com. Code § 11204(b)*]. The bank is not entitled to any recovery from the customer based on the customer's failure to notify the bank under these circumstances [*Com. Code § 11204(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 56.65 Liability for Erroneous Payment Orders

An accepted payment order transmitted pursuant to a security procedure for the detection of error may nevertheless contain errors in the payment order. If an accepted payment order erroneously instructed payment to a beneficiary not intended by the sender, erroneously instructed payment in an amount greater than the amount intended by the sender, or was an erroneously transmitted duplicate of a payment order previously sent by the sender, the following rules apply [*Com. Code § 11205(a)*; see *Com. Code § 11205(c)* (rules applicable to amendments of payment orders)]:

- If the sender proves that he or she or a person acting on his or her behalf [*see Com. Code § 11206(a)*] complied with the security procedure and that the error would have been detected if the receiving bank had also complied, the sender is not obliged to pay the order to the extent stated in the next two paragraphs.
- If the funds transfer is completed on the basis of a payment order that erroneously instructed payment to an unintended beneficiary or was an erroneously transmitted duplicate, the sender is not obliged to pay the order and the receiving bank is entitled to recover from the beneficiary any amount paid, to the extent allowed by the law governing mistake and restitution.
- If the funds transfer is completed on the basis of a payment order that erroneously instructed payment in an amount greater than that intended by the sender, the sender is not obliged to pay the order to the extent of the excess, and the receiving bank is entitled to recover from the beneficiary the excess amount.

If the sender is not obliged to pay all or part of an order under these rules, and the sender receives notification from the receiving bank that the order was accepted by the bank (or that the sender's account was debited with respect to the order), the sender has a duty to exercise ordinary care, on the basis of information available to the sender, to discover the error and to advise the bank of the relevant facts within a reasonable time, not exceeding 90 days, after the bank's notification was received by the sender. If the bank proves that the sender failed to perform that duty, the sender is liable

to the bank for any loss that the bank proves it incurred as a result of that failure, up to and including the amount of the sender's order [*Com. Code § 11205(b)*].

Legal Topics:

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§ 56.66 Cancellation and Amendment of Payment Orders

[1] Procedure

A sender may decide to cancel or amend a payment order. The communication of that decision to the receiving bank, like a notice of rejection [*see Com. Code § 11210(a); see also § 56.67*], may be transmitted electronically, orally, or in writing [*Com. Code § 11211(a)*]. However, if a security procedure is in effect between the sender and the receiving bank, the communication is not effective to cancel or amend the order unless the communication is verified pursuant to the security procedure, or the bank agrees to the cancellation or amendment [*Com. Code § 11211(a)*].

[2] Effect

A communication, properly transmitted by the sender to the receiving bank, canceling or amending a payment order [*see Com. Code § 11211(a)*], is effective to cancel or amend the order if notice of the communication is received at a time and in a manner that affords the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order [*Com. Code § 11211(b)*]. After a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees to allow it, or a funds-transfer system rule [*see Com. Code § 11501(b)* (definition)] allows cancellation or amendment without agreement of the bank [*Com. Code § 11211(c); see Com. Code § 11211(h)*]. Keeping in mind that several banks may be involved in the funds-transfer process, with respect to a payment order accepted by a receiving bank other than the beneficiary's bank, cancellation or amendment is not effective unless a conforming cancellation or amendment of the payment order issued by the receiving bank is also made [*Com. Code § 11211(c)(1)*].

With respect to a payment order accepted by the beneficiary's bank, cancellation or amendment is not effective unless the order was issued in execution of an unauthorized payment order, or because of a mistake by a sender in the funds transfer that resulted in the issuance of a payment order that does any of the following [*Com. Code § 11211(c)(2)*]:

- Duplicates a payment order previously issued by the sender;

- Orders payment to a beneficiary not entitled to receive payment from the originator; or
- Orders payment in an amount greater than the amount the beneficiary was entitled to receive from the originator.

If the payment order is canceled or amended, the beneficiary's bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law of restitution and mistake [*Com. Code § 11211(c)(2)*].

[3] Cancellation Unaccepted Payment Order

An unaccepted payment order is canceled by operation of law at the close of the fifth funds-transfer business day of the receiving bank after the execution date or payment date of the order [*Com. Code § 11211(d)*]. A "funds-transfer business day" of a receiving bank means the part of a day during which the receiving bank is open for the receipt, processing, and transmittal of payment orders and cancellations and amendments of payment orders [*Com. Code § 11105(a)(4)*].

In the case of death or incapacity of the sender, the payment order is not revoked unless the receiving bank knows of the death or of an adjudication of legal incapacity and has a reasonable opportunity to act before acceptance of the order [*Com. Code § 11211(g)*].

Once a payment order has been canceled, the order cannot subsequently be accepted [*Com. Code § 11211(e)*].

[4] Cancellation Following Acceptance

If a payment order is first accepted and then canceled, the acceptance is nullified and the rights and obligations based on that order are extinguished. The amendment of a payment order is deemed to be both a cancellation of the original order at the time of the amendment and an issuance of a new payment order in the amended form [*Com. Code § 11211(e)*].

In general, if the receiving bank accepts a payment order and then agrees to the cancellation or amendment of that order by the sender, or if the receiving bank is bound by a funds-transfer system rule allowing cancellation or amendment without the bank's agreement, the sender is liable to the bank for any loss and expenses, including reasonable attorneys' fees, incurred by the bank as a result of the cancellation or amendment, or the attempted cancellation or amendment. The sender remains liable whether or not the cancellation or amendment is effective [*Com. Code § 11211(f)*]. However, the sender is not liable under these circumstances if an agreement of the parties or an applicable funds-transfer system rule provides to the contrary [*Com. Code § 11211(f)*], with the exception that a funds-transfer system rule is ineffective if it conflicts with the cancellation and amendment rules respecting the beneficiary's bank [*Com. Code § 11211(h)*; see *Com. Code § 11211(c)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 56.67 Rejection of Payment Orders

To reject a payment order, a receiving bank must transmit a notice of rejection to the sender. The notice may be transmitted orally, electronically, or in writing and use any words sufficient to convey the rejection or refusal to pay the order [*Com. Code § 11210(a)*]. A notice sent by reasonable means, under the prevailing circumstances, is effective upon transmission. If notice of rejection is given by a means that is not reasonable, rejection is effective when the notice is received. If an agreement of the sender and receiving bank establishes the means to be used to reject a payment order, any means complying with the agreement is reasonable and any means not complying with the agreement is not reasonable unless no significant delay in receipt of the notice results from using the noncomplying means [*Com. Code § 11210(a)*].

A receiving bank other than the beneficiary's bank that fails to execute a payment order despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order may be required to pay interest to the sender on the amount of the payment order. The bank is obliged to pay interest to the sender only if the sender's authorized account does not bear interest and the sender did not receive a notice of rejection on the execution date [*Com. Code § 11210(b)* (calculation of interest due sender)].

Generally, when a receiving bank suspends payments, all unaccepted payment orders issued to it are deemed rejected at the time that the bank suspends payments [*Com. Code § 11210(c)*]. The acceptance of a payment order precludes a later rejection of the order. Similarly, the rejection of a payment order precludes a later acceptance of the order [*Com. Code § 11210(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 56.68 Execution of Sender's Payment Order by Receiving Bank

[1] When Executed

A payment order is executed by the receiving bank when it issues a payment order intended to carry out the payment order received by the bank. Thus, a payment order received by the beneficiary's bank may be accepted but not executed [*Com. Code § 11301(a)*]. The day on which the receiving bank may properly issue a payment order in execution of the sender's order is the "execution date." The execution date may be determined by instruction from the sender, but cannot be earlier than the day the order is received. Absent instruction from the sender, the execution date is the day that the payment order is received. If the sender's instruction states a payment date, the execution date is the payment date, or any earlier date reasonably necessary to allow payment to the beneficiary on the payment date [*Com. Code § 11301(b)*].

[2] Effect of Acceptance

In general, once a receiving bank other than the beneficiary's bank accepts a payment order [*see Com. Code § 11209(a)*], the bank assumes specific obligations in executing the order pursuant to the sender's instructions [*Com. Code § 11302(a)*; *but see Com. Code § 11302(b)-(d)*]. The receiving bank must issue, on the execution date, a payment order complying with the sender's order. The receiving bank must follow the sender's instructions concerning (1) the use in carrying out the funds transfer of any intermediary bank or funds-transfer system, or (2) the means by which payment orders are to be transmitted in the funds transfer. If the originator's bank issues a payment order to an intermediary bank, the originator's bank is obliged to instruct the intermediary bank according to the originator's instruction. An intermediary bank in the funds transfer is similarly bound by an instruction given to it by the sender of the payment order it accepts [*Com. Code § 11302(a)(1)*].

In addition, if the sender's instruction states that the funds transfer is to be carried out by wire transfer or telephonically, or otherwise indicates that the funds transfer is to be carried out by the most expeditious means, then the receiving bank must transmit its payment order by the most expeditious available means, and instruct any intermediary bank accordingly. If a sender's instruction states a payment date, the receiving bank must transmit its payment order at a time and by means reasonably necessary to allow payment to the beneficiary on the payment date or as soon thereafter as is

feasible [*Com. Code § 11302(a)(2)*].

[3] Discretion of Receiving Bank

The general rule regarding the receiving bank's obligations in executing the payment order pursuant to the sender's instructions [*see Com. Code § 11302(a)*] is tempered by other considerations. For example, unless otherwise instructed, a receiving bank executing a payment order may use any funds-transfer system if use of that system is reasonable in the circumstances. Further, the receiving bank may issue a payment order to the beneficiary's bank or to an intermediary bank through which a payment order conforming to the sender's order can expeditiously be issued to the beneficiary's bank, if the receiving bank exercises ordinary care in the selection of the intermediary bank.

In addition, a receiving bank is not required to follow a sender's instruction designating a funds-transfer if the receiving bank determines, in good faith, that it is not feasible to follow the instruction or that following the instruction would unduly delay completion of the funds transfer [*Com. Code § 11302(b)*].

Unless the receiving bank is instructed to use the most expeditious means [*see Com. Code § 11302(a)(2)*], or is otherwise instructed, the receiving bank may execute a payment order by transmitting the order by first-class mail or by any reasonable means under the circumstances. Even if the sender instructs the receiving bank to execute the order by a particular means, the bank may either follow the instruction or use a means as expeditious as the means stated [*Com. Code § 11302(c)*].

[4] Deduction of Service Charges

Without instructions from the sender, the receiving bank may not deduct its charges for services and expenses in connection with the execution of the sender's order from the payment sent to the beneficiary. Further, a receiving bank may not instruct a subsequent receiving bank to obtain payment of its charges in the same manner [*Com. Code § 11302(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 56.69 Errors in Execution of Payment Orders

[1] Amount Greater Than Order

A receiving bank that executes a sender's payment order by issuing a payment order in an amount greater than the amount of the sender's order, or that issues a payment order in execution of the sender's order and then issues a duplicate order, is entitled to payment of the amount of the sender's order if the order is properly accepted by another receiving bank [*Com. Code § 11303(a)*; see *Com. Code § 11402(c)* (payment of orders); see also § 56.73]. The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received, to the extent of the law governing mistake and restitution [*Com. Code § 11303(a)*].

[2] Amount Less Than Order

A receiving bank that executes the payment order of the sender by issuing a payment order in an amount less than the amount of the sender's order is entitled to payment of the amount of the sender's order if the order is properly accepted by another receiving bank [*Com. Code § 11303(b)*; see *Com. Code § 11402(c)* (payment of orders); see also § 56.73] and the bank corrects its mistake by issuing another payment order to make up the difference to the beneficiary of the sender's order. If the error is not corrected, the bank is permitted to receive or retain only the amount of the sender's order equal to the amount of the erroneous payment order [*Com. Code § 11303(b)*]. However, *Com. Code § 11303(b)* does not apply if a receiving bank executes the sender's payment order by issuing a payment order in an amount less than the amount of the sender's order for the purpose of obtaining payment of its charges for services and expenses pursuant to instruction of the sender [*Com. Code § 11303(b)*].

[3] Wrong Beneficiary

If a receiving bank executes the sender's payment order by issuing a payment order to a beneficiary who is different from the beneficiary of the sender's order and the funds transfer is completed on the basis of that error, the sender of the erroneously executed payment order and all previous senders in the funds transfer are relieved from paying the payment orders they issued. The bank issuing the payment order to the wrong beneficiary is entitled to recover from that

beneficiary to the extent permitted by the law of mistake and restitution [*Com. Code § 11303(c)*].

[4] Duty of Sender

If the sender of a payment order that is erroneously executed [*see Com. Code § 11303*] receives notification from the receiving bank that the order was executed (or that the sender's account was debited with respect to the order), the sender has a duty to exercise ordinary care to determine, on the basis of information available to him or her, that the order was erroneously executed. The sender must then notify the bank of the relevant facts within a reasonable time, not exceeding 90 days, after receiving the bank's notification [*Com. Code § 11304*]. A bank cannot recover from the sender based on the sender's failure to perform his or her statutory duties to determine whether or not the order was erroneously executed and, if so, to notify the bank. However, this failure releases the bank from any obligation to pay interest on any refundable amounts [*see Com. Code § 11402(d)*] for the period before the bank learns of the execution error [*Com. Code § 11304*].

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§ 56.70 Liability of Receiving Bank for Erroneous Executions

A receiving bank has a duty to execute the payment order without delay pursuant to the sender's instruction [*see Com. Code §§ 11301(b)* ("execution date" defined), 11302]. If the funds transfer is completed, but the receiving bank's erroneous execution of the payment order [*see Com. Code § 11302* (execution obligations); *see also § 56.69*] results in a delay in payment to the beneficiary, the receiving bank must pay interest for the period of the delay caused by the improper execution to either the originator or the beneficiary of the funds transfer [*Com. Code § 11305(a)*]. In addition to interest, the receiving bank is liable for damages, including consequential damages, to the extent provided in an express written agreement of the receiving bank [*Com. Code § 11305(a), (c)*; *see Com. Code § 11305(f)* (receiving bank cannot otherwise vary liability by agreement)].

If the receiving bank breaches its execution obligations [*see Com. Code § 11302*; *see also § 56.69*], the bank is liable to the originator of the order if the breach results in any of the following [*Com. Code § 11305(b)*]:

- The noncompletion of the funds transfer;
- The failure to use an intermediary bank designated by the originator; or
- The issuance of a payment order that does not comply with the terms of the payment order of the originator.

In these situations, the receiving bank will be liable for its expenses in the funds transfer, incidental expenses, and interest losses to the extent not covered by *Com. Code § 11305(a)* [*Com. Code § 11305(b)*]. In addition, the receiving bank is liable for damages, including consequential damages, to the extent provided in an express written agreement of the receiving bank [*Com. Code § 11305(b), (c)*; *see Com. Code § 11305(f)* (receiving bank cannot otherwise vary liability by agreement)].

Finally, reasonable attorneys' fees are recoverable if demand for compensation for these breaches of the receiving bank's

execution obligations [*see Com. Code § 11305(a), (b)*] is made and refused before an action is brought on the claim [*Com. Code § 11305(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Funds Transfers (Article 4A) Execution of Payment Orders Commercial Law (UCC) Funds Transfers (Article 4A) Receipt of Payment Orders



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§ 56.71 Liability of Receiving Bank for Failure to Execute Payment Orders

When a receiving bank fails to execute a payment order that it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction, incidental expenses, and interest losses resulting from the failure to execute. Additional damages, including consequential damages, are recoverable, but only to the extent provided in an express written agreement of the receiving bank [*Com. Code § 11305(d)*]. If a claim is made for breach of the express execution agreement, and the agreement does not provide for damages, attorneys' fees are recoverable if demand for compensation [*see Com. Code § 11305(d)*] is made and refused before an action is brought on the claim [*Com. Code § 11305(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Funds Transfers (Article 4A)Execution of Payment OrdersCommercial Law (UCC)Funds Transfers (Article 4A)Receipt of Payment Orders



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§ 56.72 Sender's Obligation to Pay for Accepted Payment Orders

With respect to a payment order issued to the beneficiary's bank, the acceptance of the order by the bank obliges the sender to pay the bank the amount of the order [*Com. Code § 11402(a), (b); but see Com. Code §§ 11205* (effect of erroneous execution on sender's duty to pay), 11207 (inaccurate identification of beneficiary precludes acceptance of order)]. However, payment is not due until the payment date [*Com. Code § 11402(b)*]. The "payment date" of a payment order is the day on which the amount of the order is payable to the beneficiary's bank. The payment date may be determined by the sender's instruction, but it cannot be earlier than the day that the order is received by the beneficiary's bank. Unless otherwise determined, the payment date is the day that the order is received by the beneficiary's bank [*Com. Code § 11401*].

With respect to a payment order issued to a receiving bank other than the beneficiary's bank, the acceptance of the order by the receiving bank obliges the sender to pay the bank the amount of the sender's order. However, payment is not due until the execution date of the sender's order [*Com. Code § 11402(c)*]. The "execution date" is the day on which the receiving bank may properly issue a payment order in execution of the sender's order. The date may be determined by the instruction of the sender, but it cannot be earlier than the day that the order is received. Unless otherwise determined, the execution date is the day on which the order is received [*Com. Code § 11301(b)*]. The sender is excused from paying the order if the funds transfer is not completed by the acceptance by the beneficiary's bank of a payment order instructing payment to the beneficiary of that sender's order [*Com. Code § 11402(c); see Com. Code § 11402(e)*]. The right of the sender to be excused from paying the order may not be varied by agreement [*Com. Code § 11402(f)*].

If the sender of a payment order pays the order but was not obliged to pay all or part of the amount paid, the bank receiving payment is obliged to refund the amount that the sender was not obliged to pay [*Com. Code § 11402(d); see Com. Code § 11402(e); but see Com. Code §§ 11204, 11304* (interest nonpayable)]. The right of the sender of a payment order to receive a refund for the amount that the sender was not obliged to pay may not be varied by agreement [*Com. Code § 11402(f); see Com. Code § 11402(d)*].

The sender's obligation to pay the receiving bank [*see Com. Code § 11402*] is satisfied as follows [*Com. Code §*

11403(a); see *Com. Code* § 11403(d)]:

- If the sender is a bank, payment occurs when the receiving bank receives final settlement of the obligation through a Federal Reserve Bank or through a funds-transfer system.
- If the sender is a bank and the sender credited an account of the receiving bank with the sender, or caused an account of the receiving bank in another bank to be credited, payment occurs when the credit is withdrawn or, if not withdrawn, at midnight of the day on which the credit is withdrawable and the receiving bank learns of that fact.
- If the receiving bank debits an account of the sender with the receiving bank, payment occurs when the debit is made to the extent that the debit is covered by a withdrawable credit balance in the account.

If the sender and receiving bank are members of a funds-transfer system that nets obligations multilaterally among participants, the receiving bank receives final settlement when settlement is complete in accordance with the rules of the system. To the extent permitted by the rules of the system, the sender's obligation to pay the amount of the payment order may be satisfied by setting off and applying against the sender's obligation the right of the sender to receive payment from the receiving bank of the amount of any other payment order transmitted to the sender by the receiving bank through the system [*Com. Code* § 11403(b)]. If two banks transmit payment orders to each other under an agreement that the settlement of the obligations of each bank to the other [*see Com. Code* § 11402] will be made at the end of the day or other period, the total amount owed with respect to all orders transmitted by one bank will be set off against the total amount owed with respect to all orders transmitted by the other bank [*Com. Code* § 11403(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Funds Transfers (Article 4A)General OverviewCommercial Law (UCC)Funds Transfers (Article 4A)Issuance & Acceptance of Payment Orders



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§ 56.73 Payment of Orders by Banks

[1] General Obligation to Pay Order; Exceptions

In general, when a beneficiary's bank accepts a payment order, that bank is obliged to pay the amount of the order to the beneficiary [*Com. Code § 11404(a)*]. This rule does not apply if (1) the payment order is canceled [*see Com. Code § 11211(e)*]; (2) a funds-transfer system rule provides that payment is provisional until the beneficiary's bank receives payment for the accepted order [*see Com. Code § 11405(d)*]; or (3) the acceptance is nullified because of the funds-transfer system's failure to complete settlement pursuant to its rules with respect to any payment order in the funds transfer [*Com. Code § 11404(a)*; *see Com. Code § 11405(e)*].

[2] Time When Payment Is Due

Payment is ordinarily due on the payment date of the order [*Com. Code § 11404(a)*; *see Com. Code § 11401* ("payment date" defined); *see also § 56.72*]. However, if acceptance occurs on the payment date after the close of the funds-transfer business day of the bank, payment is due on the next funds-transfer business day. If the bank refuses to pay after demand by the beneficiary and receipt of notice of particular circumstances that will give rise to consequential damages as a result of nonpayment, the beneficiary may recover damages resulting from the bank's refusal to pay to the extent the bank had notice of the damages. The bank may avoid liability for damages if the bank proves that it did not pay because of a reasonable doubt concerning the right of the beneficiary to payment [*Com. Code § 11404(a)*].

The right of a beneficiary to receive payment and damages [*see Com. Code § 11404(a)*] may not be varied by agreement or a funds-transfer system rule [*Com. Code § 11404(c)*].

[3] Notification of Beneficiary; When Required

If the beneficiary's bank accepts a payment order that instructs payment to an account of the beneficiary, the bank must notify the beneficiary of the receipt of the order before midnight of the next funds-transfer business day following the payment date [*Com. Code § 11404(b)*]. If the payment order does not instruct payment to an account of the beneficiary,

the bank need only notify the beneficiary if notice is required by the order. Notice may be given by first-class mail or any other means that are reasonable under the circumstances. If the bank fails to give the required notice, the bank must pay interest to the beneficiary on the amount of the payment order from the day notice should have been given until the day that the beneficiary learned of the receipt of the payment order by the bank. No other damages are recoverable, but reasonable attorneys' fees are recoverable if a demand for interest is made and refused before an action is brought on the claim [*Com. Code § 11404(b)*].

The right of a beneficiary to be notified may be varied by agreement of the beneficiary, or by a funds-transfer system rule if the beneficiary is notified of the rule before the initiation of the funds transfer [*Com. Code § 11404(c)*; see *Com. Code § 11404(b)*].

[4] When Payment Occurs

If the beneficiary's bank credits an account of the beneficiary of a payment order, payment of the bank's obligation [see *Com. Code § 11404(a)*] occurs when and to the extent that (1) the beneficiary is notified of the right to withdraw the credit, (2) the bank lawfully applies the credit to a debt of the beneficiary, or (3) the bank otherwise makes the funds (with respect to the order) available to the beneficiary [*Com. Code § 11405(a)*]. If the beneficiary's bank does not credit an account of the beneficiary, the time when payment of the bank's payment obligation [see *Com. Code § 11404(a)*] occurs is governed by principles of law that determine when an obligation is satisfied [*Com. Code § 11405(b)*].

[5] Effect of Condition to Payment

In general, if the beneficiary's bank pays the beneficiary of a payment order under a condition to payment or the agreement of the beneficiary giving the bank the right to recover payment from the beneficiary if the bank does not receive payment of the order, the condition or agreement is not enforceable [*Com. Code § 11405(c)*]. However, a beneficiary's bank making a provisional payment may be entitled to a refund from the beneficiary under certain circumstances if permitted by an applicable funds-transfer system rule [see *Com. Code § 11405(d)*]. Similarly, the bank may be entitled to recover payment from the beneficiary if the bank's acceptance of the order is subsequently nullified because of the funds-transfer system's failure to complete settlement pursuant to its rules [see *Com. Code § 11405(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Funds Transfers (Article 4A)General OverviewCommercial Law (UCC)Funds Transfers (Article 4A)Issuance & Acceptance of Payment Orders



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§ 56.74 Payment in Discharge of Existing Obligation

Ordinarily, the originator of a funds transfer is deemed to pay the beneficiary of the originator's payment order (1) at the time a payment order for the benefit of the beneficiary is accepted by the beneficiary's bank in the funds transfer and (2) in an amount equal to the amount of the order accepted by the beneficiary's bank, but not more than the amount of the originator's order [*Com. Code § 11406(a)*]. This rule does not apply if (1) the payment order is canceled [*see Com. Code § 11211(e)*]; (2) a funds-transfer system rule provides that payment is provisional until the beneficiary's bank receives payment for the accepted order [*see Com. Code § 11405(d)*]; or (3) the acceptance is nullified because of the funds-transfer system's failure to complete settlement pursuant to its rules with respect to any payment order in the funds transfer [*Com. Code § 11406(a)*; *see Com. Code § 11405(e)*].

In general, if the originator's payment [*see Com. Code § 11406(a)*] is made to satisfy an obligation, the obligation is discharged to the same extent that discharge would result from payment to the beneficiary of the same amount in money [*Com. Code § 11406(b)*; *see Com. Code § 11406(c)* (determining whether discharge occurs)]. However, the obligation is not discharged if all of the following are true [*Com. Code § 11406(b)*]:

- The originator's payment was made by a means prohibited by the contract of the beneficiary with respect to the obligation;
- The beneficiary, within a reasonable time after receiving notice of receipt of the order by the beneficiary's bank, notified the originator of the beneficiary's refusal of the payment;
- Funds with respect to the order were not withdrawn by the beneficiary or applied to a debt of the beneficiary; and
- The beneficiary would suffer a loss that could reasonably have been avoided if payment had been made by a means complying with the contract.

If payment by the originator does not discharge the debt, the originator is subrogated to the rights of the beneficiary to receive payment from the beneficiary's bank [*Com. Code § 11406(b)*; see *Com. Code § 11404(a)*]. The originator's and beneficiary's rights concerning discharge noted above may be varied only by agreement of the originator and the beneficiary [*Com. Code § 11406(d)*]. For further discussion, see Ch. 77, *Discharge of Obligations* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Funds Transfers (Article 4A)General OverviewCommercial Law (UCC)Funds Transfers (Article 4A)Issuance & Acceptance of Payment Orders



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[Reserved]

§§ 56.75[Reserved]



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§ 56.80 Scope and Function of Electronic Fund Transfer Act

An "electronic fund transfer" is a transfer of funds initiated through a point-of-sale electronic terminal, automated teller machine, or other telephonic, electronic, or magnetic device. The term does not include a transaction originated by check, draft, or other paper instrument [see 15 U.S.C. § 1693a(6), (7)]. An electronic fund transfer is made through the use of what is commonly known as a debit card or PIN code [see 15 U.S.C. § 1693a(1) (definition of "accepted card or other means of access")] rather than through the use of commercial paper [see 15 U.S.C. § 1693a(6)].

The federal Electronic Fund Transfer Act [see 15 U.S.C. §§ 1693-1693r] provides consumer rights and safeguards, including limited liability, error resolution procedures, and disclosure requirements when funds are transferred electronically [see 15 U.S.C. §§ 1693, 1693a(6), (7)]. None of the rights prescribed by the Act can be waived by a consumer or any other person [15 U.S.C. § 1693a(6)].

With one important exception, the Act is limited in its application to the relationship between financial institutions and individual "consumers" (that is, natural persons) [see 15 U.S.C. §§ 1693(b), 1693a(5)]. The exception is that, if an electronic fund transfer system malfunction prevents a transfer initiated by a consumer to a third party who has agreed to accept payment by electronic fund transfer, the consumer's obligation is suspended until the malfunction is corrected and the transfer completed, or until the third party sends the consumer a written demand for paper payment [15 U.S.C. § 1693j].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesElectronic BankingFund TransfersCommercial Law (UCC)Funds Transfers (Article 4A)General Overview



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§ 56.81 Initiation of Electronic Fund Transfer Account

In general, a financial institution may not issue a debit card or other means of access to a consumer's account for the purpose of initiating an electronic fund transfer unless it is in response to an application from the consumer, or a renewal [15 U.S.C. § 1693i(a); 12 C.F.R. § 205.5(a)]. However, a nonvalidated access device may be distributed without prior solicitation if [15 U.S.C. § 1693i(b); 12 C.F.R. § 205.5(b)]:

- The device is not validated;
- The distribution is accompanied by complete disclosure of the consumer's rights and liabilities that will apply if the device is validated;
- The distribution is accompanied by an explanation that the device is not validated and an explanation of how to dispose of the device if validation is not desired; and
- The device is validated only in response to a request or application from the consumer and after verification of the consumer's identity.

For further discussion and a form for making the required disclosure, see § 56.240.

An institution may not condition employment, the extension of credit, or receipt of government benefits on the use an electronic fund transfer system [15 U.S.C. § 1693k].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesElectronic BankingFund TransfersCommercial Law (UCC)Funds Transfers (Article 4A)General Overview



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§ 56.82 Disclosure of Terms and Conditions

The Act requires that the terms and conditions under which a financial institution operates its electronic fund transfer system be disclosed to each consumer when the consumer contracts for that service. These disclosures must be clear and readily understandable, in writing, and in a form the consumer may keep [12 C.F.R. § 205.4(a)(1)]. The disclosures must include the matters required by the Act and the governing regulations, to the extent applicable [15 U.S.C. § 1693(c)(a)]. The disclosures may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 et seq.) [12 C.F.R. § 205.4(a)(1)]. For further discussion of the E-Sign Act, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*. The most important of these matters is notice of the consumer's liability for unauthorized electronic fund transfers and notice of the error resolution procedures [15 U.S.C. § 1693c(a)(1), (7); see 12 C.F.R. § 205.7]. Model disclosure clauses have been promulgated by the Federal Reserve Bank [see 12 C.F.R. pt. 205, app. A] and are available from all financial institutions offering electronic fund transfer services. For a form based on the model disclosures, see § 56.240.

Legal Topics:

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§ 56.83 Disclosure of Changes in Terms and Conditions

If a financial institution changes any previously disclosed terms or conditions in a manner that would cause customers to incur greater cost or liability, or decrease access to their accounts, it must notify customers in writing at least 21 days before the change becomes effective. A change may be implemented without prior notice if it is immediately necessary to maintain or restore the security of the system or a customer's account. The institution must give subsequent notice if the change is made permanent [15 U.S.C. § 1693c(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 56.84 Documentation of Transfers

When a consumer makes an electronic fund transfer, the financial institution holding his or her account must give the consumer written documentation evidencing the amount, date, and type of transfer. The documentation must also identify the consumer's account and any third party to whom or from whom funds are transferred. The location or identification of the terminal involved must also be shown [15 U.S.C. § 1693d(a)]. Documentation indicating a transfer to another party is admissible evidence of the transfer and prima facie proof that the transfer was made [15 U.S.C. § 1693d(f)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 56.85 Documentation of Automatic Deposits

If the consumer has arranged in advance for automatic deposits to his or her account at the rate of at least once in each successive 60-day period, and if the payor does not give the consumer notice of the transfer, the financial institution must give its customer notice of the credit. It may elect to give positive notice when the credit is made as scheduled or negative notice when the credit is not made as scheduled. The institution must disclose the method it has elected at the time the consumer contracts for the electronic fund transfer service [15 U.S.C. § 1693d(b); see 15 U.S.C. § 1693c(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-56 California Legal Forms--Transaction Guide § 56.86

§ 56.86 Periodic Statements

Except for accounts to which electronic access may be had only to make prearranged automatic deposits, the institution must also give each consumer a monthly statement for each period in which an electronic fund transfer affecting the account has occurred, or every three months, whichever is more frequent. This statement must repeat the information shown on the transaction documentation [see § 56.84]. It must also show the amount of any fee or charge assessed, the opening and closing balances, and the address and telephone number to be used for inquiries or notices of error [15 U.S.C. § 1693d(c)].

A periodic statement need not be given in two situations [see 15 U.S.C. § 1693d(c)-(e)]. First, if the consumer has a passbook account to which electronic access may be had only to make a preauthorized automatic deposit, the institution need only note the transfer in the passbook when it is presented [15 U.S.C. § 1693d(d)]. Second, if the account is not a passbook account but the only electronic access to it is by a preauthorized automatic deposit, the institution may give its customer a quarterly statement [15 U.S.C. § 1693d(e)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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22-56 California Legal Forms--Transaction Guide § 56.87

§ 56.87 Preauthorized Payments

Preauthorized electronic payments from a consumer's account may be authorized, but the authorization must be in writing. A copy of the authorization must be given to the consumer when made. A consumer may stop the payments from being made by giving the institution oral or written notice at any time up to three business days before the date scheduled for the transfer. However, the institution may require written confirmation of any oral instruction [15 U.S.C. § 1693e(a)]. If a preauthorized payment from a consumer's account to the same person will vary in amount, the institution or the payee must give the consumer reasonable advance notice of the amount and scheduled date of the payment [15 U.S.C. § 1693e(b)].

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§ 56.88 Limited Consumer Liability for Unauthorized Transfers

A consumer's liability for an unauthorized electronic fund transfer is limited [*see 15 U.S.C. § 1693a(11)* ("unauthorized electronic fund transfer" defined); *see also § 56.89*]. A consumer is liable for an unauthorized electronic fund transfer involving his or her account only if (1) the means of access used was an accepted access device (that is, a debit card or other means of access) and (2) the issuer of the card or other means of access provided a mechanism for identifying the user, such as a signature, photograph, fingerprint, or electronic or mechanical confirmation [*15 U.S.C. § 1693g(a)*]. An accepted access device is one that the consumer has requested and received or one that the consumer has signed, used, or authorized another to use [*15 U.S.C. § 1693a(1)*; *see 12 C.F.R. § 205.2(a)(2)*].

Consumer liability is limited to the lesser of \$50 or the amount obtained in an unauthorized transfer prior to the time notice of the facts is given to the financial institution [*see 15 U.S.C. § 1693g(a)(2)* ("notice" defined)]. However, the consumer need not be reimbursed for losses the institution proves would not have occurred but for the consumer's failure to report unauthorized use within 60 days after transmittal of a statement [*15 U.S.C. § 1693g(a)*; *see 15 U.S.C. § 1693a(11)* ("unauthorized electronic fund transfer" defined)].

A consumer need not be reimbursed for losses arising from the illicit use of a lost or stolen debit card that would not have occurred but for the consumer's failure to report the loss or theft within two business days after learning of it. However, the consumer's liability is limited to \$500 or the amount of unauthorized transfers that occur following the close of the two-day period, whichever is less [*15 U.S.C. § 1693g(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-56 California Legal Forms--Transaction Guide § 56.89

§ 56.89 Unauthorized Electronic Fund Transfer

An "unauthorized electronic fund transfer" is an electronic fund transfer from a consumer's account initiated by a person other than the consumer without actual authority to do so and from which the consumer receives no benefit [15 U.S.C. § 1693a(11)]. The term does not include any electronic fund transfer initiated by a person who was furnished the consumer's debit card or code before notice to the institution that person is no longer authorized to have such access [15 U.S.C. § 1693a(11)(A)]. A transfer initiated with fraudulent intent by the consumer or any person acting in concert with the consumer is not an unauthorized transfer [15 U.S.C. § 1693a(11)(B)].

An electronic fund transfer erroneously committed by a financial institution is not an unauthorized electronic fund transfer [15 U.S.C. § 1693a(11)(C)]. However, an institution may be liable to the consumer [see § 56.90] and the consumer may be able to obtain resolution of such an error [see 15 U.S.C. § 1693f; see also § 56.92].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesElectronic BankingFund Transfers



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22-56 California Legal Forms--Transaction Guide § 56.90

§ 56.90 Institution's Liability for Faulty Transfers

A financial institution is liable to a consumer for all damages caused by its failure to make a correct or timely electronic fund transfer in accordance with the consumer's instructions and the terms and conditions applicable to the account. However, there is no liability if the consumer's account has insufficient funds, if the funds are subject to a restriction on transfer, if the transfer would exceed an established credit limit, or if an electronic terminal has insufficient cash to complete the transaction [15 U.S.C. § 1693h(a)(1)]. An institution is liable for all damages caused by its failure to make an electronic fund transfer on the ground of insufficient funds if it failed to credit a deposit that would have provided sufficient funds to make the transfer [15 U.S.C. § 1693h(a)(2)].

The institution can avoid these liabilities if it shows by a preponderance of evidence that its action or failure to act resulted from an act of God or other circumstance beyond its control, that it exercised reasonable care to prevent the occurrence, and that it exercised such diligence as the circumstances required [15 U.S.C. § 1693h(b)(1)]. It can also avoid liability by a similar showing that the act or failure to act resulted from a technical malfunction that was known to the consumer when he or she tried to initiate a transfer or, in the case of a prearranged transfer, when the transfer should have occurred [15 U.S.C. § 1693h(b)(2)].

If the financial institution can show that the failure to make an electronic fund transfer was not intentional, but resulted from a bona fide error, it is liable only for actual damages. To take advantage of this limitation of liability, the institution must have maintained procedures reasonably adapted to avoid such errors [15 U.S.C. § 1693h(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesElectronic BankingFund Transfers



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22-56 California Legal Forms--Transaction Guide § 56.91

§ 56.91 Institution's Liability for Failure to Stop Payment

A financial institution is liable for all damages caused by its failure to stop payment of a preauthorized transfer from a consumer's account when instructed to do so under the terms and conditions of the account [*15 U.S.C. § 1693h(a)(3)*]. However, if the failure was not intentional, but resulted from a bona fide error, notwithstanding the maintenance of procedures designed to avoid any such error, the institution is liable only for actual damages [*15 U.S.C. § 1693h(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesElectronic BankingFund Transfers



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22-56 California Legal Forms--Transaction Guide § 56.92

§ 56.92 Error Resolution

[1] "Error" Defined

For the purpose of the error resolution provisions of the Act, an "error" is any of the following [15 U.S.C. § 1693f(f); 12 C.F.R. § 205.11(a)]:

- An unauthorized electronic fund transfer.
- An incorrect electronic fund transfer from or to the consumer's account.
- The omission from a periodic statement of an electronic fund transfer.
- A computational or bookkeeping error made by the institution relating to an electronic fund transfer.
- Receipt by the consumer of an incorrect amount of money from an electronic terminal.
- An electronic fund transfer not properly documented [see 12 C.F.R. §§ 205.9 (documentation of transfers), 205.10(a) (preauthorized transfers to a consumer's account)], including a request the consumer makes to determine whether an error exists under 12 C.F.R. § 205.11(a)(1)(i)-(vi) [see Paragraphs 1-6, above].
- A consumer's request for additional information or clarification concerning an electronic fund transfer or any documentation required by the Act [see 12 C.F.R. §§ 205.9 (documentation of transfers), 205.10(a) (preauthorized transfers to a consumer's account)].

[2] Procedure for Error Resolution

If the consumer detects an error [see 15 U.S.C. § 1693f(f) ("error" defined); see also [1], above] in the electronic funds

transfer documentation furnished by the financial institution, the consumer may be able to obtain resolution of the problem. The institution must receive oral or written notice of the claimed error within 60 days after having transmitted the documentation of a transfer. The notice must indicate the consumer's name and account number, the consumer's belief that the documentation or account contains an error and the amount of the error, and the reasons for the consumer's belief that an error has occurred. If the notice is oral, the institution may require written confirmation to be furnished within 10 days [15 U.S.C. § 1693f(a)]. For a notice of error, see § 56.241.

The institution must then investigate the alleged error, determine whether an error has occurred, and report or mail the results and its determination to the consumer within 10 business days [15 U.S.C. § 1693f(a)]. If the institution finds that an error did occur, it must correct the error within one business day after making that finding [15 U.S.C. § 1693f(b)].

Rather than investigating, reporting, and, if necessary, correcting a claimed error within the 10-day period discussed above, the institution may elect to give the consumer a provisional credit for the amount in dispute plus any applicable interest within 10 business days after receipt of the consumer's notice (less any amount for which the consumer is liable on an unauthorized transfer [see 15 U.S.C. § 1693g; see also § 56.88]) pending its investigation and determination. This investigation, however, must be completed within 45 days after receipt of the error notice; and, during the investigation period, the consumer must be allowed full use of the amount provisionally credited [15 U.S.C. § 1693f(c)].

[3] Liability for Treble Damages

An institution that does not give a provisional credit [see [2], above] is liable for treble damages if it fails to make a good-faith investigation of the claimed error or does not have a reasonable basis for believing that the consumer's account is not in error [15 U.S.C. § 1693f(e)(1)]. The institution is also liable for treble damages if it knowingly and willfully concludes that the consumer's account is not in error when that conclusion cannot reasonably be drawn from the evidence available to it at the time of the investigation [15 U.S.C. § 1693f(e)(2)].

[4] Denial of Claimed Error

If the institution determines after an investigation of a claimed error that an error did not occur, it must send the consumer an explanation of its findings within three business days after the end of its investigation. The explanation letter must include notice of the consumer's right to request reproductions of the documents upon which the institution relied in denying the consumer's claim that an error had occurred. When requested by the consumer, it must promptly send the consumer those reproductions [15 U.S.C. § 1693f(d)].

A consumer can sue for damages [see 15 U.S.C. § 1693m(a)] in federal court or in any other court of competent jurisdiction [15 U.S.C. § 1693m(g)] if the institution fails to comply with these requirements [see 15 U.S.C. § 1693m(a)]. In certain situations, the consumer is entitled to treble damages [15 U.S.C. § 1693f(e); see [3], above].

Legal Topics:

For related research and practice materials, see the following legal topics:
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[Reserved]

§§ 56.93[Reserved]



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22-56 California Legal Forms--Transaction Guide § 56.100

§ 56.100 Letters of Credit

[1] Facts

1. Basic information regarding each party to transaction:

- a. Name.
- b. Address.
- c. Telephone number.
- d. Capacity in letter of credit transaction:
 - (1) Applicant.
 - (2) Beneficiary.
 - (3) Issuer.
 - (4) Adviser.
 - (5) Other.

e. Legal status:

- (1) Individual.
- (2) Corporation.

- (3) Limited partnership.
- (4) General partnership.
- (5) Limited liability company.
- (6) Other.

2. Purpose of letter of credit:

- a. To facilitate import or export of goods.
- b. To facilitate domestic purchase or sale of goods.
- c. To facilitate international travel.
- d. To ensure completion of subdivision improvements.
- e. Other.

3. Amount of letter of credit.

4. Method by which customer will finance letter of credit:

- a. Security agreement covering goods.
- b. Cash deposit with bank.
- c. Authorizing bank to debit customer's account.

[2] Documents

NOTE:

The following documents are those required to comply with a typical import letter of credit. Banks may have differing policies on which documents are required for any particular letter of credit transaction. The presentation of these documents is necessary to obtain payment under the credit. Most of these documents are generated immediately before or during the shipping transaction. Therefore, some will not be available at the time of the initial client contact.

Documents listed in items 1 through 5 are generally the minimum required in an import transaction letter of credit. The other documents are supplementary, but often required.

- 1. Commercial invoice prepared by seller.
- 2. Sole original clean on board vessel marine bill of lading.

NOTE:

The term "sole original" specifies that only one original bill of lading is to be used. The term "clean" refers to a bill of lading that is free of any notation showing a defect in the goods or their packaging. An "on board vessel marine" bill of lading is used when goods are shipped by sea [see McCullough, Letters of Credit, ch. 3, *The Relationship Between the Account Party and the Issuer* (Matthew Bender)].

3. Marine and war risk insurance policy or certificate for 110 percent of invoice value.

NOTE:

It is generally the applicant's obligation to provide for adequate insurance. For a discussion of the obligation to insure and the type of insurance necessary, see McCullough, Letters of Credit, Chapter 3, *The Relationship Between the Account Party and the Issuer* (Matthew Bender).

4. Certificate of origin, for assessing customs duty on import.
5. If shipment is by container, packing list showing contents of containers.
6. Special summary customs invoice [see 19 C.F.R. §§ 141.81-141.91].
7. Certificate of quality to confirm independently that goods are of quality and quantity described, and are free of foreign matter.

NOTE:

Certificates of quality are issued by the United States Department of Agriculture or the respective foreign government inspecting agency.

8. Certificate of net shipped weight at port of loading.

NOTE:

Weight determinations in the United States are frequently performed by General Superintendence Company.

9. Draft, bill or exchange, or other demand for payment, if required.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC) Letters of Credit (Article 5) General Overview



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22-56 California Legal Forms--Transaction Guide § 56.101

§ 56.101 Errors Under Uniform Commercial Code Funds Transfer

[1] Facts

NOTE:

Separate statutory schemes apply to different types of transfers of funds. The California Uniform Commercial Code Funds Transfer governs transfers by "payment orders" [*Com. Code § 11104(a)*; *see Com. Code §§ 11101-11507*; *see also §§ 56.60, 56.74*]. The federal Electronic Fund Transfer Act governs transfers by point-of-sale electronic terminals and automatic teller machines [*15 U.S.C. § 1693a(6), (7)*; *see 15 U.S.C. §§ 1693-1693r*; *see also §§ 56.80-56.92*].

1. Name, address, and telephone number of following:
 - a. Originator of funds transfer.
 - b. Sender, if different.
 - c. Beneficiary of payment order.
2. Sender's instructions, if any, for particular payment order.
3. Name, address, and telephone number of banks involved in funds transfer.
4. Payment order identification number.
5. Date of payment order.

6. Nature of claimed error:

- a. Erroneous amount of payment order.
- b. Delayed payment or execution date of order.
- c. Erroneous beneficiary.

7. Means by which payment order was transmitted.

8. Names of agents or employees authorized to instruct transmission of payment order.

9. Date of refund or correction (if made by bank) to be used to determine total interest payment due.

10. Expenses incurred or damages suffered.

[2] Documents

1. Copy of payment order actually sent by originator.

2. Copy of any applicable security procedure.

3. Copy of sender's instructions to use particular intermediary bank or funds-transfer system.

4. Copy of any rules of funds-transfer system applicable to payment order.

5. Copy of any notification of acceptance or execution sent from receiving bank to sender.

6. Copy of any payment order sent by intermediary bank pursuant to sender's payment order [*see Com. Code § 11302(b)* (conforming payment orders)].

7. Documentation showing that security procedure, if applicable, was properly used.

8. Copy of any express written agreements between sender and banks involved in funds transfer.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Letters of Credit (Article 5) General Overview International Trade Law Letters of Credit



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22-56 California Legal Forms--Transaction Guide § 56.102

§ 56.102 Errors Under Electronic Fund Transfer Act

[1] Facts

NOTE:

The following facts will be useful in drafting a demand for resolution of an erroneous electronic fund transfer [*see* § 56.241].

1. Consumer's name, address, and telephone number.
2. Name, address, and telephone number of financial institution in which consumer's account is located.
3. Consumer's account number.
4. Type of electronic fund transfer.
5. Date and type of claimed error.
6. If electronic fund transfer credits are involved:
 - a. Name, address, and telephone number of parties from whom credits are to be received.
 - b. Amounts involved.
 - c. Dates on which credits are scheduled or were made.
7. If electronic fund transfer payments are involved:

- a. Name, address, and telephone number of parties to whom payments are to be made.
- b. Amounts involved.
- c. Dates on which payments are scheduled or were made.

[2] Documents

- 1. Copy of any document executed by consumer authorizing electronic transfers to or from his or her account.
- 2. Copy of documentation of disputed transfer issued by institution.
- 3. Copies of letters or documents relating to current problem with institution:
 - a. Consumer's demand for correction of claimed error.
 - b. Institution's correspondence resolving or refusing to resolve those problems or disputes.
- 4. Copies of letters or documents relating to previous problems with institution [*see 3, above*].

NOTE:

The attorney may wish to refer to previous problems with the institution in any relevant correspondence concerning the current transaction, and it may be desirable to attach copies of those letters or documents to that correspondence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesElectronic BankingFund Transfers



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22-56 California Legal Forms--Transaction Guide §§ 56.103-56.109

[Reserved]

§§ 56.103[Reserved]



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22-56 California Legal Forms--Transaction Guide § 56.110

§ 56.110 Determinations for Applicant of Letter of Credit

NOTE:

The "applicant" in a letter of credit transaction is generally an importer who intends to import goods from an exporter. In the typical transaction, the applicant will approach the issuer, generally an issuing bank, and apply for issuance of a letter of credit in favor of the exporter. In the statutes, the applicant is variously referred to as the "applicant," the "account party," the "customer," or the "buyer," and the exporter is referred to as the "beneficiary" or "seller."

1. Which bank does applicant wish to issue letter of credit?

NOTE:

In determining which bank to choose to issue a letter of credit, the applicant should consider the reputation of the bank, the size of the bank and number of branches for ease of negotiation and payment, whether the bank has an experienced trade finance department, the ability of the bank to tailor the letter of credit to the parties' needs, and the cost of obtaining the credit from the bank.

2. Which type of letter of credit is appropriate:

a. Irrevocable or revocable?

NOTE:

In practice, most letters of credit are irrevocable [*see* § 56.13[4]].

b. Confirmed or unconfirmed?

NOTE:

A confirmed credit occurs when the advisor makes itself liable to the beneficiary, thereby becoming the confirmer. Under a confirmed credit, the beneficiary can seek payment from either the confirmer or the issuer [*see* § 56.13[5]].

An unconfirmed credit occurs when the advisor informs the beneficiary of the existence of the credit, but does not make itself liable to the beneficiary. In that case, the beneficiary can collect only from the issuer [*see* § 56.13[6]].

c. Simple or revolving?

NOTE:

A simple credit is one that applies to an isolated transaction and is exhausted after one payment under that transaction. A revolving credit is a credit where the buyer is a regular customer of the seller, and the credit is maintained at a certain level even though payments are made periodically for various transactions [*see* § 56.13[9]].

d. Divisible?

NOTE:

A divisible credit permits partial shipments and partial transfer of the benefits of the credit [*see* § 56.13[10]].

e. Notation?

NOTE:

A notation credit is a credit that specifies that any person purchasing or paying drafts drawn or demands for payment made under it must note the amount of the draft or demand on the letter of credit or advise of credit [*see Datapoint Corp v. M & I Bank*, 665 F. Supp. 722, 726-727 (W.D. Wis. 1987)]. A notation credit is generally employed when the letter of credit is intended for roving use [*see* § 56.13[11]].

f. Standby?

NOTE:

A standby letter of credit is used to secure the obligation of a party in a transaction. It is an obligation of the issuing bank to pay the beneficiary only on the failure of the bank's customer to perform under a contract. A standby credit functions as a substitute for a guarantee or surety bond, rather than as a payment mechanism [*see* § 56.13[12]].

3. Will letter of credit be assignable or transferable [*see* §§ 56.40-56.43].

4. Which standard terms does applicant wish to include in letter of credit [*see* § 56.111]?

5. Which documents does applicant wish to require beneficiary to provide to comply with letter of credit [*see* § 56.100[2]]?

6. Does applicant wish to include, or does beneficiary demand, any unusual terms?

NOTE:

In practice, most letters of credit are drafted from information gathered on standard preprinted

applications provided by banks, and there is little opportunity for flexibility, other than in specifying the documents required to satisfy the credit.

7. Will payment be by sight draft or time draft?

NOTE:

A sight draft is payable immediately on presentation, and is to the beneficiary's advantage. A time draft is payable a specified number of days after presentation, and is to the applicant's advantage. For further discussion, see § 56.14.

8. Is there sufficient tolerance in description of goods and shipping dates to allow for unforeseen delays and discrepancies [see UCP arts. 39, 46, 47]?

9. What form of currency will be required for payment?

10. Are goods to be shipped subject to any import or export restrictions?

NOTE:

Import and export restrictions apply to certain goods, natural resources, products of certain countries, and goods produced by certain types of labor [see 19 C.F.R. pts. 10, 12, 133, 145, 161, 162].

11. May shipment arrive at any port, or must it arrive at particular port?

12. May ship or aircraft call en route to arrival port, or must shipment be direct?

13. Is partial shipment allowed?

14. Is transshipment (that is, reshipment of goods from another port to best reach goods' destination) allowed?

15. Is shipment to be on particular type of vessel or aircraft?

16. Does applicant need special import license or permit before transaction can occur?

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC) Letters of Credit (Article 5) General Overview



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22-56 California Legal Forms--Transaction Guide § 56.111

§ 56.111 Determinations for Beneficiary of Letter of Credit

NOTE:

The beneficiary is the person entitled to have its complying presentation honored under the terms of the letter of credit, including a person to whom drawing rights have been transferred under a transferable letter of credit [*Com. Code § 5102(a)(3)*; *see § 56.11[2]*]. Generally, the beneficiary is the seller of goods in the transaction in whose favor the credit is issued.

The beneficiary is not a party to the agreement between the issuer and the applicant pursuant to which the letter of credit is issued, and thus plays no part in setting its terms. However, the terms of the credit are so important that the parties should determine them by agreement before the credit is issued. The beneficiary should include in the underlying agreement the terms and provisions that the beneficiary requires in the letter of credit.

1. Is letter of credit irrevocable or revocable?
2. Is reputable bank committed to paying drafts or demands under letter of credit?
 - a. Issuing bank in applicant's country.
 - b. Confirming bank, if any, in beneficiary's country.
3. Are names and addresses of all parties, including persons to be notified, correct and complete?
4. Are standard terms of credit correct and satisfactory, such as:
 - a. Whether payment is at sight or on deferred basis.

- b. Shipping dates.
- c. Expiration date of credit, if any.
- d. Price, and whether price is FOB (Free On Board), CIF (Cost, Insurance, Freight), etc.
- e. Amount of credit sufficient to cover shipment.
- f. Currency of credit.
- g. Description of goods and markings.
- h. Whether delivery is partial or whole.
- i. Shipment route.

5. Are unusual terms in letter of credit acceptable and defined with sufficient clarity?

6. Is merchandise to be shipped subject to any import or export restrictions [see 19 C.F.R. pts. 10, 12, 133, 145, 161, 162]?

7. Is partial shipment permitted?

8. Is transshipment permitted?

9. Is shipment to be on particular type of vessel or aircraft?

NOTE:

Import letters of credit frequently require shipment to be made by a vessel classified A-1 in Lloyd's Register of Shipping or an equivalent register. A letter stating that the ship meets this standard is often required.

10. Is letter of credit assignable or transferable?

11. Will foreign exchange restrictions prevent payment?

12. Does beneficiary need export license or permits before transaction can occur?

13. Can all documents and conditions necessary to comply with letter of credit be obtained and fulfilled?

NOTE:

If the letter of credit contains ambiguous terms, the beneficiary should seek clarification from the advising bank. However, if the letter of credit contains incorrect terms or terms that cannot be met, the beneficiary should seek amendment by contacting the applicant [see § 56.32].

14. Can shipping requirements, such as "on deck" or "vent-stowed," be complied with by carrier?

15. If required, can seller and carrier obtain and comply with necessary insurance coverage?

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Letters of Credit (Article 5)General OverviewCommercial Law (UCC)Letters of Credit (Article 5)Definitions



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22-56 California Legal Forms--Transaction Guide § 56.112

§ 56.112 Determinations for Issuer of Letter of Credit

NOTE:

The issuer is the bank or other person that issues a letter of credit, excluding an individual who makes an engagement for personal, family, or household purposes [*Com. Code § 5102(a)(9)*].

1. Determine creditworthiness of applicant by making thorough credit check.

a. If applicant has sufficient creditworthiness, determine corresponding method of financing letter of credit.

b. If applicant has poor credit and cannot provide adequate security, refuse to issue letter of credit.

NOTE:

The creditworthiness of the applicant will determine the method of payment that assures the most security to the issuer. The worse the applicant's credit rating, the more security the issuer should require.

2. Determine method of financing letter of credit:

a. Obtain security interest in goods that are subject of transaction [*see § 56.200[2]* (application and security agreement)].

NOTE:

Prices in the import contract and the applicant's resale contract for the goods are useful indicators of the actual value of the goods.

- b. Have applicant execute collateral loan.
 - c. Have applicant deposit maximum amount of credit before payment.
 - d. Obtain other guarantee of payment by applicant.
3. Make sure applicant has filled out application for letter of credit completely and signed it.
4. Draft text of letter of credit carefully to ensure all contingencies are provided for.
5. Obtain copy of contract for underlying transaction to ensure terms of contract and terms of letter of credit are entirely consistent, so that strict standard of compliance will be met [see § 56.50[6][b]].
6. Keep in mind following risks:
- a. Applicant may become unable to pay agreed reimbursement after issuer has committed to making payment to beneficiary.
 - b. Goods that are subject matter of transaction may prove to be inadequate security.
 - c. Issuer itself may make error that excuses applicant from obligation to reimburse issuer.
 - d. Political and economic risks in exporting country may jeopardize transaction [see Ezer, International Exporting Agreements, ch. 22, *The Management of Country Risk* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Letters of Credit (Article 5)IssuersGeneral Overview



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22-56 California Legal Forms--Transaction Guide § 56.113

§ 56.113 Determinations Applicable to Funds Transfers (UCC)

NOTE:

This section assumes that the client is the sender of a payment order that a bank has erroneously executed or erroneously failed to execute. Therefore, this section does not cover, for example, reimbursement or damages that may be available to banks based on the bank's premature execution of a payment order [*see Com. Code § 11209(d)*], on a sender's delayed cancellation or amendment of a payment order [*see Com. Code § 11211*], or on the sender's failure to pay for a properly executed order [*see Com. Code §§ 11402, 11403*].

1. What type of funds-transfer error is claimed?

- a. Wrong beneficiary.
- b. Overpayment.
- c. Underpayment.
- d. Erroneously transmitted duplicate order.
- e. Delayed execution or payment date.
- f. Payment order instructions not followed.

2. Is payment order authorized [*see Com. Code § 11202(a)*; *see also § 56.61*]?

- a. Did sender authorize payment order?

b. Is sender bound by payment order under laws of agency?

3. Is payment order effective [*see Com. Code §§ 11202(b), 11203(a); see also § 56.61*]?

a. Have bank and customer agreed that authenticity of payment orders will be verified pursuant to security procedure?

b. Is security procedure commercially reasonable [*see Com. Code § 11202(b), (c)*]?

c. Was security procedure properly adhered to by banks involved [*see Com. Code § 11201 (definition)*]?

(1) Identification of beneficiary by name.

(2) Identification of beneficiary by number.

d. Has receiving bank limited its responsibilities or rights by express written agreement [*see Com. Code § 11203(a)(1); see also § 56.63*]?

e. Was payment order caused by one of following [*see Com. Code § 11203(a)(2)*]?

(1) Authorized sender;

(2) Someone who obtained access to sender's transmitting facilities; or

(3) Someone who obtained information facilitating breach of security procedure from source controlled by sender and without authority of receiving bank.

4. Was original payment order accepted [*see Com. Code § 11209*]?

5. Was original payment order canceled or amended [*see Com. Code § 11211*]?

6. Did sender include specific instructions with payment order [*see Com. Code § 11302(a)*]?

a. Intermediary banks specified.

b. Funds-transfer system specified.

c. Deduction for expenses allowed.

d. Payment date for execution of payment order by beneficiary's bank.

7. Did sender receive notification from bank that payment order was accepted or that sender's account was debited with respect to order [*see Com. Code § 11204(a)*]?

a. Did sender exercise ordinary care to determine whether order was authorized?

b. Did sender notify bank of facts surrounding error within reasonable time after receiving bank's notification?

NOTE:

The reasonable time period may be set by agreement [*see Com. Code § 11204(b)*], but cannot exceed 90 days after the sender receives notification from the bank that the payment order was accepted or that the sender's account was debited with respect to the order [*Com. Code § 11204(a)*].

8. Was payment order rejected by receiving bank [*see Com. Code § 11210*]?

9. Was sender notified of rejection?

10. How did beneficiary's bank accept payment order [*see Com. Code § 11209(b)-(d)*]?

11. Did sender receive notification from bank that payment order was executed or that sender's account was debited with respect to order [*see Com. Code § 11304; see also Com. Code § 11303 (execution errors)*]?

a. Did sender exercise ordinary care to determine, based on information available to sender, that order was erroneously executed?

b. Did sender notify bank of relevant facts surrounding error within reasonable time after receiving bank's notification?

12. What damages are recoverable?

a. Refund, available if:

(1) Customer proves that his or her effective (but not authorized) payment order was not caused (a) by person entrusted with such duties or (b) by person who obtained information facilitating breach of security procedure [*see Com. Code § 11203*].

(2) Receiving bank erroneously accepts payment order that is (a) not authorized or effective or (b) effective but not wholly enforceable [*see Com. Code § 11204(a)*].

(3) Accepted payment order transmitted pursuant to security procedure erroneously instructs payment:

(a) To wrong beneficiary or

(b) In amount higher than that intended, or is erroneously transmitted in duplicate, and sender proves that sender complied with security procedure and that error would have been detected if bank had followed procedure [*see Com. Code § 11205*].

NOTE:

If the sender receives notice from the receiving bank regarding acceptance, the sender must exercise ordinary care, on the basis of information available to the sender, to discover the error and to advise the bank within a reasonable time, not exceeding 90 days, after the receipt of the bank's notice [*see Com. Code § 11205(b); see also § 56.65*].

(4) Funds transfer is not completed because beneficiary's bank refuses to accept payment order instructing payment to beneficiary [*see Com. Code § 11402(c), (d)*].

b. Interest on refundable amount of payment order [*see Com. Code § 11202; see also Com. Code § 11506*].

(determination of interest payable)], available if:

(1) Receiving bank erroneously accepts payment order that (a) is not authorized or effective or (b) is effective but not wholly enforceable and customer exercises ordinary care to determine that payment order was not authorized and to notify bank within reasonable time [*see Com. Code § 11204(a)*].

NOTE:

The reasonable time period may be set by agreement [*see Com. Code § 11204(b)*], but cannot exceed 90 days after the customer receives notification from the bank that the payment order was accepted or that the sender's account was debited with respect to the order [*Com. Code § 11204(a)*].

(2) Receiving bank erroneously executes payment order and sender, after receipt of notice of execution, exercises ordinary care to determine that order was erroneously executed and notifies bank of error within reasonable time, not exceeding 90 days, after receipt of bank's notice [*see Com. Code § 11304*].

c. Interest on amount of payment order based on delay in payment to beneficiary.

NOTE:

When a funds transfer is completed, but the receiving bank's erroneous execution of the payment order [*see Com. Code § 11302*; *see also* § 56.69] results in delayed payment to the beneficiary, the receiving bank must pay interest for the period of the delay caused by the improper execution to either the originator or the beneficiary of the funds transfer [*Com. Code § 11305(a)*].

d. Interest on amount of payment order based on failure of receiving bank, other than beneficiary's bank, to execute payment order.

NOTE:

If the receiving bank fails to execute a payment order covered by a withdrawable credit balance in an authorized account of the sender, the bank must pay interest if the sender's account does not bear interest and the sender did not receive notice of rejection on the execution date [*see Com. Code § 11210*].

e. Expenses in funds transfer.

NOTE:

If the receiving bank breaches its execution obligations [*see Com. Code § 11302*], and the breach results in the noncompletion of the funds transfer, the failure to use an intermediary bank designated by the originator, or the issuance of an erroneous payment order, the bank is liable to the originator of the order for the bank's expenses in the funds transfer, incidental expenses, and interest losses to the extent not covered by *Com. Code § 11305(a)* [*Com. Code § 11305(b)*; *see* (b), *above*].

If a receiving bank fails to execute a payment order that it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction, incidental expenses, and interest losses resulting from the failure to execute [*Com. Code § 11305(d)*]. Additional damages, including consequential damages, are recoverable, but only to the extent provided in an express written agreement of the receiving bank [*Com. Code § 11305(d)*].

f. Consequential damages pursuant to express written agreement [*see Com. Code § 11305(c)*].

g. Reasonable attorneys' fees.

NOTE:

Reasonable attorneys' fees are recoverable with regard to delayed executions [*see Com. Code § 11305(a)*] and certain erroneous executions [*see Com. Code § 11305(b)*], if demand for compensation is made and refused before an action is brought on the claim [*Com. Code § 11305(e)*].

If a claim is made for breach of an express execution agreement, and the agreement does not provide for damages, attorneys' fees are recoverable if demand for compensation [*see Com. Code § 11305(d)*] is made and refused before an action is brought on the claim [*Com. Code § 11305(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC) Funds Transfers (Article 4A) General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 56 LETTERS OF CREDIT AND ELECTRONIC FUND TRANSFERS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

22-56 California Legal Forms--Transaction Guide §§ 56.114-56.119

[Reserved]

§§ 56.114[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
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PART III. TRANSACTION GUIDE
C. Procedural Guide

22-56 California Legal Forms--Transaction Guide § 56.120

§ 56.120 Procedural Guide to Import Letter of Credit Transaction

NOTE:

A letter of credit transaction is designed to assure the exporter (the beneficiary) that he or she will be paid before the goods are shipped, and to assure the importer (the applicant) that all of the terms of the contract will be complied with before payment is made, including delivery to the importer of the documents of title to the goods.

[1] Procedural Guide for Applicant

1. Ensure that applicant enters into valid sales contract with beneficiary that is underlying basis of transaction; contract should include:

- a. Details of sales transaction.
- b. Agreement for conditions in letter of credit that applicant wishes to impose on beneficiary.

2. At same time as entering into sales contract, have applicant apply for letter of credit by obtaining and completing bank's application for letter of credit [see § 56.200 (illustrative application form)], including following information:

- a. Details of transaction.
- b. Clear description of goods and quantities.
- c. Name and address of beneficiary and beneficiary's bank, if known.

- d. Which documents [*see* § 56.100[2]] and number of copies of each that must be presented for beneficiary to obtain payment under credit.
- e. Amount of credit and type of currency.
- f. Type of insurance required and which party will provide insurance.
- g. What type of transportation is permissible.
- h. Whether partial shipments are involved, and any minimum permissible quantities.
- i. When credit will expire.
- j. Any other conditions that must be met before beneficiary's draft or demand will be honored.

3. After bank drafts letter of credit, review credit to make sure it contains no errors and conforms to wishes of applicant.

4. Arrange for applicant to pay issuer for issuing letter of credit:

- a. Arrange for security interest in goods that are subject of transaction.
- b. Execute collateral loan.
- c. Deposit with bank maximum amount of credit in cash.

NOTE:

A letter of credit may be unsecured, or secured against goods in transaction, receivables, real estate, cash, or other property.

5. Determine how letter of credit is to be sent to beneficiary, and advise issuer of method.

- a. Direct to beneficiary.
- b. To correspondent bank that will send beneficiary advice of credit, or advice and confirmation of credit.
- c. To beneficiary's bank.

6. Ensure that issuing bank transmits letter of credit to proper bank.

7. If amendment to credit is later required because documents specified in letter of credit and documents specified in underlying sales contract conflict, or because beneficiary cannot produce required documents, have applicant advise issuer of proposed amendment by completing application to amend [*see* § 56.210 (application to amend)].

8. Advise applicant to obtain documents of title to goods from issuing bank to secure delivery of goods on arrival.

[2] Procedural Guide for Beneficiary

1. When parties enter into underlying sales contract, ensure beneficiary provides for conditions to be included in letter of credit beneficiary wishes to impose on applicant.
2. On notification from issuing bank that letter of credit is opened in beneficiary's favor, advise beneficiary to ship goods by delivering them to carrier in accordance with letter of credit.
3. Have beneficiary prepare commercial invoice and obtain necessary shipping, insurance, and other documents to satisfy terms of letter of credit.
4. If amendment to credit is required because documents specified in letter of credit and documents specified in underlying sales contract conflict, or because beneficiary cannot provide required documents, have beneficiary contact applicant to apply to issuer for amendment [*see* § 56.210 (application to amend)].
5. Once amendment has been made, direct beneficiary to send applicant written executed acceptance of amendment.
6. Direct beneficiary to present required documents and draft or demand to obtain payment from confirming or issuing bank [*see* § 56.220 (bill of exchange)].
7. Direct beneficiary to mail one set of nonnegotiable shipping documents to applicant as soon as shipment is made.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Letters of Credit (Article 5)General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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PART III. TRANSACTION GUIDE
C. Procedural Guide

22-56 California Legal Forms--Transaction Guide § 56.121

§ 56.121 Procedural Guide to Cancellation or Amendment of Payment Orders in Funds Transfers (UCC)

1. Advise client that communication of payment order canceling or amending order may be transmitted to receiving bank orally, electronically, or in writing [*see Com. Code § 11211(a)*].
2. Advise client to send cancellation or amendment in accordance with any existing security procedure or written agreement between sender and receiving bank [*see Com. Code § 11211(a)*; *see also § 56.61*].
3. Advise client that notice of communication canceling or amending payment order must be received by bank at time and in manner affording receiving bank reasonable opportunity to act on communication before accepting order [*see Com. Code § 11211(b)*].
4. Advise client to determine whether bank agreement or funds-transfer rule allows cancellation or amendment after payment order has been accepted [*see Com. Code § 11211(f)*; *but see Com. Code § 11211(c)(2)*].
5. Advise client that bank must be informed of death or legal incapacity with reasonable opportunity to act before accepting payment order [*see Com. Code § 11211(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Funds Transfers (Article 4A)General OverviewCommercial Law (UCC)Funds Transfers (Article 4A)Issuance & Acceptance of Payment Orders



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C. Procedural Guide

22-56 California Legal Forms--Transaction Guide § 56.122

§ 56.122 Procedural Guide to Collection of Interest Due to Bank Error in Funds Transfer (UCC)

NOTE:

In addition to interest, depending on the nature of the injury, the client may also be entitled to a refund or damages, including attorney's fees [*see* § 56.113, 12 (checklist); *see also* §§ 56.64, 56.65, 56.70, 56.71 (discussion)].

1. Advise client to review any notice of acceptance or execution, or account statement, or other surrounding facts to determine whether payment order has been erroneously accepted or executed [*see Com. Code* § 11204(a); *Com. Code* § 11205(a); *see also* §§ 56.64, 56.65].
2. If client receives notice of acceptance, advise client to notify bank within reasonable time, not exceeding 90 days after receipt of notice of acceptance or execution, of any discrepancy between sender's original payment order, including instructions, and notice received from bank [*Com. Code* §§ 11204(a), 11304].
3. Advise client to notify bank of surrounding error that give rise to additional costs for which bank may be liable to customer [*Com. Code* § 11304].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Funds Transfers (Article 4A)General Overview



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22-56 California Legal Forms--Transaction Guide § 56.123

§ 56.123 Procedural Guide to Stop Payment Under Electronic Fund Transfer Act

NOTE:

If the client's account is an electronic funds transfer account, that includes arrangements for preauthorized electronic transfers from customer's account, the client may order payment stopped if and when desired [*see 12 C.F.R. § 205.10(c)*].

An institution that offers electronic fund transfer accounts is liable to a customer for damages proximately caused by its failure to stop payment of a preauthorized transfer when instructed to do so in accordance with the terms and conditions of the account [*see 15 U.S.C. § 1693h(a)(3)*], subject to excuse for acts of God, technical malfunctions, and bona fide errors [*see 15 U.S.C. § 1693h(b), (c)*].

1. Order institution, orally or in writing, to discontinue previously arranged electronic transfers from customer's account [*see 12 C.F.R. § 205.10(c)*].

NOTE:

The institution may require written confirmation of any oral order to be made within 14 days thereafter if, when the oral communication is made, the requirement is disclosed to the consumer with the address to which that writing should be sent. If written communication is required, the oral stop payment order will cease to be binding 14 days after it was made [*12 C.F.R. § 205.10*].

2. Give notice any time up to three business days before scheduled date of transfer [*see 12 C.F.R. § 205.10(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesElectronic BankingFund Transfers



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22-56 California Legal Forms--Transaction Guide §§ 56.124-56.199

[Reserved]

§§ 56.124[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 56 LETTERS OF CREDIT AND ELECTRONIC FUND TRANSFERS
PART IV. FORMS
A. Letters of Credit
1. Applications and Other General Forms

22-56 California Legal Forms--Transaction Guide § 56.200

§ 56.200 Application and Agreement for Commercial Letter of Credit

[1] Comment

[a] Use of Form

This form is an application for a commercial letter of credit. The application must be completed by the applicant (or "customer") and turned in to the issuing bank to obtain issuance of the letter of credit. Although the UCC--Letters of Credit uses the broader term "issuer," rather than "issuing bank" [see *Com. Code § 5102(a)(9)* (issuer means a bank or other person who issues a letter of credit) *cf.* UCP, art. 2 (UCP applies only to issuing banks)], in practice, most issuers are issuing banks.

The application contains two parts. The first part gathers the information needed to draft the letter of credit and, when completed, lists the documents and conditions the beneficiary must present and fulfill before payment will be made under the credit. The second part is a security agreement between the issuer and the customer. The security agreement contains the terms and conditions under which the credit is established, sets forth the responsibilities of the customer and the bank concerning reimbursement, and provides that the bank will have a security interest in the goods that are the subject matter of the underlying transaction [see ch. 42, *Secured Transactions*]. For discussion of the obligations of the customer ("applicant") and the issuing bank in a letter of credit transaction, see § 56.11[1], [3]. For a commercial letter of credit, see § 56.201.

This application and agreement of a letter of credit is reprinted with the permission of the copyright owner, Bank of America N.T. & S.A.

[b] Interpretation and Governing Law

This agreement provides that, subject to the laws, customs, and practices of the trade where the beneficiary is located, the letter of credit and performance of the parties under it will be governed by the Uniform Customs and Practice for Documentary Credits [see § 56.15]. The agreement also states that if the customer defaults under any provision of this

application and agreement, the bank may enforce its security interest granted pursuant to the Uniform Commercial Code or any other applicable law. The agreement further states that it will be governed by the laws of the state where the office of the bank that issued the letter of credit is located. In addition, the agreement specifies that any controversies will be resolved by arbitration if any party requests it, unless the controversy arises from or relates to an obligation to the bank that is secured by real property collateral, in which case the consent of all parties is required to submit the controversy to arbitration.

[2] FORM**FORM BEGINS ON FOLLOWING PAGE****Application and Agreement for Commercial Letter of Credit**

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Letters of Credit (Article 5)General OverviewInternational Trade LawLetters of Credit



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PART IV. FORMS
A. Letters of Credit
1. Applications and Other General Forms

22-56 California Legal Forms--Transaction Guide § 56.201

§ 56.201 Commercial Documentary Letter of Credit

[1] Comment

[a] Use of Form

This form is a commercial documentary letter of credit. The form is a typical letter of credit for an import-export transaction involving the sale of goods. The issuing bank issues the letter of credit after the applicant (or "customer") has completed the letter of credit application, signed the security agreement that is attached to the application, and made provisions to pay the issuer for amounts paid under the credit. The issuer then forwards the credit to an advising or confirming bank, which sends the beneficiary an advice or confirmation of the credit. After obtaining the necessary documents to fulfill the credit, the beneficiary presents the documents, draft, and credit for payment at the confirming bank. For an application and agreement for a commercial letter of credit, see § 56.200.

This form may be drafted as an irrevocable or revocable credit. Most commercial letters of credit are irrevocable [*see [b], below*].

This form is based on a letter of credit provided with the permission of the copyright owner, Bank of America N.T. & S.A.

[b] Revocability

A letter of credit may be either revocable or irrevocable [*Com. Code § 5106(a)*]. Once an irrevocable credit is issued, it cannot be amended or cancelled without the consent of the beneficiary, applicant, confirmer, and issuer, except to the extent that is provides that the issuer may amend or cancel the letter of credit without that consent [*see Com. Code § 5106(b)*].

Unless otherwise agreed, a revocable credit may be cancelled or amended by the issuer without notice to or consent from the beneficiary, applicant, confirmer, or issuer [*see Com. Code § 5106(b)*].

Since irrevocable credits cannot be amended or cancelled without consent, they provide more security than revocable credits and are generally preferred by beneficiaries. Revocable credits, on the other hand, are less expensive than irrevocable credits and require that less security be given to the issuer. For this reason, revocable credits are usually preferred by applicants. In actual practice, however, revocable credits are not commonly used in important sales transactions.

Because the Commercial Code does not contain criteria for determining whether a credit is revocable or irrevocable, every letter of credit should clearly state whether it is revocable or irrevocable.

For further discussion of revocable letters of credit, see § 56.13[3]. For further discussion of irrevocable letters of credit, see § 56.13[4].

[c] Liability Despite Revocation

Despite cancellation of a revocable credit, an issuer that has honored a presentation, as permitted or required by statute [see *Com. Code* § 5108; § 56.50] is entitled to reimbursement by the applicant in immediately available funds not later than the date of its payment of funds [*Com. Code* § 5108(i)(1)].

[d] Negotiation

This form may be used as a "negotiation" letter of credit [see § 56.13[8]]. The beneficiary under a negotiation credit may present the draft and documents for payment to either a nominated bank or, if the letter of credit is freely negotiable, to any bank. The advising bank may also be the negotiating bank. When the negotiating bank has examined the documents and the draft and determined that they comply with the letter of credit, it will pay the beneficiary and take up the documents. The negotiating bank will then note the presentation on the reverse of the credit, forward the documents, and seek reimbursement from the issuing bank.

[e] Drafts and Bills of Exchange (Deferred Payment)

This form may also be used to provide for payment on demand ("sight payment" or "sight draft") or deferred payment ("time draft"). A sight draft allows the beneficiary to seek payment immediately on presenting the draft and the documentation required in the letter of credit [see *Com. Code* § 3108(a)]. This is to the beneficiary's advantage, because payment can be obtained as soon as the beneficiary has the required shipping documents in hand and presents them to the paying bank.

Under a time draft, payments are deferred as specified in the letter of credit. Time drafts may be paid on a fixed date or a specified number of days after sight or presentation [see *Com. Code* § 3108(b)]. The main reason for using a time draft is to delay payment until the applicant has received the goods. At that time, the applicant will be in a position to sell the goods immediately, providing funds to pay the issuing bank. For further discussion of sight drafts and time drafts, see § 56.14[2], [3]. A frequently used form of draft in letter of credit transactions is the bill of exchange. For further discussion and a form of bill of exchange, see § 56.220.

[f] Acceptance

This form may also be used to provide for payment on acceptance [see *Com. Code* §§ 5102(b), 3409(a) ("acceptance" defined)]. Acceptance may be made at any time and becomes effective when notification pursuant to instructions is given or the accepted draft is delivered in order to give rights on the acceptance of any person [*Com. Code* § 3409(b)].

[g] Partial Shipments and Transshipments

This form may be used to provide for partial shipments of the goods that are the subject of the letter of credit and for transshipment. Transshipment is a term used when shipment to a destination is best reached by reshipping the goods from another port.

[2] FORM

Commercial Documentary Letter of Credit

_____ [IRREVOCABLE or REVOCABLE] LETTER OF CREDIT

_____ [name of issuing bank] Bank

L/C No. _____

Place of Issuance: _____

Date of Issuance: _____

Applicant

_____ [name]

_____ [address]

_____ [city, state, zip, country]

Advising Bank

_____ [name]

_____ [address]

_____ [city, state, zip, country]

Reference No. _____

Beneficiary

_____ [name]

_____ [address]

_____ [city, state, zip, country]

Date and Place of Expiration: _____

Amount: _____

Credit available with any bank by: [e.g., negotiation, sight payment, deferred payment, or acceptance] against presentation of the documents listed below and your drafts at sight, drawn on _____ [name of bank].

Partial Shipment:

_____ Allowed _____ Not Allowed

Transshipments:

_____ Allowed _____ Not Allowed

Shipment from [originating port] for transportation to [destination port].

Shipment latest _____[*date*]

Merchandise Description:

100,000 lbs. Almond Nuts, packed in 50 lb. new gunnybags, 1993 crop @ U.S. \$1.00 per lb.
CIF San Francisco/Bay Area, California, USA

Documents Required:

1. Signed Commercial Invoice in triplicate.
2. Marine and War Insurance Policy or Certificate for 110 percent invoice value in duplicate.
3. Certificate of origin, Form A where applicable or beneficiary's certificate that none is required.
4. Packing List.
5. Full set original clean on board vessel Ocean Bill of Lading, to order of shipper, blank endorsed, marked: "Notify _____[*name and address of buyer and customs clearing agent*] and freight prepaid."

Documents must be presented within 5 days after the date of issuance of the shipping document(s) but within the validity of the credit.

We hereby issue this documentary credit in your favor. It is subject to the Uniform Customs and Practice for Documentary Credits (1993 Revision), International Chamber of Commerce Publication No. 500, and engages us in accordance with its terms. The number and the date of the credit and the name of our bank must be quoted on all drafts required. If the credit is available by negotiation, each presentation must be noted on the reverse of this advice by the bank where the credit is available.

All documents are to be forwarded in one cover, by airmail, unless otherwise stated above. Negotiation bank charges, if any, are for account of beneficiary. The advising bank is requested to notify the credit to the beneficiary without adding their confirmation.

Please examine this instrument carefully. If you are unable to comply with the terms or conditions, please communicate with your buyer to arrange for an amendment. This procedure will facilitate prompt handling when documents are presented.

This document consists of [*number*] signed pages.

_____ [*signature*]

Authorized signature

_____ [*signature*]

Authorized countersignature

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Letters of Credit (Article 5) General Overview Commercial Law (UCC) Letters of Credit (Article 5) Issuance General Overview



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PART IV. FORMS
A. Letters of Credit
1. Applications and Other General Forms

22-56 California Legal Forms--Transaction Guide § 56.202

§ 56.202 Traveler's Letter of Credit

[1] Comment

[a] Use of Form

This form is a "clean" or traveler's letter of credit [see § 56.13[1]]. It allows a traveler to obtain funds anywhere in the world by presenting the letter of credit alone, without other documents [see *Com. Code § 5109* (UCC Comment 3) (referring to clean credit as "suicide" credit because it grants beneficiary right to draw by mere presentation of draft)]. In practice, traveler's letters of credit have largely been rendered obsolete by more convenient methods of obtaining cash, such as credit cards and automatic teller machines.

[b] Payment Under Traveler's Letter of Credit

A traveler's letter of credit can be funded by the beneficiary or another person. If funded by the beneficiary, the beneficiary and applicant are then the same person. The credit is established in the amount deposited with the issuing bank, and the beneficiary makes periodic demands against the credit by presenting the credit at paying banks. The paying banks make notations on the credit of the details of the payment. The issuing bank agrees on the face of the credit to honor drafts negotiated by a specified date.

[c] Application of UCC to Clean Credits

In practice, the UCC Letters of Credit generally applies to documentary credits. However, it also applies to a credit issued by a bank or other person if the credit is not a documentary credit, but meets the statutory definition of letter of credit [see *Com. Code § 5102(a)(10)*; § 56.10[1]] and satisfies the form requirements of *Com. Code § 5104* [see § 56.30[1]]. Because this form is entitled a letter of credit, the UCC Letters of Credit applies to it. Note, however, that courts may look beyond the title or description of a letter of credit to the intent of the parties to determine the nature of the instrument [*Wichita Eagle & B. Pub. Co., Inc. v. Pacific Nat. Bank, San Francisco* (9th Cir. 1974) 493 F.2d 1285, 1286 (instrument labeled "letter of credit" held to be ordinary guarantee contract)].

The UCP does not apply to a traveler's credit, because the UCP covers only documentary credits [see UCP art. 1].

[2] FORM

Traveler's Letter of Credit

TRAVELER'S LETTER OF CREDIT

_____ Bank

L/C No. _____

Amount _____

Dear Sir or Madam:

This is to introduce you to _____ [name of beneficiary]. We request that you furnish any funds that _____ [he or she] may require up to the aggregate amount of _____, in [form of currency], against demand drafts on us. Each draft must be clearly marked as drawn under our Letter of Credit No. _____.

We will honor these drafts if they are negotiated on or before _____ [date], and request that you buy them at the same rate you buy demand drafts on [e.g., San Francisco].

The amount of each draft must be noted on the reverse of this letter. This letter should be canceled and attached to the final draft drawn.

Please ensure that _____ [name of beneficiary] signs the drafts in your presence, and carefully compare the signature made with the signature below.

Very truly yours,

_____ [name of bank]

By _____ [signature]

_____ [typed name and title]

The signature of _____ [beneficiary].

This letter must be surrendered with the last draft under the letter.

[REVERSE SIDE]

Once endorsements of payments are made on this letter, they must not be altered or erased. Please verify information about payments desired before filling in any amounts below.

On payment of an amount exhausting this credit, this letter must be surrendered by the holder and attached to the draft by the banker negotiating the draft.

Date	Paid By	Amount in Words	Amount in Figures
_____	_____	_____	_____
_____	_____	_____	_____

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Letters of Credit (Article 5)General OverviewCommercial Law (UCC)Letters of Credit
(Article 5)IssuanceGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 56 LETTERS OF CREDIT AND ELECTRONIC FUND TRANSFERS
PART IV. FORMS
A. Letters of Credit
1. Applications and Other General Forms

22-56 California Legal Forms--Transaction Guide § 56.203

§ 56.203 Application for Standby Letter of Credit

[1] Comment

[a] Use of Form

This form is an application for a "standby" letter of credit [see § 56.13[12]]. The application must be completed by the applicant and turned in to the issuer (in this example, the issuing bank) to obtain issuance of the credit.

The application contains two parts. The first part gathers the information needed to draft the standby credit and, when completed, specifies the documents that must be presented and conditions that must occur before payment will be made under the credit. The second part is a security agreement between the issuer and the applicant. The security agreement contains the terms and conditions under which the credit is established and sets forth the responsibilities of the applicant and the issuer concerning advances and default. For discussion of the obligations of the applicant and the issuer in a letter of credit transaction, see § 56.11[1], [3]. For an irrevocable standby letter of credit, see § 56.204.

This form of application and agreement of a standby letter of credit is reprinted with the permission of the copyright owner, Bank of America N.T. & S.A.

[b] Interpretation and Governing Law

This agreement provides that the letter of credit and the performance of the parties under it will be governed by the Uniform Customs and Practice for Documentary Credits [see § 56.15]. The agreement also states that the application and agreement will be governed by California law, and that any controversies will be resolved by arbitration if any party requests it, unless the controversy arises from or relates to an obligation to the bank that is secured by real property collateral, in which case the consent of all parties is required to submit the controversy to arbitration.

[2] FORM

FORM BEGINS ON FOLLOWING PAGE

Application for Standby Letter of Credit

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Letters of Credit (Article 5)General Overview



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A. Letters of Credit
1. Applications and Other General Forms

22-56 California Legal Forms--Transaction Guide § 56.204

§ 56.204 Irrevocable Standby Letter of Credit

[1] Comment

[a] Use of Form

This form is an irrevocable standby letter of credit [see § 56.13[12]]. A "standby" letter of credit, also known as a "bank guarantee," is used to secure the obligation of a party in a transaction. It is an obligation of the issuing bank to pay the beneficiary only on the failure of the bank's customer to perform under a contract. It functions as a substitute for a guarantee or surety bond. Generally, the standby credit is put into effect when the beneficiary presents documents evidencing the failure to perform. This form is drafted as a guarantee for an import sales transaction. It can be modified for use as a guarantee on the default of a payment of a note, or to cover the money to be contributed by the developer of a construction project [see § 56.13[13]]. For an application and agreement for an irrevocable standby letter of credit, see § 56.203.

This form is based on an irrevocable standby letter of credit provided with the permission of the copyright owner, Bank of America N.T. & S.A.

[b] Standby Letter of Credit Distinguished From Other Letters of Credit

Several important differences distinguish standby letters of credit from other letters of credit. First, a standby credit functions principally as a guarantee or collateral security and not as a payment mechanism. Second, in a standby credit, the buyer is generally the beneficiary, whereas in most other letters of credit, the seller is the beneficiary. Third, the triggering of payment is simpler than in other letters of credit. In standard letters of credit, payment is made on presentation of the documents specified in the credit. In a standby credit, the beneficiary need only certify in writing that the seller has defaulted to obtain payment [see Ezer, *International Exporting Agreements*, ch. 10, *Securing the Price: Letters of Credit* (Matthew Bender)].

[c] Payment at Sight

This form provides for payment on demand ("sight payment" or "sight draft"). A sight draft allows the beneficiary to seek payment immediately on presenting the draft and the documentation required in the letter of credit [see *Com. Code* § 3108(a)]. This is to the beneficiary's advantage, because payment can be obtained as soon as the beneficiary has the required shipping documents in hand and presents them to the paying bank. If a deferred payment is preferred, this form may be modified accordingly. Deferred payments (or "time drafts") are discussed in § 56.201[1][e].

[2] FORM

Irrevocable Standby Letter of Credit

IRREVOCABLE STANDBY LETTER OF CREDIT

_____ [name of issuing bank] Bank

L/C No. _____

Place of Issuance: _____

Date of Issuance: _____

Applicant

_____ [name]

_____ [address]

_____ [city, state, zip, country]

Advising Bank

_____ [name]

_____ [address]

_____ [city, state, zip, country]

Reference No. _____

Beneficiary

_____ [name]

_____ [address]

_____ [city, state, zip, country]

Date and Place of Expiration: _____

Amount: _____

Sir or Madam:

As the request of _____ [name and address of applicant], we hereby establish our Irrevocable Letter of Credit in your favor up to an aggregate amount of [amount], U.S. DOLLARS, to expire at our counters on _____ [date]. This letter of credit is available for payment against your draft(s) at sight drawn on _____ [name of issuing bank], accompanied by this original Standby Letter of Credit and the following documents:

[E.g., A letter from beneficiary certifying that applicant has failed to perform as required under contract.]

We agree with you that all draft(s) drawn under and in compliance with this letter of credit will be honored on presentation to us as specified in this letter.

This credit is subject to the Uniform Customs and Practice for Documentary Credits (1993 Revision), International Chamber of Commerce Publication No. 500. The number and the date of the credit and the name of our bank must be quoted on all drafts required.

Please examine this instrument carefully. If you are unable to comply with the terms or conditions, please communicate

with your buyer to arrange for an amendment. This procedure will facilitate prompt handling when documents are presented.

_____ [signature]

Authorized signature

_____ [signature]

Authorized countersignature

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Letters of Credit (Article 5) General Overview



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22-56 California Legal Forms--Transaction Guide §§ 56.205-56.209

[Reserved]

§§ 56.205[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
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PART IV. FORMS
A. Letters of Credit
2. Amendment, Transfer, and Assignment

22-56 California Legal Forms--Transaction Guide § 56.210

§ 56.210 Application for Amendment to Letter of Credit

[1] Comment

[a] Use of Form

This form is an application for an amendment of a letter of credit. It may be used to amend an error in the original letter of credit. An amendment is generally made after the beneficiary has received the letter of credit and determined that it does not conform to the underlying contract between the beneficiary and the applicant. The presence of a nonconformity prevents the beneficiary from complying with the credit's terms; therefore, the beneficiary cannot demand payment. The beneficiary must then communicate with the applicant directly to ask for an amendment of the credit to correct the error. The applicant then applies to the issuer for an amendment.

A letter of credit can be amended only by mutual agreement of the applicant, the beneficiary, the issuer, and the confirmer, if any [see [b], *below*]; and this form states that the amendment is subject to acceptance by the beneficiary. Optional text has been provided so that the form can be used to amend either a commercial letter of credit [see § 56.201] or a standby letter of credit [see § 56.204].

This form is based on an application for amendment to letter of credit provided with the permission of the copyright owner, Bank of America N.T. & S.A.

[b] Amendment

After a letter of credit is issued, the rights and obligations of a beneficiary, applicant, confirmer, or issuer are not affected by an amendment to which that person has not consented, except to the extent the letter of credit provides that it is revocable or that the issuer may amend or cancel the letter of credit without that consent [*Com. Code § 5106(b)*; see § 56.32]. Revocable credits are rarely used because of this inherent uncertainty.

Instructions for any amendment must be complete and precise [see UCP art. 5(a)]. The amendment must also state

precisely the document(s) against which payment, acceptance, or negotiation is to be made [UCP art. 5(b)].

[2] FORM

Application for Amendment to Letter of Credit

APPLICATION FOR AMENDMENT TO _____ [COMMERCIAL or STANDBY] LETTER OF CREDIT

Location: _____ [date]

To: _____ [name of issuing bank]

I request you to amend by Airmail Teletransmission the [irrevocable or revocable] Documentary Letter of Credit No. _____.

For Account of (Applicant)

_____ [name]

_____ [address]

_____ [city, state, zip, country]

In Favor of (Beneficiary)

_____ [name]

_____ [address]

_____ [city, state, zip, country]

Please amend this credit as follows: *[give complete and precise details of desired amendment]*.

I understand that this amendment is subject to acceptance by the beneficiary. All other terms and conditions of the Letter of Credit remain unchanged.

The issuer agrees to the amendment described above.

_____ [name of issuer]

By _____ [signature]

_____ [typed name and title]

_____ [name of applicant]

By _____ [signature] _____ [typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Letters of Credit (Article 5) Assignments & Transfers



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PART IV. FORMS
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2. Amendment, Transfer, and Assignment

22-56 California Legal Forms--Transaction Guide § 56.211

§ 56.211 Request for Partial Transfer of Letter of Credit

[1] Comment

[a] Use of Form

This form is a request for a partial transfer of a letter of credit. It can be used only when the letter itself is transferrable. Partial transfers are usually sought by beneficiaries who wish to pay other parties, generally suppliers. To make a partial transfer of a letter of credit, the beneficiary delivers the letter of credit to the confirming, negotiating, or issuing bank along with a request to transfer a part of the letter of credit to a second beneficiary. A transfer will not be effective unless the issuer approves it.

This form is based on a request for transfer provided with the permission of the copyright owner, Bank of America N.T. & S.A. The text of the form generally follows the provisions of Article 48 of the 1993 revision of the UCP [*see* § 56.15].

[b] Right to Transfer

Except as otherwise provided by statute [*see Com. Code* § 5113 (rights and obligations of successor of beneficiary); § 56.44], unless a letter of credit states that it is transferable, the right of a beneficiary to draw or otherwise demand performance under a letter of credit may not be transferred [*Com. Code* § 5112(a)]. Moreover, even if a letter of credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if [*Com. Code* § 5112(b)]:

- The transfer would violate applicable law; or
- The transferor or transferee has failed to comply with any requirement stated in the letter of credit or any other requirement relating to transfer imposed by the issuer which is within the standard practice of financial institutions that regularly issue letters of credit [*see Com. Code* § 5108(e)] or is otherwise reasonable under the circumstances.

The power of the issuer to establish "requirements" under the UCC--Letters of Credit does not include the right absolutely to refuse to recognize transfers under a transferable letter of credit [*Com. Code § 5112* (UCC Comment 1)]. By contrast, the UCP provides the beneficiary with a "right of request," rather than a "right to transfer," giving the transferring bank the right to accept or decline the beneficiary's request [*see* UCP art. 49(c)]. An issuer who wishes to retain the right to deny all transfers should not issue transferable letters of credit or should incorporate the UCP [*Com. Code § 5112* (UCC Comment 1)].

The right to demand payment under a letter of credit is commonly referred to as the "right to draw" [*see* McCullough, Letters of Credit, Ch. 4, *The Relationship Between the Beneficiary and the Issuer* (Matthew Bender)]. The right to demand payment under a letter of credit is distinct from the right to receive the proceeds of the credit after all of the conditions for payment have been satisfied [*see* McCullough, Letters of Credit, Ch. 4, *The Relationship Between the Beneficiary and the Issuer* (Matthew Bender); *see also* § 56.43].

When the right to demand payment has been validly transferred, the person to whom the right has been transferred is referred to as the "transferee" [*Com. Code § 5112(b)*] or the "second beneficiary" [UCP art. 48(a)].

For further discussion of transfer of letters of credits, *see* § 56.42.

[c] Warranties of Beneficiary on Transfer

If its presentation is honored, the beneficiary warrants to the issuer, to any other person to whom presentation is made, and to the applicant that there is no fraud or forgery, as described in *Com. Code § 5109(a)* [*Com. Code § 5110(a)(1)*; *see Com. Code § 5109(a); 56.50[2][c]*]. The beneficiary further warrants to the applicant that the drawing does not violate any agreement between the applicant and the beneficiary or any other agreement intended by them to be augmented by the letter of credit [*Com. Code § 5110(a)(2)*]. These warranties are in addition to the warranties arising under *Com. Code § 3101* (negotiable instruments) [*see* Ch. 55, *Negotiable Instruments*], *Com. Code § 4101* (bank deposits and collections) [*see* California Points & Authorities, Ch. 34, *Checks and Banks*], *Com. Code § 7101* (documents of title, including warehouse receipts and bills of lading), and *Com. Code § 8101* (investment securities) [*see* Ch. 42, *Secured Transactions*] because of the presentation or transfer of documents covered by any of those sections [*Com. Code § 5110(b)*].

[d] Substitution of Invoices

This form includes optional text to provide that the transfer will be either with or without substitution of invoices. If there is to be a substitution of invoices, the original beneficiary transfers a portion of the credit for a lesser amount. If there is no substitution of invoices, the original beneficiary transfers all rights in the original credit up to the amount transferred and retains no interest in the amount transferred. The main reason for the substitution of invoices is to prevent the customer from learning the identity of the second beneficiary, often the original beneficiary's supplier [*see* McCullough, Letters of Credit, Ch. 4, *The Relationship Between the Beneficiary and the Issuer* (Matthew Bender)].

[e] Need to Name Transferring Bank

Under the UCP, only a designated transferring bank can transfer the letter of credit. The most logical candidate for that role is the bank authorized to pay, incur a deferred payment undertaking, accept or negotiate, or in the case of a freely negotiated letter of credit, the bank specifically authorized in the letter of credit as the transferring bank [*see* UCP art. 48(a)].

[f] Consent Required to Amend Transferred Credit

Under the UCP, the first beneficiary irrevocably must declare, at the time the transfer is made, whether the first

beneficiary retains the right to accept or refuse subsequent amendments to the transferred letter of credit [UCP, art. 48(d)]. Further, the transferring bank has a duty to convey to the second beneficiary the first beneficiary's irrevocable instructions [UCP, art. 48(d)]. On receipt of the transferred letter of credit and the first beneficiary's instructions relating to amendments, the second beneficiary is aware of any special conditions placed on the transferred credit by the first beneficiary and is then in a better position to decide whether to avail itself of the transferred letter of credit.

[2] FORM

Request for Partial Transfer of Letter of Credit

REQUEST FOR PARTIAL TRANSFER OF LETTER OF CREDIT _____ [WITH or WITHOUT]
SUBSTITUTION OF INVOICES

Name of Issuing Bank: _____ [date]

Branch Name and Number: _____

Address: _____

Letter of Credit No. _____

Your Advice No. _____

Issued by: _____

_____ There will be substitution of invoices.

_____ There will be no substitution of invoices and the paragraph dealing with substitution will not apply.

To: _____ [name of transferring bank]

We request you to transfer part of the amount of the transferable letter of credit shown above to a second beneficiary.

Amount to be transferred: \$ _____

Name of transferring bank: _____

Name and address of second beneficiary: _____

The original advice of the letter of credit is enclosed. The transfer letter of credit is subject to the terms and conditions as shown in your advice except for the following:

Merchandise: _____

Price: _____

Expiration Date: _____ (This date must be at least five business days before the expiration date of the above letter of credit when substitution of invoices is required.)

Insurance Percentage (if applicable) _____ percent (The second beneficiary must submit an insurance document covering at least 110 percent of the original credit CIF price/value. To figure percentage, divide 110 percent of the CIF price/value of the original credit by 100 percent of the CIF price/value of the transfer credit.)

_____ The following requirements* are included to achieve our confidentiality objectives, and the selection and adequacy of these requirements are solely our responsibility: _____.

* Must be consistent with letter of credit; amend if necessary.

_____ We have no requirements respecting confidentiality objectives in this transaction.

By this transfer, all our rights as beneficiary in the letter of credit up to the amount shown above are transferred to the second beneficiary. The second beneficiary shall have the sole right as beneficiary up to that amount; however, any amendments made after this transfer must be approved before the second beneficiary is advised.

Please advise the second beneficiary of the terms and conditions of the transferred credit by:

- ☐ Full Text Transmission
- ☐ Mail/Airmail
- ☐ Airmail With Brief Preliminary Teletransmission Advice
- ☐ Courier

[Add if there will be substitution of invoices: At any time on your first demand, we will deliver to you our draft and commercial invoices in compliance with the terms and conditions of the original letter of credit. The draft and invoices are in substitution of those presented by the second beneficiary. If our draft and invoices are in compliance, you are then requested to deliver the second beneficiary's invoices to us. Also, credit our account or include your check for the amount by which our draft exceeds the draft of the second beneficiary.]

If we fail, at your demand, to deliver to you our drafts and invoices as stated above, you may dispose of the invoices and other documents presented by the second beneficiary in accordance with the instructions of the credit. And, we understand that you will not pay us the difference between the amount of the draft of the second beneficiary and the amount authorized to be paid to us under the original letter of credit.

We enclose our check for \$_____ for your transfer commission. We also agree to pay you on demand any expenses that may be incurred in connection with this transfer.

The signature and title below conform with those shown in our files as authorized to sign for the beneficiary.

_____ [name of issuing bank]
 By _____ [signature]
 _____ [typed name and title]
 _____ [name of beneficiary]
 By _____ [signature]
 _____ [typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Letters of Credit (Article 5) Assignments & Transfers Commercial Law (UCC) Letters of Credit (Article 5) Warranties



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22-56 California Legal Forms--Transaction Guide §§ 56.212-56.219

[Reserved]

§§ 56.212[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
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PART IV. FORMS
A. Letters of Credit
3. Bills of Exchange

22-56 California Legal Forms--Transaction Guide § 56.220

§ 56.220 Bill of Exchange (Draft)

[1] Comment

[a] Use of Form

This form is a bill of exchange (or draft) that may be used to demand payment of money in a letter of credit transaction. A bill of exchange is a formal instrument, much like a check in appearance, by terms of which the maker (or "drawer") requests that another person (the "drawee") pay a specified sum of money to the maker or a third person (called the "payee"). In a typical letter of credit transaction, the person who is selling goods in an international transaction is both the "drawer" and the "payee." Thus, the seller will typically request that payment be made to himself or herself. The person who is purchasing the goods (or the purchaser's bank) is typically the "drawee." This form contains optional text so that it may be used as a sight draft or time draft [*see* [c], [d], *below*].

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[b] As Negotiable Instrument

A bill of exchange will be classified as a negotiable instrument if it is an order to pay a fixed amount of money that [*Com. Code § 3104(a), (e)*]:

- Is payable to bearer or to order at the time it is issued or first comes into possession of the holder;
- Is payable on demand or at a definite time; and
- Does not state any other undertaking or instruction by the drawer or maker other than to pay money, with limited exceptions [*see Com. Code § 3104(a)(3)*].

For further discussion of negotiable instruments, see Ch. 55, *Negotiable Instruments* .

[c] Sight Draft

This form can be prepared so that it is payable on demand (a "sight draft"). A sight draft is a draft that is payable on demand, at sight, otherwise indicates that it is payable at the will of the holder, or does not state a time of payment [see *Com. Code § 3108(a)*]. The seller usually presents the sight draft and accompanying documents for payment before the buyer has received the goods. For this reason, sellers generally prefer sight drafts. For further discussion of sight drafts, see Ch. 55, *Negotiable Instruments*.

[d] Time Draft

This form can also be drafted so that it is payable at a definite time (a "time draft"). A draft is "payable at a definite time" if it is payable on the elapse of a definite period after sight or acceptance, at a fixed date, or at a time readily ascertainable when the draft is issued, subject to certain rights [see *Com. Code § 3108(b)*]. Regarding a letter of credit, a time draft is a draft that the buyer (or issuing bank) accepts by signing and thereby promising to pay on maturity at some future date. An accepted time draft is also known as a "usance bill of exchange" or "banker's acceptance."

The purpose of a time draft is to delay payment to the seller until the goods have arrived. This allows the buyer to check that the goods conform to the contract and to sell the goods, providing funds to reimburse the issuing bank. For this reason, time drafts are preferred by buyers. A time draft must first be presented to the drawee to set the maturity date, unless the date is otherwise stated in the draft. The draft is presented for payment when the time specified in the draft has expired. For further discussion of time drafts, see Ch. 55, *Negotiable Instruments*.

[e] Warranties

If its presentation is honored, the beneficiary warrants to the issuer, to any other person to whom presentation is made, and to the applicant that there is no fraud or forgery, as described in *Com. Code § 5109(a)* [*Com. Code § 5110(a)(1)*; see *Com. Code § 5109(a)*; § 56.50[2][c]]. The beneficiary further warrants to the applicant that the drawing does not violate any agreement between the applicant and the beneficiary or any other agreement intended by them to be augmented by the letter of credit [*Com. Code § 5110(a)(2)*]. These warranties are in addition to the warranties arising under *Com. Code § 3101* (negotiable instruments) [see Ch. 55, *Negotiable Instruments*], *Com. Code § 4101* (bank deposits and collections) [see California Points and Authorities, Ch. 34, *Checks and Banks* (Matthew Bender)], *Com. Code § 7101* (documents of title, including warehouse receipts and bills of lading), and *Com. Code § 8101* (investment securities) [see Ch. 42, *Secured Transactions*] because of the presentation or transfer of documents covered by any of those sections [*Com. Code § 5110(b)*].

[f] Time Allowed for Honor or Rejection

An issuer must honor a presentation [see *Com. Code § 5102(a)(12)* (presentation defined as delivery of document to issuer for honor)] that, according to the standard practice of financial institutions that regularly issue letters of credit, appears on its face strictly to comply with the terms and conditions of the letter of credit [*Com. Code § 5108(a)*; see *Com. Code § 5109* (forgery or material fraud); see also *Com. Code 5108(e)* (standard practice)]. Unless otherwise agreed [see *Com. Code § 5106* (time for issuer's performance may be otherwise modified or waived); *Com. Code § 5108* (UCC Comment 2); § 56.50[3]], an issuer has a reasonable time after presentation, but not beyond the end of the seventh business day of the issuer after receipt of the documents [*Com. Code § 5018(b)*]:

- To honor [see *Com. Code § 5102(a)(8)* ("honor" of letter of credit defined)];
- To accept a draft or incur an obligation, if the letter of credit provides for honor to be completed more than seven business days after presentation;

- To give notice to a presenter of discrepancies in the presentation [*see Com. Code § 5102(a)(13)* (presenter defined as person making presentation as or on behalf of beneficiary or nominated person); *Com. Code § 5102(a)(12)* ("presentation" defined)].

Failure of the issuer to act within the prescribed time period constitutes dishonor [*Com. Code § 5108* (UCC Comment 2); *see Com. Code § 5102(a)(5)* ("dishonor" defined)].

[g] Acceptance

"Acceptance" is the drawee's signed agreement to pay a draft as presented. The acceptance must be written on the draft, and may consist of the drawee's signature alone. Acceptance may be made at any time, and becomes effective when completed by notification or delivery [*Com. Code § 3409(a)*]. A draft may be accepted even though it has not been signed by the drawer, is otherwise incomplete or overdue, or has been dishonored [*Com. Code § 3409(b)*].

If a draft is payable at a fixed period after sight, and the acceptor fails to date its acceptance, the holder may complete the draft by supplying a date in good faith [*Com. Code § 3409(c)*].

[2] FORM

Bill of Exchange (Draft)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsGeneral
OverviewCommercial Law (UCC)Letters of Credit (Article 5)General OverviewCommercial Law (UCC)Letters of
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22-56 California Legal Forms--Transaction Guide §§ 56.221-56.229

[Reserved]

§§ 56.221[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
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PART IV. FORMS
B. Electronic Transfers of Funds
1. Funds Transfers Under Commercial Code

22-56 California Legal Forms--Transaction Guide § 56.230

§ 56.230 Notice of Funds-Transfer Error and Claim for Refund

[1] Comment

[a] Use of Form

This form may be used by the sender of a payment to notify a bank of an acceptance or execution error and to inform the bank of the relevant facts surrounding that error. This form is drafted for use in situations in which the sender receives notice from the receiving bank and discovers an error in the bank's acceptance or execution of the payment order [see *Com. Code* §§ 11204, 11304], but can be adapted for use when a customer does not receive notification from the bank.

[b] "Acceptance" and "Execution" Defined

In general, "acceptance" of a payment order by the beneficiary's bank occurs at the earliest of the following times [*Com. Code* § 11209(b); but see *Com. Code* § 11209(c), (d)]:

- When the bank pays the beneficiary or notifies the beneficiary that its account has been credited and funds are withdrawable;
- When the bank receives payment of the entire amount [see *Com. Code* § 11403(a)(1), (2)]; or
- The next funds-transfer business day following the payment date if the sender's order is fully covered by a withdrawable credit in an authorized account of the sender, or the bank has otherwise received full payment from the sender, and the bank does not reject the order.

A receiving bank other than a beneficiary's bank accepts a payment order when it executes the order [*Com. Code* § 11209(a); but see *Com. Code* § 11209(d) (date of acceptance)]. For further discussion, see § 56.63.

A payment order is "executed" by a receiving bank when it issues a payment order intended to carry out the payment order received by the bank [*Com. Code § 11301(a)*]. When a receiving bank accepts a payment order, the bank must follow specified procedures in executing that order [*see Com. Code § 11302; see also Com. Code §§ 11303-11305* (execution errors)]. For further discussion, see § 56.68.

[c] Receiving Bank's Duty to Make Refunds and Pay Interest

If a receiving bank accepts a payment order issued in the name of its customer as sender and the order is (1) not authorized and not effective [*see Com. Code § 11202*], or (2) effective, but not enforceable, in whole or in part, against the customer [*see Com. Code § 11203*], the bank must refund any payment received from the customer for the payment order to the extent that the bank is not entitled to enforce payment [*Com. Code § 11204(a)*]. The bank must pay interest on the refundable amount, calculated from the date that the bank received payment until the date of the refund. However, the bank need not pay interest if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time (not exceeding 90 days) after the customer received notification from the bank that the order was accepted, or that the customer's account was debited with respect to the order [*Com. Code § 11204(a)*].

If the sender of an erroneously-executed payment order [*see Com. Code § 11303*] receives notification from the receiving bank that the order was executed or that the sender's account was debited with respect to the order, the sender must exercise ordinary care to determine, on the basis of information available to the sender, that the order was erroneously executed and to notify the bank of the relevant facts within a reasonable time not exceeding 90 days after the notification from the bank was received by the sender [*Com. Code § 11304*]. If the sender fails to exercise this duty, the bank is not obligated to pay interest on the refundable amount [*Com. Code § 11304; see Com. Code § 11402*].

If a funds transfer is completed but the receiving bank's breach of its execution obligations [*see Com. Code § 11302*] results in a delay in payment to the beneficiary, the bank is obligated to pay interest, to either the sender or the beneficiary, for the period of delay caused by the improper execution [*Com. Code § 11305(a)*].

[d] Additional Damages

In addition to its obligations to make refunds and pay interest on the refundable amount [*see [c], above*], a bank may be liable for additional damages, such as execution expenses and incidental expenses and interest losses resulting from an improper execution [*see Com. Code § 11305(b), (d)*], consequential damages if recovery is provided for in an express written agreement of the receiving bank [*see Com. Code § 11305(c), (d)*], and attorneys' fees [*see Com. Code § 11305(e)*]. This form may be adapted to demand payment of these additional damages. For further discussion, see §§ 56.70, 56.71, and 56.113.

[2] FORM

Notice of Funds-Transfer Error and Claim for Refund

NOTICE OF FUNDS-TRANSFER ERROR AND CLAIM FOR REFUND

_____ [date]

_____ [name of financial institution]

_____ [address of financial institution]

Re: Funds-Transfer Error

_____ [customer's name]

[customer's account number]

This notice is to inform you that I have received _____ [your notice of _____ (acceptance or execution) dated _____ (date of notice) or my monthly statement dated _____ covering _____ (period covered by monthly statement) or notification], which indicates that my payment order dated _____ was [accepted or executed] on _____ [date]. Attached is a copy of my original payment order [add if applicable: including instructions].

My original payment order indicates _____ [specify correct contents of payment order, e.g., that _____ (name of proper beneficiary) is the named beneficiary of that payment order or that the amount of the payment order is \$ _____]. _____ [Your notice or My monthly statement] indicates that _____ [specify erroneous fact, e.g., the bank paid _____ (name of wrong beneficiary) or the bank executed the payment order in the amount of \$ _____]. This error has resulted in _____ [explain result of error, e.g., the payment of my payment order to the wrong beneficiary or an overpayment of my payment order in the amount of \$ _____ or an underpayment of my payment order in the amount of \$ _____].

I request that you refund \$ _____, the amount of the payment order that was debited from my account. [Add, if notice is sent within a reasonable time, not exceeding 90 days, after the date of receipt of the bank notice: In addition, I request that you pay interest on that amount, calculated from the date that you received payment for the payment order until the date that you pay the refund.]

_____ [signature of sender]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Funds Transfers (Article 4A)General OverviewCommercial Law (UCC)Funds Transfers (Article 4A)Receipt of Payment Orders



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 56 LETTERS OF CREDIT AND ELECTRONIC FUND TRANSFERS
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B. Electronic Transfers of Funds
1. Funds Transfers Under Commercial Code

22-56 California Legal Forms--Transaction Guide §§ 56.231-56.239

[Reserved]

§§ 56.231[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
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2. Fund Transfers Under Electronic Fund Transfer Act

22-56 California Legal Forms--Transaction Guide § 56.240

§ 56.240 Disclosures by Financial Institution Accompanying Distribution of Unsolicited Access Device

[1] Comment

[a] Use of Form

This form is a disclosure that may be used by a financial institution to send an unsolicited electronic fund transfer access card or code to a consumer. This form satisfies the disclosure requirements for unsolicited distributions of access devices set forth in Appendix A to Title 12, Part 205, of the Code of Federal Regulations. An institution that wishes to distribute an unsolicited access device may use these model clauses or disclosure clauses of its own design [12 C.F.R. pt. 205, app. A].

This form can also be used to satisfy other disclosure requirements relating to electronic fund transfers, including the required initial disclosure of terms and conditions when the consumer and the financial institution contract for electronic fund transfer service [12 C.F.R. pt. 205, app. A; *see* 12 C.F.R. §§ 205.5(b)(2), (3), 205.7].

Use of the model clauses and compliance with other requirements of the Electronic Fund Transfer Act will protect an institution from liability to the extent the clauses accurately reflect the institution's services [12 C.F.R. pt. 205, app. A; *see* 15 U.S.C. §§ 1693m, 1693n].

These disclosures must be clear and readily understandable, in writing, and in a form the consumer may keep [12 C.F.R. § 205.4(a)(1)]. The disclosures must include the matters required by the Act and the governing regulations, to the extent applicable [15 U.S.C. § 1693(c)(a)]. The disclosures may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*) [12 C.F.R. § 205.4(a)(1)]. For further discussion of the E-Sign Act, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[b] Issuance of Access Device

In general, a financial institution may not issue an unsolicited access device [see 12 C.F.R. § 205.5(a)]. However, an institution may distribute an access device to a consumer on an unsolicited basis if [15 U.S.C. § 1693i(b); 12 C.F.R. § 205.5(b); see 15 U.S.C. § 1693c (disclosure requirements)]:

- The access device is not validated;
- The distribution is accompanied by complete disclosure of the consumer's rights and liabilities that will apply if the access device is validated;
- The distribution is accompanied by a clear explanation that the access device is not validated and how to dispose of the access device if validation is not desired; and
- The access device is validated only in response to a request or application from the consumer, and after verification of the consumer's identity by a reasonable means.

For further discussion, see § 56.82.

[c] Contents of Disclosure

A financial institution that wishes to send a consumer an unsolicited access device must include a complete disclosure of the consumer's rights and liabilities that will apply if the access device is validated [12 C.F.R. § 205.5(b)(3); see 12 C.F.R. § 205.7(a)]. The disclosure must be in a readily understandable written statement that the consumer may keep, and must include all of the following [12 C.F.R. § 205.7(b)]:

- A summary of the consumer's liability under 12 C.F.R. § 205.6, or other applicable law or agreement, for unauthorized electronic fund transfers. The financial institution may choose to include a statement on the advisability of promptly reporting loss or theft of the access device or unauthorized transfers.
- The telephone number and address of the person or office to be notified when the consumer believes that an unauthorized electronic fund transfer has been made or may be made.
- The financial institution's business days [see 12 C.F.R. § 205.2(d)].
- The type of electronic fund transfers that the consumer may make and any limitations on the frequency and dollar amount of transfers. The details of the limitations need not be disclosed if their confidentiality is essential to maintain the security of the electronic fund transfer system.
- Any charges for electronic fund transfers or for the right to make transfers.
- A summary of the consumer's right to receive documentation of electronic fund transfers [see 12 C.F.R. §§ 205.9, 205.10(a), (d)].
- A summary of the consumer's right to stop payment of a preauthorized electronic fund transfer and the procedure for initiating a stop-payment order [see 12 C.F.R. § 205.10(c)].
- A summary of the financial institution's liability to the consumer for its failure to make or stop certain transfers [see 15 U.S.C. § 1693h].
- The circumstances under which the financial institution, in the ordinary course of business, will

disclose information to third parties concerning the consumer's account.

- A notice concerning error resolution procedures.
- A notice that a fee may be imposed by an automated teller machine operator when the consumer initiates an electronic fund transfer or makes a balance inquiry, and by any network used to complete the transaction. (For these purposes, an "automated teller machine operator" is any person that operates an automated teller machine at which a consumer initiates an electronic fund transfer or a balance inquiry and that does not hold the account to or from which the transfer is made, or about which an inquiry is made [12 C.F.R. § 205.16(a)(1)].)

[2] FORM

Disclosures by Financial Institution Accompanying Distribution of Unsolicited Access Device

DISCLOSURES CONCERNING ACCESS DEVICE

Disposing of Unvalidated Device

You cannot use the enclosed [card or code] to transfer money into or out of your account until we have validated it. If you do not want to use the [card or code], please _____[specify method, e.g., for card: destroy it at once by cutting it in half or for code: destroy this notice at once].

[_____ (If desired, add validation instructions here).]

Liability for Unauthorized Transfers

Tell us AT ONCE if you believe your [card or code] has been lost or stolen. Telephoning is the best way of keeping your possible losses down. You could lose all the money in your account (plus your maximum overdraft line of credit). If you tell us within two business days, you can lose no more than \$50 if someone used your [card or code] without your permission.

If you do NOT tell us within two business days after you learn of the loss or theft of your [card or code], and we can prove we could have stopped someone from using your [card or code] without your permission if you had told us, you could lose as much as \$500.

Also, if your statement shows transfers that you did not make, tell us at once. If you do not tell us within 60 days after the statement was mailed to you, you may not get back any money you lost after the 60 days if we can prove that we could have stopped someone from taking the money if you had told us in time.

If a good reason (such as a long trip or a hospital stay) kept you from telling us, we will extend the time periods.

How to Notify Us

If you believe your [card or code] has been lost or stolen or that someone has transferred or may transfer money from your account without your permission, call [telephone number] or write _____[name of person or office to be notified], _____[address].

Business Days

Our business days are [*describe, e.g., Monday through Friday*]. Holidays [*are or are not*] included.

Account Access

You may use your [*card or code*] to:

- (1) Withdraw cash from your [*checking or savings*] account.
- (2) Make deposits to your [*checking or savings*] account.
- (3) Transfer funds between your checking and savings accounts whenever you request.
- (4) Pay for purchases at places that have agreed to accept the [*card or code*].
- (5) Pay bills [*directly or by telephone*] from your [*checking or savings*] account in the amounts and on the days you request.

Some of these services may not be available at all terminals.

Limitations on Frequency of Transfers

- (1) You may make only [*number*] cash withdrawals from our terminals each [*period*].
- (2) You can use our telephone bill-payment service to pay [*number*] bills each [*period or telephone call*].
- (3) You can use our point-of-sale transfer service for [*number*] transactions each [*period*].
- (4) For security reasons, there are [*describe other limits*] limits on the number of transfers you can make using our [*terminals or telephone bill-payment service or point-of-sale transfer service*].

Limitations on Dollar Amounts of Transfers

- (1) You may withdraw up to \$_____ from our terminals each _____ [*period or time* you use the _____ (card or code)].
- (2) You may buy up to \$_____ worth of goods or services each _____ [*period or time* you use the _____ (card or code)] in our point-of-sale transfer service.

Per-Transfer Charge

We will charge you \$_____ for each transfer you make using our [*automated teller machines or telephone bill-payment service or point-of-sale transfer service*].

Fixed Charge

We will charge you \$_____ each [*period*] for our [automated teller machines *or* telephone bill-payment service *or* point-of-sale transfer service].

**Average or Minimum
Balance Charge**

We will only charge you for using our [automated teller machines *or* telephone bill-payment service *or* point-of-sale transfer service] if the [average *or* minimum] balance in your [checking and/or savings] account[s] falls below \$_____. If it does, we will charge you \$_____ each [transfer *or period*].

Terminal Transfers

You can get a receipt each time you make any transfer to or from your account using one of our [automated teller machines *or* point-of-sale terminals].

Preauthorized Credits

If you have arranged to have direct deposits made to your account at least once every 60 days from the same person or company, _____[we will let you know if the deposit _____ (is *or* is not) made *or* the person or company making the deposit will tell you every time they send us the money *or* you can call us at _____ (*telephone number*) to find out whether or not the deposit has been made].

Periodic Statements

You will get a [*specify period, e.g., monthly*] account statement [*add if applicable: unless there are no transfers in a particular month. In any case, you will get the statement at least quarterly*].

Passbook Accounts With Only Preauthorized Credits

If you bring your passbook to us, we will record any electronic deposits that were made to your account since the last time you brought in your passbook.

Right to Stop Payment and Procedure

If you have told us in advance to make regular payments out of your account, you can stop any of these payments. Here's how:

Call us at [*telephone number*], or write us at _____[*address*], in time for us to receive your request three business days or more before the payment is scheduled to be made. If you call, we may also require you to put your request in writing and get it to us within 14 days after you call. [*Add if applicable: We will charge you*

\$_____ for each stop-payment order you give.]

Notice of Varying Amounts

If these regular payments may vary in amount, [we *or* the person you are going to pay] will tell you, 10 days before each payment, when it will be made and how much it will be. [*Add if applicable:* You may choose instead to get this notice only when the payment would differ by more than a certain amount from the previous payment, or when the amount would fall outside certain limits that you set.]

Liability for Failure to Stop Payment of Preauthorized Transfer

If you order us to stop one of these payments three business days or more before the transfer is scheduled, and we do not do so, we will be liable for your losses or damages.

Liability for Failure to Make Transfers

If we do not complete a transfer to or from your account on time or in the correct amount according to our agreement with you, we will be liable for your losses or damages. However, there are some exceptions. We will not be liable, for instance:

If, through no fault of ours, you do not have enough money in your account to make the transfer.

If the transfer would go over the credit line on your overdraft line.

If the automated teller machine where you are making the transfer does not have enough cash.

If the [terminal *or* system] was not working properly and you knew about the breakdown when you started the transfer.

If circumstances beyond our control, such as fire or flood, prevent the transfer, despite reasonable precautions that we have taken.

There may be other exceptions stated in our agreement with you.

Account Information Disclosure

We will disclose information to third parties about your account or the transfers you make:

- (1) Where it is necessary for completing transfers, or
- (2) In order to verify the existence and condition of your account for a third party, such as a credit bureau or merchant, or
- (3) In order to comply with government agency or court orders, or
- (4) If you give us your written permission.

Notice Concerning Errors

IN CASE OF ERRORS OR QUESTIONS ABOUT YOUR ELECTRONIC TRANSFERS

Telephone us at _____ [*telephone number*]

or

Write us at _____ [*address*]

as soon as you can, if you think your statement or receipt is wrong or if you need more information about a transfer listed on the statement or receipt. We must hear from you no later than 60 days after we sent you the FIRST statement on which the problem or error first appeared.

- (1) Tell us your name and account number (if any).
- (2) Describe the error or the transfer you are unsure about, and explain as clearly as you can why you believe it is an error or why you need more information.
- (3) Tell us the dollar amount of the suspected error.

If you tell us orally, we may require that you send us your complaint or question in writing within 10 business days.

We will tell you the results of our investigation within 10 business days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to 45 days to investigate your complaint or question. If we decide to do this, we will recredit your account within 10 business days for the amount you think is in error, so that you will have use of the money during the time it takes us to complete our investigation. If we ask you to put your complaint or question in writing and we do not receive it within 10 business days, we may not recredit your account.

If we decide that there was no error, we will send you a written explanation within three business days after we finish our investigation. You may ask for copies of the documents that we used in our investigation.

ATM Fees

We _____ [do not charge a fee for your use of *or* charge a fee of \$ _____ each time you use] our automated teller machines to initiate electronic funds transfers or make balance inquiries regarding your account at this institution. [However *or* In addition], if you use an automated teller machine operated by another automated teller machine operator (that is, any operator other than this institution) to initiate an electronic fund transfer or a balance inquiry, a fee may be imposed by that operator, and by any network used to complete the transaction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking Law Bank Activities Electronic Banking Fund Transfers



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 56 LETTERS OF CREDIT AND ELECTRONIC FUND TRANSFERS
PART IV. FORMS
B. Electronic Transfers of Funds
2. Fund Transfers Under Electronic Fund Transfer Act

22-56 California Legal Forms--Transaction Guide § 56.241

§ 56.241 Demand for Resolution of Erroneous Electronic Fund Transfer

[1] Comment

[a] Use of Form

This form may be used by an individual customer (or "consumer") of a bank or other financial institution to demand that an erroneous electronic fund transfer to or from the customer's account be corrected [*see 15 U.S.C. § 1693f(a)*]. The right to make this demand is guaranteed by the federal Electronic Fund Transfer Act [*15 U.S.C. §§ 1693-1693r*]. Acts constituting an error for purposes of this form are discussed in [b], *below*.

[b] "Error" Defined

For the purpose of the error resolution provisions of the Electronic Fund Transfer Act, an error may consist of any of the following [*15 U.S.C. § 1693f(f); 12 C.F.R. § 205.11(a)*]:

- An unauthorized electronic fund transfer.
- An incorrect electronic fund transfer from or to the consumer's account.
- The omission from a periodic statement of an electronic fund transfer.
- A computational or bookkeeping error made by the institution relating to an electronic fund transfer.
- Receipt by the consumer of an incorrect amount of money from an electronic terminal.
- An electronic fund transfer not properly documented [*see 12 C.F.R. §§ 205.9 (documentation of transfers), 205.10(a) (preauthorized transfers to a consumer's account)*].

- A consumer's request for additional information or clarification concerning an electronic fund transfer or any documentation required by the Act [*see 12 C.F.R. §§ 205.9 (documentation of transfers), 205.10(a) (preauthorized transfers to a consumer's account, including a request the consumer makes to determine whether an error exists under 12 C.F.R. § 205.11(a)(1)(i)-(vi) [see items above].*

[c] Error Resolution

If the consumer detects an error [*see 15 U.S.C. § 1693f(f); see also [b], above*] in the electronic fund transfer documentation furnished by his or her financial institution, the consumer may be able to obtain resolution of the problem. The institution must receive oral or written notice of the claimed error within 60 days after having transmitted the documentation of a transfer. The notice must indicate the consumer's name and account number, the consumer's belief that the documentation or account contains an error and the amount of the error, and the reasons for the consumer's belief that an error has occurred. If the notice is oral, the institution may require that written confirmation be furnished within 10 days [*15 U.S.C. § 1693f(a)*].

The institution must then investigate the alleged error, determine whether an error has occurred, and report or mail the results and its determination to the consumer within 10 business days [*15 U.S.C. § 1693f(a)*]. If the institution finds that an error did occur, it must correct the error within one business day after making that finding [*15 U.S.C. § 1693f(b)*].

Rather than investigating, reporting, and, if necessary, correcting a claimed error within the 10-day period discussed above, the institution may elect, pending its investigation and determination, to give the consumer a provisional credit for the amount in dispute plus any applicable interest within 10 business days after receipt of the consumer's notice (less any amount for which the consumer is liable on an unauthorized transfer) [*see 15 U.S.C. § 1693g; see also § 56.88*]. This investigation, however, must be completed within 45 days after receipt of the error notice; and, during the investigation period, the consumer must be allowed full use of the amount provisionally credited [*15 U.S.C. § 1693f(c)*]. Alternatively, the institution may issue a denial of error [*see 15 U.S.C. § 1693f(d); see also [d], below*].

An institution that does not give a provisional credit will be liable for treble damages if it fails to make a good faith investigation of the claimed error or does not have a reasonable basis for believing that the consumer's account is not in error [*15 U.S.C. § 1693f(e)(1)*]. The institution will also be liable for treble damages if it knowingly and willfully concludes that the consumer's account is not in error when that conclusion cannot reasonably be drawn from the evidence available at the time of the investigation [*15 U.S.C. § 1693f(e)(2)*].

[d] Denial of Claimed Error

If the institution determines, after an investigation of a claimed error, that an error did not occur, it must send the consumer an explanation of its findings within three business days after the end of its investigation. The explanation letter must include notice of the consumer's right to request reproductions of the documents upon which it relied in denying the consumer's claim that an error occurred. When requested by the consumer, the institution must promptly send him or her those reproductions [*15 U.S.C. § 1693f(d)*].

[2] FORM

Demand for Resolution of Erroneous Electronic Fund Transfer

NOTICE OF ELECTRONIC FUND TRANSFER ERROR

[date]

[name of financial institution]

[address of financial institution]

Re: Electronic Fund Transfer Error

_____ [customer's name]

_____ [customer's account number]

I am the holder of _____ [an account at _____ (name of financial institution) or a _____ (describe card by trade name, e.g., a Twenty-Four Hour Cash Card) debit card, issued by _____ (you or name of financial institution)], bearing account number [customer's account or debit card number].

I believe that the _____ [account passbook or documentation provided by _____ (name of institution) for that account number for the period of _____ (specify period)] contains an error in the amount of \$ _____. [This notice confirms the oral notice I communicated to you on _____ (specify date within prior 10 days).]

That error consists of the following: _____ [describe, e.g., a debit of \$ _____ more than should have been debited on _____ (date) or the failure to credit my account with a payment from _____ (name of payor) that should have been credited on or about _____ (date) in the amount of \$ _____ or the failure to debit my account with a payment to _____ (name of payee) on or about _____ (date) in the amount of \$ _____].

The reasons for my belief that an error has occurred are _____ [specify reasons, e.g., the documentation I received at the time I made the debit involved clearly shows the amount debited to be \$ _____ or my copy of the order I gave for the automatic payment clearly provides for the payment of \$ _____ or my copy of the automatic deposit authorization I executed provides for an automatic deposit of \$ _____] rather than the \$ _____ [actually _____ (debited or deposited or paid) or shown on your periodic statement dated _____ (date)].

[Repeat, as required:]

_____ [signature of consumer]

[typed name]

Applicant

_____ [name]

_____ [address]

_____ [city, state, zip, country]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Bank Activities Electronic Banking Fund Transfers



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS

22-57 California Legal Forms--Transaction Guide 57.syn

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.syn Synopsis to Chapter 57: COMPUTER-RELATED AND INTERNET TRANSACTIONS

§ 57.01 California Sources

[1] Statutes

[2] Regulations

§ 57.02 Federal Sources

[1] United States Constitution

[2] Federal Statutes

[3] Federal Regulations

§§ 57.03-57.04 [Reserved]

§ 57.05 Law Reviews and Periodicals

§ 57.06 [Reserved]

§ 57.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§ 57.08 Website Materials

§ 57.09 [Reserved]

§ 57.10 Hardware and Firmware

§ 57.11 Computer Programs

[1] Computer Program Language

[2] Computer Programs and Software

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§ 57.12 Software Licensing

§ 57.13 Warranty and Remedy Provisions

[1] UCC Divisions 2 and 10

[2] Song-Beverly Consumer Warranty Act

[3] Contractual Warranties

[4] Remedies

§ 57.14 Antitrust Considerations

[1] Sherman Antitrust Act

[2] Clayton Act

[3] Other Trade Regulations

§§ 57.15-57.19 [Reserved]

§ 57.20 Copyright Protection

[1] Copyright Protection of Software

[2] Computer Program Constitutes "Literary Work"

[3] Infringement of Program Copyright

[4] Limitations of Copyright Protection

§ 57.21 Trade Secret Protection of Software

[1] Trade Secret Protection in General

[2] California Action for Misappropriation

[3] Contract Actions

[4] Unfair Competition From Unauthorized Use of Trade Secret

[5] Trade Secret Not Inconsistent with Copyright

[6] Trade Secret Not Preempted by Copyright

§ 57.22 Patent Protection for Software

§ 57.23 Semiconductor Chip Protection

[1] Semiconductor Chips Not Protected Under Traditional Copyright Law

[2] Industrial Copyrights for Mask Works Embodied in Semiconductor Chips

[3] Owner's Exclusive Rights

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§ 57.30 Internet Terminology and Concepts

§ 57.31 Development of Websites

[1] Basic Website Terminology

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§ 57.32 Copyright Ownership and Protection on Websites

[1] Copyright Considerations

[2] Digital Millennium Copyright Act ("DMCA")

§ 57.33 Domain Names

[1] Nature, Use, and Registration

[2] California Domain Name Cyber Piracy Statutes

[3] Uniform Dispute Resolution Policy ("UDRP")

[4] Anticybersquatting Consumer Protection Act ("ACPA")

[5] Trademark Considerations

§ 57.34 Online Contracts

[1] Shrink-wrap Agreements

[2] Click-wrap Agreements

[3] Terms of Use

[4] Uniform Electronic Transaction Act ("UETA")

[5] E-Sign Act

[6] New Contract Terms Posted on Web Site

§ 57.35 Privacy Policies

[1] California's Online Privacy Protection Act ("OPPA")

[a] Application

[b] Privacy Policy Requirement

[c] Personally Identifiable Information

[d] Conspicuously Post

[2] Children's Online Privacy Protection Act ("COPPA")

[a] Application

[b] Requirements

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[3] Federal Privacy Notice Requirements for Financial Institutions

§ 57.36 Anti-Spam Legislation

[1] Federal "CAN-SPAM" Act

[2] California's Anti-Spam Act

§ 57.37 Children's Internet Protection Act ("CIPA")

§ 57.38 Disclosure of Customer's Personal Information

§ 57.39 Consumer Protection Against Computer Spyware Act

§ 57.40 Anti-Phishing Act of 2005

§§ 57.39-57.99 [Reserved]

§ 57.100 Facts

[1] Facts Regarding Computer System Procurement and Maintenance

Scope

[2] Facts Regarding Software Procurement, Development and Maintenance

Scope

[3] Facts Regarding Intellectual Property Protection of Software

Scope

[4] Facts Regarding Internet Related Transactions

Scope

§ 57.101 Documents

[1] Documents for Computer System Procurement, Software Procurement and Maintenance

Scope

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Scope

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Scope

§§ 57.102-57.109 [Reserved]

§ 57.110 Hardware Procurement

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§ 57.111 Software Procurement

Scope

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Computer Purchase Agreement - Computer Installed Under Prior Lease Agreement

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[d] Warranty Disclaimers

[e] Disclaimer of Consequential Damages for Breach of Warranty

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Commercial Software License Agreement

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[1] Comment

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License for Distribution of Computer Software between Program Owner and Licensee

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Mutual Non-Disclosure Agreement

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Software Warranty Provisions for Separate Levels of Support

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§ 57.243 Domain Name Purchase Agreement

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Domain Name Purchase Agreement

§ 57.244 Website Hosting Agreement

[1] Comment--Use of Form

[2] FORM

Website Hosting Agreement

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FOOTNOTES:

(n113)Footnote *. B.A. San Jose State University, May 1993, J.D. University of Santa Clara School of Law, May 1997. Ms. Kaufman was in private practice for several years before working as in-house counsel for several Silicon Valley companies, including Silicon Valley Bank, Ariba, and Phoenix Technologies.



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS

22-57 California Legal Forms--Transaction Guide Scope

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

Scope

Fiona C. Newell Kaufman, J.D. n*

Revision Author Scope

This chapter deals with computer and internet related transactions. It includes computer hardware procurement, lease, and maintenance agreements, as well as software license agreements, software development agreements and software design agreements. This chapter also includes computer and software distribution agreements, and computer access agreements. It also covers internet related transaction, such as website development, online agreements, and privacy issues.

This chapter discusses laws for the protection of proprietary interests in computer hardware, software, and on the internet. It discusses the methods for protection of computer software, including the use of software license and design or employment agreements to provide intellectual property protection. Protection of computer software under patent and copyright law is also discussed. This chapter also covers the protection of proprietary interests in websites, domain names and website content, which are generally protected under copyright and trademark law. The general process of copyright protection is covered in depth in Ch. 103A, *Copyrights* . For detailed coverage of trademarks, see Gilson on Trademarks (Matthew Bender).

Provisions in employment contracts or independent contractor agreements typically are used to protect an owner's intellectual property interests in software designed by employees or independent contractors. This chapter contains software design and development agreements that embody these provisions. For coverage of employment law and procedures as well as an employment contract between a computer software firm and a programmer, see Ch. 85, *Employment Agreements* . For discussion of the law of independent contractors, as well as general forms for contracts for use in hiring independent contractors, see Ch. 84, *Independent Contractors* .

Internet advertising and promotion is discussed in Ch. 50, *Advertising and Promotion* . Electronic funds transfers are covered in Ch. 56, *Letters of Credit and Electronic Fund Transfers* . Government procurement of computer and electronic data processing services is covered in Ch. 90A, *State Government Contracts* , and Ch. 90B, *Federal Government Contracts* . Contracts involving sales representatives, including distribution agreements, are covered in Ch. 91, *Contracts with Sales Representatives* . Electronic data processing services are covered in Ch. 92, *Service Contracts* .

FOOTNOTES:

(n114)Footnote *. B.A. San Jose State University, May 1993, J.D. University of Santa Clara School of Law, May 1997. Ms. Kaufman was in private practice for several years before working as in-house counsel for several Silicon Valley companies, including Silicon Valley Bank, Ariba, and Phoenix Technologies.



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PART I. RESEARCH GUIDE
A. Primary Sources

22-57 California Legal Forms--Transaction Guide § 57.01

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.01 California Sources

[1] Statutes

"Trademark" defined. *Bus. & Prof. Code § 14207.*

Contracts restraining competition are void. *Bus. & Prof. Code § 16600.*

Cartwright Act. *Bus. & Prof. Code § 16700 et seq.*

"Unfair competition" defined. *Bus. & Prof. Code § 17200.*

Cyber piracy. *Bus. & Prof. Code §§ 17525-17528.5.*

California Anti-Spam Act. *Bus. & Prof. Code § 17529 et seq.*

"Domain name" defined. *Bus. & Prof. Code § 17529.1(e).*

"Internet" defined. *Bus. & Prof. Code § 17538(f)(6).*

California On-Line Privacy Protection Act ("OPPA"). *Bus. & Prof. Code § 22575 et seq.*

"Personally identifiable information" defined. *Bus. & Prof. Code § 22577(a).*

"Operator" defined. *Bus. & Prof. Code § 22577(c).*

"Consumer" defined. *Bus. & Prof. Code § 22577(d).*

Consumer Protection Against Computer Spyware Act. *Bus. & Prof. Code § 22947 et seq.*

Anti-Phishing Act of 2005 (Act). *Bus. & Prof. Code § 22948 et seq.*

Uniform Electronic Transactions Act ("UETA"). *Civ. Code § 1633.1 et seq.*

Song-Beverly Consumer Warranty Act. *Civ. Code § 1790 et seq.*

"Lease" defined. *Civ. Code § 1791(g).*

"Sale" defined. *Civ. Code § 1791(n).*

Disclosure of customer's personal information. *Civ. Code § 1798.83.*

Uniform Trade Secrets Act. *Civ. Code § 3426 et seq.*

"Improper means" defined. *Civ. Code § 3426.1(a).*

"Misappropriation" defined. *Civ. Code § 3426.1(b).*

"Trade secret" defined. *Civ. Code § 3426.1(d).*

Misappropriation of trade secret may be enjoined or otherwise limited. *Civ. Code § 3426.2.*

Damages for misappropriation. *Civ. Code § 3426.3.*

Three-year limitation of action for misappropriation. *Civ. Code § 3426.6.*

California Uniform Commercial Code. *Com. Code § 2101 et seq.*

"Goods" defined. *Com. Code § 2105.*

Remedies for breach of contract. *Com. Code §§ 2701-2725.*

Lease provisions. *Com. Code §§ 10102, 10201-10221.*

California Political Cyberfraud Abatement Act. *Elec. Code § 18320 et seq.*

"Political cyberfraud" defined. *Elec. Code § 18320(c)(1).*

"Political website" defined. *Elec. Code § 18320(c)(3).*

Privilege against, and right to prevent, disclosure of trade secret. *Evid. Code § 1060.*

Employer's ownership of anything acquired by employee during employment. *Lab. Code § 2860.*

Applicability of employment agreement provision assigning employee's rights in inventions. *Lab. Code §§ 2870-2872.*

Theft of trade secrets. *Penal Code § 499c.*

Criminal access to computers defined and prohibited. *Penal Code § 502.*

[2] Regulations

Taxation of personal property lease transactions. *18 Cal. Code Reg. § 1660.*

Employment Development Department factors for determining status as employee or independent contractor. *22 Cal. Code Reg. §§ 4304-1-4304-12.*



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22-57 California Legal Forms--Transaction Guide § 57.02

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.02 Federal Sources

[1] United States Constitution

Congressional power to provide patent and copyright protection. U.S. Const., art. I, § 8, cl. 8.

[2] Federal Statutes

Controlling The Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM"). *15 U.S.C. § 7701 et seq.*

Sherman Antitrust Act. *15 U.S.C. § 1.*

Clayton Act. *15 U.S.C. § 12 et seq.*

Robinson-Patman Act. *15 U.S.C. § 13 et seq.*

Federal Trade Commission Act. *15 U.S.C. § 41 et seq.*

Federal Trademark Dilution Act of 1995--Dilution by blurring and by tarnishment. *15 U.S.C. § 1125(c).*

Anticybersquatting Consumer Protection Act ("ACPA"). *15 U.S.C. § 1125(d).*

"Trademark" defined. *15 U.S.C. § 1127.*

Magnuson-Moss Consumer Warranty Act. *15 U.S.C. §§ 2301-2312.*

Children's Online Privacy Protection Act ("COPPA"). *15 U.S.C. § 6501 et seq.*

Electronic Signatures in Global and National Commerce Act ("E-Sign"). *15 U.S.C. § 7001.*

Copyright Act. *17 U.S.C. § 101 et seq.*

Fair use provision. *17 U.S.C. § 107.*

Limitations on copyright protection, copying. *17 U.S.C. § 117.*

Preemption of rights. *17 U.S.C. § 301.*

Mandatory deposit requirements. *17 U.S.C. § 407.*

Deposit for registration. *17 U.S.C. § 408.*

Copyright Infringement. *17 U.S.C. § 501.*

Digital Millennium Copyright Act, Title II. *17 U.S.C. § 512.*

Public disclosure of copyright deposits. *17 U.S.C. § 705(b).*

Semiconductor Chip Protection Act of 1984. *17 U.S.C. § 901 et seq.*

Mask works eligible for protection. *17 U.S.C. §§ 902, 914.*

Ownership, transfer, licensing, and recordation. *17 U.S.C. § 903.*

Duration of protection. *17 U.S.C. § 904.*

Exclusive rights protected. *17 U.S.C. § 905.*

Limited rights to reproduce without infringement. *17 U.S.C. § 906.*

Innocent infringement. *17 U.S.C. § 907.*

Registration of claims of protection. *17 U.S.C. § 908.*

Notice of protection. *17 U.S.C. § 909.*

Enforcement. *17 U.S.C. § 910.*

Civil actions. *17 U.S.C. § 911.*

Trade Secrets Act. *18 U.S.C. § 1905.*

Patents. *35 U.S.C. § 1 et seq.*

Bayh-Dole Act of 1980. *35 U.S.C. § 200 et seq.*

Children's Internet Protection Act ("CIPA"). *47 U.S.C. § 254(h), (l).*

[3] Federal Regulations

Children's Online Privacy Protection Act ("COPPA")--implementing FTC regulations. *16 C.F.R. § 312.1 et seq.*

Federal warranty regulations.

Interpretations of Magnuson-Moss Warranty Act. *16 C.F.R. pt. 700.*

Disclosure of written warranty terms and conditions. *16 C.F.R. pt. 701.*

Pre-sale availability of warranty terms. *16 C.F.R. pt. 702.*

Informal dispute settlement procedures. *16 C.F.R. pt. 703.*

Copyright regulations.

Computer programs exempt from mandatory deposit. *37 C.F.R. § 202.19(c)(5)*.

Deposit for registration of works fixed in machine-readable form-deposit of portions of source code format of computer program. *37 C.F.R. § 202.20(c)(2)(vii)*.

Special relief from requirements for deposit for registration of works fixed in machine-readable form. *37 C.F.R. § 202.20(d)*.

Semiconductor chip mask work protection.

Recordation of documents. *37 C.F.R. § 211.2*.

Filing, recording, certification, and other fees. *37 C.F.R. § 211.3*.

Registration of claim of protection. *37 C.F.R. § 211.4*.

Deposit of identifying material with application for registration. *37 C.F.R. § 211.5*.

Affixing notice of protection. *37 C.F.R. § 211.6*.



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22-57 California Legal Forms--Transaction Guide §§ 57.03-57.04

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

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B. Secondary Sources

22-57 California Legal Forms--Transaction Guide § 57.05

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.05 Law Reviews and Periodicals

Wallis III, *The Madrid Protocol: Will This International System Succeed in the United States*, 2004 UCLA J.L. & Tech. 1.

Guntersdorfer, *Software Patent Law: United States and Europe Compared*, 2003 Duke L. & Tech Rev. 6.

Bakken, *Unauthorized Use of Another's Trademark on the Internet*, 2003 UCLA J.L. & Tech. 3.

Struve and Wagner, *Realspace Sovereigns in Cyberspace: Problems with the Anticyberquatting Consumer Protection Act*, 17 Berkeley Tech. L. J. 989 (2002).

Carl, Ciocchetti, Barton, Christensen, *Are Online Business Transactions Executed by Electronic Signatures Legally Binding?*, 2001 Duke L. & Tech. Rev. 5.

Soares, *Are Domain Names Property? The Sex.Com Controversy*, 2001 Duke L. & Tech. Rev. 32.

Nimmer, *Back From the Future: A Proleptic Review of the Digital Millennium Copyright Act*, 16 Berkeley Tech. L. J. 855 (2001).

Sableman, Mark, *Link Law Revisited: Internet Linking Law at Five Years*, 16 Berkeley Tech. L. J. 1273 (2001).

Post, *Encryption Source Code and the First Amendment*, 15 Berkeley Tech. L. J. 713 (2000).

Chang, *The Patenting of MIS Computer Programs: One Step Beyond*, 21 Pac. L.J. 761 (1990).

Note, *Computer Intellectual Property and Conceptual Severance*, 103 Harv. L.J. 1046 (1990).

Simon, *Computer Contract Fundamentals*, 36 Prac. Law. 77 (Oct. 1990).

Boss, *Scope of the Uniform Commercial Code: Advances in Technology and Survey of Computer Contracting Cases*, 44 Bus. Law. 1671 (1989).

Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 Stan. L. Rev. 1045 (1989).

Spivak, *Does Form Follow Function? The Idea/Expression Dichotomy in Copyright Protection of Computer Software*, 35 UCLA L. Rev. 723 (1988).

Jones, *Whelan Associates v. Jaslow Dental Laboratory: Copyright Protection for the Structure and Sequence of Computer Programs*, 21 Loy. L.A. L. Rev. 255 (1987).

Smith, *The Computer Software Rental Act: Amending the "First Sale Doctrine" to Protect Computer Software Copyright*, 20 Loy. L.A. L. Rev. 1613 (1987).

Mahn and Epperson, *Copyright and Trade Secret Protection for Hardware and Software (With Forms)*, 33(5) Prac. Law. 61 (1987).

Menell, *Tailoring Legal Protection for Computer Software*, 39 Stan. L. Rev. 1329 (1987).

Kopf, *Debugging the Computer Contract: A Preventive Strategy Based on a Review of Vendor Liability*, 20 UCC L.J. 130 (1987).

Clapes, Lynch, and Steinberg, *Silicon Epics and Binary Bards: Determining the Proper Scope of Copyright Protection for Computer Programs*, 34 UCLA L. Rev. 1493 (1987).

Dunn, *Defining the Scope of Copyright Protection for Computer Software*, 38 Stan. L. Rev. 497 (1986).

McKenzie, *Computer Programs and Copyright Law: The Object Code Controversy*, 11 San Fern. V. L. Rev. 1 (1983).

McGarrigle, *Simultaneous Copyright and Trade Secret Protection for Computer Programs*, 23 Santa Clara L. Rev. 1037 (1983).

Kelso & Rebay, *Problems of Interpretation Under the 1980 Computer Amendment*, 23 Santa Clara L. Rev. 1001 (1983).

Sheridan, *Patent Protection of Computer Software-Practical Insights*, 23 Santa Clara L. Rev. 989 (1983).



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22-57 California Legal Forms--Transaction Guide § 57.06

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22-57 California Legal Forms--Transaction Guide § 57.07

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.07 Text References

[1] Matthew Bender Sources

Bender, Computer Law (Matthew Bender).

Roditti, Computer Contracts (Matthew Bender).

California Legal Forms (Matthew Bender).

Ch. 50, *Advertising and Promotion*.

Ch. 52, *Sale of Goods Under the Uniform Commercial Code*.

Ch. 53, *Personal Property Leasing*.

Ch. 56, *Letters of Credit and Electronic Fund Transfers*.

Ch. 84, *Independent Contractors*.

Ch. 85, *Employment Agreements*.

Ch. 90A, *State Government Contracts*.

Ch. 90B, *Federal Government Contracts*.

Ch. 91, *Contracts with Sales Representatives*.

Ch. 92, *Service Contracts*.

Ch. 103A, *Copyrights*.

Cavitch, *Business Organizations with Tax Planning* (Matthew Bender).

Chs. 231 -231F (copyright protection).

Chs. 232 -235 (trade secret issues).

Ch. 236, *Covenants Not to Compete*.

Gilson on Trademarks (Matthew Bender).

Ch. 1, *General Principles*.

Ch. 2, *Trademark Subject Matter*.

Ch.7A, *Trademark Law and the Internet*.

Milgrim on Licensing (Matthew Bender).

Milgrim on Trade Secrets (Matthew Bender).

Milgrim on Copyright (Matthew Bender).

Ch. 2, *The Subject Matter of Copyright*, §§ 2.04[C], 2.18[J].

Ch. 8A, *Semiconductor Chips and Boat Hulls*.

Ch. 27, *Computers*.

Rabkin & Johnson, *Current Legal Forms with Tax Analysis* (Matthew Bender), Ch. 3B, *Computer Agreements* .

Warren's Forms of Agreement (Matthew Bender).

Ch. 59, *Computer Hardware Purchase Agreements*.

Ch. 60, *Computer Hardware Lease Agreements*.

Ch. 61, *Software Agreements*.

Ch. 62, *Multimedia*.

Ch. 66, *Business to Business Transactions*.

Ch. 67, *Consumer Transactions*.

Ch. 68, *Purchases and Sales of Internet Business*.

Ch. 73, *Trade Secrets and Technology*.

[2] Additional Text References

Street & Grant, *Law of The Internet*, 2001 Edition.



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22-57 California Legal Forms--Transaction Guide § 57.08

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.08 Website Materials

Federal Communications Commission information on the Children's Internet Protection Act ("CIPA").
<http://www.fcc.gov/cgb/consumerfacts/cipa.html>.

Federal Trade Commission Children's Online Privacy Protection Act ("COPPA") Checklist.
<http://www.ftc.gov/bcp/online/edcams/coppa/checklist.htm>.

Internet Corporation for Assigned Names and Numbers ("ICANN") Information. <http://www.icann.org>.

ICANN Uniform Dispute Resolution Policy. <http://www.icann.org/udrp/udrp-policy-24oct99.htm>.

Open Source Software Information. <http://www.opensource.org>.

United States Patent and Trademark Office examination guide to registering domain names as trademarks.
<http://www.uspto.gov/web/offices/tac/notices/guide299.htm>.

Universal Service Administration Company (administers CIPA).
<http://www.sl.universalservice.org/reference/CIPA.asp>.



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22-57 California Legal Forms--Transaction Guide § 57.09

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART II. LEGAL BACKGROUND
A. Computer and Software Terminology

22-57 California Legal Forms--Transaction Guide § 57.10

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.10 Hardware and Firmware

Computers are referred to in the industry and in this chapter as "hardware," and can be categorized by size. Mainframe computers are the largest and most expensive. Minicomputers are less powerful and less expensive. Both of these are sold as complete systems that may involve peripheral equipment and computer programs in addition to the computers themselves. Contracts for the acquisition of these systems generally are the subject of negotiation between a commercial buyer and the manufacturer or a distributor. The third basic category of hardware consists of personal computers ("microcomputers") that generally are sold to retail stores by distributors and retailed to the general public without negotiation of contract terms.

Every computer has a central processing unit ("CPU") that does the work it is told to do by the instructions contained in computer programs. These programs are generally referred to in the industry and in this chapter as "software," although that term encompasses both computer programs and the written manuals and other materials that accompany them. In copyright law, a "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result [17 U.S.C. § 101].

Computer chips or integrated circuits containing thousands of transistors and circuits photographically etched and deposited on silicon wafers, and the "mask work" patterns embodied in them, are referred to as "firmware". A "semiconductor chip product" ("chip") has two or more layers of metallic, insulating, or semiconductor material deposited on or etched from a piece of semiconductor material and functions as an electronic circuit [see 17 U.S.C. § 901(a)(1)]. A "mask work" is a series of related images that represent the patterns embodied in a semiconductor chip product [see 17 U.S.C. § 901(a)(2)].

A mask work that is fixed in a semiconductor chip product is entitled to special protection [see 17 U.S.C. § 902], similar to copyright protection, under the Semiconductor Chip Protection Act of 1984 [17 U.S.C. §§ 901-914]. A mask work is "fixed" in a chip when its embodiment in the chip is sufficiently permanent or stable to permit the pattern to be perceived or reproduced from the chip for more than a transitory period [see 17 U.S.C. § 901(a)(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawSubject MatterSemiconductor Chips & Boat HullsMask Works



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DIVISION III: COMMERCIAL TRANSACTIONS
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PART II. LEGAL BACKGROUND
A. Computer and Software Terminology

22-57 California Legal Forms--Transaction Guide § 57.11

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.11 Computer Programs

[1] Computer Program Language

Computer programs are written in different levels of "language." High-level language, such as BASIC, C, C++, COBAL, FORTRAN, Ada, and Pascal, are usually referred to as programming language. A somewhat lower level is "assembly" language; it consists of alphanumeric labels. Both of these are referred to as having been written in "source code" [*Apple Computer, Inc. v. Franklin Computer Corp.* (3d Cir. 1983) 714 F.2d 1240, 1243] . The source code is the version produced initially by a programmer and contains commentary by the programmer indicating how it works and how it may be revised or updated. Moreover, it is the version that is used to "maintain" (revise, update, or correct) the program.

The third and lowest level is "machine" language and consists of binary codes (using 0 and 1 in various combinations). Statements in machine language are referred to as having been written in "object code." The CPU can only follow instructions written in the binary object code. Programs written in source code are translated by a "compiler" program into object code for use by the computer [*Apple Computer, Inc. v. Franklin Computer Corp.* (3d Cir. 1983) 714 F.2d 1240, 1243] .

[2] Computer Programs and Software

Computer programs, or "software", are stored or "fixed" on a variety of memory devices, including tape, disks, CD-Rom's, and chips called "Read Only Memory" ("ROM"). The ROM chip is a permanent memory device that is incorporated into the circuitry of a computer, while the tape, disk, or CD-Rom is an auxiliary memory device that can be inserted into the computer and from which data or instructions can be read [*Apple Computer, Inc. v. Franklin Computer Corp.* (3d Cir. 1983) 714 F.2d 1240, 1243] .

Computer programs are categorized by function as either "application" or "operating system" programs. Application programs usually perform a specific task for the computer user, such as instructing the computer to perform word

processing or video game functions. In contrast, operating system programs generally manage the internal functions of the computer or facilitate use of the application programs [*Apple Computer, Inc. v. Franklin Computer Corp.* (3d Cir. 1983) 714 F.2d 1240, 1243] .

Computer programs are also categorized as either "standard" or "custom." A standard program is reproduced and made available to all users without any changes, while custom programs are either custom designed for a particular use or user or standard programs that have been "customized" or modified for a particular use or user. A standard program is most likely to have been tested through use and to have been "debugged," that is, to have had its faults found and corrected. Such a program is generally referred to as "stable and well defined," is generally accompanied by documentation that describes its functions and gives directions for usage, and may be either accompanied by technical specifications or warranted to perform in accordance with those specifications. The custom or customized program may not have that degree of perfection and, accordingly, is most likely to be accompanied by a more limited warranty.

[3] Open Source Software

Open source software is software that is licensed under a General Public License ("GPL") [see <http://www.opensource.org/>; see also http://www.opensource.org/docs/definition_plain.php]. Open source software usually lacks the ownership constraints, such as copyright restrictions, that are usually placed on commercially licensed software. Open source software is the result of a collaboration among many unrelated software developers. The GPL usually requires the one who modifies the software, and distributes the code, to share the modifications at little or not cost. This process of modification and distribution relies on the assumption that each developer that modifies the open source software will honor the intellectual property rights of others. Therefore one of the biggest risks with free and open source software is the potential to make the software user liable for unknown breaches of third party intellectual property rights. Furthermore, the issue of whether or not an open source software license is enforceable is unknown. In *Progress Software Corp. v. My SQL AB* [*Progress Software Corp. v. MySQL AB* (D. Mass 2002) 195 F. Supp.2d 328] , in which a licensor sought an injunction, the court did not reach the issue of enforceability of the open source software license and held that the licensor had not shown a likelihood of success on the merits nor irreparable harm. To date, no other court has held whether an open source code license is an enforceable contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet LawInternet BusinessLicensingGeneral OverviewCopyright LawSubject MatterGeneral Overview



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22-57 California Legal Forms--Transaction Guide § 57.12

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.12 Software Licensing

A licensing agreement is not a sale. Rather, it is a grant of permission to do a particular thing or to exercise a certain privilege [*Blatz Brewing Co. v. Collins* (1948) 88 Cal. App. 2d 438, 448, 199 P. 2d 34] . A software license is a contract by the owner of the computer program ("Licensor") and a user of the computer program ("Licensee") which outline the rights and responsibilities of the parties in regard to the uses and interests each has in the computer program or software.

Licensing agreements commonly are used with computer software because they do not transfer title to the software. Therefore, the licensee does not have sole and exclusive rights to the software, absent a license provision to that effect. The license permits the software owner to impose use restrictions designed to protect its proprietary interests. Specifically, the software owner can include provisions restricting access to the software, prohibiting its transfer, or prohibiting disclosure of its contents to other persons. Such restricted access is vital to intellectual property protection of software.

If licensed technology is developed with government funding, such as with grants from a federal agency, the software license should include a provision which acknowledges the governmental funding. In such a circumstance, the license should further state that the licensed technology is subject to the Bayh-Dole Act of 1980 [35 U.S.C. § 200 *et seq.*]. Under the Bayh-Dole Act, the federal government has the ability, under specified circumstances, to (1) suppress the licensed technology in the interest of national security; (2) use the licensed technology for research purposes; and (3) take control of the licensed technology.

For a more detailed discussion of intellectual property protection of software, see §§ 57.20-57.23 and Ch. 103A, *Copyrights* , and Gilson on Trademarks, Chs. 2, *Trademark Subject Matter*, and 7A, *Trademark Law and the Internet* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet LawInternet BusinessLicensingGeneral OverviewCopyright LawConveyancesLicensesGeneral
Overview



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22-57 California Legal Forms--Transaction Guide § 57.13

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.13 Warranty and Remedy Provisions

[1] UCC Divisions 2 and 10

The Uniform Commercial Code, as enacted in California [*Com. Code § 1101 et seq.*] ("UCC"), contains provisions governing the law of sales [*Com. Code §§ 2101-2801*], including warranty provisions. The UCC provisions governing the law of sales apply to transactions in goods unless the context of a particular provision requires a different application [*Com. Code § 2102*]. "Goods" are things that are movable at the time of contracting [*Com. Code § 2105(1)*], as well as future goods [*Com. Code § 2105(2)*].

The UCC sales and warranty provisions apply to any outright sale of computer equipment (computers, peripheral equipment, and/or software), just as they would to a similar sale of any other type of goods.

The UCC also has been held to apply to most commercial software license agreements. Even though most software licenses are not characterized as a sale, courts have held that computer software is a "good" and therefore governed by Division 2 of the UCC, which applies to "transactions in goods" [*see Com. Code § 2102; see also Micro Data Base Sys., Inc. v. Dharma Sys., Inc. (7th Cir. 1998), 148 F.3d 649, 654-655 ; I.Lan Sys., Inc. v. Netscout Service Level Corp. (D. Mass. 2002), 183 F. Supp.2d 328, 332 ; Berthold Types Ltd. v. Adobe Sys., Inc. (N.D. Ill. 2000) 101 F. Supp.2d 697, 698*]. When a license agreement includes provisions for services, such as installation or training, courts will then to look at the whole agreement to determine whether goods or services predominate. Several courts have held that the services necessary for the implementation of a software system are incidental to the essence of the agreement, which is, in substance a contract for the sale of goods [*see Newcourt Financial USA, Inc. v. FT Mortgage Companies, Inc. (N.D. Ill. 2001) 161 F. Supp.2d 894, 897-899 ; see also Rosenblatt & Co. v. Davidge Data Sys. Corp. (N.Y. App. Div. 2002), 743 N.Y.S. 2d 471, 472*].

For a more detailed coverage of contracts for the sale of goods under the UCC, see Ch. 52, *Sales of Goods Under The Uniform Commercial Code*.

Leases of computer hardware and related equipment are covered by Division 10 of the UCC, which contains warranty provisions similar to those governing sales [see *Com. Code* §§ 10102, 10210-10215; see also Ch. 53, *Personal Property Leasing*].

[2] Song-Beverly Consumer Warranty Act

The Song-Beverly Consumer Warranty Act [*Civ. Code* § 1790 *et seq.*] covers both sales and leases of goods primarily for personal, family, or household purposes [*Civ. Code* § 1791(a)]. For purposes of the Song-Beverly Consumer Warranty Act, a "lease" is defined as any contract for lease or bailment for the use of consumer goods by an individual for a term exceeding four months [*Civ. Code* § 1791(g)]. A "sale" is (1) the passing of title from the seller to the buyer for a price, or (2) a consignment for sale [*Civ. Code* § 1791(n)]. The Song-Beverly Consumer Warranty Act was intended to supplement the provisions of the UCC, rather than supersede the rights and obligations created by it, and thus the provisions of the UCC governing sales properly attach to those of the Song-Beverly Consumer Warranty Act [*Krieger v. Nick Alexander Imports, Inc.* (1991) 234 Cal. App. 3d 205, 215, 285 Cal. Rptr. 717] .

[3] Contractual Warranties

Regardless of whether or not the UCC or the Song-Beverly Consumer Warranty Act provisions would ordinarily apply, the parties are free to contract for such warranties and remedies as they desire, subject of course to any other legal limitations. Further, the UCC permits parties to vary the effect of its provisions by agreement [see *Com. Code* § 1302(a)]. Thus, these provisions can be modified or eliminated in situations in which they would ordinarily apply, or made applicable to situations (such as leases or licenses) in which they would ordinarily be inapplicable. Accordingly, the leases, licenses, and other forms contained in this chapter, as well as the sales agreements, include UCC warranty provisions.

[4] Remedies

Remedies for breach of a contract under the UCC are governed by [*Com. Code* §§ 2701-2725]. The provisions of Division 2 of the Commercial Code [*Com. Code* § 2101 *et seq.*] do not impair the remedies for breach of any obligation or promise collateral or ancillary to a contract for the sale of goods [*Com. Code* § 2701]. *Com. Code* § 2719 allows parties to expressly contract for remedies in addition to or in substitution for those provided under the UCC [*Com. Code* § 2719(1)(a)]. Such remedies may include limiting or altering the measure of damages recoverable to the return of goods and repayment of the price, or to repair and replace the nonconforming goods [*Com. Code* § 2719(1)(a)]. Any contractual remedy is an optional remedy unless it is expressly agreed that the contractual remedy is an exclusive and sole remedy [*Com. Code* § 2719(1)(b)]. Consequential damages may also be limited or excluded unless such limitation or exclusion is unconscionable [*Com. Code* § 2719(3)]. A limitation of consequential damages when the loss is commercial is valid unless it is proved that the limitation is unconscionable [*Com. Code* § 2719(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Leases (Article 2A)General OverviewCopyright LawConveyancesLicensesGeneral Overview



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22-57 California Legal Forms--Transaction Guide § 57.14

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.14 Antitrust Considerations

[1] Sherman Antitrust Act

An attorney preparing a computer or software license that provides for an exclusive dealing arrangement needs to be aware of the relevance and potential application of numerous federal and California statutes regulating trade.

The Sherman Antitrust Act [*15 U.S.C. § 1 et seq.*] contains the broadest antitrust language. It provides that every contract, combination in the form of a trust, or conspiracy in restraint of trade or commerce among the states and with foreign nations is illegal [*15 U.S.C. § 1*]. In particular, the Act prohibits monopolies [*15 U.S.C. § 2*], the elements of which are (1) monopoly power, (2) willful acquisition of power, and (3) causal antitrust injury [*Christofferson Dairy, Inc. v. MMM Sales, Inc.* (9th Cir. 1988) 849 F.2d 1168, 1174] . In addition, the Sherman Act prevents vertical price fixing, which is a supplier's attempt to set the price charged by those who resell its products [*General Cinema Corp. v. Buena Vista Distribution Co., Inc.* (9th Cir. 1982) 681 F.2d 594, 597 ; see *Leegin Creative Leather Prods. v. PSKS, Inc.* (2007) 127 S. Ct. 2705, 168 L. Ed. 2d 623, 2007 U.S. LEXIS 8668, at *10 (vertical price restraints are to be judged by rule of reason, not by rule of *per se* illegality), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.* (1911) 220 U.S. 373, 407-409, 31 S. Ct. 376, 55 L. Ed. 502 (established rule that it is *per se* illegal under § 1 of Sherman Act for manufacturer to agree with its distributor to set minimum price that distributor can charge for manufacturer's goods)]; horizontal price fixing, which is an agreement among competitors that interferes with the setting of a price by free market forces [*United States v. Socony-Vacuum Oil Co., Inc.* (1940) 310 U.S. 150, 224, 60 S. Ct. 811, 84 L. Ed. 1129] ; and tying arrangements, which are agreements by a seller to sell a product only on the condition that the buyer purchase a product from the seller, or not purchase from any other supplier [*Northern Pac. R. Co. v. United States* (1958) 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545] .

The reach of the Sherman Act is extremely broad. It applies to every person engaged in business whose activities might restrain or monopolize commercial dealings among the states [*United States v. Underwriters Ass'n* (1944) 322 U.S. 533]. This standard theoretically can reach anyone involved in business.

The Sherman Act [15 U.S.C. § 1 *et seq.*], however, does not restrict the right of a manufacturer to exercise independent discretion as to the parties with which it will deal [*United States v. Colgate & Co.* (1918) 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992] . Accordingly, exclusive distributorships (i.e., exclusive territories) generally have been upheld [see *United States v. Arnold, Schwinn & Co.* (1967) 388 U.S. 365, 376, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 ; see also *Klor's v. Broadway-Hale Stores* (1959) 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741] .

For a more detailed discussion of antitrust and trade regulation statutes, see Ch. 91, *Contracts with Sales Representatives* .

[2] Clayton Act

The Clayton Act [15 U.S.C. § 12 *et seq.*] prohibits price fixing and tying and exclusive dealing arrangements when the effect of any condition, agreement, or understanding is to substantially lessen competition. Especially pertinent is Section 3 of that Act [15 U.S.C. § 12 *et seq.*], which makes it unlawful for any person engaged in interstate or foreign commerce to lease, sell, or contract to sell goods or commodities for resale on the condition, agreement, or understanding that the lessee or purchaser must not deal in goods of a competitor, when the effect of that transaction may be to substantially lessen competition or tend to create a monopoly in any line of commerce [15 U.S.C. § 14]. Section 3 of the Clayton Act is considerably broader than the Sherman Act [see 15 U.S.C. § 1 *et seq.*] and, thus, if a particular arrangement does not violate the Clayton Act, it will not violate the Sherman Act [see *Times-Picayune Pub. Co. v. United States* (1952) 345 U.S. 594, 608, 609, 73 S. Ct. 872, 97 L. Ed. 1277] . Exclusive dealing arrangements may also be subject to the prohibition against unfair methods of competition contained in Section 5 of the Federal Trade Commission Act [see *Times-Picayune Pub. Co. v. United States* (1952) 345 U.S. 594, 609, 73 S. Ct. 872, 97 L. Ed. 1277] .

A requirement in a computer sale or lease agreement that the buyer or lessee buy goods or services only from the seller or lessor of other goods or services ("tying arrangements") is an exclusionary condition that violates the Sherman Act prohibition against contracts in restraint of trade [see 15 U.S.C. § 1] and the Clayton Act prohibitions against exclusive dealing arrangements [see 15 U.S.C. § 14]. Thus, for example, a computer manufacturer that refused to license its software to anyone who would not also buy its computer equipment was held to be engaged in an unlawful tying arrangement under these statutes [see *Digidyne Corp. v. Data General Corp.* (9th Cir. 1984) 734 F.2d 1336, 1338, 1339] . Such a requirement may also be treated as an unfair or deceptive trade practice under the Federal Trade Commission Act [see 15 U.S.C. § 45].

To establish that an unlawful tying arrangement exists, all of the following must occur [see *Siegel v. Chicken Delight, Inc.* (9th Cir. 1971) 448 F.2d 43, 47] :

- The scheme in question must involve two distinct items (for example, the equipment and a maintenance agreement, or the equipment and specified software) and provide that one, the tying product, cannot be obtained unless the other, the tied product, is also purchased.
- The tying product must possess sufficient economic power to appreciably restrain competition in the tied product market.
- A not insubstantial amount of commerce must be affected by the arrangement.

Until 2006, the fact of sufficient economic power could be presumed if the tying product was patented. The Supreme Court concluded, however, that the presumption cannot be supported in view of the patent law [*Ill. Tool Works, Inc. v. Indep. Ink, Inc.* (2006) 547 U.S. 28, 31, 42-43, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (any conclusion that particular tying arrangement is unlawful must be supported by proof of power in relevant market rather than by mere presumption,

whether or not tying product is patented)].

Legal justification may exist for certain types of tying arrangements [see *Siegel v. Chicken Delight, Inc.* (9th Cir. 1971) 448 F.2d 43, 51 ; see also *United States v. Jerrold Electronics Corp.* (E.D. Pa.1960) 187 F. Supp. 545, 560 , *aff'd*, 365 U.S. 567 (1961)] . However, there is no basis for an exception when the benefit to the party imposing the arrangement is the elimination of business competition and the creation of a monopoly [see *International B. Mach. Corp. v. United States* (1935) 298 U.S. 131, 139, 140, 56 S. Ct. 701, 80 L. Ed. 1085] .

For a more detailed discussion of antitrust and trade regulation statutes, see Ch. 91, *Contracts with Sales Representatives* .

[3] Other Trade Regulations

The Robinson-Patman Antidiscrimination Act [15 U.S.C. §§ 13-13b, 21] amends the Clayton Act and prohibits price discrimination if the effect of the discrimination is to substantially lessen competition or tend to create a monopoly. However, good faith discrimination is permissible to meet competition [15 U.S.C. § 13(a)].

The Federal Trade Commission Act [15 U.S.C. § 41 *et seq.*] prohibits unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce [15 U.S.C. § 45]. Conduct that violates this act as "unfair competition" is a flexible concept, and may involve a variety of unrelated activities [*Federal Trade Comm'n v. Bunte Bros.* (1941) 312 U.S. 349, 353-354, 61 S. Ct. 580, 85 L. Ed. 881] .

The most important California statute regulating trade is the Cartwright Act [Bus. & Prof. Code § 16700 *et seq.*], which prohibits most trusts as unlawful, against public policy, and void [Bus. & Prof. Code § 16726; but see Bus. & Prof. Code § 16725 (agreements to promote competition or trade not unlawful)].

For a more detailed discussion of antitrust and trade regulation statutes, see Ch. 91, *Contracts with Sales Representatives* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law
 Clayton Act Coverage
 Antitrust & Trade Law
 Robinson-Patman Act Coverage
 General Overview
 Antitrust & Trade Law
 Sherman Act Coverage
 General Overview
 Business & Corporate Law
 Distributorships & Franchises
 Trademark Licensing
 Copyright Law
 Conveyances
 Licenses
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AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

[Reserved]

§§ 57.15[Reserved]



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B. Intellectual Property Protection

22-57 California Legal Forms--Transaction Guide § 57.20

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.20 Copyright Protection

[1] Copyright Protection of Software

A copyright extends to works that have been fixed in any tangible means of expression from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device [17 U.S.C. § 102(a)]. This statutory language was intended to supersede the former rule that copyright did not extend to material that was not in a form that human beings could perceive [*Apple Computer, Inc. v. Franklin Computer Corp.* (3d Cir. 1983) 714 F.2d 1240, 1248 ; see *Williams Electronics, Inc. v. Artic International, Inc.* (3d Cir. 1982) 685 F.2d 870, 877 ; see also *Apple Computer, Inc. v. Formula Int'l Inc.* (C.D. Cal. 1983) 562 F. Supp. 775, 781 , *aff'd*, 725 F.2d 521 (9th Cir. 1984)] . These amendments firmly established the copyrightability of computer programs [*Williams Elecs., Inc. v. Artic Int'l, Inc.* (3d Cir. 1982) 685 F.2d 870, 875 ; *Apple Computer, Inc. v. Franklin Computer Corp.* (3d Cir. 1983) 714 F.2d 1240, 1248 ; see *Apple Computer, Inc. v. Formula Int'l Inc.* (C.D. Cal. 1983) 562 F. Supp. 775, 781 , *aff'd*, 725 F.2d 521 (9th Cir. 1984)] .

The Copyright Act defines "computer program" as a set of statements or instructions to be used directly or indirectly in a computer to bring about a certain result [17 U.S.C. § 101], and provides that it is not an infringement for the owner of a copy of a computer program to make another copy or adaptation of that program when necessary to the utilization of that program or for archival purposes or to make a copy for machine maintenance or repair, if that copy is used in no other manner and is destroyed immediately after the maintenance or repair is complete. However, copies can be transferred only as part of the transfer of all rights in the program, and adaptations can be transferred only with the copyright owner's permission [see 17 U.S.C. § 117]. The Ninth Circuit has held that loading software into a computer's random access memory creates a copy entitled to copyright protection [see *MAI Sys. Corp. v. Peak Computer, Inc.* (9th Cir. 1994) 991 F.2d 511, 519] .

For a general discussion of copyright law, see Ch. 103A, *Copyrights* .

[2] Computer Program Constitutes "Literary Work"

Computer programs or software are literary works for purposes of the copyright law [see 17 U.S.C. § 101] ("computer program" and "literary works" defined). Such literary works are protected from unauthorized copying under the copyright law [*Apple Computer, Inc. v. Franklin Computer Corp.* (3d Cir. 1983) 714 F.2d 1240, 1249 , cert. dismissed, 464 U.S. 1033 (1984) (computer program in object code embedded in ROM chip is appropriate subject for copyright); see *Williams Elecs., Inc. v. Artic Intern, Inc.* (3rd Cir. 1982) 685 F. 2d 870, 877 (rejecting argument that infringement of computer program was limited to copying computer text, but not to duplication of computer program fixed on silicon chip); *Micro Star v. Formgen, Inc.* (1998) 154 F.3d 1107, 1112 (CD containing 300 downloaded "levels" of play created by players of popular computer game was unauthorized derivative work); *Sony Computer Enter., Inc. v. Connectix Corp.* (9th Cir. 2000) 203 F.3d 596, 607 (drafting entirely new object code for game station was transformative, despite similarities to defendant's play station in function and screen output, and thus did not infringe on defendant's copyright)].

Copyright protection does not extend to the methodology or processes adopted by the programmer, but only to the "writing" expressing the programmer's ideas [H.R. Rep. No. 94-1476, at 57 (1976); see *Apple Computer, Inc. v. Franklin Computer Corp.* (3d Cir. 1983) 714 F.2d 1240, 1250] . Copyright protection, however, includes the structure, sequence, and organization of the program, as well as its literal code [*Whelan Assocs., Inc. v. Jaslow Dental Lab.* (3d Cir. 1986) 797 F.2d 1222, 1248] , although the Ninth Circuit has held that certain aspects of graphical user interface software (the use of windows to display multiple images on a computer screen and to facilitate user interaction with the information contained in the windows; iconic representation of familiar objects from the office environment; manipulation of icons to convey instructions and control operation of the computer; use of menus to store information or computer functions in a place that is convenient to reach, but saves screen space for other images; and opening and closing of objects as a means of retrieving, transferring, and storing information) are "ideas" in which no copyright protection inheres [see *Apple Computer, Inc. v. Microsoft Corp.* (9th Cir. 1994) 35 F.3d 1435, 1443-1444] .

For an additional discussion of copyright law as it pertains to computer software, see *Ch. 103A, Copyrights § 103A.95*.

[3] Infringement of Program Copyright

Determining whether copyright infringement of a computer program has occurred [see 17 U.S.C. § 501] involves a three-step process [*Atari Games Corp. v. Nintendo of Am. Inc.* (Fed. Cir. 1992) 975 F.2d 832, 839] :

- Determining at what level of abstraction copying has occurred.
- Filtering to separate protectable expression from non-protectable material in the copied program.
- Comparing the infringer's work to protectable expression in the copied program.

Proof of copying is made by showing literal copying or by showing that the infringer had access to the copied program and that the infringer's work is substantially similar to the copied work [*Johnson Controls, Inc. v. Phoenix Control Sys., Inc.* (9th Cir. 1989) 886 F.2d 1173, 1176] .

Disassembly of copyrighted object code is fair use of a copyrighted work [see 17 U.S.C. § 107], and therefore not infringement, if disassembly provides the only means of access to elements of the code that are not protected by copyright (such as ideas and functional elements) and the copier has a legitimate reason for seeking access [*Sega Enterprises, Ltd. v. Accolade, Inc.* (9th Cir. [Cal.] 1992) 977 F.2d 1510, 1527] . Accordingly, reverse engineering of a computer program to understand unprotected elements is fair use [*Atari Games Corp. v. Nintendo of Am. Inc.* (Fed. Cir. 1992) 975 F.2d 832, 843] .

The owner of a copyright in software has a cause of action for infringement if the holder of a license to use the software

makes copies of it in violation of the license [*Wall Data Inc. v. Los Angeles County Sheriff's Dep't* (9th Cir. 2006) 447 F.3d 769, 774, 777 (no fair use defense was available to avoid infringement liability when sheriff's department bought 3,663 single-computer licenses for software, installed that software on more than 6,000 computers in its network, and configured network-managing servers so that no more than 3,663 of those computers could use that software at any given time)].

[4] Limitations of Copyright Protection

It is not infringement when the owner of a copy of a computer program makes or authorizes the making of another copy or adaptation of that program, provided that the new copy or adaptation is either [17 U.S.C. § 117(a)]:

- Created as an essential step in the utilization of the computer program in conjunction with a machine and is used in no other manner; or
- For archival purposes only and all archival copies are destroyed in the event that continued possession of the computer program ceases to be rightful.

This protection against infringement liability is afforded to an owner, and does not reach a mere licensee, of a copy of the software. Generally, if the copyright owner makes it clear (for instance, in a "shrink-wrap" license or a "click-through" license) that the owner is granting only a license to a copy of software and imposes significant restrictions on the purchaser's ability to redistribute or transfer that copy, then the purchaser is considered to be a licensee, not an owner, of the software [*Wall Data Inc. v. Los Angeles County Sheriff's Dep't* (9th Cir. 2006) 447 F.3d 769, 784-785 (also stating in dictum that even if software purchaser were owner rather than licensee of multiple copies of software, "essential step" defense could not embrace copying of software onto many more computers than number of single-computer licenses that were purchased)]. In actual fact, scarcely any end user of software actually owns a copy of the program--a user merely has a license in almost every case, in accordance with common practice in the software industry.

Exact copies prepared as described above may be leased, sold, or otherwise transferred, along with the copy from which the copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations prepared in this manner may be transferred only with authorization of the copyright owner [17 U.S.C. § 117(b)]. In addition, subject to specified conditions, it is not an infringement for an owner or lessee of a machine to make or authorize the making of a copy of a computer program solely for purposes of maintenance or repair of that machine [see 17 U.S.C. § 117(c)].

For an additional discussion of copyright law as it pertains to computer software, see *Ch. 103A, Copyrights* § 103A.95.

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawConveyancesLicensesGeneral OverviewCopyright LawConveyancesLicensesShrinkwrapCopyright LawOwner RightsReproductionGeneral OverviewCopyright LawOwner RightsReproductionInfringementCopyright LawSubject MatterLiterary WorksComputer Programs



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 B. Intellectual Property Protection

22-57 California Legal Forms--Transaction Guide § 57.21

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§ 57.21 Trade Secret Protection of Software

[1] Trade Secret Protection in General

The foundation of trade secret law is Justice Holmes' statement that a party has the right to keep the work it has done or paid for doing to itself and others may not steal that work [*see Chicago Bd. of Trade v. Christie Grain & Stock Co. (1905) 198 U.S. 236, 250, 25 S. Ct. 637, 49 L. Ed. 1031*]. If the owner of a computer program chooses not to copyright it (and cannot patent it), trade secret protection embodied in a licensing agreement should be used. Trade secret protection is appropriate since intellectual property, as distinguished from the copyrighted contents of a publication or a patented device or process, is given legal protection if it is acquired and used under a contractual or fiduciary relationship between the proprietor and the user [*see J. Irizarry y Puente v. President & Fellows of Harvard Col. (1st Cir. [Mass.] 1957) 248 F.2d 799, 802*].

A trade secret is given legal protection if it is acquired and used under a contractual or fiduciary relationship between the proprietor and the user [*see J. Irizarry y Puente v. President & Fellows of Harvard Col. (1st Cir. [Mass.] 1957) 248 F.2d 799, 802*]. Contractually obligated secrecy is a key method of protecting a trade secret embodied in commercially exploited computer software without the automatic public disclosure that is required to patent or copyright a program. Matter that is deposited for copyright registration--the first and last 25 pages of the computer program, printed out [37 C.F.R. § 202.20(c)(2)(vii)]--is a matter of public record except for any trade secrets contained therein [*see 5 U.S.C. § 552(a), (b)(4), (e)*].

Trade secret law protects a trade secret proprietor against any unauthorized disclosure of confidential information by the user to third parties whom the proprietor does not wish to know that information. However, if an individual discovers a trade secret either independently or by "reverse engineering" applied to a program that has been disseminated to the public, that person has not breached any contractual or fiduciary relationship and would not be liable under trade secret law [*see Civ. Code § 3426.1(a)*]. The confidentiality aspect of trade secret protection is significantly different from the protection afforded by copyright [for discussion of the protection afforded by copyright law generally, *see Ch. 103A*,

Copyrights].

For common law purposes, California has adopted the broad definition of "trade secret" set forth in the Restatement of Torts [see Restatement of Torts § 757, Comment (b)(1939)]. Under this definition, a trade secret may consist of any formula, pattern, device, or compilation of information that is used in the client's business and that gives the client an advantage over competitors who do not know it or use it [see *Rigging Int'l Maintenance Co. v. Gwin* (1982) 128 Cal. App. 3d 594, 606, 180 Cal. Rptr. 451 ; see also *Futurecraft Corp. v. Clary Corp.* (1962) 205 Cal. App. 2d 279, 288-289, 23 Cal. Rptr. 198] .

For the purposes of an action for misappropriation under the Uniform Trade Secrets Act [Civ. Code § 3426 *et seq.*], a "trade secret" is information, including any formula, pattern, compilation, program, device, method, technique, or process, that derives independent economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Civ. Code § 3426.1(d); see Penal Code § 499c(a)(9)] (criminal law definition of trade secret)]. For further discussion of the application of the Act, see § 57.21[2].

Secrecy is a necessary element of a trade secret; to qualify as a trade secret, the information involved must be difficult for an outsider to acquire. Matters of public or general knowledge in a particular industry cannot be trade secrets. Information that is completely disclosed by a manufactured product cannot be a trade secret. A trade secret generally is known only in the particular business in which it is used. Without losing trade secret protection, the trade secret can be communicated to employees or to others pledged to secrecy. Others may know it independently, however, such as another who has discovered the same process but is also keeping it secret [*Futurecraft Corp. v. Clary Corp.* (1962) 205 Cal. App. 2d 279, 288-289, 23 Cal. Rptr. 198 ; see also Restatement of Torts § 757, Comment (b)(1939)].

The mere agreement of the parties that something is a trade secret does not make it a protectable interest if it is not actually a trade secret [see *Ingrassia v. Bailey* (1959) 172 Cal. App. 2d 117, 123-124, 341 P. 2d 370] .

The factors to be considered in determining whether particular information is a trade secret are [*Futurecraft Corp. v. Clary Corp.* (1962) 205 Cal. App. 2d 279, 288-289, 23 Cal. Rptr. 198 ; see also Restatement of Torts § 757, Comment (b)(1939)]:

- The extent to which the information is known outside of the business.
- The extent to which the information is known by employees and others involved in the business.
- The measures taken to guard the secrecy of the information.
- The value of the information to the owner and the owner's competitors.
- The effort and money expended in developing the information.
- The relative ease or difficulty with which the information could be properly acquired by others.

[2] California Action for Misappropriation

California has enacted a version of the Uniform Trade Secrets Act [Civ. Code § 3425.1 *et seq.*] that is designed to protect economically valuable trade secrets from misappropriation. Under the Act, an actual or threatened misappropriation of a trade secret may be enjoined or otherwise limited [see Civ. Code § 3426.2] and damages can be recovered for the misappropriation [see Civ. Code § 3426.3]. The Act does not supersede any other statute relating to trade secret misappropriation or any other statute regulating trade secrets [Civ. Code § 3426.7(a)], nor does it affect

contractual, civil, or criminal remedies [see *Civ. Code* § 3426.7(b)].

Under the Act, a "trade secret" is information, including any formula, pattern, compilation, program, device, method, technique, or process, that derives actual or potential independent economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [*Civ. Code* § 3426.1(d)]. Computer software can constitute a trade secret and qualify for trade secret protection under the Act. However, a plaintiff who seeks relief for misappropriation of trade secrets must identify the trade secrets and carry the burden of showing that they exist [*MAI Sys. Corp. v. Peak Computer, Inc.* (9th Cir. 1993) 991 F.2d 511, 522] .

Under the Act, a trade secret is misappropriated if a person does any of the following [*Civ. Code* § 3426.1(b)]:

- Acquires a trade secret knowing or having reason to know that the trade secret has been acquired by "improper means."
- Discloses or uses a trade secret the person has acquired by improper means or in violation of a nondisclosure obligation.
- Discloses or uses a trade secret the person knew or should have known was derived from another who had acquired it by improper means or who had a nondisclosure obligation.
- Discloses or uses a trade secret after learning that it is a trade secret but before a material change of position.

"Improper means" includes "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." [*Civ. Code* § 3426.1(a)] Reverse engineering or independent derivation alone are not considered improper means [*Civ. Code* § 3426.1(a)]. The Act allows for injunctive relief against actual or threatened misappropriation of a trade secret [*Civ. Code* § 3426.2; see *DVD Copy Control Assn. v. Bunner* (2001) 93 Cal. App. 4th 648, 659] .

An action for misappropriation under the Act must be brought within three years after the misappropriation is discovered or should have been discovered [see *Civ. Code* § 3426.6]. A prerequisite to discovery in an action for misappropriation under the Act requires the complaining party to identify the trade secret with reasonable particularity [*Code Civ. Proc.* § 2019.210; see *Advanced Modular Sputtering, Inc. v. Superior Court* (2005) 132 Cal. App. 4th 826, 835-837, 33 Cal. Rptr. 3d 901 ("reasonable particularity" requires describing trade secret in way that is fair, proper, just, and rational in circumstances of case)], although the court must preserve its secrecy [see *Civ. Code* § 3426.5].

[3] Contract Actions

The misappropriation or misuse of trade secrets that are protected by license or other contractual provisions can also be remedied by means of traditional contract actions. The Uniform Trade Secrets Act specifically provides that it does not affect contractual remedies, whether or not they are based on misappropriation of a trade secret [*Civ. Code* § 3426.7(b)(1)]. Under the common law definition, a "trade secret" is any formula, pattern, device, or compilation of information used in business which gives one an opportunity to obtain an advantage over competitors who do not know or use it [*Futurecraft Corp. v. Clary Corp.* (1962) 205 Cal. App. 2d 279, 288-289, 23 Cal. Rptr. 198] . Since this definition is broader than that set forth in the Uniform Trade Secrets Act, and since the plaintiff in a common law contract action may not have to make the type of disclosure required under the Act, a common law contract action may be more desirable.

[4] Unfair Competition From Unauthorized Use of Trade Secret

The Uniform Trade Secrets Act does not affect other civil remedies "that are not based upon misappropriation of a trade secret" [Civ. Code § 3426.7(b)(2)], or criminal remedies, whether or not they are based on misappropriation [Civ. Code § 3426.7(b)(3)]. Software and other computer-related information are trade secrets as defined by criminal law if they derive independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic benefit from their disclosure or use, and are subject to reasonable efforts, under the circumstances, to maintain their secrecy [Penal Code § 499c(a)(9)].

"Unfair competition" is any unlawful, unfair, or fraudulent business act or practice [Bus. & Prof. Code § 17200]. Therefore, because misuse or misappropriation of a computer program is unlawful [see Penal Code § 499c(b)(1)], misuse or appropriation is unfair competition. The person responsible may be enjoined from continued misuse or misappropriation [Bus. & Prof. Code §§ 17203, 17204] and is liable for civil penalties [Bus. & Prof. Code § 17206]. Other remedies, which may include damages for breach of any contractual provision against unauthorized use or disclosure of computer program trade secrets, are also available [see Bus. & Prof. Code § 17205]. For detailed coverage of Unfair Competition, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

[5] Trade Secret Not Inconsistent with Copyright

Trade secret protection and copyright protection, though distinct, are not inherently incompatible. Trade secret law is premised on the concepts of breach of trust and confidentiality [see § 57.21[1], *above*], as opposed to the premise of actions for breach of the copyright law, which is copying [17 U.S.C. § 501]. Trade secret law protects content irrespective of form of expression; copyright law protects form of expression but not the underlying idea [*M. Bryce & Assocs. v. Gladstone* (1982) 107 Wis.2d 241, 319 N.W.2d 907] . Trade secret law bars unauthorized disclosure or use of these ideas only by persons who are privy to the trade secret by reason of some relationship to the owner which legally limits use or disclosure by them. Copyright law prohibits unauthorized copying by anyone of the form of expression in which the ideas are fixed by the author [Balboa Ins. v. trans *Global Equities* (1990) 218 Cal. App. 3d 1327, 267 Cal. Rptr. 787] . Both the *First Amendment* and the Copyright Act are rooted in the United States Constitution, but the Uniform Trade Secrets Act lacks any constitutional basis. The prohibition on disclosure of a trade secret is of infinite duration, while the copyright protection is strictly limited in time, and there is no "fair use" exception as there is for copyrighted material. [*DVD Copy Control Assn. v. Bunner* (2001) 93 Cal. App. 4th 648, 113 Cal. Rptr. 2d 338] .

Copyright and trade secret law are not equivalent to each other, and a copyright infringement claim therefore would not preclude a subsequent trade secret action [see *Warrington Assoc. v. Real-Time Eng. Sys., Inc.* (N.D. Ill. 1981) 522 F. Supp. 367, 368, 369] . However, a copyright infringement claim would constitute an admission that there has been either a general publication of the work [see 17 U.S.C. § 106(3)] or some lesser publication [see 17 U.S.C. §§ 106(1), (2), 117]. If the copyright infringement action were successful, this admission would be subject to the doctrine of statutory estoppel, which provides that one who invokes statutory benefits by the making of representations will be estopped to deny those representations [Technicon Med. Info. Sys., Corp. v. Green Bay Packaging (7th Cir. [Wis.] 1982) 687 F.2d 1032, 1034, cert. denied, 459 U.S. 1106 (1983)] . Thus, the party that brought the successful copyright infringement action would be estopped from denying in any subsequent trade secret action whatever representations were made in the copyright action concerning publication and resultant loss of confidentiality. Depending on the nature and extent of the publication, this could adversely affect the determination of whether or not the material in question was in fact a trade secret. Accordingly, prudent practice would appear to suggest initial reliance on the trade secret remedy, or, at least, an initial copyright claim that any unauthorized reproduction [see 17 U.S.C. §§ 106(1), 117] was extremely limited.

[6] Trade Secret Not Preempted by Copyright

Although the issuance of a federal copyright preempts rights *equivalent* to those granted by a copyright [17 U.S.C. § 301(a)], the preemption does not apply to activities that violate legal or equitable rights that are not equivalent to a

copyright [17 U.S.C. § 301(b)(3)]. The legislative history of the Copyright Act indicates that the preemption does not apply to deceptive trade practices and misappropriation [see H.R. Rep. No. 94-1476 (1976), p. 132; *see also* Diamond, "Preemption of State Law," 1977 Summary of Proceedings, Section of Patent, Trademark and Copyright Law, American Bar Association]. Moreover, it has been held that the interests secured by copyright and trade secret law are not "equivalent" to each other [see *Warrington Assoc. v. Real-Time Eng. Sys., Inc.* (N.D. Ill. 1981) 522 F. Supp. 367, 368, 369] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Trade Secrets Law Factors General Overview Trade Secrets Law Federal & State Regulation General Overview Trade
 Secrets Law Misappropriation Actions General Overview Trade Secrets Law Protected Information Computer
 Software Trade Secrets Law Protection of Secrecy General Overview Trade Secrets Law Protection of Secrecy Reasonable
 Measures General Overview



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§ 57.22 Patent Protection for Software

A patent is issued for a new and useful process, machine, manufacture, or composition of matter (or an improvement to any of these) [35 U.S.C. § 101]. In *State Street Bank & Trust Company v. Signature Financial Group* [*State Street Bank & Trust Company v. Signature Financial Group* (Fed. Cir. 1998), 149 F.3d 1368, 1373-1377] , the court affirmed that computer programs are patentable as business method software. The court in *State Street Bank* rejected both the mathematical algorithm and business method exceptions to patentability, which were established by the United States Supreme Court in 1981 [see *Diamond v. Diehr* (1981) 450 U.S. 175, 187, 101 S. Ct. 1048, 67 L. Ed. 2d 155] . To determine the patentability of software, a determination must be made as to whether the computer system as a whole produces a useful, tangible, and concrete result [*State Street Bank & Trust Company v. Signature Financial Group* (1998), 149 F.3d 1368, 1373-1375] . In 1999, the same circuit court further determined that algorithms are patentable because they limit a general purpose computer to a specific purpose, performing function pursuant to the software [*WMS Gaming, Inc. v. Int'l Game Tech* (Fed. Cir. 1999) 184 F.3d 1339, 1348-1349 ; see also *In re Alappat* (Fed. Cir. 1994) 33 F.3d 1526] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Patent LawSubject MatterProcessesComputer Software & Mental Steps



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§ 57.23 Semiconductor Chip Protection

[1] Semiconductor Chips Not Protected Under Traditional Copyright Law

Copyright law does not protect "useful articles" as such, and semiconductor chip products are defined as useful articles for purposes of the copyright law [17 U.S.C. § 101; see H.R. Rep. No. 98-781, at 5-11, *reprinted at* 5 U.S.C.C.A.N. 5754-5760 (1984)]. "Masks" (as distinguished from "mask works"), which are the schematic drawings of chip layouts and accompanying technical information, may be registered under the copyright law as technical drawings. However, the protection of a technical drawing does not protect the copyright owner with respect to unauthorized duplication of the finished useful article (the chip embodying the mask work) represented by the drawing [see 17 U.S.C. § 113; H.R. Rep. No. 98-781, at 8, *reprinted at* 5 U.S.C.C.A.N. 5757 (1984); see also 17 U.S.C. § 901(a)(2) ("mask work" defined as series of related images that represent patterns embodied in semiconductor chip product); see generally 17 U.S.C. § 901(a) (definitions)].

[2] Industrial Copyrights for Mask Works Embodied in Semiconductor Chips

The Semiconductor Chip Protection Act of 1984 ("the Act") [17 U.S.C. § 901 *et seq.*] created a new approach to protecting intellectual property embodied in semiconductor chips by means of an "industrial copyright," as distinguished from the traditional author's copyright. This industrial copyright is designed to protect the mask work, which is an integral part of the manufacturing process of and embodied in a chip, and therefore the chip, from unauthorized duplication [see H.R. Rep. No. 98-781, at 5-11, *reprinted at* 5 U.S.C.C.A.N. 5754-5760 (1984)].

The Act defines a semiconductor chip product ("chip") as a product that has two or more layers of metallic, insulating, or semiconductor material deposited on or etched from a piece of semiconductor material, and functions as an electronic circuit [17 U.S.C. § 901(a)(1)]. A "mask work" is a series of related images that represent the patterns embodied in a semiconductor chip product [see 17 U.S.C. § 901(a)(2)].

The Act [17 U.S.C. § 901 *et seq.*] provides protection for and exclusive rights to persons owning semiconductor chip

products. The Act is specific to semiconductor chips, but other applicable copyright provisions are still available [17 U.S.C. § 912(a); *see, e.g.*, § 57.23[1], *above*]. The owner of a mask work protected under the Act [17 U.S.C. § 901 *et seq.*] has the exclusive rights to do and to authorize the reproduction of the mask work by any means or the importation or distribution of a semiconductor chip product in which the mask work is embodied [17 U.S.C. § 905; *see* 17 U.S.C. § 902(a), (b) (eligibility for protection); *see also* [17 U.S.C. §§ 902(c), 906(a) (limitations on protected rights)]. Owner's rights are further discussed in § 57.23[3], *below*.

[3] Owner's Exclusive Rights

The "owner" of a mask work is the person who created it, that person's legal representative if the creator is deceased or legally incapacitated, or a transferee. However, if the mask work is created within the scope of a person's employment, the owner is the employer for whom the mask work was created or the transferee from the employer [17 U.S.C. § 901(a)(6)].

In general, the owner of a mask work protected under the Semiconductor Chip Protection Act has exclusive rights to reproduce the mask work or to import or distribute the chip in which it is fixed or embodied and may induce or permit others to do either of these [17 U.S.C. §§ 903(a), 905]. The owner of exclusive rights in a mask work may transfer all of them or license all or less than all of them [17 U.S.C. § 903(b)]. However, if a license has been granted, the owner of a chip made by the licensee may import, distribute, dispose of, or use the chip without further authorization from the owner of the mask work [17 U.S.C. § 906(b)].

Any license or transfer of rights in a mask work may be accomplished by a written instrument signed by the owner or his or her agent [17 U.S.C. § 903(b)].

For a more detailed and comprehensive discussion of mask works and protection under the Semiconductor Chip Protection Act, *see Ch. 103A, Copyrights, § 103A.99*. For the official application for registration of a claim of protection of an owner's rights in a mask work [*see* 17 U.S.C. 908(a)], *see Ch. 103A, Copyrights, § 103A.240*.

Legal Topics:

For related research and practice materials, *see* the following legal topics:

Copyright Law Owner Rights General Overview Copyright Law Subject Matter Semiconductor Chips & Boat Hulls General Overview Copyright Law Subject Matter Semiconductor Chips & Boat Hulls Mask Works



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[Reserved]

§§ 57.24[Reserved]



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§ 57.30 Internet Terminology and Concepts

The Internet is an international network of interconnected computers that enables people to communicate with one another and to access vast amounts of information from around the world [*Reno v. ACLU* (1997) 521 U.S. 844, 849-850, 117 S. Ct. 2329, 138 L. Ed. 2d 874] . The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites [*Reno v. ACLU* (1997) 521 U.S. 844, 852, 117 S. Ct. 2329, 138 L. Ed. 2d 874] . The California Business and Professions Code defines the internet as "the global information system that is logically linked together by a globally unique address space based on the Internet Protocol ("IP"), or its subsequent extensions, and that is able to support communications using the Transmission Control Protocol/Internet Protocol ("TCP/IP") suite, or its subsequent extensions, or other IP-compatible protocols, and that provides, uses, or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure ..." [Bus. & Prof. Code § 17538(f)(6)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawInternet BusinessGeneral Overview



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22-57 California Legal Forms--Transaction Guide § 57.31

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§ 57.31 Development of Websites

[1] Basic Website Terminology

A "website" is simply a site or location on the World Wide Web [*see Health & Saf. Code § 1368.015(e)(7)* (defining "Internet web site" in connection with requirements for health care service plans)]. Websites are usually divided into "pages" or "documents," which are discrete locations within a particular site. Every website, and each page within a website, has a unique internet address known as a "Uniform Resource Locator" (more commonly referred to simply as a "URL") that allows a browser to locate and retrieve the Internet website or page [*see Health & Saf. Code § 1368.015(e)(6)* (URL defined)]. Website addresses are regulated by means of the domain name registration system, which is discussed in § 57.33[1].

Website pages are composed in Hypertext Markup Language ("HTML"), the authoring language used to create documents on the World Wide Web. HTML defines the structure and layout of a Web document [*see Health & Saf. Code § 1368.015(e)(2)* (definition)].

The first page or "welcome page" of an Internet website is usually referred to as the "homepage" [*see Health & Saf. Code § 1368.015(e)(1)* (definition)]. Website users navigate between Internet websites, and between individual pages within a website, by means of "hyperlinks" (more commonly referred to simply as "links"), which consist of special HTML codes that allow text or graphics to serve as a link that, when clicked on, takes the user to another place in the same page, or to another Internet website or Web page [*see Health & Saf. Code § 1368.015(e)(3)* (definition); *see* [3], *below*].

[2] Website Hosting

A website, in order to be seen on the internet, must reside on a computer that is permanently connected to the internet, and that contains software allowing other users to view the files on the computer. A company that provides website hosting services provides such a computer, commonly known as a "server." A computer that is used for website hosting

typically is much more powerful and contains more disk space than a personal computer. There are two main types of website hosting: dedicated hosting and shared (or virtual) hosting. With dedicated hosting, the server is dedicated exclusively to a particular user's website. With shared, or virtual hosting, the server is shared among many different websites.

[3] Legal Issues in Building a Website

Several techniques used in building a website have the potential for generating legal liability. The most common technique is "linking" [see [1], *above*], the process by which a website user can click on a link (that is, a reference to another web page) and be directed immediately to another page within that site or elsewhere on the internet. Another technique is "framing." Framing occurs when a webpage is divided into separate areas and the contents of another website are displayed within the website the user is viewing. "Inlining," which is also known as "mirroring," is similar to framing but involves the process of incorporating a graphic file from one website to another.

Such website development techniques are not always illegal. However, the risk of legal claims arises when website material is modified, or when website users are confused about the associations between websites. This modification or confusion can lead to claims based on trademark infringement and dilution, copyright infringement, unfair competition, and misappropriation. For a discussion of the development of internet linking law, see Sableman, Mark, *Link Law Revisited: Internet Linking Law at Five Years*, 16 *Berkeley Tech L. J.* 1273 (2001).

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Copyright Protection Civil Infringement Actions General Overview Computer & Internet

Law Internet Business Contracts Service Providers Computer & Internet Law Internet Business Internet & Online

Services General Overview Computer & Internet Law Trademark Protection Civil Infringement Actions General Overview



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§ 57.32 Copyright Ownership and Protection on Websites

[1] Copyright Considerations

Copyright is a form of protection provided to authors of published or unpublished "original works of authorship," including literary, musical, dramatic, musical, artistic, and certain other intellectual works [see 17 U.S.C. §§ 102, 104]. Websites may be considered "original works of authorship" and, as such, may be registered with the U.S. Copyright office.

The legal protection available for a copyrighted work is expressed in terms of six exclusive rights that are provided by the Copyright Act. These rights are exclusive in that they can be exercised only by their owner [see 17 U.S.C. § 106]. However, these rights are not absolute, as they are subject to a number of limitations in the Act [see 17 U.S.C. § 103A.30-103A.40]. Accordingly, subject to those limitations, a copyright owner has the exclusive right to do or to authorize others to do any of the following activities [see 17 U.S.C. §§ 107-122]:

- To reproduce the copyrighted work in copies or phonorecords.
- To prepare derivative works based upon the copyrighted work.
- To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.
- In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.
- In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual

work, to display the copyrighted work publicly.

- In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

For a further discussion of copyright law and registration of copyrights, see Ch. 103A, *Copyrights*. For an authorization to use a copyright work, see Ch. 103A, *Copyrights*, § 103A.223.

[2] Digital Millennium Copyright Act ("DMCA")

A website owner is liable under the Copyright Act for infringement if the website contains any content that violates a third party's copyright [17 U.S.C. § 501(a)]. Title II of the Digital Millennium Copyright Act ("DMCA") provides a safe harbor, which may limit the liability for copyright infringement by online service providers [see 17 U.S.C. § 512]. The DMCA provides that a service provider is not liable for monetary relief for copyright infringement by reason of the storage at the direction of a user or material that resides on a system or network controlled or operated by or for the service provider [17 U.S.C. § 512(c)(1)]. A "service provider" is defined as an entity offering the transmission, routing, or providing of connections for digital online communications without modification to the content [17 U.S.C. § 512(k)(1)(A)]. The term also includes a provider of online services or network access, or the operator of facilities [17 U.S.C. § 512(k)(1)(B)].

Before a service provider can take advantage of the safe harbor provisions of the DMCA, the provider must file an appropriate notice with the U. S. Copyright Office and display on the website the information set forth in the notice filed with the U. S. Copyright Office.

The safe harbor of the DMCA will not apply if the service provider [17 U.S.C. § 512(c)(1)(A)]:

- Had actual knowledge that the material in question was infringing;
- Was aware of facts or circumstances that made infringement apparent; or
- Did not expeditiously remove or disable access to the material in question upon receipt of knowledge or awareness that the material infringes.

In addition, the service provider must not receive a financial benefit directly attributable to the infringing activity, if the service provider has the right and ability to control the activity; and, after being notified of the claimed infringement, must respond expeditiously to remove or disable access to the material in question [17 U.S.C. § 512(c)(1)(B), (C)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Copyright Protection General Overview Computer & Internet Law Copyright Protection Digital Millennium Copyright Act General Overview Copyright Law Subject Matter General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART II. LEGAL BACKGROUND
C. Internet Transactions

22-57 California Legal Forms--Transaction Guide § 57.33

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§ 57.33 Domain Names

[1] Nature, Use, and Registration

The domain name system helps users find their way around the internet. Every computer on the internet has a unique address called its "IP address" (Internet Protocol address). Because IP addresses (which are strings of numbers) are hard to remember, the domain name system allows a familiar string of letters (the "domain name") to be used instead. Thus, for example, rather than typing "192.0.34.65," the user can type "www.icann.org" [see <http://www.icann.org>]. A "domain name" is defined by California law as any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the internet [*Bus. & Prof. Code § 17529.1(e); Elec. Code § 18320(c)(2)*].

The last part of a domain name, referred to as the "top-level domain" (for example, the familiar ".com"), is administered by certain organizations. For example, the .com top-level domain name is administered by Internet Corporation for Assigned Names and Numbers ("ICANN"). The registering authority of these top-level domain names, in turn, has been delegated to many organizations commonly referred to as domain name registrars or simply "registries." To register a domain name with a registry, one must contact the registry, usually via the registry's website, and complete the registration process.

ICANN is an internationally organized nonprofit corporation that is responsible for internet protocol address space allocation, protocol identifier assignment, generic and country code top-level domain name system management, and root server system management functions. ICANN is responsible for coordinating the management of the technical elements of the domain name system to ensure universal resolvability so that all users of the internet can find all valid addresses. It does this by overseeing the distribution of unique technical identifiers used in the internet's operations, and delegation of top-level domain names (such as .com, .info, etc.).

[2] California Domain Name Cyber Piracy Statutes

Disputes over domain names have resulted in legislation at both the state and federal level as well as administrative remedies. California statutes attacking "cyber piracy" can be found in *Bus. & Prof. Code* §§ 17525-17528.5 and *Elec. Code* § 18320 *et seq.* Generally, these statutes make it unlawful for a person acting in bad faith to register, use, or traffic in a domain name that is identical or confusingly similar to the personal name of another living person or deceased personality. The following are factors to consider in determining whether a person has acted in bad faith [*Bus. & Prof. Code* § 17526(a)-(j)]:

- The trademark or other intellectual property rights in the domain name.
- The extent to which the domain name consists of the legal name or a name that is otherwise commonly used to identify the person alleged to be in violation of this statute.
- The prior use of the domain name in connection with the bona fide offering of any goods or services.
- The legitimate noncommercial or fair use of the person's or deceased personality's name in an internet website accessible under the domain name by the person alleged to be in violation of this statute.
- The intent to divert consumers from the person's or deceased personality's name online location to a site accessible under the domain name that could harm the goodwill represented by that name, either for commercial gain or with the intent to tarnish or disparage that name by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site.
- The offer to transfer, sell, or otherwise assign the domain name to the rightful owner or any third party for substantial consideration without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services.
- The intentional provision of material and misleading false contact information when applying for the registration of the domain name.
- The registration or acquisition of multiple domain names that are identical or confusingly similar to names of other living persons or deceased personalities.
- Whether the person alleged to be in violation of this article sought or obtained consent from the rightful owner to register, traffic in, or use the domain name.
- The intent of a person alleged to be in violation of this article to mislead, deceive, or defraud voters.

California has also enacted the California Political Cyberfraud Abatement Act as a means to curtail political cyberfraud [*Elec. Code* § 18320 *et seq.*]. "Political cyberfraud" is defined as "a knowing and willful act concerning a political website that is committed with the intent to deny a person access to a political website, deny a person the opportunity to register a domain name for a political website, or cause a person reasonably to believe that a political website has been posted by a person other than the person who posted the website and would cause a reasonable person, after reading the website, to believe the site actually represents the views of the proponent or opponent of a ballot measure" [*Elec. Code* § 18320(c)(1)]. A "political website" is a website that urges or appears to urge the support or opposition of a ballot measure [*Elec. Code* § 18320(c)(3)].

Under this statute, political cyberfraud includes any of the following [*Elec. Code* § 18320(c)(1)(A)-(D)]:

- Intentionally diverting or redirecting access to a political website to another person's website by the use of a similar domain name, meta-tags, or other electronic measures.

- Intentionally preventing or denying exit from a political website by the use of frames, hyperlinks, mousetrapping, popup screens, or other electronic measures.
- Registering a domain name that is similar to another domain name for a political website.
- Intentionally preventing the use of a domain name for a political website by registering and holding the domain name or by reselling it to another with the intent of preventing its use, or both.

[3] Uniform Dispute Resolution Policy ("UDRP")

ICANN established the Uniform Dispute Resolution Policy ("UDRP") as a private system of domain name dispute resolution [see <http://www.icann.org/udrp/udrp-policy-24oct99.htm>]. All registrars of top-level domains must follow UDRP. Under this policy, most types of trademark based domain name disputes must be resolved by agreement, court action, or arbitration before a registrar will cancel, suspend or transfer a domain name [http://www.icann.org/udrp/udrp.htm]. Disputes alleged to arise from abusive registrations of domain names, such as cybersquatting, may be addressed by expedited administrative proceedings that the holder of the trademark rights initiates by filing a complaint with an approved dispute resolution provider [http://www.icann.org/udrp/udrp.htm]. To invoke UDRP, a trademark owner should either [http://www.icann.org/udrp/udrp.htm]:

- File a complaint in a court of property jurisdiction against the domain-name holder; or
- In cases of abusive registration, submit a complaint to an approved dispute resolution service provider.

[4] Anticybersquatting Consumer Protection Act ("ACPA")

The federal Anticybersquatting Consumer Protection Act ("ACPA") provides another means of domain name disputes within the United States [see 15 U.S.C. § 1125(d)]. Like UDRP, the purpose of ACPA is to provide protection to a trademark owner from the registration by a third parties of a domain names that is confusingly similar to the trademark. ACPA allows a cause of action to the original domain name registrant who loses a UDRP proceeding to challenge that loss in federal court and obtain an injunction returning to the original registrant the disputed domain name [*Sallen v. Corinthians Licenciamentos LTDA* (1st Cir. 2001) 273 F.3d 14] . ACPA also allows a suit, under the in rem provisions of UDRP, to be brought where the central registry for the top level domain name at issue is located when personal jurisdiction cannot be obtained over the domain name registrant [*CNN L.P. v. cnnnews.com* (E.D. Va. 2001) 162 F. Supp. 2d 484] .

[5] Trademark Considerations

The term "trademark" includes any word, name, symbol, device, or combination of those items used by a person to identify his or her goods, to distinguish them from those manufactured or sold by others, even if that source is unknown [15 U.S.C. § 1127, *Bus. & Prof. Code* § 14202(a)]. "Service mark" means any word, name, symbol, device, or any combination of those items used by a person to identify his or her services, to distinguish them from others' services, even if that source is unknown [15 U.S.C. § 1127, *Bus. & Prof. Code* § 14202(b)].

Marks are often classified by the courts in five categories of increasing distinctiveness [*Two Pesos, Inc. v. Taco Cabana, Inc.* (1992) 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615, 623-624 ; *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.* (1985) 469 U.S. 189, 194, 196, 105 S. Ct. 658, 83 L. Ed. 2d 582 ; *Official Airline Guides, Inc. v. Goss* (9th Cir. 1993) 6 F.3d 1385, 1390-1391 ; see also *Gilson on Trademarks*, Ch. 2, *Trademark Subject Matter* (Matthew Bender)]:

- Generic.
- Descriptive.
- Suggestive.
- Arbitrary.
- Fanciful.

The latter three categories, because their intrinsic nature serves to identify a particular source of a product, are deemed inherently distinctive and are generally entitled to protection [see, e.g., *GoTo.com, Inc. v. Walt Disney Co.* (9th Cir. 2000) 202 F.3d 1199, 1207 (logo comprising words "Go" and "To" in white letters enclosed in green circle with ".com" in black letters trailing over circle's edge was suggestive trademark for search-engine web site)]. In contrast, generic marks, those that are merely the common word for a type of product (for example, "car" or "egg") are not registrable even with a showing of secondary meaning [see *Filipino Yellow Pages, Inc. v. Asian Journal Publications, Inc.* (9th Cir. 1999) 198 F.3d 1143, 1146-1147 (combination of two generic terms results in generic mark, not descriptive one)]. A mark that is "merely descriptive" of the product also is not inherently distinctive and generally is not protectable unless it has acquired "secondary meaning"; that is, unless customers associate the mark with a particular source [*Two Pesos, Inc. v. Taco Cabana, Inc.* (1992) 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615, 623-624 ; *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.* (1985) 469 U.S. 189, 194, 196, 105 S. Ct. 658, 83 L. Ed. 2d 582 ; *Official Airline Guides, Inc. v. Goss* (9th Cir. 1993) 6 F.3d 1385, 1390-1391 ; see also Gilson on Trademarks, Ch. 2, *Trademark Subject Matter* (Matthew Bender)].

Although a trademark may be composed of generic or descriptive words, the mark is not automatically invalid. The validity and distinctiveness of a composite trademark is determined by viewing the trademark as a whole, as it appears in the marketplace, and not by dissecting the term and reviewing the validity of its individual component parts [*Self-Realization Fellowship Church v. Ananda Church of Self-Realization* (9th Cir. 1995) 59 F.3d 902, 912] .

Registration of a domain name as a trademark is subject to the same registration requirements as any other mark. A mark composed of a domain is registrable as a trademark or service mark only if it functions as a source identifier, and not merely an informational indication of the domain name addressed used to access a web site. If the proposed mark is used in a way that would be perceived as nothing more than an address at which the applicant can be contacted, registration must be refused. [see *In re Eilberg* (TTAB 1998) 49 USPQ2d 1955 ; USPTO Examination Guide No. 2-99 (Sept. 29, 1999); see also <http://www.uspto.gov/web/offices/tac/notices/guide299.htm>].

The registrant of a mark may hold liable in a civil action any person who, without the registrant's consent, uses in commerce, including use in a domain name, any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offer for sale, distribution, or advertisement of any goods or services on or in connection with which the use is likely to cause confusion, mistake, or deception. A civil action may also be brought against anyone who reproduces, counterfeits, copies, or colorably imitates a registered mark and applies it to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce on or in connection with the sale, offer for sale, distribution, or advertisement of goods or services or in connection with which the use is likely to cause confusion, mistake, or deception [15 U.S.C. § 1114(1); see *Westinghouse Elec. v. Gen. Circuit Breaker & Elec.* (9th Cir. 1997) 106 F.3d 894, 899-900 , cert. denied, 522 U.S. 857 (copying of mark is not necessary element of infringement claim, which may be based on defendant's confusing use of plaintiff's actual mark)]. However, a trademark owner is not automatically entitled to claim any related domain name, there must be an association of goods and services between the domain name and trademark. [see *Hasbro, Inc. v. Clue Computing, Inc.* (D. MA 1999) 66 F. Supp.2d. 117] .

For a more detailed discussion of trademark law, registration of trademarks, infringement, and remedies, see Gilson on Trademarks (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Trademark Protection General Overview Computer & Internet Law Trademark
Protection Protection of Rights General Overview Computer & Internet Law Trademark Protection Protection of
Rights Federal Registration Computer & Internet Law Trademark Protection Protection of Rights Internet Domain Names



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DIVISION III: COMMERCIAL TRANSACTIONS
 CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
 PART II. LEGAL BACKGROUND
 C. Internet Transactions

22-57 California Legal Forms--Transaction Guide § 57.34

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§ 57.34 Online Contracts

[1] Shrink-wrap Agreements

Shrink-wrap agreements are license agreements that are placed inside the cellophane shrink wrap of computer software boxes and that become effective once the shrink wrap is opened. [*Stomp, Inc. v. Neato, LLC (C.D. Cal. 1999) 61 F. Supp.2d 1074, 1081, n.11*]. Shrink-wrap licenses have been upheld as enforceable, as long as the consumer had an opportunity to review the terms of the license and return the product for a refund if the terms were unacceptable. [*ProCD, Inc. v. Zeidenberg (7th Cir. 1996) 86 F.3d 1447*].

[2] Click-wrap Agreements

"Click-wrap agreements" evolved from shrink-wrap agreements. Click-wrap agreements are typically used to license software, allow a user to access a website, or to provide a user with a subscription service to an online service provider. With a click-wrap agreement, the user is required to indicate assent to the agreement terms electronically. When the user's assent, or intent to be bound to the agreement, has been obtained, i.e., through the installation process, click-wrap license agreements have been upheld as enforceable [*DVD Copy Control Assn. v. Bunner (2001) 93 Cal. App. 4th 648, 113 Cal. Rptr. 2d 338*]. This intent can be shown by proof that the user clicked on an "I Agree" button at the end of the agreement. [see *I.Lan Sys., Inc. v. Netscout Service Level Corp. (D. Mass. 2002) 183 F. Supp.2d 328*].

[3] Terms of Use

"Terms of use" typically advise the user that in order to access a website, or use the services of the website, they must be bound by terms or conditions imposed by the website operator. The terms provide that if the user does not wish to be bound by those terms, he or she may not access the website or use any of its services [*Net2Phone Inc. v. L.A. County Superior Court (2003) 109 Cal. App. 4th 583, 151*]. A terms of use agreement can also limit the scope of services a website owner provides [see *Bernardo v. Planned Parenthood Federation of America (2004) 115 Cal. App. 4th 322, 333, 345, 9 Cal. Rptr. 3d 197* (statement in terms of use that website operator provided abortion information for users']

personal education but not as recommendation for medical care was characterized by court as "significant" in determining whether website content was commercial or noncommercial speech)] and thereby seek to limit the website operator's liability for use or reliance on the contents of the website.

Terms of use have been upheld as valid agreements, even though the provider requires that some contractual terms must be accessed via hyperlink, which is a common practice in internet business [*Net2Phone Inc. v. L.A. County Superior Court* (2003) 109 Cal. App. 4th 583].

[4] Uniform Electronic Transaction Act ("UETA")

The National Conference of Commissioners on Uniform State Laws approved the Uniform Electronic Transaction Act ("UETA") in 1999, and it was subsequently adopted by a number of states, including California [see *Civ. Code* § 1633.1 *et seq.*]. UETA generally validates electronic contracts and electronic signatures in transactions when each of the parties has agreed to conduct the transaction by electronic means. Whether the parties have agreed to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct [*Civ. Code* § 1633(b)].

UETA provides that a contract may be formed by the interaction of the parties' computer programs, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements; or by the interaction of a computer program and an individual [*Civ. Code* § 1633.14(a)(1), (2); see *Civ. Code* § 1633.2(f) ("electronic agent" defined)]. It also provides that a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation [*Civ. Code* § 1633.7(b); see *Civ. Code* § 1633.2(g) ("electronic record" defined)].

If a law requires that a contract be in writing, an electronic record satisfies the law [*Civ. Code* § 1633.7(c)]. Similarly, if a signature is legally required, an electronic signature satisfies that requirement [*Civ. Code* § 1633.7(d); see *Lamle v. Mattel, Inc.* (Fed. Cir. 2005) 394 F.3d 1355, 1362-1363 (reaching same result for statute of frauds purposes under California common law in pre-Act case)]. An electronic signature is a binding signature as long as the signature can be traced to an individual who took some affirmative action to agree to the contract [*Civ. Code* §§ 1633.7(d), 1633.9(a)], such as entering a password or clicking on an "I Agree" button.

The terms of an electronic contract are determined by the substantive law applicable to it [*Civ. Code* § 1633.14(b)]; thus, internet contracts are subject to general contract law, including that pertaining to illegality, unconscionability, construction of contract terms, and so on.

[5] E-Sign Act

Congress enacted the Electronic Signatures in Global and National Commerce Act ("E-Sign") [see 15 U.S.C. § 7001 *et seq.*] in June 2000. E-Sign provides that electronic signatures, contracts, or records relating to transactions in or affecting interstate commerce may not be denied legal effect, validity, or enforceability solely because they are in electronic form [15 U.S.C. § 7001(a)(1)]. E-sign also provides that a contract relating to such a transaction may not be denied legal effect, validity or enforceability solely because of an electronic signature or electronic record was used in its formation [15 U.S.C. § 7001(a)(2)]. Under E-Sign, UETA [see [4], *above*] is allowed to govern in those states in which UETA has been adopted, including California [15 U.S.C. § 7002].

[6] New Contract Terms Posted on Web Site

The terms of a consumer service contract could be posted on the service provider's web site, and that posting could be the only source to which a customer can refer for those terms. If the service provider posts revised terms on the web site, an issue might arise as to whether a court should enforce the modified contract against an existing customer. Such a

party has no obligation to check the terms of the contract on a periodic basis in order to learn whether they have been changed by the service provider. Indeed, the customer could not know when to check the web site for possible changes to the contract terms without being notified as to how the contract has been changed. Even if the customer checked the contract every day for possible changes, still, without such notice, an examination would be fairly cumbersome, as the customer would have to compare every word of the posted contract with the existing contract in order to detect whether it had changed. It is elementary that a party cannot unilaterally change the terms of a contract but must obtain the other party's consent to do so. Presenting a revised contract amounts to nothing more than making an offer and does not bind the other party until it is accepted. Generally an offeree cannot actually assent to an offer unless the offeree knows of its existence. Even if the customer's continued use of the provided service could be considered assent, such assent can be inferred only after the customer has received proper notice of the proposed changes [*Douglas v. U.S. Dist. Court (Talk America, Inc.)* (9th Cir. 2007) 495 F.3d 1062, 2007 U.S. App. LEXIS 17061, at *4-*5] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet LawInternet BusinessContractsGeneral OverviewComputer & Internet LawInternet
BusinessContractsDigital SignaturesComputer & Internet LawInternet BusinessLicensingConveyances of Copyright
InterestsCopyright LawConveyancesLicensesBrowsewrap & ClickwrapCopyright
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22-57 California Legal Forms--Transaction Guide § 57.35

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§ 57.35 Privacy Policies

[1] California's Online Privacy Protection Act ("OPPA")

[a] Application

California's Online Privacy Protection Act ("OPPA") [*Bus. & Prof. Code § 22575 et seq.*], which became effective July 1, 2004, requires every operator of a commercial website or online service that collects personally identifiable information through the internet about individual consumers residing in California who use or visit the commercial website or online service to conspicuously post the operator's privacy policy on the website [*Bus. & Prof. Code § 22575(a)*].

An operator is any person or entity that owns a website located on the internet or an online service that collects and maintains personally identifiable information from a consumer residing in California who uses or visits the website or online service if the website or online service is operated for commercial purposes [*Bus. & Prof. Code § 22577(c)*]. It does not include any third party that operates, hosts, or manages, but does not own, a website or online service on the owner's behalf or by processing information on behalf of the owner [*Bus. & Prof. Code § 22577(c)*].

A consumer is any individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for personal, family, or household purposes [*Bus. & Prof. Code § 22577(d)*].

An website operator who is subject to OPPA under *Bus. & Prof. Code § 22575* will be in violation if the operator either (1) knowingly and willfully; or (2) negligently and materially, violates the provisions of the Act [*Bus. & Prof. Code § 22576*].

[b] Privacy Policy Requirement

Under OPPA, an operator's privacy policy must do the following [*Bus. & Prof. Code § 22575(b)*]:

- Identify the categories of personally identifiable information that the operator collects through the website or online service about individual consumers who use or visit its commercial website or online service, and the categories of third-party persons or entities with whom the operator may share that personally identifiable information.
- If the operator maintains a process for an individual consumer who uses or visits its commercial website or online service to review and request changes to any of his or her personally identifiable information that is collected through the website or online service, the operator must provide a description of that process.
- Describe the process by which the operator notifies consumers who use or visit its commercial website or online service of material changes to the operator's privacy policy for that website or online service.
- Identify its effective date.

[c] Personally Identifiable Information

"Personally identifiable information" means individually identifiable information about an individual consumer collected online by the operator of a website from that individual and maintained by the operator in an accessible form [Bus. & Prof. Code § 22577(a)]. Personally identifiable information includes the following [Bus. & Prof. Code § 22577(a)]:

- First and last name.
- Physical address, including street name and name of a city or town.
- E-mail address.
- Telephone number.
- Social security number.
- Any other identifier that permits the physical or online contacting of a specific individual.
- Information concerning a user, that the website or online service collects online from the user, and maintains in personally identifiable form in combination with an of the above identifiers.

[d] Conspicuously Post

Under OPPA, a website operator must conspicuously post its privacy policy [Bus. & Prof. Code § 22575(a)]. The term "conspicuously post" with respect to a privacy policy includes posting the privacy policy in any of the following ways [Bus. & Prof. Code § 22577(b)]:

- A webpage on which the actual privacy policy is posted if the web page is the homepage or first significant page after entering the website.
- An icon that hyperlinks to a webpage on which the actual privacy policy is posted, if the icon is located on the homepage or the first significant page after entering the website, and if the icon contains

the word "privacy." The icon must use a color that contrasts with the background color of the web page or is otherwise distinguishable.

- A text link that hyperlinks to a webpage on which the actual privacy policy is posted, if the text link is located on the homepage or first significant page after entering the website, and if the text link (1) includes the word "privacy"; (2) is written in capital letters equal to or greater in size than the surrounding text; or (3) is written in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.

- Any other functional hyperlink that is so displayed that a reasonable person would notice it.

- In the case of an online service, any other reasonably accessible means of making the privacy policy available for consumers of the online service.

[2] Children's Online Privacy Protection Act ("COPPA")

[a] Application

In 1998, Congress enacted the Children's Online Privacy Protection Act of 1998 ("COPPA") [15 U.S.C. § 6501 *et seq.*; Pub. L. 105-277, Div. C, Title XIII, § 1301 *et seq.*, 112 Stat. 2681-728], which establishes legal requirements for collecting information online from children under the age of 13. COPPA requires the Federal Trade Commission ("FTC") to promulgate regulations in accordance with specified statutory requirements [15 U.S.C. § 6502(b)]. It is unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates the FTC regulations [15 U.S.C. § 6502(a)(1)]. In April 2000, the FTC promulgated its implementing regulations [16 C.F.R. § 312.1 *et seq.*].

COPPA applies to the following [15 U.S.C. § 6501(1), (2); 16 C.F.R. § 312.3]:

- Operators of commercial websites or online services directed to children under the age of 13 that collect personal information from children.
- Operators of general audience sites that knowingly collect personal information from children under 13.
- Operators of general audience sites that have a separate children's area and that collect personal information from children.

[b] Requirements

COPPA requires operators of covered websites to do the following:

- Provide notice on the website or online service of what information it collects from children, how it uses such information, and its disclosure practices for such information [16 C.F.R. § 312.4(b)].
- Obtain verifiable parental consent prior to any collection, use, and/or disclosure of personal information from children [16 C.F.R. § 312.5].
- Provide a reasonable means for a parent to review the personal information collected from a child

and to refuse to permit its further use or maintenance [16 C.F.R. § 312.6].

- Not condition a child's participation in a game, the offering of a prize, or another activity on the child disclosing more personal information than is reasonably necessary to participate in such activity [16 C.F.R. § 312.7].

- Establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children [16 C.F.R. § 312.8].

[c] Privacy Notice

Under COPPA, operators must provide a clearly labeled link to a privacy notice on the homepage of the website or online service, as well as in close proximity to each area of the website or online service, where children directly provide, or are asked to provide, personal information [C.F.R. § 312.4(b)(1)]. This privacy notice must include all of the following [16 C.F.R. § 312.4(b)(2)]:

- The name, address, telephone number, and e-mail address of all operators collecting or maintaining personal information from children through the website or online service. The operators of a website or online service may list the name, address, phone number, and e-mail address of one operator who will respond to all inquiries from parents concerning the operators' privacy policies and use of children's information, as long as the names of all the operators collecting or maintaining personal information from children through the website or online service are also listed in the notice.

- The types of personal information collected from children and whether the personal information is collected directly or passively.

- How such personal information is or may be used by the operator(s), including but not limited to fulfillment of a requested transaction, record keeping, marketing back to the child, or making it publicly available through a chat room or by other means.

- Whether personal information is disclosed to third parties, and if so, the types of business in which those third parties are engaged, and the general purposes for which the information is used; whether those third parties have agreed to maintain the confidentiality, security, and integrity of the personal information they obtain from the operator; and that the parent has the option to consent to the collection and use of their child's personal information without consenting to the disclosure of that information to third parties.

- That the operator is prohibited from conditioning a child's participation in an activity on the child disclosing more personal information than is reasonably necessary to participate in the activity.

- That the parent can review and have deleted the child's personal information, and refuse to permit further collection or use of the child's information, and state the procedures for doing so.

[d] Parental Notice

COPPA requires operators to make reasonable efforts to ensure that parents receive notice of the operator's practices with regard to the collection, use, and/or disclosure of the child's personal information, including notice of any material change in the collection, use, and/or disclosure practices to which the parent has previously consented [16 C.F.R. § 312.4(c)].

[e] Verifiable Parental Consent

COPPA requires that the operators of covered websites must obtain verifiable parental consent before collecting using, or disclosing personal information from children, subject to certain exceptions [16 C.F.R. § 312.5]. Operators must obtain verifiable parental consent to any material change of their collection, use or disclosure practices which the parent previously consented [16 C.F.R. § 312.5(a)(1)]. An operator also must give the parent the option to consent to the collection and use of the child's personal information, without consenting to the disclosure of the child's personal information to third parties [16 C.F.R. § 312.5(a)(2)].

[3] Federal Privacy Notice Requirements for Financial Institutions

In addition to the California privacy policy requirements, website operators that qualify as "financial institutions" are subject to federal privacy policy requirements governing the dissemination of consumers' nonpublic personal information [see 16 C.F.R. § 313.1 *et seq.*; see also 15 U.S.C. § 6801 *et seq.* (Gramm-Leach-Bliley Act)]. The term "financial institutions" is liberally defined and includes, among other things, mortgage lenders, finance companies, mortgage brokers, account servicers, check cashers, wire transferors, travel agencies operated in connection with financial services, collection agencies, credit counselors and other financial advisors, tax preparation firms, non-federally insured credit unions, and investment advisors that are not required to register with the Securities and Exchange Commission [16 C.F.R. § 313.1(b)]. Significantly, the term "financial institution" also includes retailers that extend credit by issuing their own credit cards directly to consumers [16 C.F.R. § 313.3(k)(2)]. For more detailed discussion and a federal privacy notice, see *Ch. 1A, Role of Counsel in Starting A New Business*, § 1A.206[1].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Right to Financial Privacy General Overview Computer & Internet Law Privacy & Security General Overview Computer & Internet Law Privacy & Security Children's Online Privacy Protection Act Computer & Internet Law Privacy & Security State Regulation



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22-57 California Legal Forms--Transaction Guide § 57.36

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.36 Anti-Spam Legislation

[1] Federal "CAN-SPAM" Act

The federal Controlling The Assault of Non-Solicited Pornography and Marketing Act of 2003 [*15 U.S.C. § 7701 et seq.*], popularly referred to as the "CAN-SPAM" Act, effective January 1, 2004, covers e-mail that has a primary purpose of advertising or promoting a commercial product or service, including content available on a website.

CAN-SPAM has four main goals:

- Ban false or misleading e-mail header information [*see 15 U.S.C. § 7704(a)(1)*].
- Prohibit deceptive subject information [*see 15 U.S.C. § 7704(a)(2)*].
- Require that the message include an e-mail or other internet based mechanism by which the recipient can opt out of receiving e-mail messages in the future [*see 15 U.S.C. § 7704(a)(3)*; *see also 15 U.S.C. § 7708*].
- Require that commercial e-mail clearly and conspicuously state that it is an advertisement or solicitation and that the recipient may opt out of receiving future e-mail [*see 15 U.S.C. § 7704(a)(5)*].

The Federal Trade Commission is authorized to enforce CAN-SPAM and bring enforcement actions against violators, and the Department of Justice has the authority to enforce criminal sanctions [*15 U.S.C. § 7711*; *see also www.ftc.gov*]. The FTC is directed or authorized to issue additional rules under CAN-SPAM, in some cases within specified periods after enactment [*see 15 U.S.C. §§ 7702(2)(C), (17)(B), 7704(c), (d)(3), 7708*; *www.ftc.gov*; *see also www.ftc.gov/spam*].

For detailed discussion of the CAN-SPAM Act, see *Ch. 50, Advertising and Promotion*, § 50.11[6][b].

[2] California's Anti-Spam Act

In 2003, California repealed its then-existing statutes dealing with unsolicited commercial e-mail advertising [see former *Bus. & Prof. Code* § 17538.4, repealed by Stats. 2003, ch. 487] effective January 1, 2004, and enacted a new scheme for regulating unsolicited commercial e-mail [see *Bus. & Prof. Code* § 17529 *et seq.*]. This scheme, as enacted, is one of the toughest anti-spam acts in the United States. Under this scheme, it is unlawful to advertise to or from a California e-mail address in an unsolicited commercial e-mail [*Bus. & Prof. Code* § 17529.2(a), (b)]; that is, an e-mail as to which the recipient neither (1) has provided direct consent to receive advertisements from the advertiser, nor (2) has a preexisting or current business relationship with the advertiser [*Bus. & Prof. Code* § 17529.1(o); see *Bus. & Prof. Code* § 17529.1 (l)(defining preexisting or current business relationship)]. Thus, the California statute is an "opt-in" statute; that is, one that generally requires the recipient take some affirmative step before a sender may lawfully send unsolicited commercial e-mail messages to the recipient.

In contrast, the federal CAN-SPAM Act [15 U.S.C. § 7701 *et seq.*], discussed in [1], *above*, takes an "opt-out" approach to spam. Under the California law, marketers would have to prove the "direct consent" of the recipients either in response to a clear and conspicuous request for the consent or on the recipient's own initiative [see *Bus. & Prof. Code* § 17529.1(d)]. The federal Act simply requires a business to stop sending e-mails to those who request to be removed from a list [see 15 U.S.C. § 7704(a)(3), (4)].

It appears probable that most or all of the California opt-in law has been preempted by the federal CAN-SPAM Act [see [1], *above*]. The CAN-SPAM Act generally provides that it supersedes any statute, regulation, or rule of a state or political subdivision that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached to such a message [15 U.S.C. § 7707(b)(1)].

For detailed discussion of the California anti-spam legislation, see "Unsolicited E-Mail Advertising--California Statutory Scheme" in the Introduction to California Forms of Pleading and Practice, Ch. 14, *Advertising* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet LawOnline AdvertisingGeneral OverviewComputer & Internet LawOnline AdvertisingSpam Email



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22-57 California Legal Forms--Transaction Guide § 57.37

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.37 Children's Internet Protection Act ("CIPA")

Congress enacted the Children's Internet Protection Act ("CIPA") in December 2000 [Pub. L. 106-554, § 1701 et seq., 114 Stat. 2763A-335; *see* 20 U.S.C. § 9134(f), 47 U.S.C. § 254(h), (l); *see* 47 C.F.R. § 54.520 (implementing FCC regulation)]. Under CIPA, schools and libraries will not receive discounts through the E-Rate program, Title III of the Elementary & Secondary Education Act, or the Library Services and Technology Act, unless they certify that specified internet safety measures are in place to block the ability of minors to obtain internet access to images and pictures that are obscene, harmful to minors, or constitute child pornography, and that an internet safety policy is in place [*see* 20 U.S.C. § 9134(f), 47 U.S.C. § 254(h)(5), (6), (l)].

CIPA requires the internet safety policy to address the following issues [47 U.S.C. § 254 (l)(1)]:

- Access by minors to inappropriate matter on the internet.
- Safety and security of minors when using e-mail, chat rooms, and other forms of electronic communications.
- Unauthorized access and other unlawful activities by minors online.
- Unauthorized disclosure, use, and dissemination of personal information regarding minors.
- Measures designed to restrict minors' access to harmful material.

The constitutionality of CIPA has been upheld by the United States Supreme Court [*U.S. v. Am. Library Ass'n* (2003) 539 U.S. 194 ; 123 S. Ct. 2297 ; 156 L. Ed. 2d 221] . The Universal Service Administration Company (USAC) is a nonprofit company that administers the Universal Service Fund (USF) which provides telecommunications services to communities through the U.S., including schools and libraries USAC provides additional information and forms

regarding CIPA on its website, which is located at <http://www.sl.universalservice.org>.

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law
Censorship
Children's Internet Protection Act



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22-57 California Legal Forms--Transaction Guide § 57.38

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.38 Disclosure of Customer's Personal Information

Effective January 1, 2005, California law gives customers of businesses the right to know the identity of any third parties to whom their personal information has been disclosed [*see Civ. Code § 1798.83*]. For purposes of this statute, a "customer" is a California resident who provides personal information to a business during the creation or throughout the duration of an established business relationship, if the business relationship is primarily for personal, family, or household purposes [*Civ. Code § 1798.83(e)(1)*]. This statute applies to businesses that disclose personal information about a customer to one or more third parties within the immediately preceding calendar year, and knows or reasonably should know that the third party will use the data for direct marketing purposes [*see Civ. Code § 1798.83(a)*].

To comply with this statute, businesses must take action to notify customers of the available means to request the information which has been disclosed [*Civ. Code § 1798.83 (b)(1)*], and must also provide the customer, within 30 days of their request, (1) the categories of information disclosed [*see Civ. Code § 1798.83(e)(6)(A)*]; and (2) the names and addresses of the third parties that received the personal information for direct marketing purposes. The statute also provides exceptions for the use of customer information by third parties [*see Civ. Code § 1798.83(d)*].

For a further discussion of the California statutes regulating disclosure of a customer's personal information, see *Ch. 46, Credit Cards and Other Open-End Credit Transactions, § 46.96*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Privacy & Security General Overview Computer & Internet Law Privacy & Security State Regulation



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22-57 California Legal Forms--Transaction Guide § 57.39

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.39 Consumer Protection Against Computer Spyware Act

Effective January 1, 2005, California law regulates computer spyware. Under the Consumer Protection Against Computer Spyware Act (Act) [*Bus. & Prof. Code § 22947 et seq.*], a person or entity who is not an authorized user of a computer owned by a person in California, may not, with actual knowledge, conscious avoidance of actual knowledge, or willfully [*see Bus. & Prof. Code § 22947.1(a)*] (definitions):

- Cause computer software to be copied onto the computer [*Bus. & Prof. Code § 22947.2*]; and
- Use the software to do any of the following:
 - Modify, through intentionally deceptive means, specified settings relating to the computer's access to or use of the Internet [*see Bus. & Prof. Code § 22947.2(a)*].
 - Collect, through intentionally deceptive means, personally identifiable information, as defined [*see Bus. & Prof. Code § 22947.2(b)*].
 - Prevent, without authorization, an authorized user's reasonable efforts to block the installation of or disable software, by causing software that the authorized user has properly removed or disabled to automatically reinstall or reactivate on the computer [*see Bus. & Prof. Code § 22947.2(c)*].
 - Intentionally misrepresent that the software will be uninstalled or disabled by an authorized user's action [*see Bus. & Prof. Code § 22947.2(d)*].
 - Through intentionally deceptive means, remove, disable, or render inoperative security, antispyware, or antivirus software installed on the computer [*see Bus. & Prof.*

Code § 22947.2(e)].

Further, a person or entity who is not an authorized user of a computer owned by a person in California, may not, with actual knowledge, conscious avoidance of actual knowledge, or willfully, do any of the following:

- Take control of the computer by doing specified acts [*see Bus. & Prof. Code § 22947.3(a)*].
- Modify the authorized user's security settings or other settings that protect the user's personal information [*see Bus. & Prof. Code § 22947.3(b)*].
- Prevent, without authorization, an authorized user's reasonable efforts to block the installation of, or to disable, software [*see Bus. & Prof. Code § 22947.3(c)*].

These provisions do not apply to any monitoring of, or interaction with, a subscriber's Internet or other network connection or service, or a protected computer, by a telecommunications carrier, cable operator, computer hardware or software provider, or provider of information service or interactive computer service for network or computer security purposes, diagnostics, technical support, repair, authorized updates of software or system firmware, authorized remote system management, or detection or prevention of the unauthorized use of or fraudulent or other illegal activities in connection with a network, service, or computer software, including scanning for and removing software proscribed under the Act [*Bus. & Prof. Code § 22947.3(d)*].

Finally, a person or entity, who is not an authorized user may not do any of the following with regard to the computer of a consumer in this state [*Bus. & Prof. Code § 22947.4(a)*; *see Bus. & Prof. Code § 22947.4(b)* (exceptions)]:

- Induce an authorized user to install a software component by intentionally misrepresenting that it is necessary for security or privacy or in order to open, view, or play a particular type of content.
- Deceptively causing the copying and execution on the computer of software components with the intent of causing an authorized user to use the components in a way that violates any of the Act's prohibitions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Privacy & Security Spyware Computer & Internet Law Privacy & Security State Regulation



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22-57 California Legal Forms--Transaction Guide § 57.40

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.40 Anti-Phishing Act of 2005

Effective January 1, 2006, the Anti-Phishing Act of 2005 (Act) [*Bus. & Prof. Code § 22948 et seq.*] makes it unlawful for any person, through the Internet or other electronic means, to solicit, request, or take any action to induce another person to provide identifying information by representing itself to be a business without the approval or authority of the business [*Bus. & Prof. Code § 22948.2; see Bus. & Prof. Code § 22948.1* (definitions)].

Persons adversely affected by the Act who may bring an action for violation of the Act include those engaged in the business of providing Internet access service to the public, owns a Web page, or owns a trademark [*Bus. & Prof. Code § 22948.3(a)(1)*]. In addition, an individual may seek statutory damages and injunctive relief, but only against a person who has directly violated the Act [*Bus. & Prof. Code § 22948.3(a)(2)*].

Further, the state Attorney General or a district attorney may bring an action against a person who is in violation of the Act, to enjoin further violations and to recover a civil penalty [*see Bus. & Prof. Code § 22948.3(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet Law Privacy & Security Spyware



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22-57 California Legal Forms--Transaction Guide §§ 57.39-57.99

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

[Reserved]

§§ 57.39[Reserved]



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22-57 California Legal Forms--Transaction Guide § 57.100

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.100 Facts

[1] Facts Regarding Computer System Procurement and Maintenance

1. Names and addresses of user's personnel:

NOTE:

The user should consult with these people so that it will be able to define its computer equipment needs in terms of tasks to be performed, future capabilities desired, cost-benefit considerations, and other details.

- a. Computer department or data processing personnel.
- b. Managers or other persons in user's business departments who can give advice concerning its data processing problems and requirements.
- c. Accounting personnel.
- d. Tax advisor.

2. Anticipated uses for computer equipment:

NOTE:

This information is essential in order to determine the potential user's equipment requirements.

- a. Tasks to be performed.
- b. Future capabilities desired.

3. Type of acquisition contemplated:

- a. Integrated system (also described as turnkey or bundled system) including:
 - (1) Hardware;
 - (2) Software [*see* § 57.101]; and
 - (3) Maintenance of either or both.
- b. Separate procurement of hardware, licensed software, and maintenance.
- c. Personal computer.

NOTE:

This chapter does not include discussion of the legal aspects of, or forms for use in, the acquisition of consumer-oriented hardware since purchase agreements, as such, generally are not used for that purpose. For security agreements and retail installment contracts that may be used for home computer purchases, see Ch. 42, ***Secured Transactions***, and Ch. 45, ***Consumer Installment Loans and Credit Sales***, respectively. The law of sales is covered in Ch. 52, ***Sale of Goods Under the Uniform Commercial Code***. The consumer warranties that should be used in the sale of personal computers are discussed in the § 57.220[1].

4. Performance standards required to meet anticipated uses for equipment.

5. Who will maintain computer equipment:

- a. Buyer, lessee, or licensee.
- b. Supplier.
- c. Third parties.

6. Date by which acquisition should be completed.

7. Terms of payment:

- a. Lump sum in advance.
- b. Installment payments upon:
 - (1) Execution of agreement.
 - (2) Delivery and/or acceptance.

(3) Completion of installation and/or training.

c. If equipment is leased, provision for increase upon renewal, if any.

8. Nature of agreement to be used:

a. Sales agreement.

NOTE:

For a guide to drafting computer purchase agreements, see § 57.140[2].

b. Lease agreement:

NOTE:

For a guide to drafting computer lease agreements, see § 57.140[3].

(1) Fixed term with renewal provisions.

(2) Fixed term with option to buy.

c. Computer hardware maintenance agreement.

NOTE:

For a guide to drafting hardware maintenance agreements, see § 57.140[4].

[2] Facts Regarding Software Procurement, Development and Maintenance

1. Names and addresses of user's personnel who can give advice concerning its data processing problems and requirements [*see* § 57.100[1]].

2. Anticipated uses for software:

a. Tasks to be performed.

b. Future capabilities desired.

3. Performance standards required to meet anticipated uses for software.

4. Who will maintain software:

a. User (buyer or licensee).

b. If user does not have its own programmer personnel, will it contract with:

(1) Licensor or developer; or

(2) Third party.

c. Type of maintenance performance desired:

(1) Performance requirements, either:

- (a) On a 24-hour basis; or
- (b) Only during regular business hours.

(2) Desired response time, e.g.:

- (a) "Within the hour";
- (b) "On call"; and/or
- (c) Regularly scheduled maintenance services.

5. Type of agreement to be used:

a. License agreement.

NOTE:

For a guide to drafting software license agreements, see § 57.141[1].

b. Design consultation agreement.

NOTE:

For a guide to drafting software design consultation agreements, see § 57.141[5].

c. Development agreement.

NOTE:

A guide to drafting software development agreements is *set forth in* § 57.141[4].

d. Software maintenance agreement.

NOTE:

For a guide to drafting software maintenance agreements, see § 57.141[3].

6. Date when acquisition should be completed.

7. Terms of payment, e.g.:

a. Lump sum upon purchase or licensing.

b. Installment payments upon:

- (1) Execution of agreement.
- (2) Delivery and/or acceptance.
- (3) Completion of:

(a) Installation services; and/or

(b) Training.

c. Provision for increase upon renewal of license, if license is used.

8. If software is to be transferred under license, services required of or to be offered by licensor, such as:

a. Installation.

b. Training of licensee's personnel in use of software:

(1) Initial training after installation.

(2) On continuing basis.

(3) Free or at specified cost.

c. Future modification and development.

NOTE:

If the licensor will not agree to update the software or make future modifications to meet the user's changing business needs, the licensee will want to have at least access to the source code and complete documentation for it so that another programmer can make the needed modifications. The licensee will also want to assure access to the source code in the event that the licensor ceases its business operations because of bankruptcy or any other reason. In either case, the licensor often will seek to avoid giving the licensee the source code because doing so would compromise its trade secret status. A possible solution would be to place the source code in escrow under strictly limited access instructions.

d. Maintenance (including debugging).

NOTE:

Generally, maintenance will be provided by the proprietor of the software since the proprietor is best acquainted with the inner workings of the program, generally has sole control of the source code, and can best act as the central repository of information on defects and cures. Moreover, the experience generated in performing maintenance will enable the proprietor to produce and then market updates.

The licensee generally will want the shortest possible time to pass before the licensor responds to maintenance calls. One device that will tend to assure that result is a license provision tying response time to the maintenance fee.

e. Post-acquisition advice.

9. Whether software is well tested or developed:

a. Has it been used in identical versions by other users for a period of time and, if so, what experiences have other users had with it:

NOTE:

If the answers to these questions are favorable and tend to indicate that the bugs have

been worked out, the warranty that accompanies the proposed software can be more extensive and maintenance costs should be lower.

(1) Delays in service from vendor?

(2) Delays caused by defects in proposed software?

(3) Indication of need for improvements?

b. If software has been developed or modified for use by one party, experiences that party has had with it.

NOTE:

If only a single user has used the software or if problems are reported, the warranty accompanying the software will likely be limited and maintenance costs will be high enough to cover the cost of perfecting it (unless it has been used long enough and has been sufficiently maintained or corrected to become well defined and stable and, thus, shown to be in conformity with its specifications).

c. Whether there are well-defined specifications.

d. Whether it has become stable and well developed through debugging (i.e., whether there is a higher degree of certainty that it will conform to its specifications).

[3] Facts Regarding Intellectual Property Protection of Software

1. Extent to which information that constitutes the program is known outside of proprietor's business.

2. Extent to which data is known by proprietor's:

a. Employees.

b. Consultants.

c. Associates.

3. Value of software to:

a. Proprietor's competitors.

b. Proprietor:

(1) Detailed description of its purposes.

(2) Frequency of its use or number of copies licensed or otherwise transferred under trade secret protection provisions.

(3) Amount of effort and money expended in developing it.

4. Whether, absent wrongful disclosure, it would be easy or difficult for others to duplicate the software (such as by reverse engineering).

NOTE:

If a trade secret can be discerned without wrongful disclosure, the party who obtains it in that manner is not liable for its use [*see Civ. Code § 3426.1(a)*]. For discussion, see § 57.21.

[4] Facts Regarding Internet Related Transactions

1. Names and addresses of business or internet user, or personnel, who can provide information on pending transactional needs.

2. Type of internet-related transaction or activity involved:

a. Website development.

b. E-mail services.

c. Website hosting services.

d. Preparation of online user agreement.

e. Preparation of terms of use.

f. Preparation of privacy policy.

(1) Whether client collects personal information in connection with website operation.

(2) Nature of information collected.

(3) Whether operator disseminates any of client's personal information to third parties and, if so:

(a) What information is disseminated.

(b) What third parties will receive the information.

(c) What third parties will do with the information.

g. Registration of domain name.

(1) Domain name desired.

(2) Purpose of registration.

h. Potential domain name dispute.

(1) Domain name involved.

(2) How long current owner has operated under that domain name.

(3) Nature of dispute.

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Copyright Protection General Overview Computer & Internet Law Internet Business General
Overview Computer & Internet Law Trade Secret Protection General Overview



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22-57 California Legal Forms--Transaction Guide § 57.101

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.101 Documents

[1] Documents for Computer System Procurement, Software Procurement and Maintenance

- a. List of existing users of items to be procured.

NOTE:

The potential purchaser or licensee will benefit from having a list of the existing users of the equipment or software. The vendor should be willing to supply such a list so that the vendee can consult with users with respect to the usefulness and reliability of the equipment or software.

- b. Copies of sales brochures.
- c. Copies of specifications.
- d. Copies of letters, proposals, or memoranda preliminary to sale, lease, or license transaction.

[2] Documents for Intellectual Property Protection

- a. Copy of proprietor's policy statement or rules stating requirement for storage in secure place.
- b. Copy of proprietor's restrictions on access and use.

c. Copy of log showing details of software use:

- (1) Names and addresses of persons who had access to and/or used software.
- (2) Dates and times of access and/or use.

d. Copy of development expense records showing:

- (1) Amount of time expended.
- (2) Amount of money expended.

e. Copies of any existing trade secret protection agreements applicable to software in question:

- (1) Employment agreements.
- (2) License agreements.

[3] Documents for Internet Related Transactions

- a. Copies of any relevant website development agreements.
- b. Copies of any license agreements for software used in development of website.
- c. Copies of any domain name registration forms.
- d. Copies of any existing intellectual property agreement applicable to website or pending transaction.
- e. Copies of any specifications for website.

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawInternet BusinessGeneral Overview



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22-57 California Legal Forms--Transaction Guide §§ 57.102-57.109

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

[Reserved]

§§ 57.102[Reserved]



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B. Preliminary Determinations

22-57 California Legal Forms--Transaction Guide § 57.110

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.110 Hardware Procurement

1. If integrated system (including hardware, software, and maintenance of both or either) is contemplated, should warranties be given to cover:

- a. System as a whole, including hardware and software; or
- b. Software and hardware separately?

NOTE:

Software and hardware are inherently different, and it is likely that the hardware will present relatively fewer warranty-related problems. For this reason the warranties and, more importantly, the warranty remedies, should be stated separately.

2. Which of following procedures should be required for vendee acceptance of hardware:

- a. Completion of installation constitutes acceptance.
- b. Acceptance within specified but limited period following prescribed testing procedures after installation.
- c. Acceptance automatically upon productive use.
- d. Graduated levels of acceptance.

3. Consequences of nonacceptance:

a. Replacement; or

b. Termination of contract, and, if so, liabilities for each party.

4. Should parties agree to use arbitration to settle disputes?

NOTE:

For discussion and a contract provision for arbitration, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions*** . For detailed coverage of arbitration, see California Forms of Pleading and Practice (Matthew Bender), Ch. 30, ***Using Alternative Dispute Resolution*** , and succeeding chapters.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawFormationGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

22-57 California Legal Forms--Transaction Guide § 57.111

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.111 Software Procurement

1. How will software be acquired?

a. Developed by and for publisher or end user as "work for hire" pursuant to design or development agreement.

NOTE:

This decision should be made by the parties based on such factors as the cost of development versus that of other means of acquisition, the complexity of the task, and the availability of personnel. For a guide to drafting agreements under which an outsider is hired to design and/or develop software for the publisher or user see § 57.141[5]. For an employment agreement that can be adapted for use in hiring "in house" programmers, using trade secret protection provisions, see *Ch. 85, Employment Agreements*, § 85.222.

b. If software will not be developed:

(1) Transferred to publisher or end user by means of license agreement; or

NOTE:

If the software is transferred under a license agreement, the transferee will not have sole and exclusive rights in it (absent a license provision to that effect), but should be able to include a license provision requiring the licensor to maintain the software (i.e., fix any bugs that become apparent) for any time period on which the parties can agree. For a guide to drafting license agreements, see § 57.141.

(2) Transferred to publisher or end user by means of assignment.

NOTE:

If the software is assigned (sold), the buyer will have sole and exclusive rights to it unless there is a provision in the agreement to negate that effect, but will not have any right to maintenance of the software without a provision in the sales agreement requiring it. For an agreement assigning an author's copyright to a publisher, see Ch. 103A, **Copyrights** .].

c. If software is to be transferred under license, should license be:

(1) Exclusive or nonexclusive?

(2) Transferable or nontransferable?

(3) Limited as to time, and, if so, will it be:

(a) Renewable; or

(b) Nonrenewable?

(4) Limited to use on single specified computer?

(5) Limited as to geographical area?

d. Type of product warranty that can or will be offered?

(1) Warranty of conformity to specifications.

NOTE:

A warranty of conformance to specifications is appropriate if software is thoroughly debugged and can be depended upon to conform to its specifications.

(2) Limited warranties and warranty remedies.

NOTE:

In the absence of certainty that software has been thoroughly debugged, only a limited warranty or a materials warranty would be appropriate from the vendor's point of view. Since software defects can remain hidden for substantial periods of time, vendors generally attempt to give limited warranties and warranty remedies to avoid being held to long-term commitments.

(3) Warranties covering defects in materials and workmanship only.

NOTE:

This type of warranty is the most limited and is the one most vendors attempt to give.

e. If user has programming personnel capable of maintaining licensed software (i.e., if it is capable of doing its own debugging and program improvement or development), or intends to contract separately for that service:

(1) Will any improved version be owned by licensor or licensee?

NOTE:

Generally a licensor will attempt to include a provision in the license agreement for ownership of all modifications made in the software, particularly those made by the licensor.

(2) What responsibilities should either party bear for modifications made by licensee?

NOTE:

Generally, a software vendor will desire to avoid responsibility or liability for modifications made by the licensee and should include a disclaimer in the license agreement.

(3) What level or cost of maintenance should be agreed to between licensor and licensee?

f. What procedure should be required for acceptance of software by transferee:

(1) No acceptance as such, with either:

(a) Delivery on "as is" basis constituting acceptance; or

(b) Productive use constituting acceptance?

(2) Acceptance within specified but limited period following prescribed testing procedures designed to show that software meets its specifications?

(3) Acceptance testing on alternate hardware (of same make as designated hardware) if designated hardware is unavailable for installation of software?

(4) Graduated levels of acceptance?

(5) What result in event of nonacceptance:

(a) Replacement; or

(b) Termination and, if so, what liabilities for either party?

g. Should parties agree to use arbitration to settle disputes?

NOTE:

For discussion and a contract provision for arbitration, see Ch. 75, **Formation of Contracts and Standard Contractual Provisions**. For detailed coverage of arbitration, see California Forms of Pleading and Practice (Matthew Bender), Ch. 30, **Using Alternative Dispute Resolution**, and succeeding chapters.

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Internet Business Licensing General Overview Copyright Law Conveyances Licenses General Overview Copyright Law Ownership Interests Works Made for Hire



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22-57 California Legal Forms--Transaction Guide § 57.112

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.112 Software Protection

1. Should software be marketed by sale or under license?

NOTE:

Licensing agreements typically are used in the marketing of computer software because they do not transfer title to the software, with the result that the licensee does not have sole and exclusive rights in it (absent a license provision to that effect). This fact permits the owner to impose use restrictions designed to protect its proprietary interests. In contrast, sales agreements do transfer title unless there is a provision in the agreement to negate that effect and, therefore, do not permit such restrictions to be imposed. For additional discussion, see § 57.220[1].

2. Does software constitute a trade secret?

NOTE:

For definitions of "trade secret" and general discussion of trade secret protection for computer software, see § 57.21.

3. What measures should be taken to guard secrecy of software and protect its owner's proprietary interests while exploiting it commercially?

a. What proprietary markings should be placed on and within software:

(1) Copyright notice?

NOTE:

For coverage of copyright law and procedures, see Ch. 103A, ***Copyrights*** .

(2) Trademark?

NOTE:

For coverage of trademark law and procedures, see Gilson on Trademarks (Matthew Bender).

(3) Trade secret legend?

b. Should copying be permitted and, if so:

NOTE:

As a practical matter, the vendor will almost always desire to keep copying to a minimum. When trade secret protection is the primary or only means of protection, this is a matter of the utmost importance and the license agreement should either forbid copying or strictly limit the number of copies that can be made, the persons or types of employees permitted to have copies, and the nondisclosure agreements to be signed by the vendee's personnel.

When copyright is relied upon, the license agreement should contain similar limitations. However, it is not an infringement for the owner of a copy of a computer program to make another copy or adaptation of that program when necessary to the utilization of that program or for archival purposes or to make a copy for machine maintenance or repair, if that copy is used in no other manner and is destroyed immediately after the maintenance or repair is complete. Such copies can be transferred only as part of the transfer of all rights in the program and adaptations can be transferred only with the copyright owner's permission [*see* 17 U.S.C. § 117].

(1) How many and for what purposes?

(2) Where should they be stored?

(3) Requirement for reproduction of proprietary markings?

(4) How many or what type of employees should have access?

c. What kind of security should licensee be required to exercise?

NOTE:

The license agreement should require the licensee to acknowledge and agree that the software is confidential and constitutes the licensee's valuable trade secret. It should also include requirements for physical security requirements and the licensee's agreement not to disclose the licensee's trade secret.

(1) Store software in secure place.

(2) Impose restrictions on access and use, either:

(a) Designed to prevent unauthorized disclosure; or

(b) Satisfactory to licensor.

(3) Use same degree of care it would with its own confidential materials.

(4) Agree not to deface proprietary marks.

d. Should license agreement provide that disclosure constitutes breach of agreement?

4. Does copyright registration of software provide appropriate protection?

NOTE:

A computer program, even one that is "copy protected" (i.e., programmed to defeat attempts to make copies), generally can be duplicated regardless of such protection and therefore is a good candidate for the protection afforded by registration of a copyright as an unpublished work. Such registration is relatively easy and inexpensive [*see* Ch. 103A, **Copyrights**, *see also* Gilson on Trademarks, Ch. 1, *General Principles* (Matthew Bender) (federal trademark registration)]. The protection afforded to an individual author lasts for that person's lifetime plus 70 years [17 U.S.C. § 302(a)], while a copyright issued for a work made for hire lasts for 95 years from the year of its first publication, or for 120 years from the year of its creation, whichever expires first [17 U.S.C. § 302(c)].

5. Should use of software be limited to:

a. Use on single designated computer?

NOTE:

Generally, software is designed for use on specific brand name hardware only. Thus, it is generally necessary to restrict its use to that hardware so that both will function properly and to avoid damage to the software.

b. Single computer at specific site or multiple system use with additional payment for that use?

NOTE:

Generally, the software vendor will seek to prevent reproduction and multiple use of the software it has licensed to the end user by restricting its use to a single computer at a specified site.

c. Single user:

(1) Prohibition against use on network?

NOTE:

A prohibition against network accessibility will tend to keep a program from being copied or used by persons who have access to the network and, at least, will provide a contractual basis for an action for damages if the prohibition is breached. Databases (information files) and certain programs are available on networks pursuant to the permission of their proprietors. For a guide to drafting computer access agreements, see § 57.140[6].

(2) Prohibition against assignment of right to use software to other user or users?

d. Specified uses or purposes?

NOTE:

A restriction on the use of licensed software will tend to keep a program from being used so indiscriminately that its status as a trade secret can be lost and, at least, will provide a contractual basis for an action for damages if the prohibition is breached.

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law
Internet Business Licensing
General Overview
Copyright Law
Subject Matter
Literary Works
Computer Programs
Trade Secrets Law
Protected Information
Computer Software
Trademark Law
Subject Matter
General Overview



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22-57 California Legal Forms--Transaction Guide § 57.113

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.113 Internet Related Transactions

[1] Domain Name Registration

1. Are there any potential conflicts with the proposed potential domain name?
 - a. Are there any trademarks similar to domain name?
 - b. Are there any companies or individuals using a similar name?
2. Does proposed registrant meet eligibility requirements of appropriate registrar?

NOTE:

It is not uncommon for domain name registries to have eligibility requirements, such as residency, for the registration of certain domain names.

3. Does potential domain name meet trademark registration requirements for potential trademark registration?

NOTE:

For a discussion of trademark registration requirements, see § 57.33[5]. For detailed coverage of federal trademark registration, see Gilson on Trademarks, Ch. 1, **General Principles** (Matthew Bender).

[2] Website Development

1. Has domain name been successfully registered with an appropriate domain name registry?

NOTE:

For a discussion of domain name registration, see § 57.33[1].

2. Have appropriate website hosting services, server, and e-mail options been selected and contracted for?

NOTE:

For a discussion of website hosting, see § 57.31[2]. For a website hosting agreement, see § 57.244.

3. Has prospective website operator entered into written agreement with a website developer covering the following:

NOTE:

For a guide to drafting a website development agreement, see § 57.142[2]. For a website development agreement, see § 57.240.

- a. Responsibilities of each party?
 - b. Payment terms?
 - c. Completion of the website?
 - d. Ownership rights of materials used on the website?
 - e. Appropriate warranties and remedies?
 - f. Protection of proprietary or confidential information?
 - g. Maintenance of the website?
 - h. Termination of the agreement for breach of contract or convenience?
4. Have consents been obtained to use any original work, copyrighted or trademarked materials?

NOTE:

For an Authorization (License) to Use Copyright Work to be used in gaining permission to use a copyrighted work, see *Ch. 103A, Copyrights*, § 103A.223[2].

5. Have adequate legal disclosure been place on website?

- a. Terms of use or user agreement?

NOTE:

For a terms of use agreement, see § 57.241.

- b. Privacy policy?

NOTE:

For a privacy policy, see § 57.242.

7. Does website fall within safe harbor provided by Digital Millennium Copyright Act ("DMCA") [*see 17 U.S.C. § 512*]?

NOTE:

For discussion of the DMCA, and the requirement needed for the safe harbor, see § 57.32[2].

- a. If so, consider registering website with U. S. Copyright office; and
- b. Place copyright notice information on website.

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet LawInternet BusinessGeneral OverviewComputer & Internet LawTrademark ProtectionProtection of RightsFederal RegistrationComputer & Internet LawTrademark ProtectionProtection of RightsInternet Domain Names



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22-57 California Legal Forms--Transaction Guide §§ 57.114-57.119

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

[Reserved]

§§ 57.114[Reserved]



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C. Procedural Guide

22-57 California Legal Forms--Transaction Guide § 57.120

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.120 Domain Name Registration

1. Search for existing trademarks on potential domain names to address any potential infringement issues.
2. Search internet at large to see if same or similar name is being used.
3. Search business name registry's to see if other businesses are using same or similar name.
4. Register domain name with a domain name registry.

NOTE:

Many internet service providers will handle domain name registration for clients in connection with website hosting arrangements [*see* § 57.31[2]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Trademark Protection Protection of Rights Federal Registration Computer & Internet Law Trademark Protection Protection of Rights Internet Domain Names



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22-57 California Legal Forms--Transaction Guide § 57.121

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.121 Website Development

NOTE:

For an advertising agreement (banner advertisements and links on website), see *Ch. 50, Advertising and Promotion*, § 50.210. For a co-branding agreement (goods or services to be advertised on market-segment website), see *Ch. 50, Advertising and Promotion*, § 50.211. For a marketing and advertising agreement providing exclusive internet marketing rights in exchange for an advertising commitment, see *Ch. 50, Advertising and Promotion*, § 50.212.

1. Search domain name registry, trademark registry, and business registries on potential name to see if there are any conflicts or any potential infringement issues.
2. Register domain name [see § 57.120].
3. Consider registering domain name as trademark if meet the requirements for trademark registration [see § 57.33[5] and Gilson on Trademarks, Ch. 1, *General Principles* (Matthew Bender), for discussion of trademark registration requirements].
4. If website developer will be hired to build website, prepare website development agreement [see §§ 57.142[2] (drafting guide); 57.240[2] (form)].
5. Apply for adequate website hosting services.

NOTE:

For a discussion of website hosting, see § 57.31[2]. For a website hosting agreement, see

§ 57.244.

6. If website contains any original work, copyright, or trademark, ensure that prospective user has permission to use it [see § 57.240[2], P 7].

NOTE:

For an authorization (license) to use a copyrighted work, see *Ch. 103A, Copyrights*, § 103A.223[2].

7. Ensure that any copyrighted materials on website, which may be modified by website users, will not lead to confusion and potential infringement.

8. Provide adequate legal disclosures on the website, including:

a. Terms of use [see § 57.241].

b. Privacy policy [see § 57.242].

9. Ensure that any website user agreement provides:

a. That user will not upload any content for which website user does not have a license;
and

b. That user will indemnify website owner for any breach of that provision.

10. Consider registering website with U. S. Copyright Office to qualify for safe harbor provided by Digital Millennium Copyright Act ("DMCA") [see 17 U.S.C. § 512] and, if so registered, place copyright notice on website.

NOTE:

For discussion of the DMCA, and the requirements that must be met to qualify for the DMCA "safe harbor" [see 17 U.S.C. § 512], see § 57.32[2].

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Copyright Protection General Overview Computer & Internet Law Internet
Business Contracts General Overview Computer & Internet Law Online Advertising General Overview Computer &
Internet Law Trademark Protection General Overview Computer & Internet Law Trademark Protection Protection of
Rights Internet Domain Names



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22-57 California Legal Forms--Transaction Guide §§ 57.122-57.139

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[Reserved]

§§ 57.122[Reserved]



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PART III. TRANSACTION GUIDE
D. Drafting Guide for Computer and Internet-Related Documents

22-57 California Legal Forms--Transaction Guide § 57.140

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.140 Hardware Related Transactions

[1] Distribution Agreement Between Computer Equipment Manufacturer and Distributor

1. Specify whether distributorship is exclusive or nonexclusive:

a. Exclusive appointment [see § 57.204[2], P 1.01 (first alternative)]:

NOTE:

For discussion of the legal basis for exclusive territories under federal antitrust law see § 57.204[1].

(1) Describe product.

(2) Describe territory.

(3) Include agreement by manufacturer not to appoint any other party to sell product in described territory.

(4) Include distributor's agreement not to sell product outside of territory.

b. Nonexclusive appointment [see § 57.204[2], P 1.01 (second alternative)]:

(1) Describe product.

- (2) Authorize sales anywhere within United States without any exclusive rights in any specific territory.
2. State term of agreement, with or without option for renewal [*see* § 57.204[2], P 1.02].
 3. Provide for purchase of product from manufacturer at manufacturer's then-current wholesale price [*see* § 57.204[2], P 2.01].
 4. Describe terms of purchase [*see* § 57.204[2], P 2.02]:
 - a. Purchase price less specified percent cash discount for payment within specified time from date of invoice.
 - b. Specify shipping terms.
 5. Specify distributor's initial purchase agreement including, if desired, manufacturer's agreement to repurchase products that remain unsold at end of specified period [*see* § 57.204[2], P 2.03].
 6. Describe distributor's obligation to make minimum subsequent purchases [*see* § 57.204[2], P 2.04]:
 - a. Schedule of minimum purchases per year or other period.
 - b. Termination of agreement if purchases are less than minimum amounts specified.
 7. State when title to product will pass to distributor [*see* § 57.204[2], P 2.05].
 8. Include risk of loss provision describing when risk shifts from manufacturer to distributor [*see* § 57.204[2], P 2.06].
 9. Include provisions for distributor's use of manufacturer's product trade name and/or trademark [*see* § 57.204[2], P 2.07]:
 - a. Permit use only in connection with advertisement and sale of product.
 - b. Require distributor to submit all advertising and promotional materials containing manufacturer's trade name and/or trademark for approval, and state that approval will not be unreasonably withheld.
 - c. Include distributor's agreement that upon termination of agreement it will cease all use of trade name and/or trademark and deliver logotype representations to manufacturer.
 10. State manufacturer's agreement to advise distributor, within specified time in advance, of any contemplated changes in the following [*see* § 57.204[2], P 2.08]:
 - a. Product designs.
 - b. Prices.
 11. Specify distributor's obligations [*see* § 57.204[2], P 2.09]:
 - a. Use of best efforts to promote distribution, sale, and use of product.

b. Maintenance of inventory of specified amount of product at all times during term of agreement.

12. Describe manufacturer's obligation to purchase and place advertising, promoting sale of product [see § 57.204[2], P 2.10].

13. If distributorship territory is international, include distributor's agreement not to export product to any country for which federal export permit is required without prior written consent of federal Office of Export Administration [see § 57.204[2], P 2.11].

14. Include manufacturer's warranty of title [see § 57.204[2], P 3.01]:

a. Statement that manufacturer has good title and right to sell free of any proprietary rights of any other party or any other encumbrance.

b. Manufacturer's warranty of title remedies:

(1) To indemnify and hold distributor harmless against infringement claims.

(2) Excepting any claim or liability based on distributor's modification or conversion of product.

15. Include limited product warranty [see § 57.204[2], P 3.02].

16. Provide for warranty service limited to repair or replacement of defective items during warranty period [see § 57.204[2], P 3.03].

17. Include conspicuous (boldface, all capital letters) statement of warranty conditions [see § 57.204[2], P 3.04]:

NOTE:

The disclaimer of an implied warranty of merchantability or fitness must be conspicuous [Com. Code § 2316(2)]. For discussion of the use of boldfaced capital letters to make a conspicuous disclaimer, see § 57.200[1][e].

a. Warranty is contingent upon proper use of product in accordance with instructions and specifications.

b. Warranty does not apply to product that has been repaired or modified by anyone other than manufacturer.

18. Include conspicuous (boldface, all capital letters) warranty disclaimer [see § 57.204[2], P 3.05].

NOTE:

The disclaimer of an implied warranty of merchantability or fitness must be conspicuous [Com. Code § 2316(2)]. For discussion of the use of boldfaced capital letters to make a conspicuous disclaimer, see § 57.200[1][e].

19. Specify conditions for termination by manufacturer [see § 57.204[2], P 4.01]:

a. Reason for termination.

b. Notice time.

c. When agreement will terminate.

20. State conditions for termination by distributor [see § 57.204[2], P 4.02]:

a. Termination upon written notice.

b. Notice time.

c. When agreement will terminate.

21. Include standard general provisions:

a. Provision governing notices [see § 57.204[2], P 5.01].

b. Prohibition against assignment of contract without prior written consent of other party [see § 57.204[2], P 5.02].

c. Provision that any amendments must be in writing [see § 57.204[2], P 5.03].

d. Agreement that no failure to exercise, and no delay in exercising any right, power, or privilege operates as waiver [see § 57.204[2], P 5.04].

e. Standard severability clause [see § 57.204[2], P 5.05].

f. Standard clause specifying governing law [see § 57.204[2], P 5.06].

g. "Entire agreement" provision [see § 57.204[2], P 5.07].

h. Provision for recovery of attorneys' fees [see § 57.204[2], P 5.08].

NOTE:

For discussion of attorneys' fees, see § 57.200[1][g].

[2] Computer Purchase Agreement

NOTE:

This drafting guide outlines provisions to be considered for the sale of computer equipment. The law of sales, detailed drafting and procedural guides related to the sale of goods generally, and alternate sales agreement provisions can be found in Ch. 52, ***Sale of Goods Under the Uniform Commercial Code*** . These materials should also be consulted prior to drafting a computer sales agreement. For an example of a computer purchase agreement, see § 57.200.

1. State agreement to purchase hardware:

a. As listed in agreement or on attached purchase schedule [see § 57.200[2], P 1.01 (computer system purchase); see also § 57.201[2], P 1 (computer presently installed

under lease)], including following information:

- (1) Name and type.
- (2) Manufacturer.
- (3) Model numbers.
- (4) Purchase price.
- (5) Warranty status, if desired.

b. Consider including provision permitting purchaser to purchase additional features or conversions in future [see § 57.201[2], P 6].

2. State agreement of parties as to payment of purchase price:

a. That purchase price for each item of hardware is as specified in agreement or attached purchase schedule [see § 57.200[2], P 1.02].

b. Requiring payment:

- (1) At specified time or times after shipment or acceptance testing [see § 57.200[2], P 4.03(a)]; or
- (2) In full upon execution of agreement [see § 57.201[2], P 2 (purchase of leased computer)].

3. Provide that purchaser will prepare site prior to installation of hardware in accordance with seller's specifications [see § 57.200[2], P 1.03].

4. Provide for installation [see § 57.200[2], P 1.04]:

a. In location specified by purchaser.

b. By either:

- (1) Purchaser in accordance with instructions provided by seller; or
- (2) Seller.

c. With seller to perform inspection and diagnostic checks using standard test procedures.

5. Provide for acceptance testing:

a. Specify seller's agreement that hardware must meet specified performance standard before acceptance by purchaser [see § 57.200[2], P 1.05].

b. Describe acceptance performance period [see § 57.200[2], P 1.05(a)]:

- (1) Beginning upon installation.

(2) Ending when hardware has operated in conformance with technical specifications:

(a) Under standard test procedures.

(b) For specified period.

(c) At stated effectiveness level.

c. If desired, provide that upon failure of hardware to meet specified performance standard during initial testing period, performance testing may continue until it meets that standard for specified consecutive number of calendar days [see § 57.200[2], P 1.05(b)].

d. Specify that if hardware fails to meet specified performance standards after stated period, purchaser, at its option, may either [see § 57.200[2], P 1.05(c)]:

(1) Request replacement; or

(2) Terminate sales agreement without further liability on part of either party.

6. If hardware includes or contains remanufactured components [see § 57.200[2], P 1.06]:

a. Disclose that fact.

b. Specify that those components have been cleaned, refinished, inspected, and tested to meet new hardware test standards.

c. State that any such hardware components will:

(1) Be equivalent to new components in performance;

(2) Meet current performance specifications; and

(3) Be subject to warranties contained in sale agreement.

7. Include title provisions:

a. Date on which title passes [see § 57.201[2], P 4].

b. Warranty of title--that seller has good title and right to sell hardware free of any [see § 57.200[2], P 1.07]:

(1) Proprietary rights of any other party; or

(2) Other encumbrance.

8. Include warranty of title remedies [see § 57.200[2], P 4.09; see also § 57.201 P 7(b)].

9. Include product warranty, using either of following:

- a. Limited product warranty that hardware is warranted to be free from defects in materials and workmanship for specified period [see § 57.200[2], P 1.08].
 - b. Warranty of conformity to specifications [see § 57.200[2], P 6.03, First Alternative].
 - c. Differing levels of limited service warranty for different items of equipment, based on:
 - (1) Length of use by purchaser [see § 57.201[2], P 8]; or
 - (2) Separate, arbitrary warranty service categories.
10. Set forth limitations to seller's obligation to provide warranty service, by choosing either of following:
- a. Warranty service limited to either repair or replacement of defective hardware [see § 57.200[2], P 1.09]:
 - (1) At seller's own expense and option.
 - (2) During warranty period.
 - (3) Subject to proviso that:
 - (a) Purchaser notifies seller of defect; and
 - (b) Upon inspection by seller, hardware is found defective.
 - b. Warranty service made inapplicable under some following circumstances [see § 57.201[2], P 9]:
 - (1) Repairs or increased service time caused by accident, transportation of equipment, neglect, misuse, or alterations or modifications when not performed by seller.
 - (2) If purchaser fails to provide suitable installation environment as prescribed by installation manual.
 - (3) If purchaser uses supplies not meeting seller's specifications.
 - (4) If purchaser uses equipment for purposes for which it was not designed.
 - (5) If equipment failure results from causes beyond seller's control, including alterations or connection to another computer or device.
 - (6) If equipment is located outside of specified area.
11. Warranty service charges provision for service [see § 57.200[2], P 1.10]:
- a. Required other than during seller's normal business hours.
 - b. Performed outside of specified area.
12. Include conspicuous (boldface, all capital letters) statement of warranty conditions [see § 57.200[2], P 1.11]:

NOTE:

The disclaimer of an implied warranty of merchantability or fitness must be both written and conspicuous [*Com. Code § 2316(2)*]. For discussion of the use of boldface capital letters to make a conspicuous disclaimer, see § 57.200[1][e].

a. All warranties contingent on proper use of hardware in accordance with published instructions and specifications.

b. Warranties do not apply to hardware that has been repaired or modified by unauthorized persons.

13. Include conspicuous (boldface, all capital letters) statement of warranty disclaimer [*see § 57.200[2]*, P 1.12; *see also § 57.201*, P 10].

NOTE:

The disclaimer of an implied warranty of merchantability or fitness must be both written and conspicuous [*Com. Code § 2316(2)*]. For discussion of the use of boldface capital letters to make a conspicuous disclaimer, see § 57.200[1][e].

14. If agreement is for procurement of integrated computer system, including software, either:

NOTE:

For a detailed guide to drafting commercial software license agreements, see § 57.141. That guide should be consulted if software license provisions are to be included in the agreement for procurement of the computer hardware. A complete commercial software license is *set forth in § 57.220*.

a. State purchaser's agreement to enter into a separate agreement for that purpose; or

b. Set forth software license provisions in hardware purchase agreement [*see § 57.200[2]*, Art. 2].

15. Provide for computer hardware maintenance services, either:

NOTE:

For a guide to drafting computer maintenance agreements, see § 57.140[4]. That guide should be consulted if hardware maintenance provisions are to be included in the agreement for procurement of the computer hardware. For a complete separate computer maintenance agreement, see § 57.203.

a. State purchaser's agreement to enter into a separate agreement for that purpose [*see § 57.202[2]*, P 7];
or

b. Set forth maintenance services provisions in hardware purchase agreement [*see § 57.200[2]*, Art. 3].

16. Provide that general terms and conditions contained in sale agreement [*see § 57.200[2]*, Art. 4] apply to all products and services furnished to purchaser [*see § 57.200[2]*, P 4.01].

17. Specify what will constitute acceptance of system by purchaser [*see § 57.200[2]*, P 4.02]:

a. If seller installs equipment and software:

(1) Satisfactory completion of seller's test procedures.

(2) Verification of test completion by purchaser's representatives.

b. If installation is not performed by seller:

(1) Define date of acceptance as date of delivery to purchaser; and

(2) Disclaim seller's obligation to perform any acceptance test procedures.

18. Specify when payment for products or services must be made [see § 57.200[2], P 4.03(a)].

19. Consider inclusion of provision allowing seller to [see § 57.200[2], P 4.03(b)]:

a. Demand payment in advance of delivery if, in its judgment, purchaser's financial condition requires it;

b. Suspend performance until that payment is made; or

c. Cancel purchaser's order.

20. Describe seller's remedies if purchaser fails to pay charges when due and payable [see § 57.200[2], P 4.03(c)]:

a. Purchaser's agreement to pay all costs, including reasonable attorneys' fees expended in collecting overdue charges.

b. Purchaser's agreement to pay late payment charge in specified amount.

21. Consider including provision for discount on payment in advance [see § 57.200[2], P 4.03(d)].

22. Provide for purchaser's responsibility for taxes, either:

a. Exclude all taxes (except taxes based on seller's income) from prices and license fees and specify that prices and license fees are subject to increase equal to any taxes seller may be required to collect or pay upon sale or delivery [see § 57.200[2], P 4.04]; or

b. Add to each price specified in agreement amounts equal to taxes due on equipment, including [see § 57.201[2], P 3]:

(1) Taxes assessable on sale.

(2) Excise taxes.

(3) Personal property taxes.

23. Include terms of shipment [see § 57.200[2], P 4.05; see also Ch. 52, *Sales of Goods Under the Uniform Commercial Code*, §§ 52.250-52.265 (shipment and delivery provisions for commercial contracts)]:

a. Type of shipment [e.g., F.O.B, F.C.A, Ex Works, etc.].

- b. Responsibility for selection of carrier.
- c. Carrier not to be construed to be seller's agent.
- d. Seller reserves right to make partial shipments.

24. Provide for insurance on shipments [see § 57.200[2], P 4.06]:

- a. Which party will obtain insurance.
- b. What type of insurance.
- c. When insurance coverage will begin and end.
- d. Which party will pay for insurance and at what rate.
- e. Provide that settlement of claims will be made on basis of repair or replacement, at seller's option.

25. Provide for cancellation of shipment by purchaser [see § 57.200[2], P 4.07].

26. Include provision for security interest [see § 57.200[2], P 4.08]:

- a. Have purchaser grant security interest in all products to seller.
- b. Include purchaser's agreement to execute and deliver financing statement and other documents evidencing security interest satisfactory for filing.

27. Provide for defense and indemnification by seller against claims of infringement of proprietary rights in hardware or software [see § 57.200[2], P 4.09; see also § 57.201[2], PP 7 (warranty of title remedies), 11 (defense of patent claims)]:

NOTE:

For a discussion of indemnification, see § 57.220[1][g]. For a procedural guide to drafting indemnification provisions, see § 57.141[1], P 32.

a. Purchaser's agreement to notify seller of any claim that seller's products or purchaser's use thereof violates any of following rights of other parties:

- (1) Trade secret.
- (2) Trademark.
- (3) Copyright.
- (4) Patent.
- (5) Other proprietary right of any other party.

b. Purchaser's agreement to cooperate with seller in investigation and resolution of all claims.

- c. Seller's promise to defend purchaser at seller's expense if seller is so notified.
- d. Seller's agreement to pay costs and damages awarded provided that seller has sole control of defense and all negotiations for settlement or compromise.
- e. Seller's promise to indemnify and hold purchaser harmless from any liability for damage, costs, or other loss incurred by purchaser in connection with any such claim, except:
 - (1) Any claim, costs, or liability based on purchaser's modification or conversion of software and/or subsequent use of that modification or conversion.
 - (2) If claim is based upon use of hardware or software in combination with other equipment or software not made by seller.
- f. Option on part of seller to either:
 - (1) Procure for purchaser right to continue using product;
 - (2) Replace or modify it so that it becomes non-infringing; or
 - (3) Grant purchaser credit for product as depreciated and accept its return, with depreciation formula.

28. Consider use of purchaser's agreement to hold seller harmless against any expense, judgment, or loss for infringement of any patents, copyrights, or trademarks that result from seller's use of purchaser's designs, plans and specifications, or computer programs [see § 57.200[2], P 4.10].

NOTE:

This type of indemnification provision may be appropriate if the system being sold has been custom designed to meet the specifications of a sophisticated purchaser who is competent to prepare very detailed plans for the system. However, the purchaser should view such a provision with extreme caution. Because the purchaser is in effect accepting responsibility for any infringements by the seller, the seller is effectively relieved of any incentive to be careful in this regard.

29. Include purchaser's agreement to maintain in confidence and not to disclose, reproduce, or copy any materials, data, documentation, or specifications provided by seller that are copyrighted, patented, trademarked, or otherwise marked as confidential, secret, or proprietary, except as otherwise provided [see § 57.200[2], P 4.11; see also § 57.200[2], P 4.02].

30. Describe any support services to be provided to purchaser, including [see § 57.200[2], P 4.12]:

- a. Assistance in implementation planning.
- b. Systems analysis and design.
- c. Installation.
- d. Evaluation.
- e. Training of purchaser personnel.

31. Include provisions giving seller authority to terminate agreement if any of following is not remedied within specified period after receipt of written notice [see § 57.200[2], P 4.13]:

- a. Purchaser's failure to make satisfactory financial arrangements for purchase of products or services;
- b. Purchaser's failure or neglect to perform or observe any of its existing or future obligations under agreement, including timely payment of any sums due;
- c. Any assignment of purchaser's business for benefit of creditors;
- d. Filing of petition in bankruptcy by or against purchaser;
- e. Appointment of receiver or trustee in bankruptcy for purchaser's property; or
- f. Adjudication of purchaser as a bankrupt.

32. Limit purchaser's remedies for breach of warranty liability with respect to products or services to those provided in agreement [see § 57.200[2], P 4.14].

33. Limit seller's liability for damages arising from services or products to total charges paid or payable for either [see § 57.200[2], P 4.14]:

- a. Services during specified period if liability arises from service; or
- b. Purchase price of products if liability results.

34. Include purchaser's agreement disclaiming seller's liability for any of following arising out of subject matter of agreement, even if seller had been advised of potential liability [see § 57.200[2], P 4.15]:

- a. Special damages.
- b. Incidental damages.
- c. Indirect damages.
- d. Consequential damages.
- e. Loss of profit or revenue.
- f. Loss of data.

35. Include purchaser's agreement that seller has no responsibility for any hardware, software, or other items, or any services provided by any persons other than seller [see § 57.200[2], P 4.16].

36. Include standard provision for notice [see § 57.200[2], P 4.17].

37. Include provision against assignment without seller's prior written consent [see § 57.200[2], P 4.18].

38. Require that amendments be in writing [see § 57.200[2], P 4.19].

39. Include nonwaiver provision stating [see § 57.200[2], P 4.20]:

- a. That no failure to exercise, and no delay in exercising any right, power, or privilege will operate to waive any right, power, or privilege under the agreement.
- b. That no single or partial exercise of any right, power, or privilege under the agreement precludes its further exercise

40. Provide for risk of loss, either on purchaser or seller, prior to date of purchase [see § 57.201[2], P 5].

41. Include standard severability clause [see § 57.200[2], P 4.21].

42. Include clause specifying governing law [see § 57.200[2], P 4.22].

43. Include "entire agreement" clause [see § 57.200[2], P 4.23].

44. Provide for payment of attorneys' fees to prevailing party [see *Civ. Code* § 1717; see also [see § 57.200[2], P 4.24].

NOTE:

For discussion of attorneys' fees provisions, see § 57.200[1][g].

45. If system is acquired pursuant to purchaser's purchase order, state that in event of conflict between contract and purchase order, terms and conditions of contract control [see § 57.200[2], P 4.25].

46. Consider use of provisions for arbitration to settle disputes [see *Ch. 75, Formation of Contracts and Standard Contractual Provisions*, § 75.250].

[3] Computer Lease Agreement

NOTE:

This drafting guide deals with computer equipment leases. The law of equipment leasing, including important tax considerations, procedural and other guides, and alternate provisions that may be adapted for use in computer leasing, are set forth in *Ch. 53, Personal Property Leasing*, and these should be consulted before drafting a computer lease agreement.

1. State that lessor leases and lessee hires use of computer equipment described in attached lease schedule, subject to terms and conditions of lease [see § 57.202[2], P 1].

2. Include title provision stating that lessee's agreement that equipment is and remains lessor's property and that lessor may remove it upon termination of agreement [see § 57.202[2], P 2].

3. Specify lessee's right to use equipment:

- a. State lessor's covenant of quiet possession during term and subject to conditions of lease as long as lessee is not in default [see § 57.202[2], P 3(a)].
- b. Include provision governing lessee's right to sell time on equipment to third parties;

either specifically:

(1) Permit lessee to sell time [see § 57.202[2], P 3(b)]; or

(2) Prohibit lessee from selling time.

4. Specify term of agreement [see § 57.202[2], P 4]:

- a. Effective from date of execution.
- b. Remaining in force until terminated.
- c. Subject to provision for guaranteed initial term.

5. Specify a commencement date (for purpose of determining when monthly rental charges and initial term begin) [see § 57.202[2], P 5]:

- a. Date when equipment is accepted by lessee as ready for use.
- b. Subject to requirement that lessee certify acceptance and date thereof.

6. Provide for lessee's payment of [see § 57.202[2], P 6]:

- a. Periodic rent, as specified in lease or attached lease schedule.
- b. All taxes, inclusive or exclusive of personal property taxes assessed on equipment and taxes based on net income.

7. Provide for equipment maintenance, either:

NOTE:

For a guide to drafting computer maintenance agreements, see § 57.140[4]. That guide should be consulted if hardware maintenance provisions are to be included in the agreement for procurement of the computer hardware. For a complete separate computer maintenance agreement, see § 57.203.

- a. Require lessee to enter into and maintain in force a maintenance agreement covering each item of equipment [see § 57.202[2], P 7]; or
- b. Include maintenance provisions in lease [see § 57.200[2], Art. 3].

8. Include lessee's agreement to pay all maintenance charges made by equipment manufacturer [see § 57.202[2], P 8].

9. Require lessee to [see § 57.202[2], P 9]:

- a. Meet manufacturer's installation requirements.
- b. Adhere to standards set by National Board of Fire Underwriters for protection of electronic computer systems.

10. Provide for supplies to be used by lessee [see § 57.202[2], P 10]:

- a. Make lessee responsible for all supplies consumed or required by equipment.
- b. Require supplies to meet specifications established by equipment manufacturer.

NOTE:

Although antitrust considerations prohibit a manufacturer from requiring a lessee to use supplies that the lessor manufactures, the manufacturer may require supplies to meet specifically stated specifications [*see International B. Mach. Corp. v. United States (1935) 298 U.S. 131, 139, 140, 56 S. Ct. 701, 80 L. Ed. 1085*].

- 11. Require equipment to be located at specified address unless otherwise permitted by lessor [*see § 57.202[2]*, P 11].
- 12. Include provision governing risk of loss [*see § 57.202[2]*, P 12]:
 - a. Lessee to bear risk of loss or damage caused by specified risks.
 - b. Lessee required to purchase insurance against any of above risks that are insurable, with lessor named as loss payee.
 - c. Lessee liable for repair costs or, if repair cannot be made, replacement cost less amount of any insurance or other recovery received.
- 13. Include provision for termination of agreement as to equipment irreparably damaged, lost, or destroyed [*see § 57.202[2]*, P 12(c)].
- 14. Include warranty of title and remedies for breach [*see § 57.202[2]*, P 13].
- 15. Describe procedure for enforcement of manufacturer's warranty [*see § 57.202[2]*, P 14].
- 16. Include disclaimer of any warranties except as expressly provided [*see § 57.202[2]*, P 15].
- 17. Include lessee's agreement to indemnify and hold lessor harmless with respect to claims or losses caused by [*see § 57.202[2]*, P 16]:

NOTE:

For a discussion of indemnification, see § 57.220[1][g]. For a procedural guide to drafting indemnification provisions, see § 57.141[1], P 32.

- a. Inadequacy of equipment.
 - b. Use or performance of equipment.
 - c. Any interruption or loss of service, use, or performance of equipment.
 - d. Loss of business or other consequential damage.
- 18. Consider inclusion of provision permitting lessee to make alterations and attachments to equipment upon prior written notice to lessor and receipt of express written approval, subject to following conditions [*see § 57.202[2]*, P 17]:

- a. All such alterations to be at lessee's expense.
 - b. Alterations or attachments must not interfere with normal operation.
 - c. Lessee must restore equipment to original condition, reasonable wear and tear excepted, upon termination of agreement.
 - d. Lessee must remove any alteration or attachment interfering with normal, satisfactory operation or maintenance of equipment if it increases cost of maintenance or creates safety hazard.
19. Include provision for payment of packing and transportation charges for delivery and return of equipment [see § 57.202[2], P 18].
20. Require lessee to report each accident or incident arising out of apparent or alleged improper manufacture, function, or operation of equipment, including [see § 57.202[2], P 19(a), (b)]:
- a. Identity of equipment.
 - b. Time, place, and nature of accident or incident.
 - c. Description of damage.
 - d. Names and addresses of parties, witnesses, and owners of any property damaged.
 - e. Any other particulars.
 - f. All correspondence, papers, notices, and documents received in connection with any claim or demand.
21. Include provision permitting lessor to inspect equipment upon request [see § 57.202[2], P 19(c)].
22. Specify lessee's right to terminate agreement if lessor defaults in any of its obligations [see § 57.202[2], P 20].
23. Provide for lessor's remedies for lessee's defaults [see § 57.202[2], P 21]:
- a. Termination of agreement.
 - b. Right to take possession of all equipment, with right to enter lessee's premises without liability for so doing.
 - c. Right to sell or otherwise dispose of equipment.
 - d. Remain entitled to unpaid rent and all other charges payable by lessee under terms of agreement.
24. Cover assignment rights of parties [see § 57.202[2], P 22]:
- a. Prohibit assignment by lessee without prior consent of lessor.
 - b. Prohibit lessee from subletting equipment without the prior consent of lessor.

c. Disclose and provide for:

(1) Possibility that lessor may assign its rights under agreement to equipment as collateral security.

(2) Lessee's agreement to recognize any such assignment and pay assignee directly.

25. Provide that agreement is binding on parties and their respective successors and (to extent specified in any assignment) assigns [*see* § 57.202[2], P 23].

26. Consider use of provision specifying that if lease is acquired pursuant to lessor's purchase order, terms of lease control in event of conflict between lease and purchase order [*see* § 57.200[2], P 4.25].

27. Consider use of provisions for arbitration to settle disputes [*see Ch. 75, Formation of Contracts and Standard Contractual Provisions*, § 75.250].

[4] Computer Maintenance Agreement

NOTE:

This procedural guide may be used in drafting agreements for the maintenance of computer equipment. These agreements are essentially service contracts. For discussion of possessory liens for services and repairs, the preliminary determinations to make before drafting a service contract, and a guide to service contract provisions, see Ch. 92, ***Service Contracts***.

1. State and describe contractor's agreement to provide maintenance services:

a. Name and describe all computer equipment covered by agreement either in body of agreement or on attached purchase order incorporated into agreement by reference [*see* § 57.203[2], P 1; *see also* § 57.200[2], P 3.01].

b. Describe services to be performed by contractor, such as [*see* § 57.203[2], P 1; *see also* § 57.200[2], P 3.02]:

(1) Maintain and service equipment.

(2) Keep equipment in good working order.

(3) Perform preventive and remedial maintenance, including:

(a) Adjustments.

(b) Replacement of parts when deemed necessary by seller.

c. Include provision that replacement parts will be [*see* § 57.200[2], P 3.02]:

(1) Furnished on exchange basis.

(2) New or equivalent to new in performance.

d. Specify that replaced parts become seller's property [*see* § 57.200[2], P 3.02].

2. Require buyer to notify contractor of hardware failure as soon as practicable after becoming aware of failure [*see* § 57.200 P 3.10].

3. Specify times when service is available [*see* § 57.203[2], P 1; *see also* § 57.200[2], P 3.03]:

a. Services to be provided during contractor's normal business hours, as defined, excluding specified holidays.

b. Scheduled maintenance to be based on specific needs of equipment as determined either by contractor or manufacturer.

c. Add requirement for contractor to provide unscheduled remedial maintenance.

4. Specify all work not included within service and maintenance work required by agreement [*see* § 57.203[2], P 2; *see also* § 57.200[2], P 3.08], such as:

a. Electrical work external to the equipment.

b. Furnishing of supplies or accessories.

c. Painting or refinishing any items of equipment or furnishing material for those purposes.

d. Making specification changes.

e. Relocating the equipment.

f. Repairs or parts replacements resulting from causes other than ordinary wear and tear including "without limitation":

(1) Neglect.

(2) Misuse (including faulty repair or maintenance by unauthorized parties).

(3) Accidents.

(4) Failure of electrical power.

(5) Failure of air conditioning or humidity control.

(6) Acts of God.

(7) Addition, removal, service, or maintenance of accessories, attachments, communication equipment, or other devices not furnished by seller [*see* § 57.200[2], P 3.11].

5. If maintenance is to be provided by hardware seller-manufacturer, consider use of provision:

a. For performance of engineering changes determined by contractor to be applicable or necessary [*see* §

57.200[2], P 3.04].

b. Imposing surcharge for usage in excess of stated no-charge usage limit schedule, with surcharge determined under current schedule of excess usage charges [see § 57.200[2], P 3.14].

6. Consider provision making performance contingent upon proper use of hardware in accordance with manufacturers' specifications [see § 57.200[2], P 3.07].

7. Consider provision requiring customer to maintain site conditions in accordance with manufacturer's specifications [see § 57.200[2], P 3.09].

8. Provide for parts to be furnished by contractor [see § 57.203[2], P 3]:

a. As necessary.

b. Free of charge during equipment warranty period and at specified charge (e.g., "contractor's then current scheduled price") thereafter.

c. Either new or equivalent to new in performance when used.

9. Consider provision permitting contractor to recondition hardware items and providing for charges for that service [see § 57.200[2], P 3.06].

10. Specify charges for scheduled preventive maintenance performed during regular business hours [see § 57.203[2], P 4(a)]:

a. Define "regular business hours" in terms of hours and weekdays, except for legal holidays.

b. State a base rate per hour or visit.

c. If hourly rate is used, consider excluding hourly charges for time spent by maintenance personnel at site awaiting arrival of other maintenance personnel and/or parts.

11. Specify charges for on-call (unscheduled remedial maintenance) service [see § 57.203[2], P 4(b); see also § 57.200[2], P 3.15]:

a. Separate rates per hour for:

(1) Weekdays.

(2) Weekends and holidays.

b. Mileage at specified rate per mile.

c. Other travel expenses at specified rate.

d. Additional expenses at actual cost or other rate.

12. Consider excluding on-call service charge for [see § 57.203[2], P 4(c)]:

a. Maintenance required due to recurrence of malfunction within specified period after maintenance service, provided recurrence is not due to fault or negligence of customer.

b. Service required when scheduled preventive maintenance preceding malfunction was not performed, unless it was not performed at customer's request or because of customer's actions.

13. Specify rate applicable to on-call maintenance that commences during regular business hours and continues beyond that time [see § 57.203[2], P 4(d)].

14. Consider mileage charges for services provided outside of defined standard service area [see § 57.200[2], P 3.13].

15. Provide for service charge increases at specified times and upon specified advance notice [see § 57.200[2], P 3.16].

16. Set forth customer's agreement to pay all maintenance charges billed by contractor [see § 57.203[2], P 5; see also § 57.200[2], P 3.12].

17. Provide that failure to pay charges when due constitutes sufficient cause for suspension or termination of service [see § 57.200[2], P 3.17].

18. Set forth term of agreement or service period [see § 57.203[2], P 6; see also § 57.200[2], P 3.05]:

a. Effective from date of execution.

b. To remain in force until:

(1) Terminated by specified party or parties on specified prior written notice; or

(2) End of stated period, subject to renewal for another period.

NOTE:

The computer owner should be aware of the need for a lengthy term for a maintenance agreement to avoid being forced to buy new or updated versions of the equipment because service is no longer available for the old equipment.

19. Include contractor's warranty, either:

a. That under normal conditions of use and operation [see § 57.203[2], P 7(a)]:

(1) Its services will be free from defects in workmanship.

(2) Parts it furnishes will be free from defects in material and workmanship.

b. In terms of performance effectiveness standards, either:

(1) Limited warranty [see § 57.200[2], P 3.18 (first alternative)], guaranteeing specified and defined average effectiveness level during any stated period; or

(2) Extended warranty [see § 57.200[2], P 3.18 (second alternative)] providing specified average effectiveness level for whole system.

20. Include replacement parts warranty [see § 57.203[2], P 7(b)]:

a. Contractor's warranty that parts it furnishes will conform to equipment manufacturer's published specifications at time of delivery to customer.

b. Limit contractor's obligation to:

(1) Parts that contractor finds not in conformity with manufacturer's published specifications within specified period after installation and acceptance.

NOTE:

The warranty period should be no greater than the warranty period given by the parts manufacturer.

(2) Repair or replacement, at its option, of those parts.

21. Apply these warranties and conditions to any repaired or replaced product, part, or component supplied by contractor [see § 57.203[2], P 7(c)].

22. Limit customer's remedies to warranties and remedies stated [see § 57.203[2], P 7(d)].

23. Extend warranties to customer only and not to any third parties [see § 57.203[2], P 7(e)].

24. Conspicuously (boldface, all capital letters) disclaim contractor's liability to customer or other parties for incidental or consequential damages [see § 57.203[2], P 7(e)].

NOTE:

The disclaimer of an implied warranty of merchantability or fitness must be both written and conspicuous [Com. Code § 2316(2)]. For discussion of the use of boldfaced capital letters to make a conspicuous disclaimer, see § 57.200[1][e].

25. Conspicuously (boldface, all capital letters) disclaim or waive other warranties:

a. If agreement is for maintenance of commercially owned equipment, state that warranty is exclusive and in lieu of all others, including merchantability or fitness [see § 57.203[2], P 7(f)(first alternative); see also § 57.200[2], P 3.19].

b. If agreement is for maintenance of consumer owned equipment, state that [see § 57.203[2], P 7(f)(second alternative)]:

(1) Customer acknowledges that parts are sold on "as is" basis.

(2) Entire risk as to quality and performance is on customer.

(3) If equipment is defective, customer assumes all costs of service, repair, or correction, except as expressly warranted.

(4) No other warranties are made.

(5) Contractor expressly disclaims warranties not stated.

26. Provide for free access to equipment by contractor's maintenance personnel for purpose of providing maintenance [see § 57.203[2], P 8; see also § 57.200[2], P 3.10].

27. Include provision exculpating contractor from liability for any delay in performance resulting from [see § 57.203[2], P 9]:

a. Acts of customer or its agents.

b. Causes beyond contractor's control, including but not limited to:

(1) Acts of God.

(2) Acts of public enemy (criminal acts).

(3) Acts of government.

(4) Fire.

(5) Flood.

(6) Epidemics.

(7) Quarantine restrictions.

(8) Strikes, civil commotions, or revolution.

(9) Freight embargoes.

(10) Unusually severe weather conditions.

(11) Default of contractor's subcontractors or suppliers.

28. Include provision making agreement binding on parties and their respective successors and (to extent specified in any assignment) assigns [see § 57.203[2], P 10].

29. Include standard provision governing notices [see § 57.203[2], P 11].

30. Include provision specifying governing law [see § 57.203[2], P 14].

31. Include provision for recovery of attorneys' fees by prevailing party [see *Civ. Code* § 1717; see also § 57.203[2], P 15].

NOTE:

For discussion of attorneys' fees provisions, see § 57.200[1][g].

32. Consider providing that if agreement is entered into pursuant to customer's purchase order, terms and conditions of agreement control in event of conflict between agreement and purchase order [see § 57.200[2], P 4.25].

33. Include provision stating whether buyer has any right to cancel, and under what circumstances buyer may exercise that right [see *Civ. Code* §§ 1794.4(c)(7), 1794.41(a)(1)].
34. Consider including provision setting forth information regarding availability of informal dispute settlement process [see *Civ. Code* §§ 1794.4(c)(8), 1794.41(a)(1)].
35. Consider use of provisions for arbitration to settle disputes [see *Ch. 75, Formation of Contracts and Standard Contractual Provisions*, § 75.250].

[5] Computer Access Agreements--Network Access Agreements

NOTE:

A "computer access agreement" is an agreement that permits an computer user to use information or data stored on another computer, server or network for either a specified or general purpose. Access agreements are frequently used by educational and medical organizations.

For an example of a network access agreement, see § 57.205.

1. Grant user a nonexclusive right of access to provider's network [see § 57.205[2], P 1].
2. Specify permitted uses of network [see § 57.205[2], P 2]:
 - a. List in agreement or specify on an exhibit or attachment.
 - b. Prohibit any additional uses of network.
3. Prohibit user from doing any of following without network provider's express written consent [see § 57.205[2], P 2]:
 - a. Using or viewing resources not specified in permitted uses.
 - b. Modifying network.
 - c. Copying or obtaining programs or data.
 - d Adding any program or data.
 - e. Cause damage to the network.
4. Specify all charges to be paid by user either in body of agreement or an exhibit or attachment [see § 57.205[2], P 3]:
 - a. Subscription cost; i.e., weekly or monthly rate user will pay to access provider's network.
 - b. Any additional services at rates specified in a fee schedule.

- c. Specify that all charges listed are exclusive of sales, use, excise or other taxes.
 - d. Specify invoicing and payment terms.
5. Confirm that user may be provided with equipment and/or passwords [see § 57.205[2], P 4]:
- a. Prohibit sharing of passwords with any third party.
 - b. Require that user take reasonable steps to secure physical access to and use of equipment and/or passwords.
 - c. Provide that user assumes responsibility for equipment and/or passwords and is liable for damage resulting from improper disclosure or use.
6. Specify term of agreement and circumstances under which agreement will terminate [see § 57.205[2], P 5].
7. Include nondisclosure and ownership clause under which [see § 57.205[2], P 6]:
- a. User agrees to protect proprietary and confidential information.
 - b. User agrees that provider is owner of network and all data contained on network.
 - c. User agrees that provider may offer services to other parties.
 - d. User agrees that provider will be entitled to injunctive relief if there is breach of any confidentiality provisions.
8. Include conspicuous (boldface, all capital letters) disclaimer of warranty [see § 57.205[2], P 7]:

NOTE:

The disclaimer of an implied warranty of merchantability or fitness must be conspicuous [Com. Code § 2316(2)]. For discussion of the use of boldface capital letters to make a conspicuous disclaimer, *see* § 57.200[1][e].

- a. No warranties, including any warranty of fitness or merchantability.
 - b. No responsibility in connection with use of services or data.
 - c. No liability for:
 - (1) Damages, including consequential damages.
 - (2) Loss of profit or revenue.
 - (3) Loss of data.
9. Include indemnification clause stating that user will be liable for damages sustained by provider arising out of user's access to or use of network [see § 57.205[2], P 8].

NOTE:

For a discussion of indemnification, see § 57.220[1][g]. For a procedural guide to drafting indemnification provisions, see § 57.141, P 32.

10. Include assignment clause restricting user from assigning or transferring rights granted in agreement without provider's consent [see § 57.205[2], P 9].
11. Include choice of law clause [see § 57.205[2], P 10].
12. Include severability clause providing that if any part of agreement is ruled invalid, remainder will remain in effect [see § 57.205[2], P 11].
13. Provide that agreement constitutes entire agreement of all parties [see § 57.205[2], P 12].

[6] Computer Access Agreements--Database Access Agreements**NOTE:**

For an example of a database access agreement, see § 57.206.

1. Grant user a nonexclusive right of access to provider's database [see § 57.206[2], P 1].
2. Specify all charges to be paid by user [see § 57.206[2], P 2]:
 - a. Subscription cost; i.e., weekly or monthly rate user will pay to access provider's database.
 - b. All other services at rates specified in fee schedule.
3. Specify that all charges listed in provider's price lists are exclusive of the following [see § 57.206[2], P 2]:
 - a. Sales or use taxes.
 - b. Excise taxes.
 - c. Other taxes.
4. Provide for invoicing and payment [see § 57.206[2], P 2]:
 - a. Taxes to be invoiced.
 - b. Charges to be invoiced and paid monthly.
 - c. Specify time limit for payment.
 - d. State when account becomes delinquent.

- e. Provide penalties for delinquency.
 - (1) Interest at stated rate.
 - (2) Reservation of right to suspend service.
 - f. Include authority to send delinquency notices by most expeditious means available.
 - g. Specify customer's liability for all costs of collection.
5. Reserve right of provider to change its charges at any time [*see* § 57.206[2], P 2]:
- a. Effective immediately upon publication.
 - b. With provider's agreement to use best efforts to provide specified advance written notice.
6. Consider provision reserving provider's right to do the following [*see* § 57.206[2], P 3]:
- a. Require advance deposit; or
 - b. Establish credit account upon prior credit approval.
7. Specify term of agreement [*see* § 57.206[2], P 4]:
- a. From date of acceptance until terminated by either party upon specified prior written notice; or
 - b. For specified period, subject to renewal or continuation.
8. Specify contents and use of database [*see* § 57.206[2], P 5]:
- a. Specify content and information contained in database.
 - b. Reserve right to make changes.
 - c. State that attached database includes supplier terms and conditions, and include customer's agreement to comply with them.
 - d. Protect suppliers' copyright:
 - (1) Include customer's agreement to comply with all copyright notices included in each database library and all other materials provided to it.
 - (2) Express customer's agreement to assume sole responsibility for compliance with all copyright notices by any user of its password.
9. Prohibit customer from doing any of following without advance authorization by database supplier [*see* § 57.206[2], P 5]:

NOTE:

Advance authorization is generally included in the database terms and conditions for some or all of these actions.

- a. Making copies.
- b. Transmitting data.
- c. Retaining data.
- d. Selling data.

10. Include provider's agreement to transmit the following [see § 57.206[2], P 5]:

- a. Manuals and other user materials.
- b. System passwords.
- c. Additional user materials when ordered.

11. Include customer's agreement for password security [see § 57.206[2], P 6]:

- a. Responsibility for security.
- b. Liability for charges incurred through its use.
- c. Requirement for notification of loss or theft as condition to relief from liability for charges incurred through wrongful use.

12. Consider provision for cancellation of password not used within specified period, subject to reinstatement fee [see § 57.206[2], P 7].

13. Disclaim liability for failures or delays [see § 57.206[2], P 8]:

- a. Include statement that neither provider nor its database suppliers are liable for delays, failures in performance, or interruption of service.
- b. Include customer's agreement to indemnify and hold provider and suppliers harmless from any loss or claims, or loss arising out of use of service or any database materials.

NOTE:

For a discussion of indemnification, see § 57.220[1]. For a procedural guide to drafting indemnification provisions, see § 57.141, P 32.

14. Include conspicuous (boldface, all capital letters) disclaimer of warranty [see § 57.206[2], P 9]:

NOTE:

The disclaimer of an implied warranty of merchantability or fitness must be conspicuous [Com. Code § 2316(2)]. For discussion of the use of boldface capital letters to make a conspicuous disclaimer, see § 57.200[1][e].

- a. No warranties, including any warranty of fitness or merchantability.
 - b. No responsibility in connection with use of services or data.
 - c. No liability for the following:
 - (1) Damages, including consequential damages.
 - (2) Loss of profit or revenue.
 - (3) Loss of data.
15. Provide that agreement controls over terms of any purchase order used by customer [see § 57.206[2], P 10].
16. Include provision governing assignments [see § 57.206[2], P 11]:
- a. Customer agrees not to assign.
 - b. Provider may assign agreement and/or payments.
17. Protect database supplier rights through customer's agreement that supplier may do the following [see § 57.206[2], P 12]:
- a. Assert rights under agreement.
 - b. Enforce any provisions of agreement directly on its own behalf.
18. Provide for termination of agreement [see § 57.206[2], P 13]:
- a. By customer if any rate increase or change in service is unacceptable, subject to condition that further use after change constitutes acceptance.
 - b. In event of default by either party.
19. Provide a notice clause that specifies where notices are to be provided to either party [see § 57.206[2], P 14].
20. Provide that agreement constitutes entire agreement of all parties [see § 57.206[2], P 15].
21. Include statement of what law will govern agreement [see § 57.206[2], P 16].
22. Include severability clause providing that if any part of agreement is ruled invalid, remainder will remain in effect [see § 57.206[2], P 17].
23. Include a nonwaiver of rights clause where the parties agree that a failure or delay in exercising rights, will not operate as a waiver of any such rights [see § 57.206[2], P 18].
24. Include an attorneys' fees clause to allow prevailing party to recover reasonably attorneys' fees [see § 57.206[2], P 19].

NOTE:

For discussion of attorneys' fees provisions, see § 57.200[1][g].

25. Consider including provisions for arbitration of disputes [*see Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.250*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law
Distributorships & Franchises
General Overview
Commercial Law (UCC)
Sales (Article 2)
Form, Formation & Readjustment
General Overview
Commercial Law (UCC)
Sales (Article 2)
Warranties
General Overview
Commercial Law (UCC)
Leases (Article 2A)
General Overview
Contracts Law
Types of Contracts
General Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART III. TRANSACTION GUIDE
D. Drafting Guide for Computer and Internet-Related Documents

22-57 California Legal Forms--Transaction Guide § 57.141

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.141 Software Related Transactions

[1] Commercial Software License Agreement

1. Define "software" to include [see § 57.220[2], P 1.01]:

NOTE:

The licensed software must be precisely defined in order to void subsequent claims that more was expected and that the licensor breached its contract obligations [*see Law Research Service, Inc. v. General Automation, Inc. (2d Cir. [N.Y.] 1974) 494 F.2d 202, 204*].

- a. Computer program itself, identified in definition or on a purchase schedule.
- b. Whether program is in object or source code, or whether both are included.

NOTE:

A majority of software licenses are for object code based programs only. However, in some instances, a company may wish to license the source code of the program to a licensee. For an example of a source code access agreement, see § 57.223.

- c. All written materials delivered with program, including necessary supporting documentation for source code if licensed.

2. If definition provision is not used or is not drafted to include updated versions of computer program portion of

software, consider use of clause to supply program updates [see § 57.220, P 2.07]

3. If definition provision is not used or is not drafted to include source code version of computer program portion of software, consider use of provision for transfer of source code to licensee if [see § 57.223 (source code access agreement)]:

a. Licensor:

- (1) Ceases business.
- (2) Ceases doing business as software producer and supplier.
- (3) Is declared bankrupt or insolvent.

b. Licensee:

- (1) Promises to pay reasonable cost.
- (2) Agrees that source program will be subject to terms of license agreement.

4. Describe scope of license [see § 57.220, P 2.01]:

- a. Nontransferable or transferable.
- b. Exclusive or nonexclusive.
- c. If desired, grant licensee authority to adapt, modify, or convert software.
- d. If desired may limit to geographic area as opposed to worldwide license.
- e. If desired may make it a royalty bearing license, as opposed to a royalty free license.

5. Limit licensee's right to use software to use for [see § 57.220, P 2.02]:

- a. Licensee's sole and exclusive benefit; or
- b. Specific described purposes.

6. Specify license period:

a. State term of license, either:

- (1) Useful life of software [see § 57.220, P 2.05];
- (2) Minimum specified term, unless terminated prior to that time as provided elsewhere in agreement [see § 57.220, P 2.05]; or
- (3) From date of acceptance or execution of agreement until expiration or termination of agreement [see § 57.200, P 2.05].

b. Require licensee to certify at end of license period that all copies of software were either returned or destroyed [see § 57.200, P 2.05].

7. If minimum license term is specified and renewal is desired, consider either [see § 57.220, P 2.05]:

a. Granting licensee option to renew license for additional minimum term; or

b. Providing for automatic renewal for successive minimum terms unless licensee notifies licensor, within specified period prior to expiration of a term, of intention not to renew.

8. Include provision governing licensee's right to make copies, either:

a. Expressly prohibit any copying;

b. Permit specified number of copies for stated purposes only, and require recording and reporting of copies [see § 57.220, § 2.03 (a)]:

(1) One or more "backup" copies for archival purposes.

(2) Additional copy for use in adapting, modifying, or converting it, if desired.

(3) Consider requiring licensee to provide licensor with written description of procedures for making backup copies for licensor's approval.

c. Permit software to be copied [see § 57.200, P 2.03]:

(1) In whole or part.

(2) For licensee's internal use only.

(3) With title in all copies reserved to licensor.

(4) Disclaiming transfer of title in any copy to licensee.

9. Require licensee to reproduce and include on all copies of software (including modifications adaptations, and/or conversions), licensor's marks and notices, as appropriate [see § 57.220, P 2.03(b); see also § 57.200, P 2.04]:

a. Copyright notice.

b. Patent notice.

c. Trademark or service mark.

d. All other proprietary markings.

e. Any confidential legends implanted within software.

10. Consider adding provision making licensee exclusively responsible for supervision, management, and control of its use of software, including, but not limited to [see § 57.220, P 2.04]:

- a. Assuring proper configuration of all equipment or devices.
- b. Establishing adequate operating methods.
- c. Implementing procedures sufficient to satisfy its software security obligations, including appropriate action between it and its employees to prevent the following:
 - (1) Misuse.
 - (2) Unauthorized copying.
 - (3) Unauthorized modification.
 - (4) Unauthorized disclosure.

11. Consider provision allowing licensee to modify software for its own use and merge it into other material to form revised materials:

- a. Add any limitations on licensee's right to modify software, such as [see § 57.220, P 2.06]:

- (1) Upon termination of license, all licensed materials must be deleted from any revised materials and either destroyed or returned to licensor.

- (2) Any revised materials be used strictly in accordance with terms of license.

- b. Consider including provision disclaiming or limiting licensor's responsibilities for maintenance of modified software.

12. If appropriate, include provision for licensee to receive updates of software [see § 57.220, P 2.07].

13. Have license specifically state ownership rights to software [see § 57.220, P 3.01]:

- a. Licensee acknowledges and agrees that software is confidential and proprietary property of licensor.
- b. Licensee receives no rights to sell, lease, market, transfer or otherwise encumber software.
- c. Ownership rights of each party to any modifications and derivative works of software.
- d. If desired, provision stating that nothing provided by licensor will be deemed a "work for hire".

NOTE:

For a discussion of "works for hire," see § 57.225[1].

14. Have licensee agree to protection of proprietary interests [see § 57.220, P 3.02; see also § 57.200, P 2.05]:

- a. Acknowledge that software:

- (1) Is confidential in nature.

- (2) Constitutes intellectual property belonging to licensor.

b. Agree either to:

(1) Hold it in trust and not to transfer or disclose it to any other party; or

(2) Use best efforts to prevent inadvertent disclosure to third party either during license term or thereafter.

NOTE:

Most license agreements contain confidentiality terms. However, some vendors may feel more comfortable having a stand alone confidentiality agreement. For a mutual nondisclosure agreement, see § 57.228.

15. Specifically state licensee's agreement regarding software security:

a. Agreement to keep software in secure place, under access and use restrictions not less strict than those applicable to licensee's own trade secrets and either [see § 57.220, P 3.03]:

(1) Designed to prevent disclosure of software to unauthorized persons; or

(2) Satisfactory to licensor.

b. Define degree of care by having licensee agree to instruct its personnel to use same care and discretion that they use with other data designated by licensee as confidential [see § 57.220, P 3.04].

c. Include licensee's agreement that any disclosure of software to any third party constitutes material breach and will result in termination of license [see § 57.220, P 3.05].

d. Include licensee's agreement that it will be strictly liable for all damages to licensor resulting from any disclosure of software to third parties [see § 57.220, P 3.06].

16. Include licensee's agreement not to remove, deface, or destroy any copyright, patent notice, trademark, service mark, other proprietary markings, or confidential legends placed on or within software [see § 57.220, P 3.07].

17. Provide for payment by licensee [see § 57.220, P 4.01; see also § 57.200, P 2.07] either:

a. In full upon execution of license.

b. Installment payment of specified percentages upon:

(1) Execution of license;

(2) Delivery and installation of software; and

(3) Completion by licensor of on-site support (if provided for by license).

c. Periodic payment of specified sum with:

(1) Initial license fee payable upon execution of license; or

(2) Succeeding periodic charges payable:

(a) Automatically in advance; or

(b) Within specified period after advance billing.

NOTE:

In drafting payment provisions, it is important to consider when payment will be considered accepted and irrevocable and consistent with recognition of revenue principles.

18. If agreement provides for periodic payments and periodic increases are desired [see § 57.220, P 4.04]:

a. Specify that licensor may increase periodic license fee upon notice to licensee.

b. State that increase becomes effective on date specified in notice of increase unless licensee terminates license by notice to licensor and returns software to licensor.

19. Provide that licensee must pay all taxes assessable on software or its use, including personal property taxes, sales and/or use taxes, and excise taxes [see § 57.220, P 4.02].

20. If license provides option for renewal, include provision for payment of renewal license fee in specified sum at beginning of new option period [see § 57.220, P 4.03].

21. Include delivery terms [see § 57.220, P 5.01]:

a. Number of copies of license.

b. Place of delivery.

c. Date of delivery.

22. Provide for installation services [see § 57.220, P 5.02]:

a. Licensor either to install or assist in installation of computer program.

b. Installation to be completed within specified time after execution of license.

c. Licensor to provide additional technical services in connection with installation at licensee's site:

(1) For specified number of days.

(2) At specified charge or at no charge other than cost of travel and reasonable living expenses.

23. Set forth testing provisions [see § 57.220, P 5.03]:

a. Specify whether testing is to be conducted by licensee or licensor.

- b. Provide for testing to be conducted under or in accordance with specified procedures.
- c. Describe materials to be used in testing (generally work licensee normally expects to process using software).
- d. Prescribe specific testing period.
- e. Require testing to be performed on specified hardware.

24. Provide for acceptance of software, either [see § 57.220, P 5.04]:

- a. When it has met prescribed acceptance criteria; or
- b. After completion of prescribed testing and either:

- (1) Productive use by licensee; or
- (2) Reasonable period of use by licensee, not to exceed specified time.

NOTE:

In drafting acceptance provisions, it is important to consider when the software will be considered accepted, because license fees for non-accepted software may not be deemed payments received under recognition of revenue principles.

25. Provide that upon any refusal by licensee to accept software, licensee must do the following [see § 57.220, P 5.04]:

- a. Return software to licensor.
- b. Report reasons for unacceptability.

26. Provide for training services to be rendered by licensor [see § 57.220, P 5.05]:

- a. For all or specified number of licensee's computer operations personnel.
- b. At specified charge.
- c. At specified location.

27. Provide for additional technical support services to be provided by licensor [see § 57.220, P 5.06]:

- a. Specify availability, either upon:
 - (1) Request and as available; or
 - (2) Specified schedule.
- b. Specify cost, either at:
 - (1) Specified rate; or

(2) Specified rate plus payment of specified charges, e.g:

(a) Travel time.

(b) Travel costs.

(c) Living expenses.

28. Consider including provision requiring licensee to enter into software maintenance agreement [*see* § 57.220, P 5.07].

NOTE:

For an example of a software maintenance agreement, see § 57.224.

29. Consider clause which specifies that the software licensor is obligated to maintain program by correcting errors or providing updated versions of program in response to claims of error [*see* § 57.220, P 5.08].

30. Include warranty provisions for software, specifying [*see* § 57.220, P 6.01]:

a. That software will conform to specifications [*see* § 57.220, P 6.01; *see also* § 57.200, P 2.09].

b. Time period in which warranty will apply, such as 90 days.

c. Remedies if software does not conform to specifications:

(1) Specify action licensor will take, either:

(a) Repair defective software; or

(b) Replace defective software; or

(c) Refund amount paid.

(2) Specify any conditions precedent:

(a) Notice of defect to licensor, inspection by licensor and determination that software is defective; or

(b) Return of defective software to licensor with copy of proof that warranty period has not expired and verification of defect by licensor.

31. Conspicuously (in boldface capital letters) disclaim all other warranties by stating that express warranties previously stated are in lieu of all other warranties, express or implied, including without limitation any [*see* § 57.220, P 6.02; *see also* § 57.200, P 2.10]:

a. Warranties of merchantability.

b. Warranties of fitness for a particular purpose.

NOTE:

The disclaimer or modification of an implied warranty of merchantability or fitness must be conspicuous [*see Com. Code § 2316(2)*]. For discussion of the use of boldface, all capital letters to make a conspicuous disclaimer, see § 57.200[1][e].

32. Include indemnification provisions [*see § 57.220*, PP 6.03, 6.04].

- a. Require licensee to notify licensor of any claim that software or its use violates trade secret, trademark, copyright, patent, or other proprietary right of any other party.
- b. Require licensee to cooperate with licensor in investigation and resolution of any claimed violation.
- c. Include licensor's promise to defend licensee against any and all claimed violations.
- d. Include licensor's promise to indemnify and hold licensee harmless from any liability for damage, costs, or other loss incurred in connection with any claimed violation.
- e. Specify licensor's options if it appears that software is likely to become subject to copyright or patent infringement claim:
 - (1) Procure right to continue using software;
 - (2) Replace or modify software to render it noninfringing; or
 - (3) Discontinue it.
- f. Disclaim licensor's liability for any claim of copyright or patent infringement based on use of original version of software if infringement would have been avoided by use of updated version.
- g. Disclaim licensor's liability for any claim based on licensee's use of any:
 - (1) Modification or conversion of software; or
 - (2) Use or combination of software with programs or data not supplied by licensor if infringement would have been avoided by use or combination of software with other programs or data.

33. For multiple software items with differing levels of perfection, use multi-level warranty and remedy provisions:

- a. State that licensor will provide programming services with respect to software, depending on each item's programming service category [*see § 57.229*, P 1]:
 - (1) Designate each category.
 - (2) Specify what services will be provided in each category.
- b. Provide that category for any item can be changed by licensor [*see § 57.229*, P 2]:
 - (1) Upon notice to licensee.
 - (2) With licensee's agreement that change may result in discontinuance of service.

c. Include provision permitting licensor to make additional service charges for any additional effort required to provide programming services resulting from licensee's [see § 57.229, P 3]:

(1) Modification of software; or

(2) Use of any version other than latest available version of software.

d. Include product warranties applicable to each category [see § 57.229, P 4].

e. Include limitation of warranty provision [see § 57.229, P 5].

34. Conspicuously (in boldface capital letters) state licensee's agreement to limitation of licensor's liability [see § 57.220, P 6.05]:

NOTE:

The limitation of liability must be conspicuous. For discussion of the use of boldface, all capital letters to make a conspicuous disclaimer, see § 57.200[1][e].

a. Provide that neither party will be liable to each other for any consequential, indirect, incidental, or special damages.

b. Consider placing a cap on licensor's liability to amount of actual payments made under agreement.

c. Consider placing a maximum liability cap for agreement.

35. Specify causes for termination of license [see § 57.220, P 7.01]:

a. Expiration of:

(1) Term specified in agreement.

(2) Any optional renewal term in absence of subsequent renewal.

b. Licensee's disclosure of software to any third party whether directly or indirectly and whether inadvertently or otherwise.

c. Licensee's refusal to pay any periodic license fee or any increase provided for in license agreement.

d. If licensee or any successor or assign to whom software was legitimately transferred ceases business.

e. If licensee commits an "event of default," defined to include [see § 57.220, P 7.02]:

(1) Any attempt by licensee to use, copy, license, or convey software:

(a) In any manner contrary to terms of license.

(b) In derogation of licensor's proprietary rights in software.

(2) Licensee's failure or neglect to perform or observe any of its existing or future obligations under

license (e.g., timely payment of any sums due licensor within specified period after notice of delinquency).

(3) Any assignment of licensee's business for benefit of creditors.

(4) Filing of a petition in bankruptcy by or against licensee.

(5) Appointment of receiver, trustee in bankruptcy, or similar officer to take charge of all or part of licensee's property.

(6) Adjudication of licensee as a bankrupt.

36. Specify whether, upon occurrence of any of the above, license will be terminated:

a. Automatically and without further notice [see § 57.220, P 7.01]; or

b. Following notice and failure to cure within specified period.

37. Describe licensee's agreement as to effect of termination [see § 57.220, P 7.03]:

a. Immediately upon operation of termination provisions licensee will either:

(1) Return all copies of software to licensor; or

(2) Destroy all copies of software and certify that fact to licensor.

b. In event of termination through licensee's default, all fees or charges due for remainder of license period are immediately due and payable.

c. Licensor's obligations cease upon termination.

38. Include standard general terms and conditions:

a. Include notice provision [see § 57.220, P 8.01].

b. Prohibit licensee's assignment of its rights under agreement without prior written consent of licensor, and specify that any attempt to do so without consent is void [see § 57.220, P 8.02].

c. State that agreement may be modified only by written agreement duly executed by persons authorized to execute agreements on parties' behalf [see § 57.220, P 8.03].

d. Include nonwaiver provision stating that [see § 57.220, P 8.04]:

(1) No failure or delay in exercising any right, power, or privilege by either party will operate as waiver of any right, power, or privilege.

(2) No single or partial exercise of any right, power, or privilege precludes its further exercise.

e. Provide that if legal action is necessary to enforce license terms, prevailing party is entitled to reasonable attorneys' fees [*see Civ. Code § 1717; see also § 57.220, P 8.05*].

NOTE:

For discussion of attorneys' fees provisions, see § 57.200[1][g].

f. Include severability provision [*see § 57.220, P 8.06*].

g. Include provision specifying governing law [*see § 57.220, P 8.07*].

h. Include "entire agreement" provision [*see § 57.220, P 8.08*].

i. If software is acquired under license agreement but pursuant to licensee's purchase order, state that in event of conflict between license and purchase order, terms and conditions of license control [*see § 57.220, P 8.09*].

39. Consider provision that if license is acquired pursuant to buyer's purchase order, in event of conflict between license and purchase order, terms and conditions of license control [*see § 57.200, P 4.25*].

40. Consider use of provision for arbitration to settle disputes [*see Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.250*].

[2] Consumer "Packaged" Software Agreements

NOTE:

Computer software is usually transferred under a license agreement rather than by purchase and sale because licenses do not transfer title and, as a result the owner is able to impose use restrictions designed to protect its proprietary interests. Sales agreements, on the other hand, do transfer title and therefore such restrictions cannot be imposed. For additional discussion, see § 57.220[1]. For discussion of the generally used methods of protecting proprietary interests in software, see § 57.225[1][c]; see also §§ 57.20-57.22.

Consumer "package" software agreements can be available in a number of ways. Software may be purchased of the shelf, and may be subject to a "shrink-wrap" license, which binds the licensee once the software package is opened. Consumer "package" software agreements may also come in a "click-wrap" form in which the license agreement appears when the software is getting ready to be installed on a computer. In such a situation, the licensee must accept the terms of the license agreement before the software may be installed. "Click-wrap" agreements are common when installing software from a media such as a CD-ROM, or downloading from an internet website. For an example of a consumer packaged software agreement, see § 57.221.

1. Begin agreement with conspicuous (boldface, all capital letters) legend [*see § 57.221*]:

NOTE:

A term is "conspicuous" if it is written, displayed, or presented so that a reasonable person against whom it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court [Com. Code § 1201(b)(10)]. Conspicuous terms include [Com. Code § 1201(b)(10)(A), (B)]:

- A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
- Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

Thus, for example, it has been held that the disclaimer of an implied warranty must be printed in boldfaced capital letters [*see Dorman v. International Harvester Co. (1975) 46 Cal. App. 3d 11, 18, 120 Cal. Rptr. 516 (prior law)*] .

- a. Cautioning licensee or buyer to read all license terms before opening, installing, or using software.
- b. Stating that opening of package, installing or using software, or clicking the "I Accept" button in the software installation program, indicates acceptance of terms and conditions of agreement.

NOTE:

To ensure that a click-wrap agreement is binding, the user should be required to take some affirmative action to agree to it, and prevented from proceeding with use if the user does not agree to it. When the user is purchasing software (or services), the user should also be given an option to return or end use of the product and receive a full refund if the user does not assent to the terms of the agreement.

2. Consider including clause that specifically states ownership rights to software, such as [*see § 57.221, P 1*]:

- a. Software and any accompanying documentation is owned and copyrighted by licensor and is protected by intellectual property laws.
- b. Licensee only owns tangible physical media on which software was originally recorded or fixed.
- c. License has no ownership interests in software itself.

3. Repeat that opening package, installing or using software, or clicking the "I Accept" button indicates acceptance of agreement terms and conditions [*see § 57.221, P 2*].

4. State agreement to return package and its contents unopened in order to obtain refund or replacement in absence of agreement with terms of agreement [*see § 57.221, P 2*].

5. Grant right to [*see § 57.221, P 3*]:

- a. Use program for specified use(s).
- b. Make copies of program:
 - (1) In specified numbers.

(2) In any machine readable form.

(3) For specified purposes, including back-up or modification purposes in support of buyer's use of program on the single computer (unless the package includes a "copy protected" marking).

6. If desired, limit licensee's right to:

a. Copy or modify the software [see § 57.221, P 3(d)].

b. Sublicense, assign, or transfer license [see § 57.221, P 3(e)].

NOTE:

This type of provision, whether it specifies that the licensee may not transfer the program and license to anyone at all, or permits such a transfer to one or two or more persons [**see** P 7, **below**], should be included in order to provide a contractual basis for an action against a consumer who copies the program and disposes of it to others without regard to the licensor's rights.

7. If desired, permit licensee to transfer program and license under specific limitations; e.g., to one other party:

a. On condition that other party agrees to accept terms and conditions of agreement.

b. Subject to agreement to either:

(1) Transfer all copies, whether in printed or machine readable form, to licensee; or

(2) Destroy any copies not transferred, including all modifications and portions of the program contained or merged into other programs.

c. Subject to agreement:

(1) Not to sublicense, assign, or transfer license except as expressly permitted by license agreement.

(2) That any attempt to do so in any way other than expressly permitted is null and void.

8. Provide for termination [see § 57.221, P 4]:

a. State that agreement will be effective until terminated.

b. Permit licensee to terminate at any time by destroying program and all copies, modifications, and merged portions.

c. Provide for automatic termination if licensee fails to comply with any term or condition of license agreement.

d. Include licensee's agreement to destroy program and all copies, modifications, and merged portions immediately upon termination of license agreement.

9. Draft limited product warranty:

a. Provide limited warranty [*see* § 57.221, P 5]:

(1) Include warranty that software will perform substantially in accordance with documentation.

(2) Include warranty that medium on which program is furnished is free from defects in materials and workmanship under normal conditions of use.

(3) Limit warranty to specified period from date of delivery of program to licensee as set forth on receipt for the purchase.

b. Exclude from warranty coverage any software that has been [*see* § 57.221, P 5]:

(1) Altered.

(2) Damaged.

(3) Abused.

(4) Misapplied.

(5) Used other than in accordance with license.

c. Set forth warranty remedies [*see* § 57.221, P 5]:

(1) Licensor (at licensor's option) will repair or replace a defective medium within warranty period; or

(2) Provide a refund of license fees paid.

d. Consider provision in which licensor does not warrant use or results of use of software in terms of correctness, accuracy, reliability or otherwise [*see* § 57.221, P 5].

e. Consider provision that no oral or written information will create a warranty of any kind [*see* § 57.221, P 5].

14. Include conspicuous (boldface, all capital letters) [*see* Com. Code § 1201(b)(10)(A), (B) and Paragraph 19, *below*] statement of waiver of implied warranties, stating that no warranties other than those expressly stated are made, and that licensor expressly disclaims all warranties not stated in license agreement, including [*see* § 57.221, P 6]:

NOTE:

The disclaimer or modification of an implied warranty of merchantability or fitness must be conspicuous [*see* Com. Code § 2316(2)]. For discussion of the use of boldfaced capital letters to make a conspicuous disclaimer, see § 57.200[1][e].

Inasmuch as software usually is sold nationally and the law regarding disclaimer of warranties may vary from state to state, this type of limitation typically includes language limiting the effects of the

disclaimer to what is permitted under the applicable state law [*see* § 57.221, P 6].

- a. Warranties of merchantability.
- b. Warranties of fitness for a particular purpose.
- c. Noninfringement.

15. Include licensee's express agreement that sole remedies and licensor's entire liability are as set forth in agreement [*see* § 57.221, P 75].

a. Include conspicuous (boldface, all capital letters) statement that licensor is not liable to licensee or any other persons for any of following that arise out of use or inability to use program [*see* § 57.221, P 6]:

NOTE:

The disclaimer or modification of an implied warranty of merchantability or fitness must be conspicuous [*see Com. Code* § 2316(2)]. For discussion of the use of boldfaced capital letters to make a conspicuous disclaimer, *see* § 57.200[1][e].

- (1) Damages, including incidental or consequential damages.
- (2) Expenses.
- (3) Lost profits.
- (4) Lost savings.
- (5) Other damages.

b. Consider placing a cap on licensor's liability to amount of license fees paid under agreement.

18. Include governing law provision [*see* § 57.221, P 7].

19. Conclude with conspicuous (boldface, all capital letters) statement containing [*see* § 57.221, P 8]:

NOTE:

A term is "conspicuous" if it is written, displayed, or presented so that a reasonable person against whom it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court [Com. Code § 1201(b)(10)]. Conspicuous terms include [Com. Code § 1201(b)(10)(A), (B)]:

- A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
- Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

Thus, for example, it has been held that the disclaimer of an implied warranty must be printed in boldface, capital letters [*see Dorman v. International Harvester Co. (1975) 46 Cal. App. 3d 11, 18, 120 Cal. Rptr. 516 (prior law)*].

- a. Licensee's acknowledgment that he or she has read and understood agreement.
- b. Licensee's agreement to be bound by license agreement terms and conditions.
- c. "Entire agreement" provision.

[3] Software Maintenance Agreement

NOTE:

For an example of a software maintenance agreement, see § 57.224.

1. State that supplier and customer have entered into a software license or purchase agreement, pursuant to which [*see § 57.224[2], Recitals*]:
 - a. Supplier licensed or sold specified computer program.
 - b. Customer agreed to enter into software maintenance agreement.
2. Set forth supplier's agreement to provide services necessary to remedy any software programming error attributable to supplier [*see § 57.224[2], P 1(a)*]:
 - a. Either by:
 - (1) Replacing software; or
 - (2) Taking appropriate corrective action.
 - b. Promptly after customer identifies claimed programming error and notifies supplier.
3. State that only one copy of any corrected or replacement software will be delivered to customer [*see § 57.224[2], P 1(b)*].
4. If software is licensed to customer, include customer's agreement that corrected or replacement software [*see § 57.224[2], P 2*]:
 - a. Is and will remain property of software licensor.
 - b. Constitutes trade secret of licensor.
 - c. Will be delivered only after customer executes a license agreement with licensor governing its use, unless licensor, at its option, waives requirement for execution of new license.

5. Disclaim any obligation on supplier's part to provide services on or with respect to modifications made by customer to software or other program incorporating it [see § 57.224[2], P 3].
6. State customer's agreement to give supplier access to customer's data and computer, [see § 57.224[2], P 4] including:
 - a. Printouts of software or data in storage that exhibits evidence of programming error.
 - b. Sufficient computer time to enable supplier to:
 - (1) Duplicate problem;
 - (2) Determine that it results from software; and
 - (3) After corrective action or replacement has taken place, determine that problem has been alleviated.
7. Specify term of agreement [see § 57.224[2], P 5]:
 - a. From specified date, such as date of expiration of warranty in software license or sale agreement.
 - b. For specified period.
 - c. Subject to renewal or termination by either party upon specified period of prior written notice.
8. State that replaced or corrected software will be subject to warranties, warranty remedies, and warranty limitations or disclaimers set forth in original software license agreement, incorporating those provisions by reference [see § 57.224[2], P 6].
9. Specify periodic maintenance service fee and state that it is payable in advance [see § 57.224[2], P 7].
10. State customer's agreement to pay supplier's then current standard rates for time and material if it corrects defects or problems attributable to errors, corrections, or modifications made by customer [see § 57.224[2], P 8].
11. State customer's agreement to be responsible for all taxes or any other taxes, fees, or duties on or with respect to services rendered or property provided by supplier [see § 57.224[2], P 9].
12. Include provision requiring customer to pay all travel and other incidental expenses incurred in connection with supplier's performance [see § 57.224[2], P 10].
13. Provide for termination [see § 57.224[2], P 11].
 - a. Specify times and events triggering termination:
 - (1) End of initial term of agreement, upon specified period of prior written notice by either party to other party.
 - (2) Termination of software license for default.
 - (3) Customer's failure to pay maintenance fee within specified period after notice of delinquency.

b. State consequences of termination:

(1) All fees or charges payable become due and payable immediately and without notice or demand by supplier.

(2) All obligations of supplier end immediately.

14. Include provision disclaiming supplier liability for any delay in performance resulting from [see § 57.224[2], P 12]:

a. Acts of customer or its agents.

b. Force majeure event, including causes beyond supplier's control.

15. Include "entire agreement" provision [see § 57.224[2], P 13].

16. Specify that amendments may be made only in writing [see § 57.224[2], P 14].

17. Include provision for recovery of attorneys' fees [see Civ. Code § 1717; see also § 57.224[2], P 15].

NOTE:

For discussion of attorneys' fees provisions, see § 57.200[1].

18. Include provision making agreement binding on parties and their respective successors and (to extent specified in any assignment) assigns [see § 57.224[2], P 16].

19. Include standard provision governing notice [see § 57.224[2], P 17].

20. Include provision specifying governing law [see § 57.224[2], P 18].

21. Consider providing that if agreement is entered into pursuant to customer's purchase order, terms and conditions of agreement control in event of conflict between agreement and purchase order [see § 57.200, P 4.25].

[4] Software Development Agreement

NOTE:

For an example of a software development agreement, see § 57.222.

1. State customer's desires [see § 57.222, P 1], e.g.:

a. For work product that will perform described functions; and

b. To have that work product designed, developed, produced, and installed by designer.

2. Define what work product the designer will be performing [see § 57.222, P 2]:

3. State designer's agreement to provide services and complete work product [see § 57.222, P 3].

- 4 State term of agreement [see § 57.222, P 4]:
- a. From specified date until terminated upon prior written notice by either party;
 - b. Until terminated pursuant to any other provision of agreement; or
 - c. Until completion of all services.
5. Provide for payment to designer, either:
- a. Periodic payment [see § 57.222, P 5 (first alternative)]; or
 - b. Lump sum purchase price [see § 57.222, P 5 (second alternative)].
6. Describe procedures to be used in agreeing on program design specifications [see § 57.222, P 6]:
- a. Meeting of parties' representatives within specified time to evaluate desired applications.
 - b. Preparation of draft specifications based on agreed upon applications.
 - c. Submission of specifications to company.
 - d. Approval and acceptance of specifications.
 - e. Termination of agreement if parties cannot agree on specifications and:
 - (1) Return by company of all materials furnished by designer.
 - (2) Retention by designer of payments already made.
7. Describe responsibilities of parties in completing work product after company accepts specifications [see § 57.222, P 7]:
- a. Designer will commence preparation and development in accordance with specifications.
 - b. Company will accept final work product if it meets specifications in all material respects.
 - c. Any balance then due will be paid.
8. Consider including provision specifying that time is of essence in value of designer's performance, subject to excuse for delays beyond designer's reasonable control.
9. Include provision governing nonacceptance of program if it fails to meet specifications [see § 57.222, P 7].
10. Include consultant's agreements relating to confidentiality of data [see § 57.222, P 8].

NOTE:

Most software development agreements contain confidentiality terms; however, some companies feel more comfortable having a stand-alone confidentiality agreement. For a mutual nondisclosure agreement, see § 57.228.

11. Prohibit consultant from using or circulating any confidential information [see § 57.222, P 9]:

- a. Except when specifically authorized in advance to do so; and
- b. Then only to the extent necessary for any of following:
 - (1) Conducting negotiations, discussions, consultations with designated company representatives.
 - (2) Supplying company with goods or services it orders.
 - (3) Preparing confidential estimates, bids or proposals, and invitations for bids or requests for proposals for submission to company.
 - (4) Doing other acts company later specifies in writing.

12. Include consultant's express agreement that [see § 57.222, P 10]:

- a. Copies of confidential information will not be made without prior written permission of company.
- b. All authorized copies will be returned to company along with originals.

13. Include consultant's express agreement to return all other confidential materials promptly upon conclusion of work on project to which materials relate [see § 57.222, P 11].

14. Describe property rights of parties in resulting work product, either:

NOTE:

For a discussion of ownership and "works for hire," see § 57.225[1][d].

a. Parties' agreement that company owns all rights to work product [see § 57.222, P 13 (first alternative)]:

- (1) Work product and specifications constitute company's trade secrets.
- (2) Designer's agreement that sale or unauthorized use or disclosure of information concerning work product is unfair competition.
- (3) Designer's agreement not to engage in any unfair competition with company.

b. Parties' agreement that designer owns work product and all related printed materials [see § 57.222, P 13 (second alternative)]:

- (1) Designer has exclusive right to protect work product by copyright or any other means.
- (2) Designer agrees to convey license for use of work product to company upon receipt of payment then due:

- (a) Nonexclusive or exclusive.
- (b) Assignable or nonassignable.
- (c) With or without right to reproduce, publish, or sublicense.

(3) Company agrees that work product is confidential and to protect its confidentiality.

15. Consider provision for joint use of concepts developed during course of agreement by designer's personnel or jointly by designer's personnel and company's personnel [see § 57.222, P 14].

16. Consider indemnification provision that designer will indemnify company for losses incurred from breach of agreement, and claims that arise from performance of services [see § 57.222, P 15].

NOTE:

For a discussion of indemnification, see § 57.220[1][g]. For a procedural guide to drafting indemnification provisions, see § 57.141[1], P 32.

17. Consider limitation of liability clause to limit the amount company will be liable for under agreement [see § 57.222, P 16].

18. Specify that designer is an independent contractor and that designer's personnel remain under designer's supervision, management, and control [see § 57.222, P 167].

NOTE:

For discussion of independent contractor law and procedures and related forms, see Ch. 84, **Independent Contractors**.

19. Include provision specifying governing law [see § 57.222, P 18].

20. Include provision for recovery of attorneys' fees [see § 57.222, P 19].

NOTE:

For discussion of attorneys' fees, see § 57.200[1][g].

21. Include "entire agreement" provision [see § 57.222, P 20].

22. Include standard severability clause [see § 57.222, P 21].

23. Provide for amendment by written agreement only [see § 57.222, P 22].

[5] Software Consultant Agreement

NOTE:

For an example of a software consultant agreement, see § 57.225.

1. State consultation services [see § 57.225[2], P 2], e.g.:

- a. For development, implementation or production of computer software.
- b. To obtain consultant's advice.

2. Confirm independent contractor status [see § 57.225[2], P 3].

NOTE:

For discussion of independent contractor status, see § 57.225[1][b]. For a discussion of independent contractor law and procedures, and related forms, see Ch. 84, *Independent Contractors* .

3. Specify how communication between the company and consultant will be achieved [see § 57.225[2], P 4]:

- a. Telephone communication.
- b. Written (e-mail) communication.
- c. In person communication.

4. Specify how and when company will deliver materials to consultant [see § 57.225[2], P 5].

5. Consider including provision specifying that time is of essence in value of designer's performance, subject to excuse for delays beyond designer's reasonable control [see § 57.225[2], P 6].

6. Consider providing that company retains the right to exercise its final judgment [see § 57.225[2], P 7].

7. Include provisions for consultant compensation, such as [see § 57.225[2], PP 8, 9]:

- a. Hourly rate.
- b. Invoicing.
- c. Royalties or other remuneration.
- d. Credit by name for contribution.
- e. Reasonably incurred business expenses.

8. Include provisions for consultant's agreement relating to confidentiality of proprietary information [see § 57.225[2], P 10].

NOTE:

It is common to request that a consultant sign an independent nondisclosure agreement at the outset of the relations. For a mutual nondisclosure agreement, see § 57.228.

9. Prohibit consultant from using or circulating any confidential information [see § 57.225[2], P 11]:

- a. Except when specifically authorized in advance to do so; and
- b. Then only to the extent necessary for any of following:

- (1) Conducting negotiations, discussions, consultations with designated company representatives;
 - (2) Supplying company with goods or services it orders;
 - (3) Preparing confidential estimates, bids or proposals, and invitations for bids or requests for proposals for submission to company; or
 - (4) Doing other acts company later specifies in writing.
10. Include consultant's express agreement that [see § 57.225[2], P 12]:
- a. Copies of confidential information will not be made without company's prior written permission.
 - b. All authorized copies will be returned to company along with originals.
11. Include consultant's express agreement to return all other confidential materials promptly upon conclusion of work on project to which materials relate [see § 57.225[2], P 13].
12. Include consultant's acknowledgment that the business relationship between the parties is confidential and may only be disclosed with written approval [see § 57.225[2], P 14].
13. Include provision that consultant agrees not to engage in any unfair competition with company, and that during the term of the agreement, the consultant will not engage in any competitive activity relating to the company [see § 57.225[2], P 15].
14. Describe ownership rights of the work product [see § 57.225[2], P 16]:
- NOTE:**
For a discussion of ownership and "works for hire," see § 57.225[1][d].
- a. Provide that consultant expressly agrees that all intellectual property rights belong solely to company.
 - b. Provide consultant agrees that all works are "works for hire" and belong to company.
 - c. Specify any pre-existing intellectual property rights of consultant.
15. Include warranty by consultant that any materials provided by consultant do not violate any third party copyright interests [see § 57.225[2], P 17].
16. State term of agreement and provide termination provisions [see § 57.225[2], P 18]:
- a. Agreement will continue in force until services have been performed [see § 57.225[2], P 18(a)].
 - b. Termination for convenience upon written notification [see § 57.225[2], P 18(b)].
 - c. Notice of termination instructions [see § 57.225[2], P 18(d), (e)].
17. Consider indemnification provision stating that designer will indemnify company for losses incurred from breach of agreement, and claims that arise from performance of services [see § 57.225, P 19].

NOTE:

For a discussion of indemnification, see § 57.220[1][g]. For a procedural guide to drafting indemnification provisions, see § 57.141[1] P 32.

18. Consider limiting amount of company's liability under agreement [*see* § 57.225[2], P 20].

19. Include provision specifying governing law [*see* § 57.225[2], P 21]

20. Include provision for recovery of attorneys' fees [*see* § 57.225[2], P 22].

NOTE:

For discussion of recovery of attorneys' fees, see § 57.200[1][g].

21. Include "entire agreement" provision [*see* § 57.225[2], P 23].

22. Include standard severability clause [*see* § 57.225[2], P 24].

23. Provide for amendment by written agreement only [*see* § 57.225[2], P 25].

24. Consider use of provisions for arbitration to settle disputes [*see* Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.250].

[6] Distribution Agreement between Manufacturer and Distributor (Publisher)

1. Grant publisher (distributor) an exclusive or nonexclusive license to market and sublicense use of software [*see* § 57.226[2], P 1.01].

2. Set forth duration of agreement [*see* § 57.226[2], P 1.02]:

a. Effective when executed and to continue in force for specified period.

b. Include option for renewal if desired.

3. Describe publisher's duties under agreement [*see* § 57.226[2], P 1.03]:

a. Publisher to use its best efforts to:

(1) Promote and market software.

(2) Maximize royalty payments.

b. Define "best efforts" as efforts at least equivalent to those expended by publisher in marketing of other products it distributes (its own software products or those authored by other parties).

4. Grant publisher right to reproduce software in sufficient quantities to fulfill its obligations under agreement [*see* § 57.226[2], P 1.04].

5. Require publisher to reproduce and include copyright notice, patent notice, trademark, service mark, other proprietary markings, and/or confidential legends on any copies of software it reproduces [*see* § 57.226[2], P 1.04].

6. Grant publisher right to determine retail sublicense fee, subject to its obligation to maximize royalty payments to author [*see* § 57.226[2], P 1.05].

7. Provide for retail sublicense agreements [*see* § 57.226[2], P 1.06]:

a. Specify conditions that must be included, e.g.:

(1) Restrictions designed to protect trade secret and other proprietary rights of parties in software.

(2) Requirement that it conform in all other respects to terms and conditions of distribution agreement.

b. Specify parties responsible for drafting retail sublicense agreements, either:

(1) Publisher to exercise its sole discretion; or

(2) Both parties to exercise joint discretion.

8. Include trade name/trademark provision [*see* § 57.226[2], P 1.07]:

a. Specify party responsible for devising and registering trade name and/or trademark for use with respect to software.

b. Specify which party owns trade name and/or trademark.

9. Specify that nothing in distribution agreement prevents publisher from developing and marketing its own software or acquiring and marketing software authored by other parties [*see* § 57.226[2], P 1.08].

10. Set forth property rights of parties [*see* § 57.226[2], P 2.01]:

a. Specify who has title to software, including:

(1) Computer program (specify "whether in source or object code or both").

(2) All written documentation.

(3) Any ancillary data or information concerning software.

b. State that author either retains or has granted publisher all rights in copyrights or patents applicable to the software.

11. Include author's agreements relating to improvements to or modifications of software by author, as applicable [*see* § 57.226[2], P 2.02(a)]:

a. To provide consultation services with respect to software.

b. To attempt to make improvements or modifications at author's request.

- c. That any improvements or modifications will be included in subsequent versions of the software.
- d. That improvements or modifications and software, as modified, are property of software owner.

12. If desired, include author's agreement [*see* § 57.226[2], P 2.02(b)]:

- a. Permitting publisher or third parties to make improvements or modifications to software.
- b. Specifying which party will own those improvements or modifications.

13. Include publisher's agreement relating to nondisclosure of program [*see* § 57.226[2], P 2.03]:

- a. That programming of computer program and all improvements or modifications made by author is a trade secret and property of author.
- b. To use its best efforts to prevent inadvertent disclosure of any trade secret to any third party.
- c. To instruct its personnel to keep that information confidential by using same care and control that they use with similar data designated by it as confidential.
- d. To require its sublicensees to exercise same standard of care and control.

14. Specify that any disclosure of programming of computer program portion of software to third party [*see* § 57.226[2], P 2.04]:

- a. Constitutes material breach of agreement.
- b. Will result in termination of license.

15. Specify publisher's agreement that it will be liable for all damages to author that result from any disclosure of programming of computer program portion of software, to any third party [*see* § 57.226[2], P 2.05].

16. Include license fee provisions:

- a. Initial license fee and renewal license fees if desired [*see* § 57.226[2], P 3.01].
- b. Royalties based on sublicense fees [*see* § 57.226[2], P 3.02(a)].
- c. Whether royalties are due for services performed by publisher for sublicensees [*see* § 57.226[2], P 3.02(b)].
- d. Whether publisher's obligation to pay royalties may cease and, if so, when or under what circumstances [*see* § 57.226[2], P 3.02(b)].
- e. Publisher's agreement to do the following with respect to accounting and auditing procedure [*see* § 57.226[2], P 3.03]:
 - (1) Establish accounting procedures designed to show royalties received from sublicensing.

(2) Allow author to audit its royalty records upon reasonable notice by independent auditor at author's expense.

17. Specify that publisher is responsible for payment of all taxes imposed on use or sublicensing of software, but not for taxes based on income earned by author [see § 57.226[2], P 3.04].

18. Include author's warranty of title [see § 57.226[2], P 4.01].

19. Provide warranty of title and indemnification remedies [see § 57.226[2], P 4.02(a)].

NOTE:

For a discussion of indemnification, see § 57.220[1][g]. For a procedural guide to drafting indemnification provisions, see § 57.141[1], P 32.

a. Publisher's agreement to notify author of any claim that software or its use violates or infringes any of following rights of other parties:

(1) Trade secret.

(2) Trademark.

(3) Copyright.

(4) Patent.

(5) Other proprietary right of any other party.

b. Author's agreement to cooperate with publisher in investigation and resolution of claims.

c. Author's promise to indemnify and defend publisher against any such claims, at its expense.

d. Author's agreement to pay costs and damages awarded.

e. Publisher's right to participate in any action on such claims.

20. Specify that author has no obligation to indemnify publisher against any claim or liability based on publisher's [see § 57.226[2], P 4.02(b)]:

a. Modification or conversion of software and/or subsequent use of the modified software.

b. Use or combination of software with programs or data not supplied by author, if infringement would have been avoided by use or combination of software with other programs or data.

21. Include conspicuous (boldface, all capital letters) statement disclaiming other warranties [see § 57.226[2], P 4.03].

NOTE:

The disclaimer of an implied warranty of merchantability or fitness must be conspicuous [Com. Code § 2316(2)]. For discussion of the use of boldfaced capital letters to make a conspicuous disclaimer, see § 57.200[1][e].

22. Exclude author's liability for damages of any kind, including, but not limited to consequential damages, arising out of subject matter of agreement [see § 57.226[2], P 4.04].

23. Provide for automatic termination of license without notice if any of following occur [see § 57.226[2], P 5.01]:

- a. Expiration of specified term or renewal term.
- b. Disclosure of trade secrets.
- c. Publisher's failure to pay any royalty due.
- d. Cessation of business by publisher or any legitimate successor or assign.
- e. Commission by publisher of any event of default.

24. Define "event of default" to include [see § 57.226[2], P 5.02]:

- a. Publisher's attempt to use, copy, license, or convey software contrary to the terms of agreement or in derogation of author's proprietary rights in software.
- b. Publisher's failure or neglect to perform or observe any of its existing or future obligations under agreement.
- c. Assignment of publisher's business for benefit of creditors.
- d. Filing of petition in bankruptcy by or against publisher.
- e. Appointment of receiver, trustee in bankruptcy, or similar officer for publisher.
- f. Adjudication of publisher as bankrupt.

25. Describe effect of termination [see § 57.226[2], P 5.03]:

- a. Immediate return or destruction of all copies of software by publisher.
- b. Publisher's certification of that fact to author.
- c. If termination results from publisher's default, immediate payment of all fees or charges due for remainder of current term.
- d. Cessation of author's obligations.
- e. No effect on publisher's ability to fulfill any obligations made in good faith relating to software that arose prior to date of termination.

26. Include general terms and conditions:

- a. Standard provision governing notices [see § 57.226[2], P 6.01].

- b. Prohibition against assignment without prior written consent of author [*see* § 57.226[2], P 6.02].
 - c. Provision requiring that amendments must be in writing and executed by authorized persons [*see* § 57.226[2], P 6.03].
 - d. Agreement that no failure to exercise, and no delay in exercising any right, power, or privilege operates as waiver [*see* § 57.226[2], P 6.04].
 - e. Provision governing recovering of attorneys' fees [*see* § 57.226[2], P 6.05].
- NOTE:**
For discussion of attorneys' fees, see § 57.200[1][g].
- f. Standard severability clause [*see* § 57.226[2], P 6.06].
 - g. Provision specifying governing law [*see* § 57.226[2], P 6.07].
 - h. "Entire agreement" provision [*see* § 57.226[2], P 6.08].
 - i. Consider use of provisions for arbitration to settle disputes [*see* Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.250].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCopyright LawConveyancesLicensesGeneral OverviewCopyright LawConveyancesLicensesBrowsewrap & ClickwrapCopyright LawConveyancesLicensesShrinkwrap



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART III. TRANSACTION GUIDE

D. Drafting Guide for Computer and Internet-Related Documents

22-57 California Legal Forms--Transaction Guide § 57.142

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.142 Internet Related Transactions

[1] Domain Name Purchase Agreement

NOTE:

When transferring or purchasing a domain name, it is important to consider the relevant rules of the domain name registry and to ensure that the purchaser is eligible to be the registrant of the domain name. It is also possible to transfer or purchase a domain name directly from one of the many domain name registries themselves.

For an example of a domain name purchase agreement, see § 57.243.

1. State that seller and buyer have entered into a domain name purchase agreement to transfer ownership of a specific domain name [see § 57.243[2], P 1].

2. Provide payment terms [see § 57.243[2], P 2]:

- a. Purchase price for domain name.
- b. Method of payment.
- c. Mandatory or optional use of escrow service, if desired.

3. Include provision with respect to transfer of domain name ownership from seller to buyer [see § 57.243[2], P 3]:

- a. Specify that transfer will occur on seller's receipt of payment (or another time agreed upon by parties).
 - b. Provide that seller will sell, assign and transfer all rights, title and interests in domain name.
 - c. If applicable, specify that transfer will include specified trademarks, service marks, copyrights, or other intellectual property rights.
 - d. Provide that seller will prepare all necessary forms to effectuate transfer of domain name.
4. Include representations and warranties on behalf of seller that [see § 57.243[2], P 4]:
 - a. Seller has obtained all necessary authorizations to execute agreement and fulfill obligations.
 - b. Seller is registrant of domain name.
 - c. Domain name is free and clear of all liens, charges, claims and encumbrances.
 - d. Seller does not owe any amount to any domain name registry.
 - e. Seller is not aware of any pending or threatened action related to domain name.
5. Consider including clause for nonperformance by seller which limits liability of seller to amounts paid under agreement [see § 57.243[2], P 5].
6. Consider including limitation of liability clause [see § 57.243[2], P 6].
7. Consider including force majeure clause [see § 57.243[2], P 7].
8. Provide that any modifications to agreement must be made in writing executed by both parties [see § 57.243[2], P 8].
9. Specify address that all notices need to be directed to and method of delivery of any notices [see § 57.243[2], P 9].
10. Include choice of law clause [see § 57.243[2], P 10].

[2] Website Development Agreement

NOTE:

For a website development agreement, see § 57.240.

1. Include statement of basic purpose of website development agreement [see § 57.240[2], P 1].

2. Specify services that website developer will provide; e.g.,

a. Basic services [*see* § 57.240[2], PP 2(a), Exhibit A].

NOTE:

Since the nature of the services performed by a website developer can vary substantially from one project to the next, it is usually easiest to include a detailed description of the services to be provided and the time frame for those services in an attached exhibit.

b. Changes, modifications, or additional services provided in excess of basic cost [*see* § 57.240[2], P 2(b)].

2. Specify payment terms, e.g.:

a. Flat fee for basic services, if work is to be performed on a flat fee basis [*see* § 57.240[2], P 2(b)].

b. Additional rate for changes, modifications, or additional services [*see* § 57.240[2], P 2(c)].

c. Dates and amounts of payments [*see* § 57.240[2], P 2(d)].

3. Specify conditions for acceptance of work done by developer [*see* § 57.240[2], PP 2(d)(4), 9].

4. Specify ownership of any intellectual property rights [*see* § 57.240[2], P 3], including confirmation that all necessary rights have been transferred to appropriate party by written agreement.

NOTE:

For a discussion of ownership and "works for hire," *see* § 57.225[1].

5. If applicable, specify manner of acquisition of software to be used on website, including ownership or source of software; for example, licensed from software owner or developed by software developer.

NOTE:

For a discussion of the rights associated with the development of software, *see* § 57.225[1].

6. Include any applicable warranties and remedies [*see* § 57.240[2], P 4].

a. Warranty that developer has obtained all necessary rights and licenses for use of material and/or software that is used on site.

b. Indemnification provision, if desired.

c. Disclaimer of other warranties.

NOTE:

The disclaimer or modification of an implied warranty of merchantability or fitness must be conspicuous [*see* *Com. Code* § 2316(2)]. For discussion of the use of boldfaced capital letters to make a conspicuous disclaimer, *see* § 57.200[1].

7. Include a conspicuous (boldface, all capital letters) statement which limits the website developers liability for performance of the services to exclude [*see* § 57.240[2], P 5]:

- a. Damages, including incidental or consequential damages.
- b. Expenses.
- c. Lost profits.
- d. Lost savings.
- e. Other damages.

NOTE:

The disclaimer or modification of an implied warranty of merchantability or fitness must be conspicuous [*see Com. Code § 2316(2)*]. For discussion of the use of boldfaced capital letters to make a conspicuous disclaimer, see § 57.200[1].

8. Consider placing a cap on website developer's liability to amount of license fees paid under agreement [*see § 57.240[2]*, P 5].

9. Specify customer's responsibilities to include [*see § 57.240[2]*, P 6]:

- a. Artwork, design, logos or photos are supplied with proper permission.
- b. Any work supplied does not infringe any copyright or trademark.

10. Include provision for protection of proprietary or confidential information to protect trade secrets and prevent disclosure [*see § 57.240[2]*, P 7].

NOTE:

It is common to request a developer to sign an independent nondisclosure agreement at the outset of the relations. For a mutual nondisclosure agreement, see § 57.228.

11. Provide for termination for breach of agreement [*see § 57.240[2]*, P 8].

12. Include standard contractual provisions governing:

- a. Notices [*see § 57.240[2]*, P 10].
- b. Governing law [*see § 57.240[2]*, P 11].
- c. Attorneys' fees [*see § 57.240[2]*, P 12].

NOTE:

For discussion of attorneys' fees provisions, see § 57.200[1].

- d. Severability [*see § 57.240[2]*, P 13].
- e. "Entire agreement" provision [*see § 57.240[2]*, P 14].

[3] Website Hosting Agreement

NOTE:

For an example of a website hosting agreement, see § 57.244.

1. State that by accepting agreement and using services of provider, user agrees to be bound by agreement [see § 57.244[2], P 1].

2. Specify provider's services [see § 57.244[2], P 2]:

a. Basic services or plan.

NOTE:

Most providers offer a variety of user plans providing a range of services and prices. To simplify the agreement, the precise services provided by the particular plan selected by the user can be set out on an attachment or appendix to the agreement [see § 57.244[2], App. A].

b. Provider's right to change or modify services on specified advance notice.

3. Specify agreement term, such as [see § 57.244[2], P 3]:

a. Initial term.

b. Automatic renewal for month to month or other specified periodic term unless terminated by either party.

c. If desired, optional extended renewal period.

4. Include termination provisions:

a. Termination without cause upon notice by either party [see § 57.244[2], P 4].

b. Grounds for termination for cause by either party [see § 57.244[2], P 5].

5. Specify payment terms [see § 57.244[2], P 6].

a. Amount of payment.

b. Provider's right to increase payment following specified notice period.

c. Billing of additional or add-on services.

d. Billing cycle, such as monthly, quarterly or other basis.

e. Specify method of payment.

f. Provide policy on late payment charges and amount of interest added to outstanding invoices.

6. State that provider will not be liable for any taxes or other governmental fees, and that user is responsible for all taxes and fees associated with user's use of provider's services [see § 57.244[2], P 7].

7. Confirm that user may provide material and data (i.e., website content) to provider [see § 57.244[2], P 8], and that:

- a. Material and data will be in a form requiring no additional manipulation.
- b. Company will make no effort to validate material or data.
- c. Company may reject any such material and data.
- d. Failure of user to modify material and data as directed by company is breach of agreement.

8. Include provision prohibiting electronic mail abuse [see § 57.244[2], P 9].

a. State what uses are prohibited:

- (1) Unsolicited bulk mail messages (spam).
- (2) Malicious e-mail.
- (3) Forging of header or other information
- (4) Subscribing someone to or removing someone from an e-mailing list without permission.

b. State penalties for electronic mail abuse.

9. Specify what constitutes violations of network security [see § 57.244[2], P 10], such as:

- a. Accessing data user is not authorized to access.
- b. Attempting to probe, scan, or test vulnerability of a system or network, or to breach security or authentication measures without proper authorization.
- c. Attempting to interfere with service to any user, host, or network, including overloading, "flooding," "mail bombing," or "crashing."
- d. Forging any TCP/IP packet header or any part of header information in any e-mail or news group posting.
- e. Taking any action in order to obtain services to which the User is not entitled.

10. Include warranty by user against any unlawful use of provider's services [see § 57.244[2], P 11].

11. Limit provider's liability by specifying that [see § 57.244[2], P 12]:

- a. Use of services is at user's sole risk.
- b. Provider is not liable for any damages from use or inability to use services.

12. Limit damages [see § 57.244[2], P 12(a), (b)].

- a. If desired, limit damages for any "down time" time to credit toward future invoices.
- b. Expressly limit responsibility for any damages arising as a consequence of any such unavailability.

13. Specify applicable warranties [see § 57.244[2], P 12(c)- (f)].

- a. No warranty that services will be provided uninterrupted or error free.
- b. No warranty as to accuracy, reliability, or content of any information contained or provided through services.
- c. No warranties or representations of any kind for services provided.
- d. Disclaim any warranty of merchantability or fitness for a particular purpose.

NOTE:

The disclaimer of an implied warranty of merchantability or fitness must be both written and conspicuous [Com. Code § 2316(2)]. For discussion of the use of boldface capital letters to make a conspicuous disclaimer, see § 57.200[1][e].

14. Confirm that agreement does not transfer any intellectual, proprietary or other property right to user, and that user agrees that all right, title, and interest in any product or service is company's [see § 57.244[2], P 13(a)].

15. If appropriate, provide that user expressly warrants that user has the right to use any patented, copyrighted, or trademarked materials which user uses, posts or transfers to provider's servers [see § 57.244[2], P 13(b)].

16. Confirm that user is responsible for all hardware, equipment and software needed to access provider's services [see § 57.244[2], P 14].

17. If appropriate, state that user expressly represents and warranty that he or she is at least 18 years of age and that any person whom user grants access to his or her account also is 18 [see § 57.244[2], P 15].

18. Include appropriate indemnification provision [see § 57.244[2], P 16] specifying that user will indemnify provider against liabilities arising out of any of following:

NOTE:

For a discussion of indemnification, see § 57.220[1][g]. For a procedural guide to drafting indemnification provisions, see § 57.141[1], P 32.

- a. Any liability incurred by provider due to user's unlawful use of provider's services.
- b. Any injury to person or property caused by any products sold or otherwise distributed in connection with services provided to user.
- c. Any material supplied by user infringing or allegedly infringing on property or proprietary rights of a third party.

d. Copyright infringement.

e. Any defective product that user sold or distributed by means of provider's services.

19. Include provision for award of attorneys' fees to prevailing party in event of legal action [see § 57.244[2], P 17].

20. Include provision requiring user to keep provider informed of changes in user's account information [see § 57.244[2], P 18]

21. Include choice of law clause [see § 57.244[2], P 19].

22. Include standard severability clause [see § 57.244[2], P 20].

23. Consider including waiver provision stating that no waiver of any breach will be deemed a waiver of any preceding or succeeding breach [see § 57.244[2], P 21].

24. Include "entire agreement" clause [see § 57.244[2], P 22].

25. Consider use of provisions for arbitration to settle disputes [see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.250].

[4] Terms of Use

NOTE:

For an example of a terms of use agreement, see § 57.241.

1. Provide clearly marked hyperlink on homepage that directs website user to terms of use agreement.
2. State that website user must comply with terms of use in order to use website [see § 57.241[2], P 1].
3. Provide that the terms of use is a legally binding agreement, and is applicable every time user uses website [see § 57.241[2], P 1].

NOTE:

To ensure that the terms or use, or any click-wrap agreement, is binding, the user should be forced to take some action to agree to it, and be prevented from proceeding with use if the user does not agree to it. If the user is purchasing software (or services), the user should also have an option to return or end use of the product and receive a full refund if the user does not assent to the terms of the agreement.

4. Reference and/or hyperlink privacy policy and any other policies on website as part of terms of use [see § 57.241[2], P 2].
5. Specify ownership of content of website [see § 57.241[2], P 3].
 - a. Provide that content is protected under applicable copyright, patent, trademark, and other proprietary rights.

- b. Provide that any copying, redistribution, or publication is prohibited.
 - c. Provide that no ownership rights will be transferred to user by use of website.
- 6. Define intended audience, such as [see § 57.241[2], P 4]:
 - a. Website for adults only over the age of 18 and not intended for children under age 13.
 - b. General audience website.
 - c. Specific audience website.
- 7. Provide ownership provisions for any trademarks used on website [see § 57.241[2], P 5].
- 8. Specify website usage and purposes [see § 57.241[2], P 6].
 - a. Provide that user agrees not to copy materials, reverse engineer, break into the site, or use materials, products, or services in violation of any law.
 - b. Consider providing that site use is at discretion of website owner and may be terminated at any time.
- 9. Provide that user agrees to comply with all applicable laws [see § 57.241[2], P 7].
 - a. Consider including provision stating that user agrees to be truthful and accurate in information user provides on website.
- 10. Include indemnification provision [see § 57.241[2], P 8].

NOTE:
For discussion of indemnification, see § 57.220[1][g]. For a procedural guide to drafting indemnification provisions, see § 57.141[1], P 32.
- 11. Include disclaimer of warranties [see § 57.241[2], P 9].
 - a. Information to be provided on an "as is" basis.
 - b. User uses website at own risk.
 - c. Website owner disclaims all warranties of any kind.

NOTE:
The disclaimer of an implied warranty of merchantability or fitness must be both written and conspicuous [Com. Code § 2316(2)]. For discussion of the use of boldface capital letters to make a conspicuous disclaimer, see § 57.200[1][e].
- 12. Include limitation of liability clause [see § 57.241[2], P 10].
- 13. Provide a use of information statement [see § 57.241[2], P 11].

14. Provide copyrights and copyright agent information statement [*see* § 57.241[2], P 12].

NOTE:

Copyright and copyright agent information is needed to comply with the safe harbor provisions of the Digital Millennium Copyright Act ("DMCA") [17 U.S.C. § 512]. For a further discussion of the DMCA, and the requirement needed for the safe harbor, see § 57.32[2].

15. Include provision stating applicable law [*see* § 57.241[2], P 13].

16. Include severability clause [*see* § 57.241[2], P 14].

17. Include termination provision [*see* § 57.241[2], P 15].

18. Provide contact information for company/website operator [*see* § 57.241[2], P 16].

NOTE:

If a website is to provide for the purchase or sale of goods, it is important that the terms of use, or user agreement states any policies regarding warranty, shipping, returns, and so on, and that the agreement states that the user agrees to comply with those policies. For additional information on laws and regulations that govern the sale of products over the internet, see the FTC website, located at <http://www.ftc.gov>.

[5] Privacy Policy

NOTE:

For an example of a privacy policy meeting the California requirements noted in this section, see § 57.242.

Effective January 1, 2005, a business that collects customer personal information may also be subject to a statute covering disclosure of customers' personal information [*see* *Civ. Code* § 1798.83 (effective January 1, 2005)]. For further discussion of the disclosure of a customer's personal information, see § 57.38; see also *Ch. 46, Credit Cards and Other Open-End Credit Transactions*, § 46.96.

In addition to the California privacy policy requirements, website operators that fall within the federal definition of "financial institutions" [*see* 16 C.F.R. § 313.1(b); *see also* § 57.35[3]] are subject to detailed federal privacy policy requirements governing the dissemination of consumers' nonpublic personal information [*see* 16 C.F.R. § 313.1 *et seq.*; *see also* 15 U.S.C. § 6801 *et seq.* (Gramm-Leach-Bliley Act)]. This drafting guide does not deal with compliance with these federal requirements. For more detailed discussion and a federal privacy notice, see *Ch. 1A, Role of Counsel in Starting A New Business*, § 1A.206[1].

1. Inform website developer and owner that privacy policy must be "conspicuously posted" by one of following methods [*Bus. & Prof. Code* §§ 22575(a), 22577(b)]:

- a. Posting actual privacy policy on homepage or first significant page after entering website.

NOTE:

Although the California statute does not specify exact color, size, and font requirements for the privacy policy itself (as opposed to text links and hyperlinks, noted in (b) and (c), **below**), in order to assure that the policy meets the requirement that it be "conspicuously posted," it is advisable to post the policy so that it stands out, clearly labeled, and is in a different color, different font, or larger type size than the surrounding text [*compare 16 C.F.R. § 313.3(b)(2)(ii), (iii)* (federal privacy notice requirements applicable to financial institutions)].

b. Icon that hyperlinks to web page on which actual privacy policy is posted, if:

(1) Icon is located on homepage or first significant page after entering website;

(2) Icon contains word "privacy"; and

(3) Icon uses color that contrasts with background color of web page or is otherwise distinguishable.

c. Text link that hyperlinks to web page on which actual privacy policy is posted, if:

(1) Text link is located on homepage or first significant page after entering website; and

(2) Text link does one of following:

(a) Includes word "privacy."

(b) Is written in capital letters equal to or greater in size than surrounding text.

(c) Is written in larger type than surrounding text, or in contrasting type, font, or color to surrounding text of same size, or set off from surrounding text of same size by symbols or other marks that call attention to language.

d. Other functional hyperlink that is so displayed that a reasonable person would notice it.

2. Include a "commitment to privacy" statement if desired [*see § 57.242[2], P 1*].

NOTE:

Such a statement is not legally required but is commonly included in this type of statement by operators seeking to impress website users with their commitment to protect the privacy of their users.

a. State website owner's commitment to protection of privacy

b. State that by use of website user is accepting terms of privacy policy.

3. Identify categories of "personally identifiable information" that will be collected by website owner from website user, e.g. [*Bus. & Prof. Code §§ 22575(b)(1), 22577(a); see § 57.242[2], P 2*]:

a. First and last name.

b. Home or other physical address, including street name and name of a city or town.

- c. E-mail address.
- d. Telephone number.
- e. Social security number.
- f. Any other identifier that permits physical or online contacting of specific individual.
- g. Other information concerning user that website or online service collects online from user and maintains in personally identifiable form in combination with an identifier described above, such as:

- (1) Information provided from website user.

- (2) Automatic information.

- (3) Use of "cookies."

NOTE:

"Cookies" are pieces of information that are transferred to the user's computer from a web server. They can be used for a variety of purposes by the website operator.

4. Explain how and when information that is collected from website user will be used by website owner [see § 57.242[2], P 3].

5. Identify categories of third-party persons or entities with whom operator may share personally identifiable information collected from user [Bus. & Prof. Code §§ 22575(b)(1); see § 57.242[2], P 4].

6. If desired, inform user of importance of password protection on website, and state that user should log out of website when done using the site [see § 57.242[2], P 4].

NOTE:

These statements are not legally required under the California statute regulating internet privacy policies, but may be included to educate users regarding security procedures that may help them maintain the confidentiality of their personal information on the site.

7. If desired, explain who has access to information provided by website user [see § 57.242[2], P 5].

NOTE:

The California statute requiring internet privacy policies requires only that the policy specify the **categories** of third-party persons or entities with whom the operator may share information [Bus. & Prof. Code § 22575(b)(1); **see** P 5, **above**]; specific identification of third parties with whom the operator may share information is not required. However, operators sometimes include this type of statement for informational purposes.

8. If desired, explain how website operator protects information provided by website user [see § 57.242[2], P 6].

NOTE:

These statements are not legally required under the California statute regulating internet privacy policies, but operators sometimes include this type of statement for informational purposes.

- a. Reference any security software used.
- b. State that business practices are periodically reviewed.
- c. Explain limitations on employee access to information.

9. Specified intended audience of website [see § 57.242[2], P 7].

- a. Is website for adults?
- b. Is website intended for children under age of 13?

NOTE:

If the website is intended for children under the age of 13, the privacy policy must copy with the Children's Online Privacy Protections Act (COPPA) [15 U.S.C. § 6501 *et seq.*] and its implementing FTC regulations [16 C.F.R. § 312 *et seq.*; **see** § 57.35[2]; **see also** <http://www.ftc.gov/bcp/online/edcams/coppa/index.html>]. For a drafting guide to COPPA compliance, see § 57.142[6].

10. If operator maintains process for users to review and request changes to personally identifiable information that is collected through website, describe that process [Bus. & Prof. Code § 22575(b)(2); see § 57.242[2], P 8].

11. Provide consent statement in which user acknowledges that [see § 57.242[2], P 9]:

- a. Use of website provides consent to collection of information.
- b. Use of website provides consent to use of information.

12. Describe process by which operator notifies users of material changes to operator's privacy policy [Bus. & Prof. Code § 22575(b)(3); see § 57.242[2], P 10].

13. State effective date of policy [Bus. & Prof. Code § 22575(b)(4); see § 57.242[2], P 11].

[6] COPPA Compliant Privacy Policy

NOTE:

Privacy policies for websites or online services that are directed to children under the age of 13, or for general audience websites that have a children's area and collect personal information from children, must comply with the Children's Online Privacy Protection Act ("COPPA") [15 U.S.C. § 6501 *et seq.*] and its implementing FTC regulations [16 C.F.R. § 312 *et seq.*; **see also** 16 C.F.R. § 312 *et seq.*; <http://www.ftc.gov/bcp/online/edcams/coppa/index.html>], in addition to the California COPPA requirements discussed in [5], **above**. For additional discussion of COPPA, see § 57.35[2].

1. State privacy policy homepage of website or on homepage of children's area of website [16 C.F.R. § 312.4(b)(1)].

2. Include links to privacy policy near each and every place where personal information is collected from children under age 13 [16 C.F.R. § 312.4(b)(1)].

3. Provide names, addresses, telephone numbers and e-mail addresses of all parties who collect or maintain personal information from children through site [16 C.F.R. § 312.4(b)(2)(i)].

NOTE:

The operators of a website or online service may list the name, address, phone number, and e-mail address of one operator who will respond to all inquiries from parents concerning the operators' privacy policies and use of children's information, as long as the names of all the operators collecting or maintaining personal information from children through the website or online service are also listed in the notice [16 C.F.R. § 312.4(b)(2)(i)].

4. Specifically state in a descriptive manner each type of personal information collected [16 C.F.R. § 312.4(b)(2)(ii)].

5. Inform parents whether personal information is collected actively (i.e., by input from child) or passively (i.e., by use of "cookies") [16 C.F.R. § 312.4(b)(2)(ii)].

6. Specify how personal information is or may be used, including but not limited to [16 C.F.R. § 312.4(b)(2)(iii)]:

- a. Fulfillment of a requested transaction.
- b. Recordkeeping.
- c. Marketing back to child.
- d. Making it publicly available through chat room or by other means.

7. If website or online service shares or discloses children's personal information with third parties, state [16 C.F.R. § 312.4(b)(2)(iv)]:

- a. Types of business in which third parties are engaged.
- b. General purposes for which information is used.
- c. Whether third parties have agreed to maintain confidentiality, security, and integrity of personal information they obtain from operator.
- d. That parent has option to consent to collection and use of child's personal information without consenting to disclosure of that information to third parties.

8. State that site cannot condition child's participation in an activity on child's disclosure of more personal information that is reasonably necessary to participate in activity [16 C.F.R. § 312.4(b)(2)(v)].

9. Inform parents that they can review personal information website has collected from their child [16 C.F.R. § 312.4(b)(2)(v)].

10. Inform parents how to review their child's personal information [16 C.F.R. § 312.4(b)(2)(vi)].
11. Inform parents they can have their child's personal information deleted from website, and how to have it deleted [16 C.F.R. § 312.4(b)(2)(vi)].
12. Inform parents they can stop website from further collecting or using personal information from their child, and how to stop further collection and use [16 C.F.R. § 312.4(b)(2)(vi)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet LawInternet BusinessContractsGeneral OverviewComputer & Internet LawPrivacy & SecurityGeneral OverviewComputer & Internet LawPrivacy & SecurityChildren's Online Privacy Protection ActComputer & Internet LawTrademark ProtectionProtection of RightsFederal RegistrationComputer & Internet LawTrademark ProtectionProtection of RightsInternet Domain Names



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22-57 California Legal Forms--Transaction Guide §§ 57.143-57.199

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[Reserved]

§§ 57.143[Reserved]



140 of 164 DOCUMENTS

California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART IV. FORMS
A. Hardware Related Forms

22-57 California Legal Forms--Transaction Guide § 57.200

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§ 57.200 Computer Purchase Agreement

[1] Comment

[a] Use of Form

This form is an integrated agreement for use when a computer supplier and a commercial buyer bargain for the procurement of an entire computer system consisting of hardware, software, and an agreement for the maintenance of both. This type of system is sometimes referred to as a "bundled system." It is "integrated" or "bundled" in that it contains the buyer's agreement to purchase hardware from the seller, the seller's agreement to license some or all of the software to be used on the system, and the seller's hardware maintenance agreement.

For a separate commercial software license agreement, see § 57.220. A consumer software licensing agreement is illustrated in § 57.221. The *form in § 57.203* is a separate computer maintenance agreement. For a separate software maintenance agreement, see § 57.224.

[b] Warranty Provisions In General

This form contains "commercial" warranties (warranties applicable to commercial as distinguished from consumer transactions) covering the hardware [*see § 57.200[2]*, PP 1.07-1.12], the software [*see § 57.200[2]*, PP 2.08-2.10], and the maintenance services [*see § 57.200[2]*, PP 3.18, 3.19] provided under the contract. The warranties in this agreement are single-level, that is, the items covered by the warranties are not differentiated into different classes, each covered by a different level of warranty coverage.

The California Commercial Code provides for warranties of title and against infringement [*see Com. Code § 2312*], express warranties [*see Com. Code § 2313*], and implied warranties of merchantability [*see Com. Code § 2314*] and fitness for a particular purpose [*see Com. Code § 2315*]. These warranties are discussed in Ch. 52, *Sales of Goods Under the Uniform Commercial Code*.

The federal Magnuson-Moss Consumer Warranty Act [15 U.S.C. § 2301 *et seq.*] and the California Song-Beverly Consumer Warranty Act [Civ. Code § 1790 *et seq.*] do not apply to the warranties contained in this form because this form is intended for commercial rather than consumer use. For discussion of the application of these statutes to consumer software licensing agreements, see § 57.221.

[c] Warranty Disclaimers

The language that creates an express warranty and any language intended to limit a warranty must be consistent [Com. Code § 2316(1)]. This means that no warranty, whether express or implied, can be modified or disclaimed unless the seller clearly limits its liability [see *Hauter v. Zogarts* (1975) 14 Cal. 3d 104, 119, 120 Cal. Rptr. 681, 534 P.2d 377]. In addition, the disclaimer of an implied warranty of merchantability must mention "merchantability," and be conspicuous and the disclaimer of any implied warranty of fitness must be both written and conspicuous [Com. Code § 2316(2)]. Therefore, the warranty disclaimer clauses in this form state that its express warranties are in lieu of all other warranties, express or implied, including any warranties of merchantability or fitness for a particular purpose and, moreover, are complemented by specific warranty remedy provisions. For the implied warranty disclaimers to meet the requirement for conspicuousness, the disclaimer clause must be printed in boldfaced capital letters [see *Dorman v. International Harvester Co.* (1975) 46 Cal. App. 3d 11, 18, 120 Cal. Rptr. 516 ; see also § 57.200[1][e]].

There are other ways to disclaim implied warranties. They are excluded by expressions like "as is," "with all faults," or language that makes it plain there is no implied warranty [Com. Code § 2316(3)(a)] or by a phrase like "there are no warranties that extend beyond the description on the face hereof" [Com. Code § 2316(2)]. An implied warranty can also be negated by conduct such as the examination of a model [see Com. Code § 2316(3)(b), (c)].

[d] Disclaimer of Consequential Damages for Breach of Warranty

Remedies for breach of warranty, including the measure of damages, can be limited by contract [see Com. Code §§ 2316(4), 2719]. Moreover, the limitation or exclusion of consequential damages when the loss is commercial is valid unless it can be proven that the limitation is unconscionable [Com. Code § 2719(3)]. However, language excluding consequential damages must be conspicuous [see *Dorman v. International Harvester Co.* (1975) 46 Cal. App. 3d 11, 20, 120 Cal. Rptr. 516]. For that reason, the language in this form that excludes consequential damages is printed in boldfaced capital letters within the body of the agreement [see § 57.200[1][e]].

[e] Requirement for Conspicuousness

A term is "conspicuous" if it is written, displayed, or presented so that a reasonable person against whom it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court [Com. Code § 1201(b)(10)]. Conspicuous terms include [Com. Code § 1201(b)(10)(A), (B)]:

- A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
- Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

It has been held that implied warranty disclaimers and language excluding consequential damages must be printed in boldfaced capital letters [see *Dorman v. International Harvester Co.* (1975) 46 Cal. App. 3d 11, 18, 20, 120 Cal. Rptr. 516 (prior law)], as they are in this form.

[f] Avoidance of Disclaimers Under Fraud Theory

Notwithstanding the use of warranty disclaimer provisions, it is important for the seller of a computer system to avoid any misrepresentations in making the sale, whether incorporated into the contract or not. Even though California has not enacted UCC § 2-302, under which courts could refuse to enforce unconscionable contract provisions (such as the warranty disclaimer provisions when used as a defense against sales misrepresentations), and even if a California contract contains a valid and effective disclaimer of warranty provision, that does not necessarily vitiate later claims by a computer system purchaser that the seller made fraudulent misrepresentations concerning the system.

If a computer system is sold in justifiable reliance on a misrepresentation knowingly made with the intent of inducing reliance, and damage results, fraud is established under California law [*Glovatorium, Inc. v. NCR Corp.* (9th Cir. 1982) 684 F.2d 658, 660] . Fraud may be inferred from the seller's failure to perform a promise, including a promise regarding the manner in which a computer will operate or produce results [*Glovatorium, Inc. v. NCR Corp.* (9th Cir. 1982) 684 F.2d 658, 661] .

[g] Attorneys' Fees

In any contract action, if the contract provides for attorneys' fees to be awarded to a specified party or the party prevailing on the contract (generally, the party who recovered a greater relief in the action on the contract), the party later found to be the prevailing party will be entitled to reasonable attorneys' fees [see *Civ. Code* § 1717(a); see also *Jackson v. Homeowners Assn. Monte Vista Estates-East* (2001) 93 Cal. App. 4th 773, 779-780, 782, 113 Cal. Rptr. 2d 363 (parties who agreed on record and in written settlement agreement that trial court would determine prevailing party in action and amount of attorney fee award before dismissal of action could and did waive provisions of *Civ. Code* § 1717(b)(2), which provides there will be no prevailing party when an action is dismissed pursuant to settlement); *Sears v. Baccaglio* (1998) 60 Cal. App. 4th 1136, 1154-1155, 70 Cal. Rptr. 2d 769 (reviewing legislative history of *Civ. Code* § 1717 and finding that party can fail to recover net monetary judgment and still prevail for purposes of collecting fees in action founded on contract)]. A court may deny a contractual claim for attorneys' fees by a defendant who has been voluntarily dismissed from a suit prior to trial [see *Santisas v. Goodin* (1998) 17 Cal. 4th 599, 602, 608, 71 Cal. Rptr. 2d 830, 951 P.2d 399 (examining recovery of attorneys' fees incurred defending action when plaintiff has voluntarily dismissed action before trial); see also *Topanga and Victory Partners, LLP v. Toghia* (2002) 103 Cal. App. 4th 775, 778, 127 Cal. Rptr. 2d 104 (defendant who was not party to contract but was sued for breach of contract and other causes of action may not recover attorney fees incurred in defending noncontract causes of action when plaintiff has filed voluntary dismissal with prejudice); *Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal. App. 4th 443, 446, 118 Cal. Rptr. 2d 475 (holding that defendant was not prevailing party when plaintiffs obtained their litigation objective through settlement with other defendants)]. The court may determine that there is no party prevailing on the contract for the purpose of awarding attorneys' fees [*Civ. Code* § 1717(b)(1); but see *Civ. Code* § 1717(b)(2) (defendant who has tendered to plaintiff the full amount due may be party prevailing on contract)].

A provision for attorneys' fees will be construed to be applicable to the entire contract unless each party was represented by counsel in the negotiation and execution of the contract and that fact is stated in the contract [see *Civ. Code* § 1717(b)]. The provision in this form [see § 57.201[2], P 4.24] is specifically applicable to the entire contract.

For forms and additional discussion of contract provisions governing the award of attorneys' fees, see *Ch. 75, Formation of Contracts and Standard Contractual Provisions*, § 75.252.

[2] FORM

Computer Purchase Agreement

COMPUTER SYSTEM PURCHASE AGREEMENT

_____[name of buyer], _____[address], hereinafter referred to as "Customer," and

_____[*name of seller*], _____[*address*], hereinafter referred to as "Seller" or "Licensor," in consideration of the promises made herein and intending to be legally bound, agree as follows:

ARTICLE 1. PURCHASE OF HARDWARE

1.01. Agreement to Purchase. Customer agrees to purchase from Seller, and Seller agrees to sell to Customer, the Hardware listed on the purchase schedule attached to this Agreement and incorporated herein by reference.

1.02. Purchase Price. The purchase price for each item of Hardware shall be as specified on the attached purchase schedule.

1.03. Site Preparation. Prior to the installation of the Hardware, Customer shall prepare the installation site in accordance with Seller's installation procedures as specified in Seller's current installation manual.

1.04. Responsibility for Installation. Customer shall specify the location for the Hardware.

_____[Seller shall install the Hardware and or Customer shall install the Hardware in accordance with the instructions provided by Seller and Seller shall] perform inspection and diagnostic checks of the Hardware using _____[its or the manufacturer's] standard test procedures.

1.05. Acceptance Testing. (a) Seller agrees that the Hardware shall meet the standard of performance specified in this section before the Hardware must be accepted by Customer. An acceptance performance period shall begin on the date on which Seller installs the Hardware and end when the Hardware has operated in conformance with Seller's technical specifications under Seller's standard test procedures for a period of _____[specify period, e.g., 30] consecutive calendar days at an effectiveness level of _____[specify percentage] percent [or more]. The effectiveness level shall be computed by dividing the operational use time by the sum of that time plus the amount of time during _____[specify period, e.g., normal business hours or the periods from 8:00 A.M. through 6:00 P.M., Monday through Friday]. "Operational use time" is the accumulated time during which the Central Processing Unit ("CPU") is in actual operation, including any time between the start and stop of the CPU.

(b) If the Hardware does not meet the standard of performance specified herein during the initial testing period, performance testing shall continue on a day-by-day basis until the Hardware meets the standard of performance specified in Subparagraph (a), above, for a total of _____[specify period, e.g., 30] consecutive calendar days.

(c) If the Hardware fails to meet the standard of performance specified herein after _____[specify period, e.g., 90] consecutive calendar days from the date of installation, Customer may, at its option, request a replacement or terminate this Agreement. If Customer does elect to terminate this Agreement pursuant to this provision, there shall be no further liability on the part of either party.

1.06. Remanufactured Components. Hardware furnished by Seller hereunder may contain remanufactured sub-assemblies or parts that have been cleaned, refinished, inspected, and tested to meet new Hardware test standards. Any such Hardware components shall be equivalent to new components in performance, shall meet the performance specifications published and currently in use by Seller, and shall be subject to the limited warranties contained herein.

1.07. Warranty of Title. Seller warrants that it has good title to the Hardware and the right to sell it to Customer free of any proprietary rights of any other party or any other encumbrance whatever.

1.08. Limited Warranty. The Hardware furnished hereunder is warranted to be free from defects in materials and workmanship for a warranty period of _____[specify, e.g., 90 days] from _____[the

date of installation by Seller or the date of delivery to Customer for installation by Customer].

1.09. Warranty Service. Seller, at its own expense and option, shall either repair or replace the defective Hardware during the warranty period, provided that Customer has notified Seller and, upon inspection by Seller, Seller has found the Hardware to be defective. Customer's sole and exclusive remedy hereunder shall be limited to the repair or replacement specified herein.

1.10. Warranty Service Charges. Notwithstanding the provisions of Section 1.09, if Customer requires warranty service other than during Seller's normal business hours, that service will be provided on a best effort basis at Seller's then current hourly rates and terms for service outside normal business hours. Warranty service for Hardware located outside of _____[specify area or Seller's standard service area] shall be provided at Seller's then current time and travel charges.

1.11. Warranty Conditions.

THE FOREGOING WARRANTIES ARE CONTINGENT UPON THE PROPER USE OF THE HARDWARE IN ACCORDANCE WITH THE INSTRUCTIONS AND SPECIFICATIONS PUBLISHED BY THE _____[SELLER or MANUFACTURER] AND MAY NOT APPLY TO ANY HARDWARE THAT HAS BEEN REPAIRED OR MODIFIED BY PERSONS OTHER THAN THE _____[SELLER or MANUFACTURER].

1.12. Warranty Disclaimer.

THE EXPRESS WARRANTIES SET FORTH IN THIS AGREEMENT IN LIEU OF ALL OTHER WARRANTIES. SELLER DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY WARRANTIES OF MERCHANTABILITY, NONINFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE.

1.13. Title. Title to the Hardware shall pass to Customer on the date on which this Agreement is executed by Seller (the "date of purchase").

1.14. Risk of Loss. Prior to the date of purchase, the risk of loss to the Hardware shall be on Seller. The risk of loss shall pass to Customer on the date of purchase.

ARTICLE 2. SOFTWARE LICENSE

2.01. Agreement to License. (a) Seller, hereinafter referred to in this Article as "Licensor," agrees to grant Customer, and Customer accepts, a license to use those computer programs and related materials hereafter referred to as "the Software."

[First alternative; use to describe a number of software products:]

(b) The Software shall consist of the products listed in the attached Software Purchase Schedule, which is incorporated herein by reference.

[OR]

[Second alternative; use to describe one or a few software products:]

(b) The Software shall consist of computer programs _____ [named or designated] as _____ [name or title of program] on _____ [describe medium, e.g.: _____ (size) disks], designed to _____ [describe projected features and function for each program] pursuant to Licensor's published specifications, in _____ [object code language only or subject code using _____ (specify language, e.g., COBOL) only or both object and subject code using _____ (specify language, e.g., COBOL) languages]. The Software shall also include printed materials consisting of _____ [specify each printed manual or set of instructions and other documentation or all related printed documentation, including manuals covering the installation, application, and use of the computer program and published specifications, which are attached to this Agreement as Exhibit X and incorporated herein by reference]. [Optional: The Software shall further include all subsequent improvements to either the computer program or the related printed documentation made by either Licensor or Customer].

[Continue with the following:]

2.02. Limitation on License. Customer promises and agrees that each item of Software, including any subsequent updates provided hereunder, is furnished to Customer under a nontransferable, nonexclusive license for use by Customer only. All copies of the Software, in whole or in part, including all updates, are the property of Licensor, and no title to or ownership of the Software, or any unmodified parts thereof is transferred under this Agreement to Customer.

2.03. Use on Designated Hardware. Each item of Software licensed hereunder shall be used by Customer on a single designated CPU, namely, _____ [specify particular central processing unit], only.

2.04. Copies. The Software may be copied in whole or in part, up to a maximum of three machine-readable copies, for Customer's internal use on the designated CPU. Customer agrees to reproduce and include Licensor's copyright and/or any other proprietary or other legend on each copy of the Software, including partial copies and modifications of the Software.

2.05. Confidentiality. Customer acknowledges and agrees that the Software is proprietary to and the confidential information of Licensor. Customer agrees not to provide, disclose, or make available any Software or any part thereof to any third party without the prior written consent of Licensor.

2.06. License Period. This license shall be effective from the date on which this Agreement is _____ [accepted or executed] by Seller and shall remain in effect until _____ [expiration date or it is terminated by Customer or by Licensor]. Upon _____ [expiration or termination], Customer shall certify in writing to Licensor that, to the best of its knowledge, the original and all copies of the Software have been returned to Licensor or destroyed.

2.07. Charges. Customer agrees to pay the fees and charges for each item of Software listed on the attached Software Purchase Schedule, which is incorporated herein by reference. These charges shall include an initial license fee, an installation fee, and a periodic usage fee. Fractional use fees shall be prorated on the basis of a 30-day month.

2.08. Warranty of Title. Licensor warrants that it has good title to the Software and the right to license its use to Licensee free of any proprietary rights of any other party or any other encumbrance whatever.

2.09. Limited Product Warranty.

[Caution: The following warranty should be given only in connection with well defined, proven, and stable computer programs:]

(a) The Software is warranted to conform to Licensor's published functional specifications. **ANY MODIFICATION OF THE SOFTWARE BY ANY PERSONS OTHER THAN LICENSOR SHALL VOID THIS WARRANTY.**

[Continue with the following:]

(b) During a period of _____ [number] days after acceptance of the Software by Customer, Licensor, at its own expense, will correct Software defects that cause the Software to fail to conform to Licensor's published functional specifications [and that significantly affect its performance in accordance with those specifications], provided that Customer has notified Licensor of any such defects and, upon inspection, Licensor has found the Software to be nonconforming. Customer agrees that Customer's sole and exclusive remedy under this Agreement shall be limited to that corrective action.

2.10. Warranty Disclaimer.

THE EXPRESS WARRANTIES SET FORTH IN THIS AGREEMENT IN LIEU OF ALL OTHER WARRANTIES. SELLER DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY WARRANTIES OF MERCHANTABILITY, NONINFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE.

ARTICLE 3. MAINTENANCE SERVICES

3.01. Agreement to Provide Maintenance Services. Customer agrees to purchase from Seller, and Seller agrees to provide to Customer, Hardware maintenance services ("Services") as listed on the maintenance services purchase order attached to this Agreement and incorporated herein by reference, at the maintenance charge rates specified therein and in Section 3.18 of this Agreement.

3.02. Scope of Maintenance. Seller agrees to provide Services based on the specific performance standard needs of individual Hardware items as determined by Seller. Services shall be both preventive and remedial and shall include adjustments, lubrication, and replacement of parts when deemed necessary by Seller. Replacement parts shall be furnished on an exchange basis when installed by Seller and shall be new or equivalent to new in performance. Replaced parts shall become the property of Seller.

3.03. Time When Services Available. Seller agrees to provide Services during its normal business hours; that is, between _____ [specify, e.g., 8 A.M.] and _____ [specify, e.g., 6 P.M.], Monday through Friday, excluding the following holidays: _____ [specify]. Customer may request performance of Services _____ [at other times or on a full-time basis], subject to Seller's then current terms, conditions, and prices, pursuant to Section 3.15.

3.04. Engineering Changes. Engineering changes determined by Seller to be applicable or necessary shall be performed by Seller _____ [for _____ (specify charge) or at no charge] on Hardware having Services coverage hereunder. Customer, by providing written notice to Seller, may elect to have Seller make only those engineering changes that are determined by Seller to be mandatory.

3.05. Service Period. Services shall commence on the date specified in the attached maintenance purchase order and shall continue for an initial period of _____ [specify, e.g., one year]. Thereafter, this agreement to provide Services shall automatically be renewed for successive _____ [specify, e.g., one-year] periods, subject to Seller's then current prices, terms, and conditions until terminated by either party upon _____ [specify, e.g., 90 days] prior written notice.

3.06. Reconditioning. Seller may charge for the reconditioning of Hardware which, in its opinion, cannot be properly or economically repaired on site because of excessive wear or deterioration. Reconditioning charges shall not be applicable to CPUs and controllers within _____ [*specify, e.g., five*] years of their initial installation, disk drives and workstations within _____ [*specify, e.g., three*] years of their initial installation, or other Hardware items within _____ [*specify, e.g., two*] years of their initial installation. In the event that reconditioning becomes necessary after expiration of the applicable time periods stated herein, Seller shall provide Customer with an estimate of the applicable reconditioning charge. If Customer elects not to have the applicable Hardware item reconditioned, Seller _____ [*shall replace or may withdraw Service for*] that item.

3.07. Limitation. The performance of Services is contingent upon proper use of the Hardware in accordance with Seller's published specifications.

3.08. Exclusions. "Services" does not include any of the following [; however, Seller, at Seller's sole option, may agree to perform any of the following at its then applicable service charge]:

- (a) Electrical work external to the Hardware;
- (b) The maintenance of accessories, attachments, or other devices not furnished by Seller;
- (c) Service necessitated by supply items or software not furnished by Seller;
- (d) Service connected with relocation of the Hardware;
- (e) Service that is unsafe or impractical for Seller to render because of alterations in the Hardware or their connection by mechanical or electrical means to machines or devices not furnished by Seller;
- (f) Service on Hardware that Seller determines has been located in an unsafe or hazardous environment;
- (g) Service necessitated by elements external to the Hardware that are not within Seller's specifications including, but not limited to, humidity, temperature, power supply, or air conditioning;
- (h) Service necessitated by accident, neglect, alterations, improper use or misuse of the Hardware; or
- (i) Service necessitated by repairs attempted by persons other than Seller's personnel.

3.09. Maintenance of Site Conditions. Throughout the term of this Agreement, Customer shall maintain site conditions in compliance with specifications provided by Seller prior to installation of the Hardware.

3.10. Hardware Failure. Customer shall notify Seller of Hardware failure as soon as practicable after becoming aware thereof and shall allow Seller full and free access to the Hardware for the purpose of performing Services.

3.11. Other Devices. Customer shall be responsible for maintenance and installation of any common carrier related equipment or communication service not furnished by Seller. Charges incurred for communication facilities shall be the responsibility of Customer, whether incurred by Customer or by Seller's personnel while performing Services on the Hardware.

3.12. Payment of Charges. Customer agrees to pay all maintenance charges billed by Seller. Charges for Services shall commence on the first day following the expiration of the warranty on the Hardware. All charges for Services, whether annual or monthly, will be invoiced in advance. Partial billings will be prorated on the basis of a 30-day month.

3.13. Services Beyond Standard Area. Services provided for Hardware located outside of the standard service area as defined at the time of any required Services shall be subject to Seller's mileage surcharge applicable at the time of any required Services.

3.14. Excess Usage Charges. Hardware that contains a usage meter and that is used in excess of the no-charge usage limit schedule stated herein shall incur a surcharge in accordance with Seller's then current schedule of excess usage charges. The no-charge usage period schedule is as follows:

Hardware Name	Model Number	No-Charge Use Limit
_____	_____	_____
_____	_____	_____

3.15. After Hours Charges. If Customer requires Services at times other than during Seller's normal business hours as specified in Section 3.03, those Services shall be provided on a best efforts basis under and in accordance with Seller's then current schedule of hourly rates and terms.

3.16. Service Charge Changes. Seller may, at any time after the initial one-year period, change its charges for Services by giving Customer at least 30 days prior written notice.

3.17. Failure to Pay. Failure of Customer to pay any charges when due shall constitute sufficient cause for _____ [name of seller] to suspend or terminate Services under this Agreement.

3.18. Performance Effectiveness Standards.

[First alternative; use for limited warranty:]

Any _____ [specify product or product component, e.g., core system component, including _____ (list all applicable units)] will perform at an average effectiveness level of _____ [specify, e.g., 95] percent during any _____ [specify, e.g., 30-day period]. The average effectiveness level shall be computed by dividing the available operational use time by the sum of that time plus the time during which the unit to which this provision is applicable is not operational.

[OR]

[Second alternative; use for "extended" warranty:]

(a) The complete _____ [specify product or system, e.g., core system, including _____ (list all applicable units) and any other items to be covered, e.g., and all disks], taken as a whole, will perform at an average effectiveness level of _____ [specify, e.g., 98] percent. Customer agrees that a surcharge of _____ [specify additional percentage] percent of the monthly maintenance charge shall be assessed by Seller for each component within the _____ [specify product or system, e.g., core system].

(b) Seller guarantees to respond to service calls pursuant to this Section within _____ [specify time limit] from the time a maintenance call is placed by Customer. If Seller fails to meet this guaranteed response time, or if

any single nonperformance period exceeds _____[specify time limit] from the time a maintenance call is placed, _____[specify terms for lesser surcharge or reduction in surcharge, e.g., one-half of the monthly maintenance surcharge shall be credited to Customer's account, up to a maximum of _____(number) times per calendar month].

(c) If Seller is not able to meet the guarantee that the _____[specify product or system, e.g., core system] will perform at an average effectiveness level of _____[specify, e.g., 98] percent, _____[specify terms for lesser surcharge or reduction in surcharge, e.g., 25 percent of the monthly maintenance surcharge shall be credited to Customer's account for each defective item for each occurrence up to a total of not more than 100 percent of _____(the surcharge or the surcharge and the monthly maintenance charge combined)]. If an individual component of the _____[specify product or system] is the cause of a deviation from the guaranteed average effectiveness level, Seller, at its option, shall either continue to maintain the defective item at no monthly maintenance charge or surcharge until the item meets published specifications or replace the item on a priority basis at no additional cost to Customer.

[Continue with the following:]

3.19. Warranty Disclaimer.

THE EXPRESS WARRANTIES SET FORTH IN THIS AGREEMENT IN LIEU OF ALL OTHER WARRANTIES. SELLER DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY WARRANTIES OF MERCHANTABILITY, NONINFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE.

ARTICLE 4. GENERAL TERMS AND CONDITIONS

4.01. Applicability. The general terms and conditions contained in this Article shall apply to any Hardware sold and Software licensed (hereinafter collectively referred to as "Products") and Services furnished to Customer pursuant to this Agreement.

4.02. Acceptance. Subject to the provisions of Article 1, satisfactory completion of Seller's standard test procedures on Products installed by Seller [, including replacement, substitute, added, or field-modified Products installed after acceptance of initially installed Products], and the execution of a report form verifying such test completion by representatives of Customer and Seller shall be sufficient to establish acceptance of Products by Customer. [If installation is not performed by Seller, the date of acceptance shall be the date of delivery to Customer and Seller shall be under no obligation to perform any acceptance test procedures.]

4.03. Payment and Credit. (a) Unless otherwise agreed in writing, payment for Products or Services hereunder shall be made _____[specify, e.g., 30 days following the date of shipment of Products or performance of Services ("delivery")] or no later than the date on which acceptance testing has been successfully completed]. Seller shall issue invoices on or after the date of delivery.

(b) If in Seller's judgment the financial condition of Customer at any time does not justify the commencement or continuance of delivery on the terms specified herein, Seller may, in addition to all other remedies it may have at law or in equity, make a written demand for full or partial payment in advance, suspend performance until that payment is made, or cancel Customer's order.

(c) If Customer fails to pay any charges when due and payable, Customer agrees that Seller shall have the right to invoice and Customer shall pay all costs, including reasonable attorneys' fees expended in collecting overdue charges

and a late payment charge of one and one-half percent per month but not in excess of the lawful maximum on the unpaid balance.

[(d) Customer may pay Seller for Hardware in advance. If Customer does so not less than _____ (*specify period*) days prior to shipment, Customer shall be entitled to a discount equal to _____ percent of the purchase price. If the Hardware fails to meet the standard of performance specified herein after _____ (*specify period, e.g., 90*) consecutive calendar days from the date of installation, and Customer opts to terminate this Agreement, Seller shall return the full discounted purchase price.]

4.04. Taxes. All of the prices and license fees provided for by this Agreement are exclusive of all federal, state, municipal, or other political subdivision excise, sales, use, property, occupational, or like taxes now in force or enacted in the future and are therefore subject to increase equal to any such taxes Seller may be required to collect or pay upon the sale or delivery of the Products or Services purchased or licensed hereunder, except taxes based on Seller's income.

4.05. Terms of Shipment. All Products shall be shipped f.o.b. Seller's facility in _____ [*name of city*]. In the absence of specific instructions, Seller shall select the carrier, but the carrier shall not be construed to be an agent of Seller. Seller reserves the right to make partial shipments.

4.06. Insurance on Shipments. Seller shall provide "All Risk" transit insurance coverage on all Products shipped to Customer. That insurance coverage shall begin when the Products are tendered by Seller to the carrier and shall terminate upon Customer's receipt of the Products. Customer shall pay an insurance charge based on a rate of _____ [*specify, e.g., \$.50 per \$100*] of invoice value, excluding freight and tax. Settlement of all claims shall be made on the basis of repair or replacement, at Seller's option.

4.07. Cancellation of Shipment. Customer may cancel, without charge, the shipment of any Product provided that Seller receives written confirmation of any cancellation at least _____ [*specify, e.g., 30*] days prior to the scheduled shipment date. In the event that Customer cancels (or reschedules and subsequently cancels) the shipment of any unshipped Products less than _____ [*specify, e.g., 30*] days prior to the original scheduled shipment date, Customer agrees that it shall pay an additional handling charge of _____ [*specify, e.g., five*] percent of the purchase price or license fee for each item involved.

4.08. Security Interest. Customer hereby grants Seller a security interest in the Products to secure full payment. Customer agrees that upon Seller's request, it will execute and deliver to Seller a financing statement and other documents evidencing this security interest satisfactory for filing with the appropriate authorities.

4.09. Defense Against Infringement Claims. (a) Customer agrees to notify Seller _____ [*promptly or within _____ (specify) days*] of any action or claim alleging that the Products or Customer's use of the Products violates the trade secret, trademark, copyright, patent, or other proprietary rights of any other party, and further agrees to cooperate with Seller in the investigation and resolution of that action or claim.

(b) If Seller is so notified, Seller shall defend Customer against any and all such claims at its expense and shall pay any costs and damages awarded therein; provided that Seller shall have sole control of the defense of any such action and all negotiations for its settlement or compromise.

(c) Subject to the limitations in Sections 4.10, 4.14, and 4.15 of this Agreement, Seller shall indemnify and hold Customer harmless from any liability for damage, costs, or other loss incurred by Customer in connection with any such claim.

(d) Seller shall not indemnify Customer against any claim, costs, or liability based on Customer's modification or conversion of the Software and/or the subsequent use of that modification or conversion. Seller shall not have any

liability to Customer if the infringement or violation, or the claim thereof, is based upon the use of Products in combination with other equipment or software not made by Seller.

(e) At any time during the course of any litigation arising out of a claim of infringement of a United States patent or copyright [or other proprietary right], or, if in Seller's opinion, a Product is likely to become the subject of a claim of infringement of a United States patent or copyright [or other proprietary right], Seller, at its option and expense, shall either procure for Customer the right to continue using the Product, replace or modify the same so that it becomes noninfringing, or grant Customer a credit for the Product as depreciated and accept its return. The depreciation shall be an equal amount per year over the lifetime of the Product as established by Seller.

4.10. Customer's Hold Harmless Agreement. Customer shall hold Seller harmless against any expense, judgment, or loss for infringement of any patents, copyrights, or trademarks that result from Seller's use of designs, plans and specifications, or computer programs furnished by Customer. No costs or expenses shall be incurred for or on behalf of Seller without Seller's prior written consent.

4.11. Confidentiality of Materials. Except as otherwise provided in this Agreement, Customer agrees to maintain in confidence and not to disclose, reproduce, or copy any materials, data, documentation, or specifications that are provided by Seller pursuant to this Agreement and which are copyrighted, patented, trademarked, or otherwise marked as confidential, secret, or proprietary.

4.12. Support Services. Customer shall be entitled to support services for Products provided pursuant to this Agreement. "Support services" include assistance in implementation planning, systems analysis and design, installation, evaluation, and training of Customer personnel. Support services shall be provided _____ [specify, e.g., at the rate specified in the _____ (specify schedule) attached to this Agreement and incorporated herein by reference or at no additional charge].

4.13. Termination. Seller shall have the right to terminate this Agreement in the event the occurrence of any one of the following is not remedied within _____ [specify period] days following receipt of written notice thereof:

- (a) Failure of Customer to make financial arrangements satisfactory to Seller for the purchase of Products or Services;
- (b) Customer's failure or neglect to perform or observe any of its existing or future obligations under this Agreement, including, without limitation, the timely payment of any sums due Seller;
- (c) Any assignment of Customer's business for the benefit of creditors;
- (d) The filing of a petition in bankruptcy by or against Customer;
- (e) The appointment of a receiver, trustee in bankruptcy, or similar officer to take charge of all or part of Customer's property; or
- (f) The adjudication of Customer as a bankrupt.

4.14. Limitation of Remedies. Customer agrees that the sole remedies for the breach of any of the warranties contained in this Agreement and the sole remedies for Seller's liability of any kind with respect to the Products or Services provided pursuant to this Agreement shall be limited to the remedies provided in this Agreement. Customer further agrees that in no event shall Seller's liability to Customer for damages of any nature exceed the total charges paid or payable for either:

(a) The total charges paid or payable for Services during one year under this Agreement if the liability arises from service; or

(b) The purchase price of Products if the liability results therefrom.

4.15. Consequential Damages.

CUSTOMER AGREES THAT SELLER SHALL NOT BE LIABLE FOR ANY SPECIAL, INCIDENTAL, INDIRECT, OR CONSEQUENTIAL DAMAGES OR FOR THE LOSS OF PROFIT, REVENUE, OR DATA ARISING OUT OF THE SUBJECT MATTER OF THIS AGREEMENT, EVEN IF SELLER SHALL HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH POTENTIAL LOSS OR DAMAGE.

4.16. Other Products. Customer agrees that Seller shall have no responsibility for any hardware, software, or other items, or any services provided by any persons other than Seller.

4.17. Notices. Unless otherwise provided in this Agreement, any notice required or permitted by this Agreement to either party shall be deemed to have been duly given if in writing and delivered personally or mailed by first-class, registered, or certified mail, postage prepaid [or when deposited with a public telegraph company for transmittal with charges prepaid] and addressed (when intended for Customer) to _____ [specify address, including appropriate department] or (when intended for Seller) to _____ [specify address, including appropriate department] [or when transmitted to the other party by _____ (specify network name or designation) computer mail system].

4.18. Assignment of Contract. Customer shall not assign this Agreement or its rights without the prior written consent of Seller. Any attempt to make such an assignment without Seller's consent shall be void.

4.19. Amendments. Customer and Seller agree that this Agreement shall be modified only by a written agreement duly executed by persons authorized to execute agreements on behalf of Customer and Seller. The parties further agree that the terms, conditions, and prices contained in this Agreement shall prevail notwithstanding any variations or additional terms on any orders or other notifications submitted by Customer.

4.20. Nonwaiver. Customer and Seller agree that no failure to exercise, and no delay in exercising any right, power, or privilege under this Agreement on the part of either party shall operate as a waiver of any right, power, or privilege hereunder. Customer and Seller further agree that no single or partial exercise of any right, power, or privilege hereunder shall preclude further exercise thereof.

4.21. Severability. If any part of this Agreement shall be adjudged invalid by any court of competent jurisdiction, that judgment shall not affect or nullify the remainder of this Agreement and its effect shall be confined to the part immediately involved in the controversy adjudged.

4.22. Governing Law. This Agreement shall be deemed to have been made in, and shall be construed pursuant to, the laws of the State of California.

4.23. Entire Agreement. Customer acknowledges and agrees that this Agreement is the complete and exclusive statement of the mutual understanding of the parties and that this Agreement supersedes and cancels all previous written and oral agreements and communications relating to the subject matter of this Agreement.

4.24. Attorneys' Fees. If any legal action is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire Agreement.

4.25. Effect of Purchase Order. In the event of any conflict between this Agreement and the terms and conditions of any purchase order or similar document pursuant to which Customer entered into this Agreement, the terms and conditions of this Agreement shall control.

[Optional:]

4.26. Arbitration. Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration conducted in accordance with the then current Rules of the American Arbitration Association (the "Association,") strictly in accordance with the terms of this Agreement and the substantive law of the State of California. The arbitration shall be held at _____ [specify, e.g., the office of the Association located closest to the principal place of business of Customer], and shall be conducted by three arbitrators. At least one of the arbitrators shall be chosen from a panel of persons knowledgeable in data processing and business information systems and at least one of the arbitrators shall be an attorney. Judgment on an award rendered by the arbitrators may be entered and enforced in any court of competent jurisdiction. Neither party shall institute a proceeding hereunder until that party has furnished to the other party, by registered mail, at least _____ [specify number] days prior written notice of its intent to do so.

Executed this _____ day of _____, at _____ [city], California.

SELLER

_____ [name of corporation]

By _____ [signature]

[typed name and title]

CUSTOMER

_____ [name of corporation]

By _____ [signature]

[typed name and title]

EQUIPMENT PURCHASE SCHEDULE

Product Name	Product Manufacturer	Product Number	Purchase Price
_____	_____	_____	\$ _____
—			
_____	_____	_____	\$ _____
—			
_____	_____	_____	\$ _____
—			

SOFTWARE PURCHASE SCHEDULE

Product Name	Product Licensor	Product Number	Category	Fee
_____	_____	_____	_____	\$ _____

_____	_____	_____	_____	—
_____	_____	_____	_____	\$ _____
_____	_____	_____	_____	—
_____	_____	_____	_____	\$ _____
_____	_____	_____	_____	—

MAINTENANCE SERVICES SCHEDULE

Product Name	Product Number	Type of Service	Service Period	Base Charge
_____	_____	_____	_____	\$ _____
_____	_____	_____	_____	—
_____	_____	_____	_____	\$ _____
_____	_____	_____	_____	—
_____	_____	_____	_____	\$ _____
_____	_____	_____	_____	—

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Costs & Attorney Fees General Overview Commercial Law (UCC) Sales (Article 2) General Overview Commercial Law (UCC) Sales (Article 2) Warranties General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART IV. FORMS
A. Hardware Related Forms

22-57 California Legal Forms--Transaction Guide § 57.201

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.201 Computer Purchase Agreement--Computer Installed Under Prior Lease Agreement

[1] Comment

[a] Use of Form

This form is an agreement for the purchase of a business computer (as distinguished from a personal computer) that is already in place on the buyer's premises under a preexisting lease agreement. It deals solely with the sale of the hardware and does not include software license terms or maintenance provisions. For an integrated computer purchase agreement combining the sale of hardware, the licensing of software, and maintenance of the hardware, see § 57.200. For a separate commercial software license agreement, see § 57.221. For a separate computer maintenance agreement, see § 57.203.

[b] Warranty Provisions

This agreement includes warranty [see § 57.201[2], PP 7, 8], warranty remedy [see § 57.201[2], P 8], warranty limitation [see § 57.201[2], P 9], and warranty disclaimer provisions [see § 57.201[2], P 10] designed for use in connection with computers used in business rather than for personal, family, or household purposes. The service warranty provisions in this form differ from those contained in § 57.200 in that this form identifies different classes of equipment and applies a different level of warranty obligation to each class. For discussion of the law of warranty and warranty disclaimers, see § 57.200[1].

[2] FORM

Computer Purchase Agreement - Computer Installed Under Prior Lease Agreement

COMPUTER PURCHASE AGREEMENT

_____[*name of buyer*], _____[*address*], referred to as "Buyer," and
 _____[*name of seller*], _____[*address*], referred to as "Seller" or "Licensor," in
 consideration of the promises made in this Agreement and intending to be legally bound, agree as follows:

1. Agreement to Purchase. Buyer agrees to purchase from Seller and Seller agrees to sell to Buyer, pursuant to the terms and conditions of this Agreement, the computer equipment ("Equipment") presently installed on Buyer's premises pursuant to the Lease Agreement dated _____[*date*], and listed on the purchase schedule attached to this Agreement and incorporated herein by reference.

2. Purchase Price. The purchase price for each item of Equipment shall be as specified on the attached purchase schedule. Payment in full shall be tendered to Seller on execution of this Agreement.

3. Tax Liability. There shall be added to each price specified in this Agreement amounts equal to any taxes, however designated, levied, or based, that are assessed as a result of the purchase and sale of the Equipment pursuant to this Agreement, including any state and local sales or use taxes and any federal, state, or local privilege or excise taxes. Any personal property taxes assessable on the basis of the value of the Equipment during the period beginning with the date of this Agreement shall be paid by Buyer.

4. Title. Title to the Equipment shall pass to Buyer on the date on which this Agreement is executed by Seller (the "date of purchase").

5. Risk of Loss. Prior to the date of purchase, the risk of loss to the Equipment shall be on Seller. The risk of loss shall pass to Buyer on the date of purchase.

6. Equipment Changes. Buyer may order additional features and model conversions from Seller for installation on the Equipment if they can be installed in the field, and Seller shall install any such additional features or conversions, subject to Seller's then prevailing prices, terms, and conditions.

7. Warranty of Title. (a) Seller warrants that it has good title to the Equipment and the right to sell it to Buyer free of any proprietary rights of any other party or any other encumbrance whatever.

(b) Seller shall defend Buyer against any and all claims that the Equipment or Buyer's use thereof under this Agreement violates the trade secret, trademark, copyright, patent, or other proprietary right of any other party asserted by any third party. However, Buyer agrees that Seller shall not be liable for consequential damages arising out of the subject matter of this Paragraph, even if Seller has been advised of the possibility thereof. Buyer shall notify Seller of the assertion of any such claim and shall cooperate with Seller in the investigation and resolution thereof.

(c) Seller shall not indemnify Buyer against any claim or liability based on Buyer's modification or conversion of the Equipment and/or the subsequent use of that modification or conversion.

8. Limited Service Warranty.

(a) **BUYER AGREES THAT ITS PURCHASE OF ITEMS OF EQUIPMENT THAT HAVE BEEN INSTALLED ON BUYER'S PREMISES FOR MORE THAN ONE YEAR PRIOR TO THE DATE OF PURCHASE (hereinafter "WARRANTY CATEGORY I PROPERTY") IS ON AN "AS IS" BASIS.** Service on and replacement parts for Warranty Category I Property shall be furnished by Seller at the applicable hourly rates, prices, and terms current at the time furnished.

(b) Seller warrants each item of Equipment that has been installed on Buyer's premises for less than one year before the date of purchase (hereinafter "Warranty Category II Property") to be free from defects in material and workmanship for

the one-year period beginning on the date of installation.

(c) Seller shall maintain in good working order each item of Warranty Category II Property for the one-year period beginning on the date of installation _____ [*specify rate, e.g., without additional charge to Buyer or at Seller's then current applicable hourly rates and terms*]. On notice of any malfunction or defect, Seller shall make all necessary adjustments, repairs, and parts replacements during the warranty period for Warranty Category II Property. All replacement parts shall be new or equivalent to new in performance. All replaced parts shall become the property of Seller on an exchange basis. [Seller, at its option, may store maintenance equipment or parts it deems necessary to fulfill this warranty on Buyer's premises.].

(d) Service pursuant to this warranty shall be furnished by Seller from its _____ [*designate location*] facility. Seller shall have full and free access to the Equipment to perform warranty service. Buyer shall promptly inform Seller of any change in location of any Warranty Category II Property during the warranty period.

(e) Service outside the scope of this warranty shall be furnished by Seller at its then current applicable hourly rates and terms. Parts furnished outside the scope of this warranty shall be furnished by Seller at its then current applicable prices and terms.

9. Warranty Limitations. (a) The foregoing warranties shall not apply to the repair of damage or increase in service time caused by accident, transportation of the Equipment, neglect, misuse, or alterations or modifications (including any deviation from circuit or structural design, installation or removal of features proprietary to Seller, or any other modification or maintenance), whenever any of the foregoing are performed by parties other than Seller.

(b) The foregoing warranties shall not apply if Buyer fails to provide a suitable installation environment with all facilities prescribed by the applicable installation manual, uses supplies not meeting Seller's specifications, or makes use of the Equipment for purposes for which the Equipment was not designed.

(c) Seller shall not be responsible for failure to provide service or parts when that failure results from causes beyond Seller's control or when parts or service are required to adjust or repair any item of Equipment and it would be impractical to provide parts or service because of alterations in the Equipment or its connection by mechanical or electrical means to another computer or device or if the Equipment is located outside of _____ [*location, e.g., the United States*].

10. Warranty Disclaimer.

(a) **BUYER AGREES THAT THE FOREGOING WARRANTIES ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, NONINFRINGEMENT AND FITNESS FOR A PARTICULAR PURPOSE.**

(b) Buyer agrees that Seller shall not be liable for any lost profits, or for any claim or demand against Buyer by any other party other than a claim for patent infringement as provided herein.

(c) Buyer further agrees that Seller shall not be liable for consequential damages arising out of the subject matter of this Agreement, even if Seller has been advised of the possibility thereof.

11. Patent Claims. Seller agrees to defend, at its own expense, any action brought against Buyer to the extent that the action is based on a claim that the Equipment or the operation of the equipment with software furnished by Seller infringes a United States patent ("patent infringement claim"). Seller further agrees to pay all costs and damages finally awarded against Buyer pursuant to any patent infringement claim. Seller's obligation is conditioned on the following:

- (a) Seller shall be notified promptly in writing by Buyer of any notice of patent infringement claim.
- (b) Seller shall have sole control of the defense of any patent infringement action and all negotiations for its settlement or compromise.
- (c) If any item of Equipment, or the operation of the equipment, becomes, or in Seller's opinion is likely to become, the subject of a patent infringement claim, Buyer shall permit Seller, at its option and expense, either to procure for Buyer the right to continue using the Equipment, to replace or modify the Equipment so that it becomes noninfringing, or to grant Buyer a credit for the item or items of Equipment involved, as depreciated, and accept their return. Depreciation shall be computed _____ [*specify, e.g., in the same manner as depreciation is computed for federal income tax purposes*].
- (d) Seller shall have no liability to Buyer with respect to any patent infringement claim based on any of the following:
- (1) The combination or use of the Equipment with computers or other devices not manufactured by Seller;
 - (2) The operation of the Equipment pursuant to any software other than, or in addition to, software furnished by Seller; or
 - (3) The modification by Buyer of the Equipment or of software furnished by Seller.
- (e) Seller shall not be liable for any consequential damages arising out of any patent infringement claim.
- (f) The foregoing states the entire liability of Seller with respect to infringement of patents.

12. Assignments. Buyer shall not assign this Agreement or its rights under this Agreement without the express prior written permission of Seller. Buyer agrees that any attempt to assign any rights, duties, or obligations that arise under this Agreement without Seller's express prior written permission shall be void.

13. Entire Agreement. Buyer and Seller agree that this Agreement constitutes the complete and exclusive agreement between them relating to the subject matter of this Agreement and that it supersedes all proposals or other communications, oral or written, between them relating to the subject matter of this Agreement.

14. Governing Law. This Agreement shall be governed by, and the rights of the parties shall be construed under, the laws of the State of California.

15. Amendments. This Agreement may be amended only by a written agreement executed on behalf of Seller and Buyer. The term "this Agreement" as used herein includes any amendment made in accordance with this paragraph.

16. Attorneys' Fees. If any legal action is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees, in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire Agreement.

Executed on _____, at _____ [city], California.

SELLER

_____ [name of corporation]

By _____ [signature]

[typed name and title]

BUYER

_____ [name of corporation]

By _____ [signature]

[typed name and title]

PURCHASE SCHEDULE

Equipment Name	Equipment Maker	Equipment Number	Price	Installation Date
_____	_____	_____	\$ _____	_____
_____	_____	_____	_____	_____
_____	_____	_____	\$ _____	_____
_____	_____	_____	_____	_____
_____	_____	_____	\$ _____	_____
_____	_____	_____	_____	_____

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART IV. FORMS
A. Hardware Related Forms

22-57 California Legal Forms--Transaction Guide § 57.202

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.202 Computer Lease Agreement

[1] Comment

[a] Use of Form

This form is a computer lease agreement for use by a firm that leases computer equipment for commercial purposes. It does not include provisions for the maintenance of the system being leased. Instead, it includes a requirement that the lessee execute a separate maintenance agreement [see § 57.202[2], P 7]. For a computer maintenance agreement, see § 57.203.

[b] Warranty Provisions

This form contains warranty provisions applicable to commercial as distinct from consumer agreements [see § 57.202[2], PP 13-15 of form]. For discussion of the California Commercial Code provisions relating to warranty provisions and disclaimers used in agreements between a computer lessor and a commercial lessee, see § 57.200[1].

This form may be adapted to lease a computer to a consumer by replacing the warranty provisions included in this form with the consumer warranty provisions contained in § 57.221. For coverage of warranties and warranty disclaimers and waivers used in consumer transactions, see § 57.221[1][b].

[2] FORM

Computer Lease Agreement

COMPUTER LEASE

Lease No.: _____

_____[*name of lessor*], _____[*address*] ("Lessor"), and
 _____[*name of lessee*], _____[*address*] ("Lessee") in consideration of the promises
 made in this Agreement and intending to be legally bound, agree as follows:

1. Lease. Lessor leases to Lessee, and Lessee hires from Lessor, the use of the computer equipment ("Equipment") described in the Lease Schedule attached to and made a part of this Agreement, subject to the terms and conditions of this Lease.

2. Ownership. Lessee agrees that all Equipment is and shall remain Lessor's property and that it may be removed from Lessee's premises by Lessor or its duly authorized agents at any time after termination of this Agreement.

3. Quiet Possession and Use. (a) Lessor covenants with Lessee that Lessee shall be entitled to quiet possession of the Equipment under and during the term of this Agreement, in accordance with the provisions of this Agreement, as long as Lessee is not in default under the Agreement.

(b) Lessee shall be entitled to unlimited use of the Equipment and may sell time on the Equipment to third parties.

4. Term of Agreement. This Agreement shall be effective from the date of its execution by Lessor and Lessee, and shall remain in force until terminated by Lessee on _____[*number*] days prior written notice to Lessor; provided, however, that Lessee shall not, except as otherwise expressly permitted herein, terminate this Agreement as to any item of equipment covered by this Lease prior to a date _____[*number*] months from the first day of the first month following the commencement date (the "Initial Term").

5. Commencement Date. The commencement date of this Agreement for the purpose of determining when the monthly rental charges and Initial Term begin shall be the date the Equipment is installed and accepted by Lessee as ready for use. Lessee shall advise Lessor promptly in writing of its confirmation that each item of Equipment is in satisfactory operating condition, the date of that confirmation, and its acceptance of each item of Equipment as of that date.

6. Rental Charges and Taxes. (a) Lessee shall pay Lessor for the use of each item of Equipment the monthly availability charge set forth for that item in the Lease Schedule attached to and made a part of this Agreement.

(b) Lessee shall also pay Lessor the amount of any taxes due on the Equipment or its use or on this Agreement, no matter how designated, levied, or based, including any state and/or local privilege or excise taxes based on gross revenue and any taxes or amounts in lieu thereof paid or payable by Lessor with respect to the Equipment or its use or on this Agreement, _____[*inclusive or exclusive*] of personal property taxes assessed on the Equipment and exclusive of taxes based on net income.

(c) The monthly availability charge shall be payable monthly in advance. Charges for taxes due and charges made under any other provision of this Agreement shall be made by invoice, are due immediately upon receipt by Lessee, and shall be paid by Lessee when invoiced. Payments due Lessor under this Agreement shall be made to Lessor at _____[*address*] or to such other person and place as may be designated in writing from time to time by Lessor.

7. Maintenance. Lessee shall enter into and maintain in force a Maintenance Agreement covering maintenance of each item of Equipment. Lessee shall cause the other party to the Maintenance Agreement to keep the Equipment in good working order in accordance with the provisions of that agreement and make all necessary adjustments and repairs to the Equipment. If the agreement is made with the manufacturer of the Equipment, the manufacturer is hereby authorized to accept the directions of Lessee, and Lessee shall allow the manufacturer full and free access to the Equipment.

8. Manufacturer's Maintenance Charges. Lessee agrees that all of the Equipment manufacturer's maintenance charges, whether under the Maintenance Agreement (if made with the manufacturer) or otherwise, including the expenses, if any, of the manufacturer's customer engineers charged by the manufacturer in connection with its maintenance and repair services, shall be borne by Lessee. Charges for any repairs or replacements required as a result of any willful or negligent act of Lessee, any user of the Equipment, or improper repair or maintenance, shall be borne by Lessee.

9. Facilities. Lessee shall meet all of the requirements for installation of the Equipment specified in the manufacturer's installation manual, including a suitable place of installation with appropriate air conditioning and suitable electric power supply. Lessee's installation and facilities shall at all times meet the minimum standard of the National Board of Fire Underwriters for the protection of electronic computer systems as recommended by the National Fire Protection Association.

10. Supplies. Lessee shall be responsible for and shall furnish all supplies consumed or required by the Equipment. All supplies, including data processing cards, magnetic tapes, disks, and other storage media shall meet the manufacturer's applicable specifications.

11. Location. Lessee agrees that during the term of this Agreement, the Equipment shall be located at _____[address] and shall not be moved without the prior express written consent of Lessor.

12. Risk of Loss. (a) Lessee agrees that during the period that any item of Equipment is installed on its premises, Lessee shall be responsible for loss or damage thereto caused by fire, fire suppressant gasses or chemicals, water damage whether from sprinkler leakage or otherwise, lightning, windstorm or tornado, explosion, smoke or smudge, aircraft or motor vehicle damage, earthquake, collapse of buildings or structures, strikes, riots, civil commotion, vandalism and malicious mischief, burglary and theft. Lessee further agrees to maintain a policy of insurance against any of these risks for which insurance can be purchased and to designate Lessor as the loss payee. Lessee shall not be responsible for loss or damage to the Equipment caused by or as a result of hostile or warlike action in time of peace or war; insurrection, rebellion, revolution, or civil war; or nuclear reaction, radiation, or contamination.

(b) If any item of Equipment is damaged, lost, or destroyed by any means for which Lessee is responsible, Lessee shall be liable for the expense of repairing that item, or, if repair cannot be made, for an amount equal to the cost of purchasing similar equipment from the manufacturer, less the amount of any insurance or other recovery received by Lessor.

(c) Lessee agrees that upon the occurrence of any irreparable damage, loss, or destruction to any item of Equipment for any reason, Lessor may terminate Lessee's rights under this Agreement as to each and every item of Equipment [*add if right to terminate will be limited to damaged, lost, or destroyed equipment: irreparably damaged, lost, or destroyed*].

13. Warranty of Title. (a) Lessor warrants that it has good title to the Equipment and the right to lease it to Lessee free of any proprietary rights of any other party or any other encumbrance whatever.

(b) Lessor shall defend Lessee against any and all claims that the Equipment or Lessee's use thereof under this Agreement violates the trade secret, trademark, copyright, patent, or other proprietary right of any other party asserted by any third party. Lessor shall indemnify and hold Lessee harmless from any liability for damage, costs, or other loss incurred by Lessee in connection with any such claim. Lessee shall notify Lessor of the assertion of any such claim and shall cooperate with Lessor in the investigation and resolution thereof. However, Lessor shall not be liable for any consequential damages arising out of the subject matter of this Agreement.

(c) Lessor shall not indemnify Lessee against any claim or liability based on Buyer's modification or conversion of the

Equipment and/or the subsequent use of that modification or conversion.

14. Enforcement of Manufacturer's Warranty. Upon receipt of a written request from Lessee during the term of this Agreement, Lessor shall take all reasonable action requested by Lessee to enforce any manufacturer's warranty, express or implied, issued on or applicable to any item of Equipment and which is enforceable by Lessor in its own name. Lessor further represents that it will obtain for Lessee all service furnished by the manufacturer in connection therewith [; provided, however, that Lessor shall not be obligated to commence or resort to any litigation to enforce any such warranty unless Lessee pays all expenses in connection with that litigation]. If any such warranty is enforceable by Lessee in its own name, upon receipt of a written request from Lessor during the term of this Agreement, Lessee shall take all reasonable action requested by Lessor to enforce that warranty, and Lessee shall obtain for Lessor all service furnished by the manufacturer in connection therewith.

15. Warranty Disclaimer.

EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, LESSOR MAKES NO WARRANTIES, EITHER EXPRESS OR IMPLIED, AND SHALL NOT, BY VIRTUE OF HAVING LEASED THE EQUIPMENT COVERED BY THIS AGREEMENT, BE DEEMED TO HAVE MADE ANY REPRESENTATION OR WARRANTY AS TO THE MERCHANTABILITY, FITNESS, DESIGN, OR CONDITION OF, OR THE QUALITY OF THE MATERIAL OR WORKMANSHIP IN THE EQUIPMENT.

16. Indemnity. Lessor shall not be liable to Lessee for, and Lessee shall indemnify and hold Lessor harmless with respect to any third party from, any liability, claim, loss, damage, or expense of any kind or nature caused directly or indirectly by the inadequacy of any item of the Equipment for any purpose; any deficiency or defect in any item of the Equipment; the use or performance of any item of the Equipment; any interruption or loss of service, use, or performance of any item of the Equipment; or any loss of business or other consequential damage whether or not resulting from any of the foregoing.

17. Alterations and Attachments. Upon prior written notice to Lessor and receipt of express written approval, Lessee, at its own expense, may make alterations in or add attachments to the Equipment; provided, however, that such alterations or attachments shall not interfere with the normal operation of the Equipment. Unless Lessor agrees otherwise in writing, all such alterations and attachments shall be removed by Lessee and the Equipment shall be restored to its original condition, reasonable wear and tear excepted, upon termination of this Agreement. If the alteration or attachment interferes with the normal and satisfactory operation or maintenance of any item of the Equipment in a manner that increases the cost of maintenance or creates a safety hazard, Lessee, upon receipt of notice from Lessor to that effect, shall promptly remove the alteration or attachment and restore the Equipment to its previous condition.

18. Transportation Expenses. All transportation, rigging, and drayage charges related to the Equipment, both for delivery to Lessee and return to Lessor, shall be paid by Lessee. Necessary packing materials for the return of the Equipment and a representative to supervise the packing will be furnished to Lessee by Lessor [without charge]. Lessee shall furnish any labor that may be necessary for unpacking the Equipment upon delivery to Lessee and for repacking it for return to Lessor.

19. Notice of Incident or Claim. (a) Lessee shall notify Lessor in writing of each accident or incident arising out of the apparent or alleged improper manufacture, functioning, or operation of any item of the Equipment, immediately after the occurrence thereof. The notice shall identify the item of Equipment and include the time, place, and nature of the accident or incident, the damage, the names and addresses of any parties involved, persons injured, witnesses, and owners of any property damaged, and any other information that may be known.

(b) Lessee shall promptly advise Lessor of all correspondence, papers, notices, and documents of any kind whatsoever

received by Lessee in connection with any claim or demand involving or relating to any alleged improper manufacture, functioning, or operation of any item of Equipment or charging Lessor with liability, and shall, together with Lessee's employees, aid in the investigation and defense of all such claims and in the recovery of damages from any third persons liable.

(c) Upon request, Lessee shall permit persons designated by Lessor to examine each item of Equipment.

20. Remedy for Default by Lessor. If Lessor defaults in the performance of any of its obligations under this Agreement for a continuous period of _____[specify number] days after receipt by Lessor of written notice of the default from Lessee, Lessee, at Lessee's option, may terminate this Agreement as of the end of that period by delivering notice to Lessor together with payment to Lessor of all sums due hereunder to the date of Lessor's default.

21. Remedies for Default by Lessee. If Lessee defaults in the payment of any sum of money due hereunder beyond the _____[specify number] day after receipt by Lessee of written notice of default from Lessor, or in the performance of any other of its obligations under this Agreement for a continuous period of _____[specify number] days after receipt by Lessee of written notice of default from Lessor, Lessor, at its option, may do any or all of the following: terminate this Agreement as of the end of that period by delivering notice of termination to Lessee; take immediate possession of any or all items of Equipment, wherever situated, and for that purpose, enter upon any premises without liability for so doing, whether or not this Agreement is terminated; and sell, dispose of, hold, use, or lease any repossessed item of Equipment as Lessor in its sole discretion may decide. Lessee agrees that it shall remain liable for the remaining unpaid rent for the balance of the term of this Agreement and for all other charges payable by Lessee in accordance with this Agreement.

22. Assignments. Lessee shall not assign this Agreement or sublet any item of Equipment without the prior express written consent of Lessor, which consent shall not be unreasonably withheld. Lessee acknowledges that the terms and conditions of this Agreement have been fixed in anticipation of the possible assignment of Lessor's rights under this Agreement in and to the Equipment as collateral security to a third party (the "Assignee") which will rely on and be entitled to the benefit of the provisions of this Agreement. Lessee agrees with Lessor and that Assignee to recognize in writing any such assignment within _____[specify number] days after receipt of written notice thereof and thereafter to pay all sums due Lessor directly to the Assignee as directed by the notice. No such assignment shall transfer to the Assignee any of Lessor's obligations hereunder, and any such assignment shall be subject to Lessee's rights to the use and possession of the Equipment under this Agreement as long as Lessee is not in default under this Agreement.

23. Parties Bound. This Agreement shall be binding on and inure to the benefit of Lessor and Lessee and their respective successors and (to the extent specified in any assignment) assigns.

24. Notices. Any notices or reports required by this Agreement to be given by one party to the other party shall be made in writing to that party at the address shown at the beginning of this Agreement or at such other address as that party may designate in writing from time to time.

25. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

26. Attorneys' Fees. If any legal action is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire Agreement.

Executed on _____, at _____[city], California.

LESSOR

_____ [name of corporation]

By _____ [signature]

[typed name and title]

LESSEE

_____ [name of corporation]

By _____ [signature]

[typed name and title]

LEASE SCHEDULE

Monthly Equipment Name	Equipment Manufacturer	Equipment Number	Availability Charge
_____	_____	_____	_____
—			
_____	_____	_____	_____
—			
_____	_____	_____	_____
—			

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law
(UCC)Leases (Article 2A)Formation & ConstructionWarranties



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART IV. FORMS
A. Hardware Related Forms

22-57 California Legal Forms--Transaction Guide § 57.203

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.203 Computer Maintenance Agreement

[1] Comment

[a] Use of Form

This form is a computer maintenance agreement designed for use between the purchaser or lessee of a computer or computer system and a computer maintenance firm. Generally, computer maintenance is performed by the party from whom the computer is acquired, either under the terms of the computer sale or lease agreement or under a separate maintenance agreement entered into by the buyer or lessee pursuant to a requirement in the sale or lease agreement [see § 57.202]. For an example of maintenance provisions included in a contract for the sale of a computer, see § 57.200.

This agreement is essentially a service contract. For detailed discussion of possessory liens for services and repairs, the preliminary determinations prior to drafting a service contract, and a guide to specific service contract provisions, see Ch. 92, *Service Contracts* .

[b] Warranty Provisions

This form includes warranty provisions designed for use in connection with computers used for commercial purposes [see P 7 of form]. It also includes alternate warranty provisions ("consumer goods" warranty provisions) to use if the agreement is to cover personal computers in home use [see § 57.203[2], P 7(f)]. The federal Magnuson-Moss Consumer Warranty Act [15 U.S.C. §§ 2301-2312] and the California Song-Beverly Consumer Warranty Act [Civ. Code §§ 1794.4, 1794.41; see Civ. Code §§ 1790-1795.8] apply to warranties and service contracts on consumer goods. For a discussion of the application of these statutes, see Ch. 92, *Service Contracts* .

[2] FORM

Computer Maintenance Agreement

COMPUTER MAINTENANCE AGREEMENT

_____[*name of computer operator*], _____[*address*] ("Customer"), and
 _____[*name of maintenance contractor*], _____[*address*], ("Contractor"), in
 consideration of the promises made herein and intending to be legally bound, agree as follows:

[*Optional: The following recitals are for use when maintenance agreement is entered into with seller or lessor simultaneously with computer sale or lease agreement:*]

Recitals

Concurrently with this Agreement, Contractor and Customer entered into an agreement (the
 _____["Lease Agreement" or "Purchase Agreement"]) pursuant to which Customer
 _____[leased or purchased] _____[*describe computer and other equipment including*
serial or identification number or the computer equipment listed on the purchase order attached to the
 _____(Lease Agreement or Purchase Agreement)] (the "Equipment"). That agreement requires the
 Customer to maintain and service the Equipment pursuant to a maintenance agreement.

[*Continue with the following:*]

1. Maintenance Services. Contractor shall maintain and service _____[*describe computer and other*
equipment or the computer equipment listed on the purchase order attached to this Agreement and incorporated herein
 by reference] (the "Equipment") and keep the Equipment in good working order. Contractor shall provide scheduled
 preventive maintenance during regular business with the schedule to be based on the specific needs of the Equipment as
 determined by Contractor. In addition, Contractor shall provide unscheduled remedial maintenance ("on-call service")
 as and when needed. Both scheduled and unscheduled service maintenance shall include lubrication, adjustments, and
 replacement of parts deemed necessary by Contractor.

2. Exclusions. The service and maintenance performed pursuant to this Agreement shall not include any of the
 following:

- (a) Electrical work external to the Equipment.
- (b) Furnishing of supplies or accessories.
- (c) Painting or refinishing the Equipment or furnishing the material therefore.
- (d) Making specification changes.
- (e) Performing services connected with relocation of the Equipment.
- (f) Repairing damage resulting from, or furnishing parts required as a result of, causes other than ordinary wear and tear
 including, without limitation, neglect, misuse (including faulty repair or maintenance by unauthorized parties),
 accidents, failure of electrical power, air conditioning, humidity control, or acts of God.

[*Add if contractor is seller of the equipment:*]

(g) Adding, removing, servicing, or maintaining accessories, attachments, or other devices not furnished by Contractor.

[Continue with the following:]

3. Parts. Contractor shall furnish parts as necessary [add if contractor is seller of the equipment:, free of charge during the Equipment warranty period,] _____ [specify charge, e.g., at Contractor's then current scheduled price or on an exchange basis, regardless of when installed] and shall either be new or equivalent to new in performance when used in the Equipment.

4. Charges. (a) Charges for scheduled preventive maintenance performed during regular business hours, that is, the _____ [number] consecutive hours between _____ A.M. and _____ P.M., Monday through Friday (except for legal holidays) shall be at the base rate of \$ _____ per _____ [hour or visit]. [Optional for use if base rate is an hourly rate: There shall be no hourly scheduled preventive maintenance charge for time spent during a service call by maintenance personnel after arrival at the site while awaiting arrival of additional maintenance personnel and/or delivery of parts.]

(b) Charges for on-call service shall be at the rate of \$ _____ per hour Monday through Friday and \$ _____ per hour Saturday through Sunday and holidays, plus mileage at the rate of _____ [specify, e.g., 20 cents per mile] and other travel expenses of \$ _____ per hour Monday through Sunday, and additional expenses at actual cost.

(c) There shall be no on-call service charge for maintenance required within _____ [specify period, e.g., 48] hours after any maintenance service resulting from a recurrence of the same malfunction without fault or negligence of Customer [, its employees, officers, or computer operators] or for on-call service required when the scheduled preventive maintenance preceding the malfunction has not been performed, unless not performed at the request of or because of actions taken by Customer.

(d) If unscheduled remedial maintenance is commenced during regular business hours and is continued beyond that time, _____ [specify terms, e.g., only hourly charges, at the rate specified in Paragraph 4(b) above, shall apply, beginning _____ (specify, e.g., immediately after the end of the regular business hour period or other)].

5. Payment of Charges. Customer agrees to pay all maintenance charges billed by Contractor. All charges for services will be invoiced in advance. Partial billings will be prorated on the basis of a 30-day month.

6. Term. This Agreement shall be effective from the date of its execution by Contractor and Customer and shall remain in force until terminated by Customer on _____ [number] days prior written notice to Contractor.

7. Warranty. (a) Contractor warrants that under normal conditions of use and operation, the services furnished pursuant to this Agreement shall be free from defects in workmanship and that the parts furnished pursuant to this Agreement shall be free from defects in workmanship and material.

(b) Contractor further warrants that the parts furnished pursuant to this Agreement shall conform to the Equipment manufacturer's published specifications at the time of delivery to Customer. Contractor's obligation under this warranty is limited to the repair or replacement, at its option, of any part which, within _____ [specify period] days after installation and acceptance, is established by Contractor not to be in conformity with the Equipment manufacturer's published specifications.

(c) The foregoing warranty and conditions shall apply to any repaired or replaced product, part, or component supplied

by Contractor.

(d) Customer's remedies are limited to Contractor's obligations as expressly stated herein.

(e) This warranty extends only to Customer and not to any third parties. **IN NO EVENT SHALL CONTRACTOR BE LIABLE TO CUSTOMER OR ANYONE ELSE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES, HOWEVER OCCASIONED.**

[First alternative: use the following disclaimer only in commercial equipment maintenance agreements:]

(f) **THIS WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS.**

[OR]

[Second alternative: use the following in consumer product maintenance agreements:]

(f) **CUSTOMER ACKNOWLEDGES THAT ALL PARTS ARE SOLD ON AN "AS IS" BASIS, THAT THE ENTIRE RISK AS TO THEIR QUALITY AND PERFORMANCE IS ON CUSTOMER, AND THAT SHOULD THEY PROVE DEFECTIVE (EXCEPT AS EXPRESSLY WARRANTED HEREIN) CUSTOMER AND NOT CONTRACTOR ASSUMES THE ENTIRE COST OF ALL NECESSARY SERVICING, REPAIR, OR CORRECTION. EXCEPT AS EXPRESSLY SET FORTH ABOVE, NO OTHER WARRANTIES ARE MADE AND CONTRACTOR EXPRESSLY DISCLAIMS ALL WARRANTIES NOT STATED HEREIN.**

[Continue with the following:]

8. Access to Equipment. Contractor's maintenance personnel shall have free access to the Equipment for the purpose of providing maintenance service.

9. Delays. Contractor shall not be liable for any delay in performance directly or indirectly resulting from acts of Customer, its agents, employees, or subcontractors, or causes beyond the control of Contractor. "Causes beyond the control of Contractor" include, but are not limited to:

(a) Acts of God.

(b) Acts of a public enemy.

(c) Acts of the United States or the District of Columbia, any State or Territory of the United States, or any of their political subdivisions.

(d) Fire.

(e) Flood.

(f) Epidemics.

(g) Quarantine restrictions.

(h) Strikes, civil commotions, or revolution.

(i) Freight embargoes.

(j) Unusually severe weather conditions.

(k) Default of Contractor's subcontractors or suppliers.

10. Parties Bound. This Agreement shall be binding on and inure to the benefit of Contractor and Customer and their respective successors and (to the extent specified in any assignment) assigns.

11. Notices. Any notices or reports required by this Agreement to be given by one party to the other party shall be made in writing to that party at the address shown at the beginning of this Agreement or any other address that may be designated in writing from time to time by that party.

12. Customer's Right to Cancel. Within _____ [30 or more] days after receipt of this Contract the Buyer may cancel the Contract and receive a refund of the full amount paid if the Buyer provides a written notice of cancellation to the Contractor at the address specified in this Agreement, provided that no claim has been made against the contract during that _____ [30 or more] day period. If a claim has been made during that period, the Buyer shall be entitled to a pro rata refund, based on _____ [elapsed time or another objective measure of use, e.g., the retail value of any service performed] if the Buyer provides a written notice of cancellation to the Contractor at the address specified in this Agreement.

After the expiration of _____ [30 or more] days following the receipt of this Contract, the Buyer may cancel the Contract and receive a pro rata refund, based on _____ [elapsed time or another objective measure of use, e.g., the retail value of any service performed] if the Buyer provides a written notice of cancellation to the Contractor at the address specified in this Agreement. [Add if desired: Cancellation after the expiration of the _____ (30 or more)-day period shall be subject to _____ (a cancellation or an administrative) fee of \$ _____ (amount that does not exceed 10 percent of the price of the contract or \$25.00, whichever is less)].

[Optional:]

13. Dispute Resolution. In case of a dispute between the Buyer and the Contractor, the parties agree to settle the dispute as follows: _____ [describe details of any informal dispute settlement process, such as arbitration].

[Continue with the following:]

14. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

15. Attorneys' Fees. If any legal action is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire Agreement.

Executed on _____ [date], at _____ [city], California.

CUSTOMER

[*name of corporation*]

By _____ [signature]

[*typed name and title*]

CONTRACTOR

[*name of corporation*]

By _____ [signature]

[*typed name and title*][*address and telephone number*]**Legal Topics:**

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection Magnuson-Moss Warranty Act General Overview Contracts Law Types of Contracts General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
 CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
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22-57 California Legal Forms--Transaction Guide § 57.204

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.204 Distribution Agreement Between Computer Equipment Manufacturer and Distributor

[1] Comment

[a] Use of Form

This form is a distribution agreement between a computer equipment manufacturer and a distributor. It grants the distributor the right to sell specified computer equipment within a designated territory. It may also be adapted for use between a distributor and a retailer or for the distribution of computer software at either the manufacturer-distributor level or the distributor-retailer level. For an agreement between the author of a computer program and a software producer granting the producer a license to mass produce and distribute the program, see § 57.226.

This form provides that the manufacturer will sell the computer equipment to the distributor, who in turn will resell it to the public. For an agreement for sale on consignment, containing consignment language that may be used to adapt this form for such an arrangement, Ch. 52, *Sale of Goods Under the Uniform Commercial Code*, § 52.206. For a sales agent agreement under which the distributor acts merely as an agent and receives a commission for its sales services, see Ch. 91, *Contracts With Sales Representatives*, § 91.02. For additional distributor agreements and provisions, see Ch. 91, *Contracts With Sales Representatives*.

[b] Antitrust Considerations

A distribution contract that provides for an exclusive dealing arrangement may have antitrust implications. Especially pertinent is Section 3 of the Clayton Act [15 U.S.C. § 12 *et seq.*], which makes it unlawful for any person engaged in interstate or foreign commerce to lease, sell, or contract to sell goods or commodities for resale on the condition, agreement, or understanding that the lessee or purchaser must not deal in goods of a competitor, when the effect of that transaction may be to substantially lessen competition or tend to create a monopoly in any line of commerce [15 U.S.C. § 14]. Section 3 of the Clayton Act is considerably broader than the Sherman Act [see 15 U.S.C. § 1 *et seq.*] and, thus, if a particular arrangement does not violate the Clayton Act, it will not violate the Sherman Act [see *Times-Picayune*

Pub. Co. v. United States (1952) 345 U.S. 594, 608, 609, 73 S. Ct. 872, 97 L. Ed. 1277]. Exclusive dealing arrangements may also be subject to the prohibition against unfair methods of competition contained in Section 5 of the Federal Trade Commission Act [see *Times-Picayune Pub. Co. v. United States* (1952) 345 U.S. 594, 609, 73 S. Ct. 872, 97 L. Ed. 1277].

The Clayton Act applies to corporations [15 U.S.C. § 12], associations [15 U.S.C. § 12], and individuals [*Hoffman Motors Corp. v. Alfa Romeo S.p.A.* (S.D.N.Y. 1965) 244 F. Supp. 70, 82], and is designed to suppress combinations to restrain competition and attempts to monopolize [*Balian Ice Cream Co. v. Arden Farms Co.* (S.D. Cal. 1952) 104 F. Supp. 796, 799, *aff'd*, 231 F.2d 356 (1955), *cert. denied*, 350 U.S. 991 (1956), *reh'g denied*, 351 U.S. 928 (1956)]. Unlawful combinations to restrain competition and attempts to monopolize include, under appropriate circumstances, exclusive dealing contracts in which the purchaser agrees not to purchase goods from competitors of the seller and requirements contracts in which the purchaser agrees to purchase from the seller all of the goods he requires in the course of business. The practical effect of both types of restrictive contracts is essentially the same, since both operate to preclude the purchasers from acquiring goods from competitors of the seller. The courts, accordingly, treat both types of contracts in the same manner.

For a more in-depth discussion of antitrust implications, see Ch. 91, *Contracts with Sales Representatives*, § 91.50[1][d].

[2] FORM

Distribution Agreement between Computer Equipment Manufacturer and Distributor

COMPUTER HARDWARE DISTRIBUTION AGREEMENT

_____[name of manufacturer], _____[address] ("Manufacturer"), and
 _____[name of distributor], _____[address] ("Distributor") in consideration of the
 promises made herein, agree as follows:

ARTICLE 1. DISTRIBUTORSHIP

[If distributor is granted an exclusive territory:]

1.01. Exclusive Appointment. (a) Manufacturer hereby appoints Distributor to be the exclusive distributor of the
 _____[description of product] manufactured and sold by Manufacturer under the trade name of
 _____[state trade name] ("the Product") in _____[the following territory:
 _____(specify territory) or the territory described in Schedule A attached to this Agreement and
 incorporated herein by reference] (the "Territory").

(b) During the term of this Agreement, Manufacturer shall not appoint any other party to sell the Product in the Territory.

(c) Except as specifically authorized in an agreement amending this Agreement, Distributor shall not sell the Product outside of the Territory.

[Or, for a nonexclusive appointment:]

1.01. Nonexclusive Appointment. Manufacturer hereby appoints Distributor to be the distributor of the

_____ [type of product] manufactured and sold by Manufacturer under the trade name of _____ [state trade name] ("the Product") anywhere within the United States without any exclusive rights in any specific territory.

[Continue with the following:]

1.02. Duration of Agreement. This Agreement and the distributorship created under this Agreement shall continue in force for _____ years from the date of execution of this Agreement unless terminated earlier as provided herein. [Optional if renewal is desired: If the provisions of this Agreement are complied with, unless either party gives written notice of its election to terminate this Agreement at least _____ days prior to the end of any _____ -year period, it shall automatically be renewed for an additional _____ -year period at the expiration of each period.]

ARTICLE 2. OPERATION OF DISTRIBUTORSHIP

2.01. Purchase Price. Distributor shall purchase the Product from Manufacturer and pay Manufacturer at the wholesale price in effect at the time Distributor's order is received, less any applicable discount.

2.02. Terms of Purchase. Distributor shall pay Manufacturer for its purchases of the Product at the price described in Section 2.01, less a _____ [specify percentage] percent cash discount for payment within _____ days from the date of invoice. All shipments shall be _____ [specify shipping terms].

2.03. Initial Purchase. Distributor agrees to make an initial purchase of _____ [specify number] units of the Product no later than _____ [date]. [In the case of the initial purchase only, Manufacturer agrees to repurchase any units of the Product that remain unsold by Distributor at the end of _____ (specify period) from the date of delivery of the initial order to Distributor at the price paid by Distributor].

2.04. Minimum Subsequent Purchases. (a) Distributor agrees to make purchases of the Product from Manufacturer of not less than the following numbers of units for each of the following periods: _____ (specify minimum subsequent purchases in time periods, e.g., x number of units per quarter)

(b) Distributor further agrees that in the event its purchases from Manufacturer are less than the minimum amounts specified above, Manufacturer shall have the right to terminate this Agreement.

2.05. Title. Title to the Product shall pass to Distributor on the date on which payment is received by Manufacturer (the "Date of Purchase").

2.06. Risk of Loss. Prior to the date of purchase, the risk of loss to the Product shall be on Manufacturer. The risk of loss shall pass to Distributor on the Date of Purchase.

2.07. Use of Trade Name and Trademark. (a) Manufacturer agrees that while this Agreement continues in force, Distributor may use the Product trade name and/or trademark in connection with the advertisement and sale of the Product. The Manufacturer's trade name and/or trademark shall not be affixed to or advertised in connection with any merchandise or service other than the Product.

(b) All advertising and promotional materials containing or referring to Manufacturer's trade name and/or trademark shall be submitted to Manufacturer for approval, which shall not be unreasonably withheld.

(c) Distributor further agrees that upon termination of this Agreement, it shall cease all use of the trade name and/or trademark and deliver to Manufacturer the logotype representations thereof.

2.08. Design and Price Changes. Manufacturer agrees to advise Distributor of all contemplated changes in Product design and price not less than _____ days prior to marketing any changed Product or establishing any revised price.

2.09. Distributor's Obligations. (a) Distributor agrees to use its best efforts to promote the distribution, sale, and use of the Product.

(b) Distributor agrees to maintain _____ [a sufficient inventory of the Product on hand to assure that it can fill anticipated or actual orders expeditiously or at least _____ (number) units of the Product on hand] at all times during the course of this Agreement.

2.10. Advertising by Manufacturer. Manufacturer agrees that it will from time to time purchase and place advertising promoting the sale of the Product. All decisions regarding the use of national, regional, or local advertising, or a combination thereof, or with respect to the selection of a particular medium or advertising content shall remain with the sole discretion of Manufacturer and such advertising agencies or others as it may appoint. Nothing in this Agreement shall be deemed to prohibit or prevent Distributor from engaging in any advertising or promotion of the Product in addition to advertising or promotion paid for by Manufacturer.

[Add the following if distributorship territory is international:]

2.11. Restrictions on Exportation. Distributor agrees not to export the Product, either directly or indirectly, to any country for which a permit to export is required from the federal government without the express prior written consent of the Office of Export Administration of the United States Department of Commerce, Washington, D.C. 20230. Distributor further agrees to furnish Manufacturer a copy of that consent immediately upon receipt.

[Continue with the following:]

ARTICLE 3. WARRANTIES

3.01. Warranty of Title. (a) Manufacturer warrants that it has good title to the Product and the right to sell it to Distributor free of any proprietary rights of any other party or any other encumbrance.

(b) Manufacturer shall defend Distributor against any and all claims that the Product or Distributor's sale or use thereof under this Agreement violates the trade secret, trademark, copyright, patent, or other proprietary right of any other party asserted by any third party. Manufacturer shall indemnify and hold Distributor harmless from any liability for damage, costs, or other loss incurred by Distributor in connection with any such claim. Distributor shall notify Manufacturer of the assertion of any such claim and shall cooperate with Manufacturer in the investigation and resolution thereof.

(c) Manufacturer shall not indemnify Distributor against any claim or liability based on Distributor's modification or conversion of the Product and/or the subsequent use of that modification or conversion.

3.02. Limited Warranty. Manufacturer warrants the Product to be free from defects and workmanship for a warranty period of _____ [specify, e.g., 90 days] from the date of delivery to _____ [specify delivery point, e.g., Distributor or retailers by Distributor or persons who purchase the Product from retailers].

3.03. Warranty Service. Manufacturer, at its own expense and option, shall either repair or replace any defective items

of the Product during the warranty period, provided that Distributor has notified Manufacturer and, upon inspection by Manufacturer, Manufacturer has found the Product to be defective. Distributor's sole and exclusive remedy under this agreement shall be limited to the repair or replacement specified herein.

3.04. Warranty Conditions.

THE FOREGOING WARRANTIES ARE CONTINGENT ON THE PROPER USE OF THE PRODUCT IN ACCORDANCE WITH THE INSTRUCTIONS AND SPECIFICATIONS PUBLISHED BY MANUFACTURER AND SHALL NOT APPLY TO ANY PRODUCT THAT HAS BEEN REPAIRED OR MODIFIED BY PERSONS OTHER THAN MANUFACTURER.

3.05. Warranty Disclaimer.

THE EXPRESS WARRANTIES SET FORTH IN THIS AGREEMENT ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED. MANUFACTURER HEREBY SPECIFICALLY DISCLAIMS ANY OTHER REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY WARRANTIES OF TITLE, NONINFRINGEMENT, QUIET ENJOYMENT, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE.

3.06. Damage Waiver.

NOTWITHSTANDING ANY OTHER PROVISIONS OF THIS AGREEMENT, IN NO EVENT WILL MANUFACTURER OR ITS SUPPLIERS BE LIABLE FOR ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES SUFFERED BY DISTRIBUTOR OR ANY THIRD PARTY WHICH MAY ARISE UNDER OR IN CONNECTION WITH THIS AGREEMENT.

3.07. Limitation of Liability.

IN NO EVENT WILL MANUFACTURER'S LIABILITY FOR ANY CLAIM, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEED THE CUMULATIVE AMOUNTS ACTUALLY RECEIVED BY MANUFACTURER FROM DISTRIBUTOR FOR THE PRODUCTS SOLD TO DISTRIBUTOR PURSUANT TO THIS AGREEMENT DURING THE 12 MONTH PERIOD IMMEDIATELY PRECEDING THE ACCRUAL OF THE CLAIM.

DISTRIBUTOR UNDERSTANDS AND AGREES THAT MANUFACTURER AND ITS SUPPLIERS SHALL HAVE NO LIABILITY TO DISTRIBUTOR'S CUSTOMERS AND THAT ANY RIGHTS SUCH CUSTOMERS MAY HAVE SHALL BE SOLELY AGAINST DISTRIBUTOR. DISTRIBUTOR, AT ITS EXPENSE, SHALL DEFEND ANY CLAIM, SUIT OR PROCEEDING BROUGHT AGAINST MANUFACTURER BY ANY THIRD PARTY THAT ARISES FROM OR RELATES TO THE PROMOTION, RESALE OR USE BY DISTRIBUTOR OR ITS RESELLERS OF THE PRODUCTS, AND SHALL INDEMNIFY AND HOLD MANUFACTURER HARMLESS FROM AND AGAINST ANY LOSS, DAMAGE, LIABILITY OR EXPENSE RESULTING THEREFROM.

ARTICLE 4. TERMINATION

4.01. Termination by Manufacturer. Manufacturer may terminate this Agreement if Distributor fails to perform the terms of this Agreement. If Manufacturer elects to terminate this Agreement, it shall give written notice of termination to Distributor _____ [not less than _____ days prior to the close of the calendar year in which Distributor has failed to perform in accordance with the terms of this Agreement, and this Agreement shall then terminate at the close of that calendar year or _____ days prior to the date of termination

specified in that notice and this Agreement shall then terminate on the specified date].

4.02. Termination by Distributor. Distributor may terminate this Agreement upon written notice of termination to Manufacturer _____ [not less than _____ days prior to the close of any calendar year, and this Agreement shall then terminate at the close of that calendar year or _____ days prior to the date of termination specified in that notice and this Agreement shall then terminate on the specified date].

ARTICLE 5. GENERAL PROVISIONS

5.01. Notices. Any notice, request, demand, or other communication required or permitted under this Agreement shall be deemed to have been properly given when deposited in the United States mail, first class [certified, or registered] postage prepaid and addressed to the other party at the address for that party specified above [or when transmitted to the other party by _____ (*specify network name or designation*) computer mail system].

5.02. Assignment of Contract. Neither party shall assign this Agreement or its rights hereunder without the prior written consent of the other. Any attempt to make such an assignment without the other party's consent shall be void.

5.03. Modifications. Manufacturer and Distributor agree that this Agreement may be modified only by a written agreement duly executed by persons authorized to execute agreements on behalf of Manufacturer and Distributor.

5.04. Nonwaiver. Manufacturer and Distributor agree that no failure to exercise or delay in exercising any right, power, or privilege under this Agreement on the part of either party shall operate as a waiver of any right, power, or privilege hereunder. Manufacturer and Distributor further agree that no single or partial exercise of any right, power, or privilege under this Agreement shall preclude further exercise thereof.

5.05. Severability. If any part of this Agreement is found or deemed by a court of competent jurisdiction to be invalid or unenforceable, that part shall be severable from the remainder of this Agreement and shall not cause the invalidity or unenforceability of the remainder of this Agreement.

5.06. Governing Law. This Agreement shall be deemed to have been made in, and shall be construed pursuant to, the laws of the State of California.

5.07. Entire Agreement. This Agreement is the complete and exclusive statement of the mutual understanding of the parties, and supersedes and cancels all previous written and oral agreements and communications relating to the subject matter of this Agreement.

5.08. Attorneys' Fees. If any legal action is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire Agreement.

Executed this _____ day of _____, at _____ [city], California.

MANUFACTURER

_____ [name of corporation]

By _____ [signature]

[typed name and title]

DISTRIBUTOR

_____ [name of corporation]

By _____ [signature]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Clayton Act Coverage Business & Corporate Law Distributorships & Franchises General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
 CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
 PART IV. FORMS
 A. Hardware Related Forms

22-57 California Legal Forms--Transaction Guide § 57.205

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.205 Network Access Agreement

[1] Comment--Use of Form

This form is an agreement between a network owner and a individual to provide for access to the computer or internet network. Network access agreements are used in many contexts, ranging from academic, scientific and legal information. Network access agreements are becoming increasing popular with schools and school districts as a means of providing students access to the internet at school with the consent of a parent.

Network access agreements are also typically provided by the providers through their websites. Many such agreements are a modified terms of use [see § 57.241[2]], and require a user to assent to the terms and conditions of the network access agreement before the user can access the services. Furthermore, if such an access agreement is coupled with a website, the website owner will typically have a privacy policy in conjunction with an access agreement [see § 57.242].

[2] FORM

Network Access Agreement

NETWORK ACCESS AGREEMENT

This Network Access Agreement ("Agreement") is entered into between _____[*name of network provider*] ("Provider") and _____[*name of network user*] ("User"), who hereby agree as follows:

1. Network Use. Provider grants User the nonexclusive revocable right, subject to all the terms and conditions of this Agreement, to obtain access to and use Provider's Network ("Network").

2. Permitted Uses. (a) User's access to and use of the Network shall be limited to the purpose and type of activity set forth in Attachment A ("Permitted Uses"). Any other use of the Network and any other method of accessing the

Network is strictly prohibited and may subject the User to civil and criminal prosecution.

(b) In accessing and using the Network for the Permitted Uses, User may not use Network resources; modify, view, copy or obtain programs or data if not authorized to do so; insert any program or data if not authorized to do so; or do anything else that might cause damage to the Network.

3. Fees. Access to and use of the Network shall be at User's expense. Provider will charge User a fee for access to or use of the Network as specified on the fee schedule attached to this Agreement. All charges are exclusive of sales, use, excise or other tax. All payments shall be due and payable upon net 30-day terms from the date of invoice.

4. Equipment and Access Procedures. Provider may provide User with certain equipment and/or passwords to access the Network ("Equipment"). User shall not share the Equipment with any third party and user shall take all reasonable steps to secure physical access to and use of the Equipment. User agrees to assume sole responsibility for the Equipment and to pay Provider replacement costs for any damage or loss to the Equipment while in User's possession. User shall notify Provider promptly of any loss, damage, or theft of the Equipment.

5. Term and Termination. This agreement shall terminate _____ [length of term] from the date this agreement is executed, or upon mutual agreement of the parties. Upon termination, User shall immediately cease using the Network and immediately return all Equipment to Provider.

6. Nondisclosure and Ownership. (a) Through use of the Network, User may have access to certain information that is confidential and proprietary to Provider ("Confidential Information"). User agrees to protect all Confidential Information by using a reasonable degree of care to prevent the unauthorized use, dissemination, or publication of the Confidential Information. This Agreement imposes no obligation to User with respect to Confidential Information which is (1) generally known to the public; (2) becomes generally known to the public other than as a result of an act or omission of User; (3) was rightfully known to User prior to User receiving the same information from Provider; (4) is disclosed by Provider to a third party without a duty of confidentiality on the third party; (5) is independently developed by User; (6) is disclosed under operation of law; or (6) is disclosed by User with Provider's prior written consent.

(b) User acknowledges and agrees that Provider is the owner of the Network and all data contained therein. Nothing in this Agreement shall be construed to transfer any of Provider's proprietary or intellectual property rights to user. User agrees that Provider may offer use of and access to the Network to other parties.

(c) User agrees that a breach of the confidentiality provisions of this Agreement will breach the security of Provider's Network and thus would cause irreparable harm to Provider for which no adequate remedy at law exists. User therefore agrees that in addition to any other remedies available, Provider shall be entitled to injunctive relief to enforce the terms of this Agreement.

7. Warranty Disclaimer/Limitation of Liability.

USER ACCEPTS ACCESS TO THE NETWORK ON AN "AS IS" BASIS. PROVIDER MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND WITH RESPECT TO PERFORMANCE, DATA QUALITY, ACCESSIBILITY OR INTEGRITY OF THE NETWORK, INCLUDING BUT NOT LIMITED TO THE WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE OR MERCHANTABILITY. PROVIDER ASSUMES NO RESPONSIBILITY IN CONNECTION WITH USER'S ACCESS TO OR USE OF THE NETWORK. PROVIDER SHALL NOT BE LIABLE FOR ANY DAMAGES WHATSOEVER ARISING OUT OF THE COMPANY'S ACCESS TO OR USE OF THE NETWORK.

8. Indemnification.

USER SHALL BE LIABLE FOR, AND HOLD PROVIDER HARMLESS FOR, ANY DAMAGES SUSTAINED BY PROVIDER, INCLUDING BUT NOT LIMITED TO, LOSSES, LIABILITIES, CLAIMS, DEMANDS, SUITS, CAUSES OF ACTION, JUDGMENTS, COSTS OR EXPENSES (INCLUDING COURT COSTS AND ATTORNEY'S FEES), ARISING OUT OF THE USER'S ACCESS TO OR USE OF THE NETWORK.

9. Assignment. The rights granted in this Agreement may not be assigned or transferred by User without the prior written approval of Provider. User shall not be permitted to delegate its responsibilities or obligations hereunder without the prior written approval of Provider.

10. Governing Law, Jurisdiction. This Agreement shall be governed by the laws of the State of California [*or specify other state*].

11. Severability. In the event that any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of this Agreement will remain in full force and effect.

12. Entire Agreement. This Agreement constitutes the complete agreement between the parties and supersedes all prior or contemporaneous agreements or representations, written or oral, concerning the subject matter of this Agreement. This Agreement may not be modified or amended except in a writing signed by duly authorized representatives of each party.

Executed this _____ day of _____, at _____[city], California.

USER

_____ [name]
[typed name and title]

PROVIDER

_____ [name of corporation]
By _____ [signature]
[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Internet Business Contracts General Overview Computer & Internet Law Internet Business Internet & Online Services General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
 CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
 PART IV. FORMS
 A. Hardware Related Forms

22-57 California Legal Forms--Transaction Guide § 57.206

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.206 Database Access Agreement

[1] Comment--Use of Form

This form is an agreement between a computer owner and a firm established to collect data ("databases" or "database libraries") and provide individual users with access to that data. It gives the user access to the collected data, in return for which the user pays a fee based on the services used.

Computer database suppliers exist in many fields. They provide a wide range of data to their customers, ranging from employment opportunities to academic, scientific, and legal information. Materials may be made available for review or duplication in whole or in part, subject to the terms of the governing agreement and any copyright or other applicable restrictions.

Access agreements also typically are provided by database providers through their websites. Many such agreements are a modified form of the website terms of use [see § 57.241[2]], and require a user to assent to the terms and conditions of the database access agreement before the user can access the services. Furthermore, if such an access agreement is coupled with a website, the website owner typically will have a privacy policy in conjunction with an access agreement [see § 57.242].

[2] FORM

Database Access Agreement

DATABASE ACCESS AGREEMENT

_____ [name of database provider] ("Provider") and _____ [name of customer]
 ("Customer") agree as follows:

1. Database Services. Acceptance of this Agreement by Provider shall entitle Customer to obtain access to Provider's database, subject to the terms and conditions stated herein.

2. Charges. Customer will be charged a subscription fee in the amount set forth on the current fee schedule attached to this agreement ("Fee Schedule"). All charges shall be due and payable upon receipt of invoice by Customer. Invoices not paid within 30 days of invoice shall be deemed delinquent and are subject to interest charges of _____[percent] per annum on the unpaid balance. All charges listed in Provider's fee schedule are exclusive of sales, use, excise, or other taxes and Customer shall pay any such taxes as invoiced by Provider. Provider reserves the right to suspend its service to Customer without prior notice if Customer's account becomes delinquent. Customer authorizes Provider to send notices of delinquency by the most expeditious means available and Customer further agrees that it shall be liable for all costs of collection of any delinquency, including collection agency fees, reasonable attorneys' fees, and court costs. Provider reserves the right to change any and all charges at any time and Customer agrees that all such changes shall be effective immediately upon publication by Provider. However, Provider agrees to use its best efforts to provide _____ days prior written notice of any such change.

3. Establishment of Account. Provider reserves the right to require an advance deposit or to establish a credit account for Customer upon advance approval of Customer's credit.

4. Term. This Agreement shall be in effect between Provider and Customer from the date of its acceptance by Provider until terminated by either party upon _____ days prior written notice to the other party, except as otherwise provided herein.

5. Contents and Use of Database. (a) The database shall contain the information described on the Database Index attached to this Agreement. Provider reserves the right to add or withdraw content or information or to modify the Database Index without notice. However Provider will use its best efforts to provide _____ days prior written notice of any such change.

(b) The Database Index includes database supplier terms and conditions. Customer agrees to and shall comply with all database supplier terms and conditions as set forth from time to time.

(c) Customer agrees to comply with all copyright notices included in each database library and all other materials provided by Provider under this Agreement. Customer further agrees to assume sole responsibility for compliance with all copyright notices by any user of the password supplied to Customer.

(d) Customer shall not copy, transmit, or retain data received from Provider except as specifically and expressly authorized in advance by the database library supplier. Customer further agrees that it shall not transfer or sell any data received from Provider without express advance authorization in writing from the database library supplier.

6. Password and Materials Provided. Provider shall provide to Customer the user materials listed on the User Materials List attached to this Agreement and all necessary system passwords, no later than _____[e.g., the date upon which it accepts this Agreement]. Provider shall provide other user materials listed in its catalogue upon order and payment by Customer.

7. Password Use and Security. Customer agrees to assume sole responsibility for the security of the password issued to it and for all charges incurred through the use of that password. Customer is solely responsible for notifying Provider of the loss or theft of a password by the most expeditious means available, and Customer shall be relieved of liability for charges incurred through the use of a lost or stolen password only after Provider's receipt of that notice. [Passwords not used for _____ (specify period) are subject to cancellation without prior notice, and Provider may require a reinstatement fee.]

8. Liability for Failures or Delays. Customer agrees that Provider and its database suppliers shall not be liable for any delays or failures in performance or for any interruption of Provider's service [arising from any cause or circumstance beyond their reasonable control] and further agrees to indemnify and hold Provider and its database suppliers harmless from any loss or claims or loss arising out of the use of Provider's service or any materials provided under this Agreement.

9. Warranty Disclaimer.

PROVIDER AND ITS DATABASE LIBRARY SUPPLIERS MAKE NO REPRESENTATIONS OR WARRANTIES OF ANY KIND WITH RESPECT TO SERVICES OR DATA MADE AVAILABLE BY PROVIDER, INCLUDING BUT NOT LIMITED TO THE WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE OR MERCHANTABILITY. PROVIDER AND ITS DATABASE LIBRARY SUPPLIERS ASSUME NO RESPONSIBILITY IN CONNECTION WITH THE USE OF ANY OF THE SERVICES OR DATA MADE AVAILABLE BY PROVIDER. CUSTOMER AGREES THAT NEITHER PROVIDER NOR ITS DATABASE LIBRARY SUPPLIERS SHALL BE LIABLE FOR ANY SPECIAL, INCIDENTAL, INDIRECT, PUNITIVE, OR CONSEQUENTIAL DAMAGES OR FOR THE LOSS OF PROFIT, REVENUE, OR DATA ARISING OUT OF THE SUBJECT MATTER OF THIS AGREEMENT, EVEN IF CUSTOMER HAS BEEN ADVISED OF THE POSSIBILITY OF POTENTIAL LOSS OR DAMAGE.

10. Use of Purchase Order. Customer agrees that the terms and conditions set forth in this Agreement shall automatically be incorporated into any purchase order used by Customer in conjunction with this Agreement; that the terms and conditions of this Agreement are and shall be in lieu of all terms and conditions, express or implied, contained in Customer's purchase order; and that the terms and conditions of this Agreement shall control in the event of any conflict between this Agreement and the terms and conditions of any purchase order used by Customer in conjunction with this Agreement.

11. Assignments. Customer agrees that this Agreement shall not be assigned or transferred and that any attempt on its part to assign or transfer this Agreement or any of its rights or obligations under this Agreement shall be null and void. Customer further agrees that Provider may assign this Agreement and/or payments due under this Agreement without further permission or approval.

12. Database Supplier Rights. Customer agrees that any database supplier shall have the right to assert rights under, or to enforce any of the provisions of, this Agreement directly on its own behalf.

13. Termination by Customer. Provider agrees that Customer may terminate this Agreement immediately upon written notice to Provider if any rate or service charge increase or change in service is unacceptable to Customer. However, Customer agrees that its continued use of Provider's service pursuant to this Agreement after notice of any rate or service charge increase or change in service shall constitute acceptance of any such change.

14. Notices. Notices required or provided for under this Agreement may be given by Provider to Customer in writing in publications issued or letters posted by Provider or electronically over its computer service. Notices required or provided for under this Agreement may be given by Customer to Provider in writing in letters posted by Customer or electronically over Provider's computer service.

15. Entire Agreement. This Agreement, including all attachments, and any revisions issued in writing, constitute the entire agreement of the parties.

16. Governing Law. This Agreement shall be construed under and be governed by the law of the State of California.

17. Severability. If any provision in this Agreement is held by any court to be invalid, void, or unenforceable, the

remaining provisions shall nevertheless continue in full force and effect.

18. Nonwaiver of Rights. Customer and Provider agree that no failure to exercise, and no delay in exercising any right, power, or privilege on the part of either party shall operate as a waiver of any right, power, or privilege under this Agreement. Customer and Provider further agree that no single or partial exercise of any right, power, or privilege under this Agreement shall preclude further exercise thereof.

19. Attorneys' Fees. If any legal action is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire Agreement.

Executed this _____ day of _____, at _____[city], California.

CUSTOMER

_____ [name]

[typed name and title]

PROVIDER

_____ [name of corporation]

By _____ [signature]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Internet Business Internet & Online Services General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART IV. FORMS
A. Hardware Related Forms

22-57 California Legal Forms--Transaction Guide §§ 57.207-57.219

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

[Reserved]

§§ 57.207[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART IV. FORMS
B. Software Related Transactions

22-57 California Legal Forms--Transaction Guide § 57.220

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.220 Commercial Software License Agreement

[1] Comment

[a] Use of Form

This form is a nonexclusive and nontransferable license agreement for the use of computer software between a publisher of computer software and a commercial user of that software. For an agreement licensing the use of "off the shelf" or "clickwrap" software, see § 57.221.

This form does not include provisions for software maintenance or updating. A software maintenance agreement is *set forth in § 57.224*.

This form is drafted to license the use of a single computer program and its associated documentation. It can be adapted to license the use of more than one computer program; however, the attorney must first determine whether it makes more sense to use separate agreements for each licensed item. In addition, if there are separate computer programs licensed under one agreement, and the warranties are different, § 57.229 offers some alternative language for warranty provisions with differing levels of support.

[b] Use of License to Protect Proprietary Interests

A software developer or producer who intends to market software must decide whether the software will be sold outright to prospective users or licensed to those users. This choice can have important effects on the proprietary interests of the producer or developer of the software.

Licensing agreements are commonly used in the marketing of computer software because they do not transfer title to the software, with the result that the licensee does not have sole and exclusive rights to it (absent a license provision to that effect). This permits the software producer to impose use restrictions designed to protect its proprietary interests.

Specifically, the producer can include provisions restricting access to the software and prohibiting its transfer or disclosure of its contents to other persons. This restricted access is vital to intellectual property protection of the software and is the reason why licensing is usually the only acceptable alternative if the developer or producer desires to protect the intellectual properties of the software.

For example, a company that made programmable chips and provided software for programming its chips could effectively prevent competitors from using its software (which a competitor might use for programming its own similar devices) by specifying in the software license agreement that customers may "use the Licensed Programs for the sole purpose of programming logic devices manufactured by ALTERA and sold by ALTERA or its authorized distributors (the "Permitted Use")" [*Altera Corp. v. Clear Logic, Inc.* (9th Cir. 2005) 424 F.3d 1079, 1091-1092 (plaintiff had claim for tortious interference with contractual relations)].

In contrast, if the software is sold outright, the buyer will have sole and exclusive rights to it. This means that the seller will not be able to impose use and disclosure restrictions and that it will be far more difficult to maintain intellectual property protection for the software.

For discussion of the generally acknowledged methods of protecting proprietary interests in software, see §§ 57.20-57.23; see also § 57.225[1].

[c] Commercial Warranties In General

This form contains warranties applicable to commercial as distinguished from consumer transactions. The Uniform Commercial Code, as enacted in California [*Com. Code § 1101 et seq.*] (referred to in this chapter for convenience as "UCC"), provides for warranties of title and against infringement [*see Com. Code § 2312*], express warranties [*see Com. Code § 2313*], and implied warranties of merchantability [*see Com. Code § 2314*] and fitness for a particular purpose [*see Com. Code § 2315*]. These warranties are discussed in Ch. 52, *Sales of Goods Under the Uniform Commercial Code*.

There are two alternative types of product warranty provisions in this form. The first [*see §§ 6.03, 6.04* (first alternatives) of Form] should be used only if the program is tried and proven to be "bug-free." The second [*see §§ 6.03, 6.04* (second alternatives) of Form] is a limited warranty that is advisable when, as is in almost all cases, the licensor cannot be sure that the program is bug-free and thus does not wish to be held to a long term commitment. For a third type of warranty provision, establishing different levels of warranty commitment for different grades or types of programs, see § 57.229.

The federal Magnuson-Moss Consumer Warranty Act [*15 U.S.C. § 2301 et seq.*] and the California Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*] do not apply to the warranties contained in this form because the transaction is not a sale and because the software involved is intended for commercial rather than consumer use [*see 15 U.S.C. § 2301(6), (7); Civ. Code § 1791.1, 1791.2, 1792, 1793*]. For discussion of the application of these statutes to consumer software licensing agreements, see § 57.221[1].

[d] Warranty Disclaimers

The language that creates an express warranty and any language intended to limit a warranty must be consistent [*Com. Code § 2316(1)*]. This means that no warranty, whether express or implied, can be modified or disclaimed unless the seller clearly limits its liability [*see Hauter v. Zogarts* (1975) 14 Cal. 3d 104, 119, 120 Cal. Rptr. 681, 534 P.2d 377]. In addition, the disclaimer of an implied warranty of merchantability must mention "merchantability," and the disclaimer of any implied warranty of fitness must be both written and conspicuous [*Com. Code § 2316(2)*]. Therefore, the warranty disclaimer clauses in this form state that its express warranties are in lieu of all other warranties, express or implied, including any warranties of merchantability or fitness for a particular purpose and, moreover, are

complemented by specific warranty remedy provisions. Printing the disclaimer clause in boldfaced capital letters (as they are in this form) is the best way of assuring that it will be conspicuous, and failure to use both boldfaced and capital letters has been held to result in an inadequate disclaimer [see *Dorman v. International Harvester Co.* (1975) 46 Cal. App. 3d 11, 18, 120 Cal. Rptr. 516] .

There are other ways to disclaim implied warranties. They are excluded by expressions such as "as is," "with all faults," by language that makes it plain there is no implied warranty [Com. Code § 2316(3)(a)], or by a phrase such as "there are no warranties which extend beyond the description on the face hereof" [Com. Code § 2316(2)]. An implied warranty can also be negated by conduct such as the examination of a model [see Com. Code § 2316(3)(b), (c)].

[e] Disclaimer of Consequential Damages for Breach of Warranty

Remedies for breach of warranty, including the measure of damages, can be limited by contract [see Com. Code §§ 2316(4), 2719]. Moreover, the limitation or exclusion of consequential damages when the loss is commercial is valid unless it can be proved that the limitation is unconscionable [Com. Code § 2719(3)]. However, language excluding consequential damages must be conspicuous [see *Dorman v. International Harvester Co.* (1975) 46 Cal. App. 3d 11, 20, 120 Cal. Rptr. 516] . For that reason, the language in this form that excludes consequential damages is printed in boldfaced capital letters within the body of the agreement [see P 6.06 of Form].

[f] Avoidance of Disclaimers Under Fraud Theory

Notwithstanding the use of warranty disclaimer provisions, the licensor must avoid any misrepresentations in consummating the transaction, whether incorporated into the contract or not. Even though California has not enacted Uniform Commercial Code Section 2-302, under which courts could refuse to enforce unconscionable contract provisions (such as the warranty disclaimer provisions when posed as a defense against misrepresentations), and even if a California contract contains a valid and effective disclaimer of warranty provision, that does not necessarily vitiate future claims made by a licensee that the licensor made fraudulent misrepresentations concerning the system.

If the licensor justifiably relies on a misrepresentation knowingly made with the intent of inducing reliance, and damage results, fraud is established under California law [see *Glovatorium, Inc. v. NCR Corp.* (9th Cir. 1982) 684 F.2d 658, 660 (computer system sale)]. Fraud may be inferred from the seller's failure to perform a promise, including a promise regarding the manner in which an item will operate or produce results [see *Glovatorium, Inc. v. NCR Corp.* (9th Cir. 1982) 684 F.2d 658, 661] .

[g] Indemnification

Indemnification is an obligation by which one party engages to save another from a legal consequence of the conduct of one of the parties, or of some other person [Civ. Code § 2772 *et seq.*]. Such an obligation to indemnification can arise as implied by law or under an express contract under which one party assumes a duty to hold the other harmless under circumstances specified in the contract. Indemnification provisions can be drafted in many different forms, so it becomes imperative to draft indemnification clauses specific to the relationship at hand.

Sometimes an indemnification provision will call for indemnity for the performance of the work specified under the agreement. In such a case, it is important to ensure that an appropriate standard of care is also specified. If a standard is not specified, the indemnifying party may be held to a standard of care that is inappropriate for the work that party is performing.

If an indemnification provision provides for indemnity for the breach of the agreement, it is important that there is a cap on damages. Otherwise the indemnified party may be able to recover all costs and all expenses.

In the event an indemnification provision calls for indemnity for the manufacture, use or sale of a product, it is important that the indemnifying party has control over the entire process.

If an indemnification provision calls for a party to indemnify against all claims for intellectual property infringement, the indemnifying party needs to perform enough due diligence to be able to agree to such a liability. It is very important that a party limits such a provision to match what they have control over, or to what they can adequately perform due diligence on.

In drafting an indemnification provision, care should be taken to distinguish between liability and loss or damages. It would be beneficial to avoid a clause that calls for an indemnifying party to cover liability; otherwise a party may end up being required to pay for the prevention of the harm or injury. A provision which provides for the payment of loss or damages will ensure that a party will be required only to pay for actual loss paid out.

[2] FORM

Commercial Software License Agreement

SOFTWARE LICENSE AGREEMENT

This Software License Agreement ("Agreement") is entered on _____ [date], ("Effective Date") between _____ [name of licensor], a _____ [state of incorporation] corporation with its principal place of business at _____ [address] ("Licensor"), and _____ [name of licensee], a _____ [state of incorporation] corporation with its principal place of business at _____ [address] ("Licensee"), individually referred to in this Agreement as a "Party" and collectively as the "Parties".

In consideration of the benefits and obligations exchanged in this Agreement, the Parties agree as follows:

ARTICLE 1. THE SOFTWARE

1.01. "Software" Defined. The term "Software" as used in this agreement shall mean all computer programs licensed under this Agreement, including all related files, documentation, and other materials, whether in whole or in part, including any and all modifications, derivative works, and copies of the foregoing, regardless of the form or media in or on which they may exist. The Software shall consist of the products listed in the attached Software License Schedule, which is incorporated herein by reference.

ARTICLE 2. LICENSE GRANT AND LIMITATIONS

2.01. Grant of License. Licensor hereby grants, and Licensee hereby accepts, a nontransferable, non-exclusive, worldwide, and royalty-free license to use the Software, subject to the conditions and for the period specified in this Agreement.

2.02. Use of Software. Licensee agrees to use the Software for _____ [its sole and exclusive benefit or specify purposes, e.g., Licensee's _____ (own or internal) purposes or in the performance of data processing services for others only].

2.03. Copies. (a) Except as provided in this Agreement, Licensee shall not copy any portion of the Software. Licensee may make one copy ("backup copy") of the computer program portion of the Software for archival purposes [add if licensee is to be authorized to modify or adapt the program or convert it to a different language or configuration: and may make an additional copy of the licensed computer program for use in adapting, modifying, or converting it as

authorized herein]. *[Optional: Licensee shall provide Licensor a written description of the procedures under which it makes backup copies, including any that may involve backup of the Software, and Licensor shall promptly approve or disapprove those procedures. Licensor's approval shall not be unreasonably withheld.]*

(b) Licensee shall reproduce and include Licensor's copyright notice, patent notice, trademark, service mark, other proprietary markings, and/or confidential legends on any copies of the Software [, including any modifications, adaptations, or conversions].

2.04. Licensee's Responsibilities. Licensee shall be exclusively responsible for the supervision, management, and control of its use of the Software, including, but not limited to:

(a) Assuring proper configuration of equipment or devices;

(b) Establishing adequate operating methods; and

(c) Implementing procedures sufficient to satisfy its obligations for security under this Agreement, including appropriate action between it and its employees to prevent misuse, unauthorized copying, modification, or disclosure of the Software.

2.05. License Period. The license granted in this Agreement shall remain in force _____[for the useful life of the Software *or* for the minimum term of _____ (*specify period*)] unless terminated prior to that time as provided herein. *[Optional if a minimum term is specified and renewal is desired: Upon expiration of the term specified herein, _____ (Licensee shall have the option to renew the license for an additional minimum term or the license shall automatically renew for successive minimum terms unless Licensee gives Licensor notice of its intention not to renew the license within _____[specify period, e.g., 60 days] prior to the expiration of a term).]*

[Include if licensee is authorized to modify software for its own use:]

2.06. Modifications or Adaptations. Licensee may modify the Software for its own use and merge it into other material to form revised materials, provided that upon termination of the license granted in this Agreement, the licensed materials shall be deleted from the revised materials and _____[destroyed *or* returned to Licensor]. Any such revised materials shall be used strictly in accordance with the terms of this Agreement.

[Optional provision:]

2.07. Supply of Updated Version of Software. [Licensor shall notify Licensee when an updated version of the computer program portion of the Software has been designed and is available for distribution and, if Licensee is current in all payments required under this Agreement, shall supply a copy of the updated version to Licensee within _____[*number*] days after receipt of a request from Licensee _____[and upon payment of the sum of \$_____ by Licensee *or* without further charge other than _____ (*specify incidental charges, e.g.: the cost of delivery, duplication, and installation*)]; provided that Licensee shall return the original computer program portion of the Software and all copies or modifications.

[Continue with the following:]

ARTICLE 3. PROPERTY RIGHTS

3.01. Ownership Rights to Software. [(a)] Licensee acknowledges and agrees that the Software is the confidential and proprietary property of Licensor, and except to the extent expressly authorized in this Agreement, Licensee receives no rights to and will not sell, assign, lease, market, transfer, encumber or otherwise suffer to exist any lien or security interest on, nor allow any third person, firm, company, or other entity to copy, reproduce or disclose the Software, whether in whole, in part, or in any manner whatsoever.

[Optional provision if license grants licensee to modify software:]

(b) Any modifications or derivative works made solely by Licensee will be the property of Licensee, but shall be subject to all of Licensor's intellectual property rights in the underlying Software. Licensee will have the right to register copyrights of its derivative works (as a derivative work), provided that any derivative works must retain all copyright and other proprietary rights notices included as part of the Software when provided by Licensor.

[Optional provision if license provides maintenance, support or services to licensee:]

(c) Licensor shall retain complete ownership of all modifications and derivative works provided to Licensee as part of any maintenance, support, or services. In no event shall any support, maintenance, services or Software provided to Licensee by Licensor pursuant to this Agreement be deemed to be based on any "work made for hire" agreement between the Parties.

[Continue with the following:]

3.02. Nondisclosure of Software. Licensee acknowledges that the Software is the confidential and proprietary property of Licensor. Licensee agrees [to hold it in trust and] not to sell, rent, license, distribute, transfer, or, directly or indirectly, disclose or permit the sale, rental, licensing, distribution, transfer, or disclosure of the Software or its contents to any other party [, and to use its best efforts to prevent inadvertent disclosure of the Software to any third party], either during the term of this Agreement or thereafter.

3.03. Security. Licensee agrees to keep the Software in a secure place, under access and use restrictions _____ [designed to prevent disclosure of the Software to unauthorized persons or satisfactory to Licensor] and not less strict than those applicable to Licensee's own trade secrets.

3.04. Degree of Care. Licensee further agrees to instruct its personnel to keep the Software confidential by using the same care and discretion that they use with other data designated by Licensee as confidential.

3.05. Disclosure Constitutes Breach. Licensee agrees that any disclosure of the Software to a third party constitutes a material breach of this Agreement and shall terminate the license granted by this Agreement.

3.06. Damages for Breach. Licensee further agrees that it shall be strictly liable for all damages to Licensor that result from any disclosure of the Software to any third party.

3.07. Copyright or Other Marks. Licensee agrees not to remove, deface, or destroy any copyright, patent notice, trademark, service mark, other proprietary markings, or confidential legends placed on or within the Software.

ARTICLE 4. PAYMENT

[If payment is to be made in a lump sum:]

4.01. Lump Sum Payment Upon Execution. In payment for the license granted under this Agreement, Licensee shall pay Licensor the total sum of \$_____ as a license fee, due and payable in full upon execution of this Agreement.

[Or, if payment is to be made in installments:]

4.01. Installment Payment. In payment for the license granted under this Agreement, Licensee shall pay Licensor the total sum of \$_____ as a license fee. The license fee shall be payable as follows:

_____*[specify, e.g.: _____ (specify percent) shall be paid upon execution of this Agreement, _____ (specify percent) shall be paid upon delivery and installation of the Software, _____ (specify per cent shall be paid on completion of testing and acceptance of the Software (add if agreement provides for on-site support services; and the balance shall be paid on completion by Licensor of on-site support)]*.

[Or, if payment is to be made on a periodic basis:]

4.01. Periodic Payment. In payment for the license granted under this Agreement, Licensee shall pay Licensor the _____*[monthly or other period]* sum of \$_____ as a license fee. The initial license fee shall be payable on _____*[execution of this Agreement or completion of testing and acceptance of the Software]*. _____*[State terms of periodic payments, e.g., Succeeding monthly charges shall be payable from month to month in advance or Licensee shall be billed for succeeding monthly charges in advance and shall pay the amount billed within _____ days after the date billed]*.

[Continue with the following:]

4.02. Payment of Taxes. Licensee shall pay all taxes that may be assessed on the Software or its use, including personal property taxes, sales and use taxes, and excise taxes.

[Add if agreement provides an option for renewal:]

4.03. Renewal License Fee. On the exercise of an option to renew the license granted under this Agreement, Licensee shall pay Licensor a renewal license fee in the total sum of \$_____ at the beginning of the new option period.

[Add if agreement provides for periodic payments and periodic increases are desired:]

4.04. License Fee Increases. Licensor may increase the periodic license fee provided for hereunder on _____*[specify period]* notice to Licensee. The increased license fee shall become effective on the date specified in the notice of the increase unless Licensee terminates this Agreement by _____*[specify period]* notice to Licensor and returns the Software to Licensor on or before the date on which the increased fee would otherwise go into effect.

[Continue with the following:]

ARTICLE 5. DELIVERY, INSTALLATION, AND TRAINING

5.01. Delivery of Software. Licensor shall deliver the Software to Licensee by _____ [provide method of delivery, i.e. CD-Rom, FTP site, etc.].

5.02. Installation Services. Licensor shall _____ [install or assist in the installation of] the Software. Technical services shall be provided by Licensor in connection with the installation of the Software at Licensee's site for _____ [number] days at _____ [specify charge, e.g., no charge other than the cost of travel and reasonable living expenses].

5.03. Testing. _____ [Licensee or Licensor] shall conduct tests of the Software on its installation. All testing shall be conducted in accordance with _____ [specify testing protocol, e.g., specifications devised for testing of the Software by Licensor], using _____ [describe input, e.g., data or materials or work] provided by Licensee, for a period of _____ days.

5.04. Acceptance. The Software shall be deemed to have been accepted by Licensee _____ [upon delivery or when it has met the acceptance criteria prescribed by _____ (specify testing protocol, e.g., the specifications devised for testing of the Software by Licensor) or after completion of the testing prescribed by Section 5.03 and _____ (productive use of the Software by Licensee or a reasonable period of use by Licensee, not to exceed _____ days)]. If the Software is deemed unacceptable, Licensee shall return the Software without charge with a report detailing the reasons for its unacceptability.

5.05. Training. Licensor shall provide _____ [number] days of technical orientation and training for _____ [number or all] of Licensee's computer operations personnel at _____ [specify charge, e.g., \$_____ per person per day or no charge]. Training and orientation shall be provided at _____ [specify place, e.g., Licensor's place of business located at _____ (address)].

5.06. Additional Technical Support. Licensor shall provide additional technical support services to Licensee on request and as available at the rate of \$_____ per _____ [day or hour] [Optional if a per hour rate is used:, including travel time] plus travel costs and _____ [specify other, e.g., living expenses].

[Add if maintenance agreement will be executed:]

5.07. Execution of Maintenance Agreement. Licensee shall enter into and maintain in force a Maintenance Agreement covering maintenance of the Software. Licensee shall cause the other party to the Maintenance Agreement to keep the Software in good working order in accordance with the provisions of that agreement and make all necessary adjustments and repairs to the Software.

[Optional provision:]

5.08. Correction of Software Problems. Upon discovery of any _____ [deviation in the computer program portion of the Software from the published functional specifications or coding error in the computer program portion of the Software that prevents it from performing substantially in accordance with the _____ (published specifications for the Software or the written portions of the Software)], Licensee shall notify Licensor and provide supporting data, including printouts showing the claimed defective performance. Within _____ [number] days thereafter, Licensor [, at its own expense,] shall either:

(a) Devise and deliver to Licensee programming or procedural instructions designed to avoid the claimed error; or

(b) Upon receipt by Licensor of the original version of the computer program portion of the Software, provide and deliver to Licensee a completely updated version designed to avoid the claimed error.

[Continue with the following:]

ARTICLE 6. WARRANTY, INDEMNIFICATION AND LIMITATION OF LIABILITY

6.01. Warranty. Licensor warrants to Licensee that the Software, in unmodified form and when used as authorized by this Agreement, will perform materially in accordance the Specifications for a period of _____ days from the date initially delivered to Licensee ("Warranty Period"). If during the Warranty Period, Licensee demonstrates to Licensor that the Software does not perform materially in accordance with its Specifications ("Defect"), then Licensor, within _____ days of receiving written notice of such a Defect, shall respond to Licensee with either (a) a statement that Licensor has in good faith and using reasonable efforts not yet been able to duplicate the alleged Defect, or (b) a plan indicating whether Licensor intends, at its option and expense, to: (1) use commercially reasonable efforts to correct the Defect; or (2) provide Licensee with replacement Software of equivalent or greater functionality. If Licensor determines that neither of the preceding options is commercially feasible, then Licensor shall return to Licensee any license fees paid for the Software in question, and in that event, any licenses granted by Licensor to Licensee for the Software shall terminate.

6.02. Warranty Disclaimer.

THE PROVISIONS OF THIS ARTICLE 6 STATE THE SOLE AND EXCLUSIVE REMEDIES AVAILABLE TO LICENSEE, AND LICENSOR'S SOLE AND EXCLUSIVE LIABILITY, FOR ANY PERFORMANCE OR NONPERFORMANCE OF THE SOFTWARE. LICENSOR DISCLAIMS ALL OTHER WARRANTIES, INCLUDING ALL EXPRESS OR IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, TITLE, NONINFRINGEMENT, AND FITNESS FOR A PARTICULAR PURPOSE.

6.03. Indemnification by Licensor. (a) Except as otherwise provided, Licensor, at its own expense, will defend, indemnify, and hold Licensee harmless from any claim made or threatened or any suit or proceeding brought against Licensee insofar as it is based on an allegation that any Software furnished to Licensee under this Agreement infringes any copyright or patent in existence on the date the Software was initially provided to Licensee, but only if Licensee does all of the following:

- (1) Notifies Licensor of that action in writing within a reasonable period of time (such that Licensor suffers no prejudice to its rights);
- (2) Gives Licensor the right to control and direct the defense and settlement of that action;
- (3) Makes no compromise, settlement, or admission of liability; and
- (4) Provides reasonable assistance and cooperates in the defense of that action at Licensor's expense.

Subject to the limitations set forth in this Article 6, Licensor shall pay any resulting damages, costs and expenses finally awarded to a third party, including but not limited to reasonable legal fees. Licensor will have no responsibility for the settlement of any claim, suit, or proceeding made by Licensee without Licensor's prior written approval.

(b) If any Software is held to infringe and the use of that Software is enjoined, Licensor, at its expense, will do one of the following:

- (1) Procure for Licensee the right to continue using the infringing or potentially infringing Software;
- (2) Replace the infringing or potentially infringing Software with non-infringing Software; or
- (3) Modify the infringing or potentially infringing Software so that it become non-infringing.

If none of the foregoing remedies are commercially feasible, then Licensor will return to Licensee any license fees paid for that Software, and upon such a return, any licenses granted to Licensee for that Software shall terminate immediately.

(c) Licensor's obligations as stated in this Section will not apply to any claim, suit or proceeding to the extent it is based on any of the following:

- (1) Any modification of the Software other than by Licensor or the combination of the Software with non-Licensor hardware or software, if the claim, suit or proceeding would have been avoided if the Software had not been so modified or combined;
- (2) Licensee's use of other than the latest release of the Software if Licensee is informed that a claim, suit or proceeding can be avoided by use of the latest release;
- (3) Any use of the Software not authorized by this Agreement; or
- (4) A modification or derivative work made by Licensor based on Licensee's instructions, designs or specifications.

(d) This Section 6.03 sets forth the entire obligation of Licensor, and Licensee's exclusive remedy, for the actual or alleged infringement by any Software of any patent, copyright, trade secret or other intellectual property right of any person or entity.

6.04. Indemnification by Licensee. [(a)] Licensee shall defend, indemnify, and hold Licensor harmless, under the same terms and conditions and to the same extent as Licensor's indemnification obligation pursuant to Section 6.03, from and against any and all claims asserted by a third party against Licensor to the extent such a claim is based or alleges the infringement of that third party's intellectual property rights by (1) modification(s) of the Software made by Licensee, or (2) derivative works made by Licensee.

[Optional provision:]

(b) Licensee acknowledges that the Software is not designed, made, or intended for any use in hazardous environments requiring fail-safe performance, such as in the operation of nuclear facilities, aircraft control, communications, or navigation, air traffic control, medical devices, nuclear applications, missile and defense systems that could lead directly to death, personal injury or severe physical or environmental damage ("Unintended Uses"). In the event any Licensee's Products incorporating any Software is used for any Unintended Uses, Licensee shall indemnify and hold Licensor and its suppliers, successors and assigns harmless from any claims, losses, costs, damages, expenses, or liability arising out of or in connection with any such Unintended Uses.

[Continue with the following:]

6.05. Limitation of Liability.

IN NO EVENT WILL EITHER PARTY BE LIABLE TO EACH OTHER OR TO ANY THIRD PARTY FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL OR SPECIAL DAMAGES, EVEN IF THE PARTY TO BE CHARGED HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT WILL LICENSOR'S TOTAL LIABILITY UNDER ANY OR ALL PROVISIONS OF THIS AGREEMENT FOR ALL CAUSES OF ACTION ON A CUMULATIVE BASIS EXCEED THE PAYMENTS ACTUALLY MADE TO LICENSOR UNDER THIS AGREEMENT FOR ALL SOFTWARE OR SERVICES OR SUPPORT OR MAINTENANCE RESULTING IN LIABILITY OR OBLIGATIONS ON LICENSOR'S PART DURING THE IMMEDIATELY PRECEDING _____[specify number of months or years] PERIOD. NOTWITHSTANDING THE FOREGOING, WITH REGARD TO LICENSOR'S LIABILITY UNDER THIS SECTION, LICENSOR'S TOTAL LIABILITY SHALL NOT EXCEED THE GREATER OF SUCH PAYMENTS OR \$_____.

ARTICLE 7. TERMINATION

7.01. Grounds for Automatic Termination. The license granted by this Agreement shall be terminated automatically and without further notice upon the occurrence of any of the following:

- (a) Expiration of the term specified in this Agreement, or of any optional renewal term in the absence of a subsequent renewal in accordance with the terms of this Agreement.
- (b) Disclosure of the Software to a third party, whether directly by Licensee or indirectly and whether inadvertently or otherwise.
- (c) Refusal by Licensee to pay any periodic license fee or any increase in that fee provided for in this Agreement.
- (d) Cessation of business by Licensee or any successor or assign to whom the Software has been legitimately transferred.
- (e) Commission by Licensee of an event of default as defined herein.

7.02. Events of Default. Licensee shall have committed an event of default, and this Agreement and the license granted hereunder shall terminate, if any of the following occur:

- (a) Licensee attempts to use, copy, license, or convey the Software in any manner contrary to the terms of this Agreement or in derogation of Licensor's proprietary rights in the Software.
- (b) Licensee fails or neglects to perform or observe any of its existing or future obligations under this Agreement, including, without limitation, the timely payment of any sums due Licensor within _____[specify period] after notice that the payment is delinquent.
- (c) Licensee makes an assignment of Licensee's business for the benefit of creditors.
- (d) A petition in bankruptcy is filed by or against Licensee.
- (e) A receiver, trustee in bankruptcy, or similar officer is appointed to take charge of all or part of Licensee's property.
- (f) Licensee is adjudicated a bankrupt.

7.03. Effect of Termination. Licensee agrees that immediately upon the operation of Section 7.01, whether or not it receives notice of termination, it shall immediately _____[return all copies of the Software to Licensor or destroy all copies of the Software and certify that fact to Licensor]. Licensee further agrees that in the event of termination through its default, all fees or charges due for the remaining term of this Agreement shall immediately become due and payable. Upon termination of the license granted hereunder, Licensor's obligations under this Agreement shall cease.

ARTICLE 8. GENERAL TERMS AND CONDITIONS

8.01. Notices. Unless otherwise provided in this Agreement, any notice required or permitted by this Agreement to be given to either party shall be deemed to have been duly given if in writing and delivered personally or mailed by first-class, registered, or certified mail, postage prepaid and addressed (when intended for Licensee) to _____[address, including appropriate department] or (when intended for Licensor) to _____[address, including appropriate department].

8.02. Assignment of Contract. Licensee shall not assign _____[or otherwise transfer its rights under this Agreement, including the license granted hereunder, or the Software obtained pursuant to this Agreement or this Agreement or its rights hereunder] without the prior written consent of Licensor. Any attempt to make such an assignment without Licensor's consent shall be void.

8.03. Amendments. Licensor and Licensee agree that this Agreement can be modified only by a written agreement duly executed by persons authorized to execute agreements on their behalf.

8.04. Nonwaiver. Licensor and Licensee agree that no failure to exercise, and no delay in exercising any right, power, or privilege hereunder on the part of either party shall operate as a waiver of any right, power, or privilege. Licensor and Licensee further agree that no single or partial exercise of any right, power, or privilege hereunder shall preclude its further exercise.

8.05. Attorneys' Fees. If any legal action is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire Agreement.

8.06. Severability. If any part of this Agreement is adjudged by any court of competent jurisdiction to be invalid, that judgment shall not affect or nullify the remainder of this Agreement, and the effect shall be confined to the part immediately involved in the controversy adjudged.

8.07. Governing Law. This Agreement shall be deemed to have been made in, and shall be construed pursuant to, the laws of the State of California.

8.08. Entire Agreement. Licensee acknowledges and agrees that this Agreement is the complete and exclusive statement of the mutual understanding of the parties, and that it supersedes and cancels all previous written and oral agreements and communications relating to the subject matter of this Agreement.

[Add the following if licensee uses a purchase order for acquisition of the software:]

8.09. Effect of Purchase Order. In the event of any conflict between this Agreement and the terms and conditions of any purchase order or similar document pursuant to which Licensee acquired the license granted by this Agreement, the terms and conditions of this Agreement shall control.

Executed this _____ day of _____, at _____[city], California.

LICENSOR

_____ [name of corporation]

By _____ [signature]

[typed name and title]

LICENSEE

_____ [name of corporation]

By _____ [signature]

[typed name and title]

SOFTWARE LICENSE SCHEDULE

[Attach detailed description of software products covered by the license agreement.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesExclusion & ModificationCopyright LawConveyancesLicensesBrowsewrap & Clickwrap



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART IV. FORMS
B. Software Related Transactions

22-57 California Legal Forms--Transaction Guide § 57.221

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.221 Consumer "Packaged" Software Agreement

[1] Comment

[a] Use of Form

This form is an agreement under which consumer software may be licensed to businesses or individuals. Consumer software agreements may be available in a number of formats. Software may be purchased of the shelf, and may be subject to a "shrink-wrap" license, which binds the licensee once the software package is opened. Consumer software agreements may also come in a "click-wrap" form in which the license agreement appears when the software is being installed on a computer. In such a situation, the licensee must accept the terms of the license agreement before the software may be installed. "Click-wrap" agreements are common when installing software from a media such as a CD-Rom, or downloading from an internet website.

For comment on the reasons for using a license to transfer software, see § 57.200[1].

This form does not include provisions for software maintenance or updating. For additional provisions that may be adapted and included in this form to provide for these functions, see §§ 57.220 and 57.224.

For a review of the basic terminology used in describing and dealing with computer software, see the discussion in §§ 57.10-57.13. For discussion of the generally acknowledged methods of protecting proprietary interests in software see §§ 57.20-57.23, 57.225[1]. For additional discussions on general intellectual property rights see Ch. 103A, *Copyrights*, and Gilson on Trademarks, Ch. 1, *General Principles* (Matthew Bender).

[b] Warranty Provisions

This agreement contains a limited product warranty that the software will conform substantially in accordance with the specifications, and provides a limited warranty against defects in materials and workmanship [see P 5 of Form]. This

form includes express warranties, warranty disclaimer and waiver language, and warranty remedies. The California version of the Uniform Commercial Code provides for warranties of title and against infringement [see *Com. Code* § 2312], express warranties [see *Com. Code* § 2313], and implied warranties of merchantability [see *Com. Code* § 2314] and fitness for a particular purpose [see *Com. Code* § 2315]. For additional discussion of applicable warranty provisions, see §§ 57.13 and 57.200[1].

[c] Acceptance of Contract

This agreement is not executed, in the traditional sense, by either party. The agreement, however, specifies that the buyer of the packaged software accepts the terms of the agreement by the act of opening the package containing the software, by installing the software, or by clicking an "I Accept" button. That act constitutes acceptance of the agreement [see *Civ. Code* § 1584].

[2] FORM

Consumer "Packaged" Software Agreement

CONSUMER LICENSE AGREEMENT

THE PERSON WHO HAS PURCHASED THE LICENSE FOR THIS SOFTWARE (THE "LICENSEE") MUST CAREFULLY READ ALL OF THE TERMS OF THIS AGREEMENT BEFORE _____ [for a "shrink-wrap" agreement: **OPENING THIS PACKAGE or INSTALLING, COPYING, OR OTHERWISE USING THE SOFTWARE** or, for a "click-wrap" agreement: **CONSENTING TO THE TERMS OF THIS AGREEMENT BY CLICKING THE "I ACCEPT" BUTTON BELOW**]. _____ [For a "shrink-wrap" agreement: **OPENING THIS PACKAGE** or, for a "click-wrap" agreement: **CLICKING THE "I ACCEPT" BUTTON BELOW**] INDICATES LICENSEE'S ACCEPTANCE OF THE TERMS AND CONDITIONS OF THIS AGREEMENT.

ANY QUESTIONS CONCERNING THIS AGREEMENT SHOULD BE REFERRED TO _____ [insert contact information of licensor].

1. Proprietary Rights. The Software and any accompanying documentation is owned and copyrighted by _____ [licensor] and is protected by United States copyright and trademark laws. This License is not a sale of the original Software or any copy. As the Licensee, you own only the magnetic or other tangible physical media on which the Software is originally or subsequently recorded or fixed and do have any ownership interest in the Software, improvements, or modifications to the Software or any accompanying documentation.

2. Method of Acceptance. Licensee agrees that by _____ [for a "shrink-wrap" agreement: opening the package or installing, copying, or otherwise using the software or, for a "click-wrap" agreement: clicking the "I Accept" button below], Licensee is accepting the following terms and conditions for use of _____ [name of software] ("Software"). Licensee further agrees that if he or she does not agree with any of the following terms and conditions, he or she shall promptly return the unused Software along with proof of purchase to the place of purchase for a full refund of the licensee fee paid.

3. License. (a) Licensor hereby grants, and Licensee hereby accepts, a nontransferable, non-exclusive, worldwide, perpetual license to use the software, subject to the conditions and for the period specified herein.

(b) Licensee agrees to use the software for _____ [its sole and exclusive benefit or specify purposes, e.g., Licensee's _____ (own or internal) purposes or in the performance of data processing services for others only].

(c) Licensee is authorized to use make one copy of the Software in any machine readable form for back-up or

modification purposes in support of his or her use of the Software.

(d) Licensee agrees not to use, copy, or modify the Software or any copy, modification, or merged portion, in whole or in part, except as expressly provided for in this Agreement.

(e) Licensee agrees not to sublicense, assign, or transfer the license granted by this Agreement or the Software except as expressly provided herein, and agrees that any attempt to do so in any way other than expressly provided herein shall be null and void.

4. Termination of License. This License is effective until terminated. Licensee may terminate this License at any time by destroying all copies of the Software and its Documentation. This License will terminate immediately without notice from Licensor, if Licensee fails to comply with any provision of this License. Upon termination, Licensee must destroy all copies of the Software and its Documentation.

5. Limited Warranty. Licensor warrants that the Software will perform substantially in accordance with the accompanying documentation and the media on which the Software is distributed is properly recorded and free from defects in materials and workmanship under normal use for a period of 90 days from the date of original purchase. This Limited Warranty does not apply to Software that has been altered, damaged, abused, mis-applied, or used other than in accordance with this License and any instructions and documentation that accompany the Software. Licensor's entire liability and Licensee's exclusive remedy will be that Licensor will repair or replace a defective media returned within the warranty period or will, at Licensor's option, refund the money Licensee paid for the Software provided that the Software is returned within the warranty period along with a copy of the original purchase receipt. Any replacement Software will be warranted for the remainder of the original warranty period or 30 days, whichever is longer. Licensor does not warrant that the functions contained in the Software will meet the Licensee's requirements, or that the operation of the software will be uninterrupted or error-free, or that defects in the Software will be corrected. Furthermore, Licensor does not warrant or make any representations regarding the use or the results of the use of the Software or its documentation in terms of their correctness, accuracy, reliability, or otherwise. No oral or written information or advice given by Licensor or its authorized representative shall create a warranty or in any way increase the scope of this warranty. Some jurisdictions do not allow the exclusion of implied warranties, so the above exclusion may not apply.

THE ABOVE WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NONINFRINGEMENT. THIS WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS. YOU MAY HAVE OTHER RIGHTS, WHICH VARY FROM STATE TO STATE.

6. Limitation of Liability.

IN NO EVENT SHALL LICENSOR'S LIABILITY RELATED TO ANY OF THE SOFTWARE EXCEED THE LICENSE FEES ACTUALLY PAID BY LICENSEE FOR THE SOFTWARE. EXCEPT FOR A RETURN OF THE PURCHASE PRICE UNDER THE CIRCUMSTANCES PROVIDED UNDER THE LIMITED WARRANTY. NEITHER LICENSOR NOR ITS SUPPLIERS SHALL IN ANY EVENT BE LIABLE FOR ANY DAMAGES WHATSOEVER ARISING OUT OF OR RELATED TO THE USE OF OR INABILITY TO USE THE SOFTWARE, INCLUDING BUT NOT LIMITED TO DIRECT, INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, AND DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, OR OTHER PECUNIARY LOSS, EVEN IF LICENSOR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, WHETHER SUCH LIABILITY IS BASED ON CONTRACT, TORT, WARRANTY, OR ANY OTHER LEGAL OR EQUITABLE GROUNDS. BECAUSE SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, THE ABOVE LIMITATION MAY

NOT APPLY TO LICENSEE. HOWEVER, IN NO CASE SHALL LICENSOR'S LIABILITY EXCEED THE PURCHASE PRICE FOR THE SOFTWARE.

7. Governing Law. This Agreement shall be construed according to, and the rights of the parties shall be governed by, the law of the State of California.

8. Licensee's Acknowledgment.

LICENSEE ACKNOWLEDGES THAT HE OR SHE HAS READ THIS AGREEMENT, UNDERSTANDS IT, AND AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS. LICENSEE FURTHER AGREES THAT IT IS THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN LICENSEE AND _____[*name of software owner*] AND THAT IT SUPERSEDES ANY PRIOR AGREEMENT, ORAL OR WRITTEN, AND ANY OTHER COMMUNICATIONS BETWEEN LICENSEE AND _____[*name of software owner*] RELATING TO THE SUBJECT MATTER OF THIS AGREEMENT.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCopyright LawConveyancesLicensesBrowsewrap & ClickwrapCopyright LawConveyancesLicensesShrinkwrap



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART IV. FORMS
B. Software Related Transactions

22-57 California Legal Forms--Transaction Guide § 57.222

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.222 Software Development Agreement

[1] Comment

[a] Use of Form

This form is an agreement for the services of a computer software development firm in developing, preparing, and installing a computer program tailored to the needs of an individual or business. It differs from the software consultant agreement in § 57.225 in that the consultant in this agreement is not an individual but a software development firm. In addition, this form calls for installation and post-installation services as well as program design.

This form is not intended for use as an employment agreement between a computer software firm and a person hired as a computer programmer employee. For that type of agreement, including language that may be used in this form, and related comments, see *Ch. 85, Employment Agreements*, § 85.222.

[b] Intellectual Property Protection

For discussion of the various methods used in protecting the proprietary rights of the person for whom computer software is designed, see § 57.225.

[2] FORM

Software Development Agreement

SOFTWARE DEVELOPMENT AGREEMENT

_____[Name of party contracting for program development], _____[address]
("Company"), and _____[name of designer], _____[address] ("Designer"), in

consideration of the promises made herein, hereby agree as follows:

1. Work Product Defined. The term "Work Product," as used in this Agreement, means all programs, systems, processes, inventions, concepts, techniques, data, materials, or work of authorship in any form, first produced or created by Designer or for Designer as a result of, or related to, directly or indirectly, the performance of work or services under this Agreement, including all works that may have copyrights, trade secrets, patents, and all other intellectual property rights, and that shall, to the fullest extent permissible under law, be considered works made for hire.

2. Work Product Description. Company desires to have Designer perform all services and produce Work Product as described _____ [below: _____ (*describe projected features and function*) or in Appendix A attached to this Agreement and incorporated herein by reference].

3. Services. Designer agrees to provide all services necessary to produce the Work Product as described in _____ [Paragraph 2, above or Appendix A].

4. Term of Agreement. This Agreement shall be effective from the date upon which it is executed until terminated by Company upon _____ [*specify period*] prior written notice or by Designer on _____ [*specify period*] prior written notice, terminated pursuant to any other provision of this Agreement, or until completion of all services contemplated by this Agreement.

[*For periodic charges, use the following provision:*]

5. Periodic Payment. Company shall pay Designer for all services rendered in accordance with Designer's established rates contained in its rate schedule dated _____ which are attached to this Agreement as Exhibit B and incorporated by reference, and all applicable taxes, including sales or use taxes. Company also shall pay Designer for _____ [*specify extra items, e.g.: travel costs, including travel time, meals, and lodging, related to performance of this Agreement*]. Company shall also reimburse Designer for special or unusual expenses incurred at Company's specific request. All rates are subject to change by Designer on _____ [*specify period, e.g., 30 days*] prior written notice. Charges shall be billed _____ [*specify period, e.g.: monthly*] and shall be payable immediately upon receipt of each invoice. Payment is contingent upon completion of the Work Product and acceptance of the Work Product by Company. [Concurrent with the execution of this Agreement, Company shall deposit with Designer the sum of \$ _____ as an advance to be applied against the charges billed to Company by Designer as specified above.]

[*Or, for a lump-sum purchase price:*]

5. Purchase Price. Company shall pay Designer the sum of \$ _____ as the purchase price for all services rendered. Concurrent with the execution of this Agreement, Company shall deposit with Designer an amount equal to _____ percent of that purchase price to be applied against the purchase price. Payment of the balance shall be made upon completion of the Work Product and acceptance of the Work Product by Company.

[*Continue with the following:*]

6. Development and Acceptance of Specifications. (a) Within _____ working days after the date of this Agreement, the parties shall meet and discuss the basic purpose and functions of the Work Product and the specific features necessary in order to accomplish its specific purpose. Following agreement on the purpose and basic features of the Work Product, Designer shall prepare specifications for any software portion of the Work Product. If these

specifications are acceptable to Company, Company shall execute a copy of the Specifications Acceptance Agreement attached to this Agreement as Exhibit C.

(b) If Designer and Company are unable to agree upon specifications for the software portion of the Work Product, this Agreement shall be terminated and all copies of any specifications or other materials furnished by Designer to Company shall be returned immediately *[add if lump sum purchase price provision was used and parties agree that designer will be entitled to retain deposit:]*, but Designer shall retain that portion of the purchase price deposited by Company at the time this Agreement was executed].

7. Completion and Acceptance of Work Product. When Company accepts the specifications for the software portion of the Work Product, Designer shall commence preparation and development of the program in accordance with those specifications. If the final complete program meets the specifications in all material respects, Company shall promptly accept it and Designer shall complete the additional portion of the Work Product.

8. Failure to Complete Work Product. Designer's failure to complete the Work Product in accordance with the specifications adopted under Paragraph 6 shall constitute a breach of this Agreement for which Company may seek damages.

9. Confidential Information. (a) Designer agrees that all information communicated to it with respect to the proposed Work Product, including any confidential information relating to the proposed Work Product gained by Designer or its personnel, whether or not that information was directly or intentionally communicated, is confidential. Designer further agrees that all information, conclusions, recommendations, reports, advice, or other documents generated by Designer pursuant to this Agreement is confidential.

(b) Designer promises and agrees that it shall not disclose any confidential information to any other person unless specifically authorized in writing by Company to do so. If Company gives Designer written authorization to make any disclosures, Designer shall do so only within the limits and to the extent of that authorization.

(c) Designer shall use its best efforts to prevent inadvertent disclosure of any confidential information to any third party. Designer shall instruct its personnel to keep that information confidential by using the same care and discretion that they use with similar data designated by Designer as confidential.

(d) Designer acknowledges and agrees that all information concerning the Work Product and any future and proposed products of Company or any of its associates constitutes an exceptionally valuable trade secret of Company. That information includes, among other matters, the facts that the Work Product is planned, under consideration, or in production, as well as any descriptions of the features of the Work Product.

10. Use and Disclosure of Confidential Data. Designer shall not use any confidential information or circulate it to any other person or persons, except when specifically authorized in advance by Company and then only to the extent necessary for any of the following:

(a) Conducting negotiations, discussions, and/or consultations with designated Company representatives.

(b) Supplying Company with goods or services at its order.

(c) Preparing confidential estimates, bids or proposals, and invitations for bids or requests for proposals for submission to Company.

(d) Accomplishing any purpose Company may later specify in writing.

11. Copies of Confidential Data. Designer agrees that copies of confidential information shall not be made without the express written permission of Company and that all such copies shall be returned to Company along with the originals. [Notwithstanding the foregoing, Company agrees that Designer, subject to the other terms and conditions of this Agreement, may make one and only one copy of any materials supplied by or to Company and retain those copied materials solely for its use as historical and legal references.]

12. Return of Materials. Designer shall return to Company, promptly at Company's request, all confidential materials [other than material that Consultant may retain under Paragraph 11 of this Agreement]. Any materials that Company specifically requests to be returned shall be returned promptly at the conclusion of the work on the project to which the materials relate, or, if no work is performed, at the time Designer ceases to be involved with that project.

[If buyer is to have exclusive rights to the work product:]

13. Property Rights in Work Product. Company and Designer agree that all original material, including all computer programs and all related printed materials comprising the Work Product, originated and prepared for Company by Designer pursuant to this Agreement, shall belong exclusively to Company and shall constitute a trade secret owned exclusively by Company. Designer acknowledges and agrees that the sale or unauthorized use or disclosure of information concerning the Work Product [and any future proposed products of Company or any of its associates, the facts that those products are planned, under consideration, or in production,] as well as any descriptions of the features thereof shall constitute unfair competition. Designer promises and agrees not to engage in any unfair competition with Company.

[Or, if rights are to be retained by designer:]

13. Property Rights and License. Company and Designer agree that all original material, including all computer programs and all related printed materials comprising the Work Product, originated and prepared for Company by Designer pursuant to this Agreement, shall belong exclusively to and be the property of Designer, and that Designer shall have the exclusive right to protect the Work Product by copyright or any other means. However, Designer agrees that upon receipt of payment in full pursuant to the terms of this Agreement, Designer shall convey to Company _____ [a nonexclusive or an exclusive] _____ [assignable or nonassignable] license for the use of the Work Product which _____ [shall or shall not] include the right to reproduce, publish, or sublicense the Work Product to other parties. Company acknowledges and agrees that the Work Product is confidential and agrees to use all reasonable means necessary to protect its confidentiality. [Optional: Designer agrees to pay Company a royalty of _____ [specify dollar or percentage amount] on each license Designer grants with respect to the Work Product or any modification or amendment it makes thereto.]

[Continue with the following:]

14. Joint Use of Concepts. Company and Designer acknowledge and agree that the technical expertise developed during the course of this Agreement by Designer's personnel or jointly by Designer's personnel and Company's personnel may be used by either party in any way that party deems appropriate.

15. Indemnification. Consultant shall indemnify Company against all losses and expenses incurred by Company, including but not limited to reasonable attorneys' fees, resulting from any breach of this Agreement by Designer. Designer agrees to indemnify and hold Company harmless from all claims for bodily injury or property damage that may arise from Designer's performance of services for Company. Designer waives all rights against Company for damages covered by other insurance.

16. Liability Limitation.

NOTWITHSTANDING ANYTHING TO THE CONTRARY WITHIN THIS AGREEMENT, ALL LIABILITY OF COMPANY UNDER THIS AGREEMENT SHALL BE LIMITED TO THE AMOUNTS OWED TO DESIGNER BY COMPANY FOR WORK ACTUALLY PERFORMED BY DESIGNER.

17. Independent Contractor Status. Company and Designer agree that Designer shall perform its duties under this Agreement as an independent contractor. Personnel employed by Designer who perform duties related to this Agreement shall remain under the supervision, management, and control of Designer.

18. Governing Law. This Agreement shall be construed according to, and the rights of the parties shall be governed by, the law of the State of California.

19. Attorneys' Fees. If any legal action is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire Agreement.

20. Entire Agreement. This Agreement sets forth the entire agreement between the parties with regard to the subject matter hereof. No other agreements, representations, or warranties have been made by either party to the other with respect to the subject matter of this Agreement.

21. Severability. If any of the provisions of this Agreement are found or deemed by a court of competent jurisdiction to be invalid or unenforceable, they shall be severable from the remainder of this Agreement and shall not cause the invalidity or unenforceability of the remainder of this Agreement.

22. Amendment.

This Agreement may be amended only by a written agreement signed by both parties.

Executed at _____, California, on _____.

COMPANY

_____ [name of company]

By _____ [signature]

[typed name and title]

DESIGNER

_____ [name of company]

By _____ [signature]

[typed name and title]

EXHIBIT A**Description of Work Product to Be Produced by Designer**

[If work product to be produced by designer is not specified in agreement itself, attach description here; include

general discussion of what the software must do, and include any reference to manuals or other documentation that is required in connection with the software.]

EXHIBIT B
Designer's Rate Schedule

[If designer is to be paid in accordance with a standard rate schedule, attach a copy of that schedule here.]

EXHIBIT C
Acceptance of Specifications

[Attach copy of form document accepting specifications for work product.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet LawInternet BusinessContractsGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART IV. FORMS
B. Software Related Transactions

22-57 California Legal Forms--Transaction Guide § 57.223

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.223 Source Code Access Agreement

[1] Comment

[a] Use of Form

This form may be used in conjunction with a software license agreement, such as the *form in § 57.220[2]*, to give the licensee the right to obtain a copy of the source code version of a computer program. Such a form is typically used if the licensee requests to make modifications or alterations to the computer program, and requires source code in order to do such modifications or alterations. Alternatively, this form may also be used with a software license agreement to give the licensee the right to obtain a copy of the source code should the licensor go out of business or declare bankruptcy. This form is designed for use with agreements that otherwise grant the licensee right only to the object code version of the software.

[b] Definition of Source Code

Computer programs are written in different levels of "language." High-level language, such as BASIC, C, C++, COBAL, FORTRAN, Ada, and Pascal, are usually referred to as programming language. A somewhat lower level is "assembly" language; it consists of alphanumeric labels. Both of these are referred to as having been written in "source code" [*Apple Computer, Inc. v. Franklin Computer Corp.* (3d Cir. 1983) 714 F.2d 1240, 1243] . The source code is the version produced initially by a programmer and contains commentary by the programmer indicating how it works and how it may be revised or updated. Moreover, it is the version that is used to "maintain" (revise, update, or correct) the program.

[c] Limitations on Use of Source Code

It is common for a licensor to limit the use of the source code by specifying what the licensee is going to do with the source code [see § 57.223[2], Exhibit A]. Furthermore, a licensor typically will provide that a licensee may not engage

in activities that would compete with licensor [see § 57.223 [2], P 7], and that the licensee must use best efforts to protect and safeguard the source code [see § 57.223 [2], P 4].

[2] FORM

Source Code Access Agreement

SOURCE CODE ACCESS AGREEMENT

This Agreement is entered into as of _____ [date] (the "Effective Date") between _____ [name of company], a _____ [state of incorporation] corporation with its principal place of business at _____ [address of company] ("Company"), and _____ [name of customer], a _____ [state of incorporation] corporation with its principal place of business at _____ [address of customer] ("Customer"). The parties agree as follows:

1. Source Code Access. Company wishes to provide Customer with access to certain documentation and source code as set forth in Exhibit A attached to this Agreement (the "Company Information"), and Customer wishes to access the Company Information on a temporary basis in order to undertake the development activities described in Exhibit A (the "Services"). Company and Customer have also entered into a _____ [specify agreement, usually a mutual nondisclosure agreement or a master software license agreement], dated _____ [date of prior agreement] (the "Prior Agreement").

2. Limitation on Access to Information. Only Customer employees or contractors who sign an Acknowledgment in the form of Exhibit B ("Customer Personnel") will have access to the Company Information and shall access the Company Information for the sole purpose of performing the Services. Company shall have the right to approve each individual Customer Personnel, and may require any or all Customer Personnel to cease performing the Services at any time.

3. Access on "Need to Know" Basis. Only Customer Personnel who have a reasonable need to have access to the Company Information in order to perform the Services will have access to the Company Information.

4. Protection of Company Information. Customer shall exercise best efforts to protect and safeguard the Company Information, which shall at a minimum include the following:

- (a) Segregating and labeling the Company Information according to the date of delivery and any other identifying information supplied by Company, and
- (b) Requiring that Customer Personnel only access the Company Information in a secured area that requires a passcode or card access to enter (the "Work Facility").

Customer also warrants and represents to Company that its procedures for safeguarding and protecting the Company Information shall meet or exceed industry standards regarding source code access.

5. Compliance with Governmental Restrictions. Customer will comply with all applicable export control laws or regulations administered by the U.S. Commerce Department, or any other government agency in performing the Services hereunder.

6. Additional Confidentiality Provisions. The confidentiality provisions set forth within the Prior Agreement shall apply to the Customer Personnel and the Services to be performed, except that the following additional provisions shall also apply:

(a) Confidential Information shall be deemed to include Company Information and any source code written by Customer resulting from the Services ("Work Product") without the need for any confidential or proprietary markings.

(b) The period within which Company Information and Work Product must be kept confidential shall be perpetual.

(c) Except as reasonably necessary to perform the Services, Customer Personnel may not make any copies of Company Information.

(d) Without Company's express written consent, Customer Personnel may not (1) remove in any manner any Company Information or Work Product from the Work Facility, including but not limited to by electronic transmission, nor (2) access the Company Information or Work Product from outside the Work Facility (including but not limited to off-site modem access).

(e) Except as otherwise expressly set forth in this Agreement, Customer Personnel may use the Company Information and Work Product solely for the purpose of performing the Services.

(f) Without Company's express written consent, Customer Personnel may not modify or recompile the Company Information.

7. No Licensing or Distribution. Customer agrees not to develop, license, sublicense, resell or distribute any application, computer program or other software offering that competes directly with any Company products or services.

8. Insurance. Customer agrees to obtain and maintain general commercial liability insurance in an amount of not less than \$_____. Upon written request, Customer shall furnish Company with certificates of insurance, within 30 days of request, to evidence its compliance with this provisions.

9. Ownership of Company Information. Customer recognizes and acknowledges that ownership of all rights to the Company Information shall remain with Company at all times. The right of Customer to access and use the Company Information to perform the Services will not include, implicitly or otherwise, either ownership or the right to incorporate, distribute or sublicense the Company Information. As between the parties, Company's products, implementation methodology, related Company products, and any changes or modifications thereto as a result of this Agreement, and all related intellectual and proprietary rights are exclusively owned by Company, and Customer shall (and hereby does) make assignments as necessary to effect such ownership. Customer agrees not to change or delete any proprietary notices from any of Company's products. Customer will not take any action to jeopardize, limit or interfere in any manner with Company's ownership of or rights with respect to Company's products. Nothing in this Agreement shall preclude or restrict Company from developing, acquiring, using, marketing or distributing any software, documentation, or other products performing the same or similar functions as any extensions created by Customer under this Agreement.

10. Extensions of Modifications to Information. Customer acknowledges and agrees that Customer shall be solely responsible for supporting any extensions to Company's unmodified products or modifications to the Company Information made hereunder, and that (1) Company shall have no responsibility for providing support for any such extensions or modifications, and (2) if such extensions or modifications affect Company's ability to support Customer's use of Company's unmodified products, and if Customer has a license to use Company products under a separate agreement, then Company shall not be obligated to provide support to Customer under any such separate agreement.

11. No Fees or Royalties. Except as the parties may otherwise expressly agree in writing, neither party shall owe the other party any fees, royalties, or other payments of any kind for any of the Services performed or rights granted under

this Agreement.

12. Termination. (a) Either party may terminate this Agreement at any time upon written notice.

(b) Paragraphs 6, 8, 9, 10, 11, 12, 13, 14 and 15 of this Agreement shall survive any termination of this Agreement.

(c) Upon the expiration or termination of this Agreement, or upon any breach of the terms and conditions of this Agreement or the termination or breach of the separate agreement under which Customer has a license to use Company products, Customer shall immediately return and deliver to Company or destroy all Company Information and all other proprietary or confidential materials belonging to Company, in its possession and Customer shall warrant in writing that it has not retained any copies of (1) the Company Information, (2) the documentation, if any, related to the Company Information, (3) any licensing, delivery or technical information regarding the Company Information, or (4) any other proprietary or confidential information of Company relating to the Company Information.

13. Disclaimer of Warranty.

THE COMPANY INFORMATION IS PROVIDED TO CUSTOMER AS IS WITHOUT WARRANTY OF ANY KIND. COMPANY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NONINFRINGEMENT, WITH RESPECT TO THE COMPANY INFORMATION.

14. No Liability for Damages.

EXCEPT FOR CUSTOMER'S (1) MISUSE OR DISCLOSURE OF COMPANY INFORMATION OR THE WORK PRODUCT; (2) CLAIM OF OWNERSHIP OF COMPANY INFORMATION; OR (3) CLAIM OF OWNERSHIP OF ANY WORK PRODUCT, IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, PUNITIVE, SPECIAL OR OTHER DAMAGES WHATSOEVER, INCLUDING WITHOUT LIMITATION, DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, AND THE LIKE, ARISING OUT OF THIS AGREEMENT OR THE USE OF OR INABILITY TO USE THE COMPANY INFORMATION EVEN IF COMPANY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

15. Miscellaneous Provisions. (a) In the event any court or tribunal of competent jurisdiction determines that any term or provision of this Agreement is unenforceable, that provision shall be enforced to the maximum extent permitted by law and all other terms and provisions shall remain in full force and effect.

(b) Customer shall not assign or otherwise transfer, whether by merger, operation of law, or otherwise, any rights or responsibilities set forth in this Agreement. Any attempted assignment in violation of this provision shall be null and void.

(c) Neither party's failure to exercise any right under this Agreement shall be deemed a waiver of that right.

(d) This Agreement represents the entire understanding and agreement between the parties as to the matters set forth herein, and supersedes all prior communications, written and oral, relating to the subject matter of this Agreement.

(e) This Agreement may only be modified by a writing signed by an authorized representative of each party.

(f) This Agreement shall be governed by the laws of the State of California without regard to conflicts of laws provisions thereof.

Executed this _____ day of _____, at _____[city], California.

COMPANY

_____ [name]

[typed name and title]

CUSTOMER

_____ [name of corporation]

By _____ [signature]

[typed name and title]

EXHIBIT A

Description of Company Information and Services

_____ [insert a description of the company information and/or services which will be provided to customer]

Customer will access the Company Information in order to _____ [insert the purpose for which customer is receiving the source code]. Under no circumstances will Customer localize the Company Information without first obtaining Company's prior written consent.

EXHIBIT B

Acknowledgment Of Company Source Code Access Agreement

I am an employee or contractor of _____ [name of customer] ("Customer"). I acknowledge that I have read and understand the Company Source Code Access Agreement Between Company and Customer and any addendums thereto (collectively, the "Agreement"). I understand that the Agreement applies to me as an employee or contractor of Customer to the extent I have access to the Company Information and assist in providing the Services.

I am a U.S. citizen: Yes/No _____

_____ [signature of customer's employee or contractor]

_____ [printed name of customer's employee or contractor]

_____ [date]

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Internet Business Contracts General Overview Copyright Law Conveyances Licenses General Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART IV. FORMS
B. Software Related Transactions

22-57 California Legal Forms--Transaction Guide § 57.224

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.224 Software Maintenance Agreement

[1] Comment--Use of Form

This form is a software maintenance agreement for use between a computer software supplier and a software licensee or buyer. It provides for the maintenance of the software after expiration of the warranty period specified in the software license or sale agreement. "Maintenance of software" may include updates containing changes, additions, and enhancements, correction of defects or "bugs," and physical replacement of lost or damaged computer programs or written documentation materials.

Generally, software maintenance agreements are used only in connection with software intended for commercial use. The service is usually performed by the party from whom the software was acquired, either under the terms of the software license agreement or under a separate maintenance agreement entered into by the purchaser or licensee pursuant to a requirement in the sale or license agreement [see § 57.221].

A packaged or "consumer" software license agreement may include maintenance provisions, but these are generally limited to "update service."

This agreement is essentially a service contract. For discussion of possessory liens for services and repairs, the preliminary determinations prior to drafting a service contract, and a guide to specific service contract provisions, see Ch. 92, *Service Contracts*.

[2] FORM

Software Maintenance Agreement

COMPUTER SOFTWARE MAINTENANCE AGREEMENT

_____[*Name of software licensee or buyer*], _____[*address*], ("Customer"), and
 _____[*name of software supplier/maintenance contractor*], _____[*address*]
 ("Supplier") in consideration of the promises made in this Agreement and intending to be legally bound, agree as follows:

Recitals

Concurrently with this Agreement, Supplier and Customer entered into an agreement (the _____["License Agreement" or "Purchase Agreement"]), dated _____, pursuant to which Supplier _____[*licensed or sold*] to customer the computer program listed on the purchase order attached to the _____ License Agreement or Purchase Agreement] (the "Software") and Customer agreed to enter into an agreement providing for the maintenance of the Software.

1. Maintenance Services. (a) Supplier agrees to provide the services necessary to remedy any programming error attributable to Supplier that is found to exist in the Software, either by replacing the Software or by taking appropriate corrective action. Supplier shall take any such corrective action, make any necessary replacement, or provide other services promptly after Customer identifies a claimed programming error and notifies Contractor of that error.

(b) Corrected or replacement Software delivered to Customer shall be limited to one copy of the Software and one copy of any revised documentation.

[Use the following paragraph only if customer is a licensee:]

2. Proprietary Rights. Customer acknowledges and agrees that corrected or replacement Software and associated documentation remain the property of _____[*name of software licensor*] and constitute a trade secret of _____[*name of software licensor*]. Customer further agrees that corrected or replacement Software and associated documentation shall be delivered to Customer only after Customer executes a subsequent license agreement with _____[*name of software licensor*] governing its use, unless Supplier, at its option, waives this requirement for a execution of a subsequent license agreement.

[Continue with the following:]

3. Modifications Excluded. Supplier shall not be obligated to provide maintenance services pursuant to this Agreement with respect to any modifications to the Software made by Customer or to any computer program incorporating all or any part of the Software.

4. Access to Data and Computer. On request, Customer agrees to provide Supplier with printouts of the Software or of data in storage that exhibits evidence of a programming error. Customer further agrees to provide Supplier with access to Customer's computer and sufficient computer time to enable Supplier to duplicate the problem, determine that it results from the Software, and, after corrective action or replacement has taken place, determine that the problem has been alleviated.

5. Term of Agreement. This Agreement shall be operative from _____[*generally date of expiration of warranty in software license or sale agreement*], for a _____[*specify, e.g., one-year*] period _____[*subject to renewal or after which it may be terminated by either party*] on _____[*number*] days prior written notice to the other party.

6. Warranty Provisions. Replaced or corrected Software shall be subject to the warranties, warranty remedies, and warranty limitations or disclaimers set forth in the _____ [License Agreement or Purchase Agreement] pursuant to which Customer acquired the original Software, for the period designated therein. The warranty provisions contained in that _____ [License Agreement or Purchase Agreement] are incorporated herein by reference.

7. Fees and Charges. The fee for the maintenance services provided for in this Agreement shall be \$_____ per _____ [period], payable in advance of each period.

8. Costs Related to Customer-Modified Software. If Supplier corrects defects or problems attributable to errors made by Customer or corrections or modifications made by Customer, Customer agrees to pay Supplier the Supplier's then-current standard rates for time and material.

9. Taxes. Customer shall be responsible for all sales or use taxes or any other taxes, fees, or duties imposed by federal, state, local, or other governments or governmental entities on or with respect to the services rendered or property provided by Supplier pursuant to this Agreement.

10. Travel Expenses. Customer agrees to pay Supplier for all travel and other incidental expenses, including meals, telephone charges, and shipping costs, incurred in connection with Supplier's performance of its duties under this Agreement.

11. Termination. (a) This Agreement may be terminated by either party at the end of its initial term on _____ [number] days prior written notice to the other party.

(b) This Agreement shall be terminated on the termination by reason of default on the part of Customer of the agreement pursuant to which Customer obtained the Software.

(c) This Agreement may be terminated at any time by Supplier in the event of any failure on the part of Customer to pay the maintenance fee provided for hereunder within _____ [specify period] days after notice that the maintenance fee is delinquent.

(d) In the event of termination, all fees or charges payable under this Agreement shall become due and payable immediately and without notice or demand by Supplier and all obligations of Supplier under this Agreement shall end immediately upon termination.

12. Delays. Supplier shall not be liable for any delay in performance directly or indirectly resulting from acts of Customer, its agents, employees, or subcontractors or causes beyond the control of Supplier. "Causes beyond the control of Supplier" include, but are not limited to: acts of God; acts of a public enemy; acts of the United States or the District of Columbia, any State or Territory of the United States, or any of their political subdivisions; fire; flood; epidemics; quarantine restrictions; strikes, civil commotions, or revolution; freight embargoes; unusually severe weather conditions; or default of Supplier's subcontractors or suppliers.

13. Entire Agreement. This Agreement constitutes the entire agreement of the parties and the terms and conditions stated herein supersede all prior agreements between the parties relating to the subject matter of this Agreement.

14. Amendments. This Agreement may be amended by the parties only by a written agreement.

15. Attorneys' Fees. If any legal action is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire Agreement.

16. Parties Bound. This Agreement shall be binding on and inure to the benefit of Supplier and Customer and their respective successors and (to the extent specified in any assignment) assigns.

17. Notices. Any notices or reports required by this Agreement to be given by one party to the other party shall be made in writing to that party at the address shown at the beginning of this Agreement or at any other address that may be designated in writing from time to time by that party.

18. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

Executed on _____[*date*], at _____[*city*], California.

CUSTOMER

_____[*name*]

By _____[*signature*]

[*typed name and title*]

SUPPLIER

_____[*name*]

By _____[*signature*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewCopyright LawConveyancesLicensesGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART IV. FORMS
B. Software Related Transactions

22-57 California Legal Forms--Transaction Guide § 57.225

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.225 Software Design Consultant Agreement

[1] Comment

[a] Use of Form

This form is an agreement by an individual software consultant acting as an independent contractor to perform a software design study as the first stage in the design and development of a computer program.

This form may be used when an individual or a company has a basic idea or goal for a software program, or when there is a relatively highly developed idea (whether derived from its own personnel or outside programmers) of what the program should do to accomplish its goals. In either case, the agreement contemplates that the consultant will refine the existing idea or goal. To that end, it describes in general terms the function the prospective program is expected to perform and specifies the types of materials to be delivered to the consultant to aid that person in designing or redesigning the software program. An agreement containing alternate language that is designed for use in contracting for the services of a software development firm to develop, prepare, and install a computer program is set forth in Form 57.222.

This form is not intended for use as an employment agreement between a computer software firm and a computer programmer hired as an employee. For employment agreements see Ch. 85, *Employment Agreements*. For a guide to the preparation of an agreement for consultation or advice, and methods for compensating a consultant, see Ch. 86, *Agreements for Professional Services*. For a complete employment contract for a professional person, specifically a research and development engineer, see Ch. 85, *Employment Agreements*, § 85.221. For a complete employment contract between a software publisher and a programmer, see Ch. 85, *Employment Agreements*, § 85.222. For a contract between a business consultant and a client for whom the consultant will perform specified services, such as computer consulting services, see Ch. 86, *Agreements for Professional Services*, § 86.200. For a sample of a vendor to vendor consulting services agreement, see Ch. 86, *Agreements for Professional Services*, § 86.203.

Nondisclosure agreements protect a client's confidential and proprietary information, and may be incorporated into an agreement for services. However, nondisclosure issues are frequently covered in separate agreements. For a sample separate nondisclosure contract, see § 57.228; see also *Ch. 86, Agreements for Professional Services*, § 86.204. For a separate provision specific to maintaining the confidentiality of trade secrets, see *Ch. 85, Employment Agreements*, § 85.440.

[b] Independent Contractor Status

In determining whether a person performing work is an independent contractor or an employee, the courts will look beyond the language of the agreement to the substance of the relationship between the parties [*Grant v. Woods* (1977) 71 Cal. App. 3d 647, 653, 654, 139 Cal. Rptr. 533 ; *Pacific Lumber Co. v. Industrial Accident Comm'n* (1943) 22 Cal. 2d 410, 422, 139 P.2d 892] . For discussion of the factors leading to a determination of this issue and other legal issues relating to independent contractors, as well as guides to the drafting of agreements with independent contractors, see *Ch. 84, Independent Contractors* .

[c] Intellectual Property Protection of Software

The greatest problem in the computer software field is finding a way to protect the software from unauthorized disclosure to and use by third parties. The three generally acknowledged methods of protecting proprietary rights in software are trade secret, copyright, and patent protection.

Of the three methods mentioned above, patent protection is the least likely since, a determination must be made as to whether the computer system as a whole produces a useful, tangible, and concrete result [*State Street Bank & Trust Co. v. Signature Fin. Group* (1998), 149 F.3d 1368, 1373-1375] . For further discussion, see § 57.22.

Copyright protection is available for computer programs, or software, as they are considered literary works [see 17 U.S.C. § 101 ("computer program" and "literary works" defined)]. Such literary works are protected from unauthorized copying under the copyright law [*Apple Computer, Inc. v. Franklin Computer Corp.* (3d Cir. 1983) 714 F.2d 1240, 1249 , cert. dismissed, 464 U.S. 1033 (1984) (computer program in object code embedded in ROM chip is appropriate subject for copyright); see also § 57.20]. However, even though it is clear that the right to copyright work created "for hire" belongs to the employer [see 17 U.S.C. § 201(b)], an action for copyright infringement, in most cases, cannot be instituted without first registering the program [see 17 U.S.C. § 411 (exceptions)] and depositing at least part of the documentation [17 U.S.C. § 408; see 37 C.F.R. § 202.20(c)(2)(vii), (d)]. Registration and deposit obviously can defeat the secrecy of a computer program, and for this reason copyrighting a program that is not intended for general distribution is generally viewed as inadequate protection.

The third method of software protection, the application of trade secret law, offers protection in the form of traditional contract actions and the right to injunctive and other relief [see *Bus. & Prof. Code* §§ 17200, 17202-17209] without the public disclosure (and loss of secrecy) required under patent law or the registration and publication of a work under copyright law. Under the Uniform Trade Secrets Act [*Civ. Code* § 3426 *et seq.*], an actual or threatened misappropriation of a trade secret may be enjoined or otherwise limited [see *Civ. Code* § 3426.2] and damages can be recovered for the misappropriation [see *Civ. Code* § 3426.3; see also § 57.21].

[d] Ownership and Works for Hire

In Paragraph 16 of this form, the consultant disclaims any rights that he or she might have in the product as the result of his or her work pursuant to the agreement. In copyright law, work done for hire is considered the work of the employer [17 U.S.C. § 201(b)]. However, since it is entirely possible that the party for whom the work is to be done may elect not to protect the work under copyright, it is necessary to include this type of disclaimer.

Lab. Code § 2870 makes unenforceable as against public policy any employment agreement provision assigning an employee's rights in any invention for which no equipment, supplies, facilities, or trade secret information of the employer was used, which was developed entirely on the employee's own time, and which does not either relate, at the time of conception or reduction to practice of the invention, to the employer's business or research and development or result from any work performed by the employee for the employer [*see Lab. Code § 2870*]. This statutory provision should not apply to this form since the agreement contemplates an independent contractor relationship rather than that of employer and employee. It also contemplates the consultant's use of the other party's trade secret information and assumes that the work product will relate to the other party's work. Nevertheless, prudent practice dictates an assumption that *Lab. Code § 2870* might be found applicable to this agreement under some circumstances (for example, if a court decided in a given case that notwithstanding the terms of the contract the relationship of the parties actually was that of employer and employee). Since the Labor Code also requires the employer to notify the employee that the agreement does not apply to an invention that would remain the employee's property under the law, and since that notice must be given at the time the agreement is made [*Lab. Code § 2872*], Paragraph 16(f) contains that notice.

[2] FORM

Software Design Consultant Agreement

AGREEMENT FOR SOFTWARE CONSULTANT'S SERVICES

_____[*name of party contracting for consultant's services*] _____[*address*]
("Company"), and _____[*name of consultant*], _____[*address*] ("Consultant") in
consideration of the promises made herein, agree as follows:

1. Development of Computer Program. Company desires to [*specify, e.g., develop, implement, and produce*] a computer program, hereinafter referred to as "the Software," _____[*designed to* _____ (*describe projected features and function*) or designated as _____ (*name or title of program or programs*)] and to obtain Consultant's advice concerning the _____[*specify, e.g., production, application, and implementation*] of the Software. [Company agrees that Consultant is accepted as an expert for the purposes of providing the consultation required by this Agreement.]

2. Consultation Services. (a) _____[*name of consultant*] hereby agrees to act as Consultant and to advise Company with respect to the development of the Software by other parties. Company and Consultant agree that any consultation provided by Consultant, whether in writing or orally, is purely advisory and that there is no guarantee of any particular result.

(b) The consultation to be performed pursuant to this Agreement includes, but is not limited to, advice concerning the _____[*specify, e.g., production, application, and implementation*] of the Software.

(c) Consultant shall perform the duties specified in this Agreement personally. Consultant shall not delegate the performance of those duties to any other person without first obtaining Company's written consent.

3. Independent Contractor Status. Company and Consultant agree that Consultant shall perform the duties specified in this Agreement as an independent contractor, not as an employee of Company. Consultant shall not have or claim any right arising from employee status.

4. Communication of Advice. Consultation shall be orally communicated between Consultant and _____[*name of designated employee*] when appropriate, and Consultant shall prepare, upon Company's request, such reports or documents as are reasonable [and mutually agreed upon]. Consultation may be made in person between Consultant and _____[*name of company's designated employee*] when mutually

convenient and mutually agreed upon.

5. Delivery of Materials. Company shall deliver materials, including _____ [specify], relating to the Software [by _____ (specify means of transmission)] to Consultant no later than _____ [specify date]. From time to time, Company shall deliver other written materials that relate to the Software.

6. Review and Response by Consultant. Consultant acknowledges and agrees that time is of the essence in the value of Consultant's services to Company and _____ [agrees that consultation services are to be rendered within a reasonable time after receipt of materials from Company or shall complete a review of the materials forwarded to Consultant by Company _____ (specify time, e.g., immediately upon or within _____ days after) receipt) and render Consultant's services to Company within _____ (specify time limit) after review of the materials]. [Optional: However, Company agrees that Consultant may postpone Company's proposed assignments when necessary to allow Consultant to perform _____ (specify other duties, e.g., Consultant's normal full time occupation), if mutually acceptable rescheduling is agreed upon by Company. Company further agrees that Consultant may refuse any proposed assignment if that refusal is communicated to Company _____ (in a timely manner or within _____ [number] working days after receipt of the proposed assignment.)]

7. Exercise of Final Judgment. Company hereby retains the right to exercise, and shall exercise, final judgment with respect to, and responsibility for, the ultimate development and delivery of the Software and all related materials.

8. Compensation. (a) Consultant shall be paid at the rate of \$ _____ per hour for Consultant's services under this Agreement.

(b) Billing shall be by invoice prepared by Consultant by the first of each month following the performance of the duties described in this Agreement. Company agrees to make payment on each invoice, and payments are due, within _____ days following receipt. [The failure of Company to make payment on any invoice within _____ days after its receipt by Company shall be cause for Consultant to terminate this Agreement.]

(c) Consultant shall receive no royalty or other remuneration whatsoever on the production or sale of the Software.

(d) If Consultant so desires, Consultant shall receive credit by name for Consultant's contribution to the creation of the Software, displayed on Software's packaging in a form to be determined by Company.

9. Expenses. Expenses that are reasonably incurred by Consultant in the performance of this Agreement and approved in advance by Company shall be reimbursed to Consultant upon proper documentation.

10. Confidentiality of Data. (a) Consultant agrees that all information communicated to Consultant with respect to the Software, including any confidential information gained by Consultant or Consultant's representatives by reason of association or employment with Company or its associates, whether or not that confidential information was directly or intentionally communicated, is confidential. Consultant further agrees that all information, conclusions, recommendations, reports, advice, or other documents generated by Consultant pursuant to this Agreement is confidential.

(b) Consultant promises and agrees that Consultant will not disclose any confidential information to any other person unless specifically authorized in writing by Company to do so. If Company gives Consultant written authorization to make any disclosures, Consultant shall do so only within the limits and to the extent of that authorization.

(c) Consultant shall use Consultant's best efforts to prevent inadvertent disclosure of any confidential information to any

third party by using the same care and discretion that Consultant uses with similar data that Consultant designates as confidential.

(d) Consultant acknowledges and agrees that all information concerning the Software and any future and proposed products of Company or any of its associates is and constitutes an exceptionally valuable trade secret of Company. That information includes, among other matters, the facts that the Software is planned, under consideration, or in production, as well as any descriptions of the features of the Software.

11. Use and Disclosure of Confidential Data. Consultant shall not use any confidential information or circulate it to any other person or persons, except when specifically authorized in advance by Company and then only to the extent necessary for any of the following:

- (a) Conducting negotiations, discussions, and/or consultations with designated Company representatives.
- (b) Supplying Company with goods or services at its order.
- (c) Preparing confidential estimates, bids or proposals, and invitations for bids or requests for proposals for submission to Company.
- (d) Accomplishing any purpose Company may later specify in writing.

12. Copies of Confidential Information. Consultant agrees that copies of confidential information may not be made without the express written permission of Company and that all such copies shall be returned to Company along with the originals. [Notwithstanding the foregoing, Company agrees that, subject to the other terms and conditions of this Agreement, Consultant may make one and only one copy of any materials supplied by or to Company and that Consultant may retain those copied materials solely for Consultant's use as historical and legal references.]

13. Return of Materials. Consultant shall return to Company, promptly at Company's request, all confidential materials [other than copies that Consultant may retain pursuant to Paragraph 12 of this Agreement]. Any materials the return of which is specifically requested shall be returned promptly at the conclusion of the work on, or consideration of work on, the project to which the materials relate.

14. Confidentiality of Relationship. Consultant acknowledges and agrees that the fact that Company is using Consultant's services is confidential. Company agrees that the fact that it is using the services of Consultant is confidential and that Company may disclose that fact to others only with Consultant's written permission.

15. Competitive Activities. (a) Consultant acknowledges and agrees that the sale or unauthorized use or disclosure of any of Company's trade secrets obtained by Consultant pursuant to this Agreement, including information concerning the Software and any future and proposed products of Company or any of its associates, the facts that those products are planned, under consideration, or in production, as well as any descriptions of the features of those products, constitute unfair competition. Consultant promises and agrees not to engage in any unfair competition with Company [without Company's prior written consent].

(b) Consultant further promises and agrees that during the term of this Agreement, Consultant shall not, directly or indirectly, either as an employee, employer, consultant, agent, principal, partner, stockholder, corporate officer, director, or in any other individual or representative capacity, engage or participate in any competitive activity relating to the Software [without Company's written consent].

16. Ownership of Work Product. (a) Consultant agrees that any and all intellectual properties, including, but not limited to, all ideas, concepts, themes, computer programs or parts thereof, documentation or other literature, or

illustrations, or any components thereof, conceived, developed, written, or contributed by Consultant, either individually or in collaboration with others, pursuant to this Agreement, shall belong to and be the sole property of Company.

(b) Consultant agrees that all rights in all works prepared or performed by Consultant pursuant to this Agreement, including patent rights and copyrights applicable to any of the intellectual properties described in Paragraph 16(a) above, shall belong exclusively to Company and shall constitute "works made for hire."

(c) This Paragraph shall exclude patent rights and copyrights that relate to Consultant's prior _____ [activities or employment] [optional: but shall include those patent rights and copyrights that relate to Consultant's prior _____ (activities or employment) but pertain and relate to the subject matter of Consultant's work for Company pursuant to this Agreement and Company's business].

[Optional; include if consultant is employed by a third party in addition to rendering services under this agreement:]

(d) This Paragraph shall exclude patent rights and copyrights that relate to Consultant's present employment, but shall include those patent rights and copyrights that relate to Consultant's present employment and that pertain and relate to the subject matter of Consultant's work for Company pursuant to this Agreement and Company's business.

[Continue with the following:]

(e) This Paragraph shall exclude rights in patents and copyrights obtained by Consultant that do not directly pertain to Consultant's work for Company and that are obtained 10 or more years after completion of Consultant's last work for Company under this Agreement.

(f) The provisions of this Paragraph shall not apply to assign to Company any of Consultant's rights in any invention for which no equipment, supplies, facilities, or trade secret information of Company was used, which was developed entirely on Consultant's own time, and which:

(1) Does not relate, at the time of conception or reduction to practice of the invention, to Company's business or to Company's actual or demonstrably anticipated research or development; or

(2) Does not result from any work performed by Consultant for Company.

17. Use of Copyrighted Materials. Consultant warrants that any materials provided by Consultant for use by Company pursuant to this Agreement shall not contain any material that is protected under the Copyright Act or any other similar law, except to the extent of "fair use," as that concept is defined in the Copyright Act. Consultant shall be solely responsible for ensuring that any materials provided by Consultant for use by Company pursuant to this Agreement satisfy this requirement, and Consultant agrees to hold Company harmless from all liability or loss, including debt or expense for attorneys' fees to which Company is exposed on account of Consultant's failure to perform this duty.

18. Termination of Contract. (a) Unless otherwise terminated as provided herein, this Agreement shall continue in force until the services provided for have been fully and completely performed, and shall thereupon terminate unless renewed in writing by both parties.

(b) Notwithstanding any other provision of this Agreement, either party hereto may terminate this Agreement at any time by giving written notice thereof to the other.

(c) In the event that either party, in that party's sole judgment, determines that a conflict of interest exists between them, that party may terminate this Agreement by giving written notice to the other party. With respect to "conflict of interest," Consultant warrants that Consultant is not now under any obligation to any company or other person to perform services of the kind to be performed under this Agreement or that constitutes rival work. "Rival work" means any electronic or software work that is, or is in substantial part [designed to _____] (*describe projected features and function, e.g., function as a medical services system*) or designated as _____ (*name or title of program or programs*).

(d) Notice of termination shall be mailed by _____ [*specify type of mail*] to Consultant at _____ [*address*] and to Company at _____ [*address*].

(e) Notice of termination shall be deemed effective on its receipt by the other party.

(f) On termination of this Agreement, Consultant shall have no further obligation to provide services for Company and Company shall have no further obligation to pay compensation beyond that for services rendered before the notice of termination is received.

19. Indemnification. Consultant shall indemnify Company against all losses and expenses incurred by Company, including but not limited to reasonable attorneys' fees, resulting from any breach of this Agreement by Consultant. Consultant agrees to indemnify and hold Company harmless from all claims for bodily injury or property damage that may arise from Consultant's performance of services for Company. Consultant waives all rights against Company for damages covered by other insurance.

20. Liability Limitation.

NOTWITHSTANDING ANYTHING TO THE CONTRARY WITHIN THIS AGREEMENT, ALL LIABILITY OF COMPANY UNDER THIS AGREEMENT SHALL BE LIMITED TO THE AMOUNTS OWED TO CONSULTANT BY COMPANY FOR WORK ACTUALLY PERFORMED BY CONSULTANT.

21. Governing Law. This Agreement shall be construed according to, and the rights of the parties shall be governed by, the law of the State of California.

22. Attorneys' Fees. If any legal action is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire Agreement.

23. Entire Agreement. This Agreement sets forth the entire agreement between the parties with regard to the subject matter hereof. No other agreements, representations, or warranties have been made by either party to the other with respect to the subject matter of this Agreement.

24. Severability. If any provision of this Agreement is found or deemed by a court of competent jurisdiction to be invalid or unenforceable, they shall be considered severable from the remainder of this Agreement and shall not cause the remainder to be invalid or unenforceable.

25. Amendment. This Agreement may be amended only by a written agreement signed by both parties.

Executed at _____, California, on _____ [*date*].

COMPANY
[*name of company*]

By _____ [signature]

[typed name and title]

CONSULTANT

_____ [signature of consultant]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewCopyright LawSubject MatterLiterary WorksComputer
ProgramsLabor & Employment LawEmployment RelationshipsIndependent ContractorsTrade Secrets LawProtected
InformationComputer Software



154 of 164 DOCUMENTS

California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART IV. FORMS
B. Software Related Transactions

22-57 California Legal Forms--Transaction Guide § 57.226

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.226 License for Distribution of Computer Software Between Program Owner and Licensee

[1] Comment--Use of Form

This form is an agreement between a computer program author and a computer software publisher under which the author grants the publisher a license to reproduce and sublicense the program. Such agreements typically are drafted as licenses because they do not transfer title to the software and thus permit the author to protect his or her trade secret interests. In contrast, sales agreements do transfer title and therefore do not protect the owner from disclosure of the secrets inherent in the software [*see § 57.220[1]*].

With respect to remedies specified in a license agreement generally, see *Sun Microsystems Inc. v. Microsoft* [*Sun Microsystems Inc. v. Microsoft* (N.D. Cal. 1998) 999 F. Supp. 1301] , which involved a technology license and distribution agreement between a creator of a computer language and a developer of software products. In that case, the court held that the agreement did not preclude injunctive relief for the developer's allegedly intentional breaches of the agreement's compatibility provisions. The agreement placed no limitations on the creator's remedies for the developer's intentional breaches of the compatibility provisions, and no language in the agreement precluded the creator from injunctive relief to redress infringement of its trademark [*Sun Microsystems Inc. v. Microsoft* (N.D. Cal. 1998) 999 F. Supp. 1301, 1306-1307] .

For discussion of trade secret protection of software and the other methods available for the protection of proprietary rights in computer software see §§ 57.20-57.23; see also § 57.225[1]. For discussion of the legitimacy of exclusive territory distributorships, see § 57.204[1].

[2] FORM

License for Distribution of Computer Software between Program Owner and Licensee

DISTRIBUTOR LICENSE AGREEMENT

_____[*name of software author*], _____[*address*] ("Licensor"), and
 _____[*name of publisher*], _____[*address*] ("Publisher" or "Licensee"), in
 consideration of the promises made herein, agree as follows:

Recitals

Licensor is the owner of all rights to _____[*describe software, e.g., a computer program designed to*
 _____(*describe projected features and function*) and all related documentation, including
 specifications and user manuals] (the "Software"), designated as _____[*name or title or trademarked*
name]. Publisher desires to acquire from Licensor the _____[*exclusive or nonexclusive*] right and
 license to _____[*e.g., publish, distribute, and sell*] the Software on the terms set forth in this
 Agreement.

Article 1. License Grant and Limitations

1.01. Grant of License. Licensor hereby grants, and Publisher hereby accepts, a nontransferable and
 _____[*exclusive or nonexclusive*] license to _____[*publish or manufacture or copy*
 or market and sublicense the use of] the Software and to distribute and sell the Software for use on
 _____[*_____ (specify computer hardware by brand name) only or all computers*
 now in use or to be marketed in the future] everywhere in _____[*specify geographical limitation, e.g.,*
 the world or the United States or California, Oregon, and Washington].

1.02. Duration of Agreement. This Agreement shall become effective when executed by Licensor and Publisher and
 shall continue in force for _____[*specify period*] years thereafter unless terminated earlier as provided
 herein. [Optional if renewal is desired: If the provisions of this Agreement are complied with, unless either party gives
 written notice of its election to terminate this Agreement at least _____ days prior to the end of any
 _____-year period, it shall automatically be renewed for an additional _____-year
 period at the expiration of each period.]

1.03. Best Efforts. Publisher shall use its best efforts to promote and market the Software and to maximize royalty
 payments to Licensor pursuant to Section 3.02(a). "Best efforts" means efforts at least equivalent to those expended by
 Publisher in the marketing of its own software products or software products created by other parties.

1.04. Reproduction of Software. Publisher shall have the right to reproduce the Software in sufficient quantities to
 fulfill its obligations under this Agreement. Publisher shall reproduce and include Licensor's copyright notice, patent
 notice, trademark, service mark, other proprietary markings, and/or confidential legends on any copies of the Software.

1.05. Determination of Sublicense Fees. Publisher shall have the right to determine sublicense fees to be charged by it
 to ultimate users for the use of the Software, subject to its obligation to maximize royalty payments to Licensor.

1.06. Terms of Sublicenses. _____[Publisher shall exercise its sole discretion or Publisher and
 Licensor shall exercise joint discretion] with respect to the terms of all sublicenses for the use of the Software, provided
 that all sublicense agreements shall include restrictions designed to protect the trade secret and other proprietary rights
 of the parties in the Software and shall conform in all other respects to the terms and conditions of this Agreement.

1.07. Trade Name and Trademark. Publisher shall devise and register a trade name and/or trademark for use with
 respect to the Software [in consultation with Licensor]. Publisher agrees that any such trade name and/or trademark

shall be Licensor's property.

1.08. Other Products. Nothing in this Agreement shall prevent Publisher from developing and marketing its own software or acquiring and marketing software authored by other parties.

Article 2. Licensor's Rights and Obligations

2.01. Title. Licensor retains title to the Software, including the computer program (whether in source or object code or both), all written documentation, and any ancillary data or information concerning the Software. Licensor also retains all rights in copyrights or patents applicable to the Software, including the computer program and all ancillary written documentation and materials.

2.02. Improvements or Modifications. (a) Licensor agrees to provide consultation services with respect to the Software and to attempt to make improvements or modifications at the request of Publisher. Licensor agrees that any improvements or modifications made by Licensor shall be included in subsequent versions of the Software, and Publisher agrees that those improvements or modifications and the Software as modified remain the property of Licensor.

(b) Licensor agrees that Publisher or third parties may make improvements or modifications to the Software and that any such improvements or modifications shall be the property of Publisher or the originating third parties.

2.03. Trade Secrets. Publisher acknowledges and agrees that the programming of the computer program portion of the Software and all improvements or modifications made thereto by Licensor is a trade secret that is the property of Licensor. Publisher shall use its best efforts to prevent inadvertent disclosure of any trade secret information to any third party. Publisher shall instruct its personnel to keep that information confidential by using the same care and control that they use with similar data designated by Publisher as confidential, and shall require its sublicensees to exercise the same standard of care and control.

2.04. Disclosure as Breach. Publisher agrees that any disclosure of the programming of the computer program portion of the Software to a third party constitutes a material breach of this Agreement and shall terminate the license granted by this Agreement.

2.05. Damages for Breach. Publisher further agrees that it shall be strictly liable for all damages to Licensor that result from any disclosure of the programming of the computer program portion of the Software to any third party.

Article 3. Payment

3.01. License Fee. Publisher shall pay Licensor an initial license fee of \$ _____. [Add if renewal is provided for: Upon renewal of this Agreement, Publisher shall pay Licensor a renewal license fee _____ (specify amount or state formula for computation).]

3.02. Royalties Based on Sublicense Fees. (a) In addition to the license fee specified in Section 3.01, Publisher shall pay Licensor a royalty of _____ [specify percentage] percent of each sublicense fee Publisher collects from sublicensees. All royalties shall be payable _____ [specify period, e.g., quarterly].

(b) Royalties shall not be due or payable for services such as consultation, modification, training, installation, or maintenance performed by Publisher for sublicensees with respect to the Software. [Optional if desired by Licensee: Publisher's obligation to pay royalties to Licensor shall cease _____ (specify, e.g., when Publisher has received total royalties in the amount of \$ _____ or at the end of the _____ (number, e.g., third) year after execution of this Agreement by Licensor and Publisher.)]

3.03. Audit Rights. Publisher agrees to establish accounting procedures designed to show royalties received from the sublicensing of the Software and grants Licensor the right to audit its records of those royalties. Audits shall be performed upon reasonable notice by an independent auditor and shall be paid for by Licensor.

3.04. Responsibility for Taxes. Publisher shall pay all sales, use, excise, or other taxes that may be imposed on the use or sublicensing of the Software, but shall not be responsible or liable for taxes based on income earned by Licensor under this Agreement.

Article 4. Warranties

4.01. Warranty of Title. Licensor warrants that it has good title to the Software and the right to license its use to Publisher free of any proprietary rights of any other party or any other encumbrance whatever.

4.02. Warranty of Title Remedies. (a) Publisher shall notify Licensor of the assertion of any claim that the Software or the use thereof under this Agreement violates the trade secret, trademark, copyright, patent, or other proprietary right of any other party, and shall cooperate with Licensor in the investigation and resolution thereof. Licensor shall defend Publisher against any and all such claims. Licensor shall indemnify and hold Publisher and its sublicensees harmless from any liability for damage, costs, or other loss, _____[including *or* not including] consequential damages arising out of the subject matter of this section, even if Licensor has been advised of the possibility thereof, incurred by Publisher in connection with any such claim. Publisher shall have the right to participate in the defense of any action arising out of any such claim.

(b) Licensor shall not indemnify Publisher against any claim or liability based on Publisher's _____[modification or conversion of the Software and/or the subsequent use of that modification or conversion *or* use or combination of the Software with programs or data not supplied by Licensor if infringement would have been avoided by the use or combination of the Software with other programs or data].

4.03. Disclaimer of Warranty.

THE FOREGOING WARRANTIES ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE *or* THE SOFTWARE IS LICENSED ON AN "AS IS" BASIS WITHOUT WARRANTY.

4.04. Limitation of Liability. Licensor shall not be liable for any claim or demand against Publisher by any other party for damages of any kind, including, but not limited to consequential damages, arising out of the subject matter of this Agreement.

Article 5. Termination

5.01. Cause for Termination. The license granted by this Agreement shall be terminated automatically and without further notice upon the occurrence of any of the following:

(a) Expiration of the term specified herein of any optional renewal term, in the absence of a subsequent renewal in accordance with the terms of this Agreement.

(b) Disclosure of the trade secret aspects of the Software to a third party, whether directly by Publisher or indirectly or whether inadvertently or otherwise.

- (c) Publisher's failure to pay any royalty due under this Agreement.
- (d) Cessation of business by Publisher or any successor or assign to whom the Software has been legitimately transferred.
- (e) Publisher's commission of an event of default as defined herein.

5.02. Events of Default. Publisher shall be considered to have committed an event of default, and this Agreement and the license granted hereunder shall terminate, if any of the following occur:

- (a) Publisher attempts to use, copy, license, or convey the Software in any manner contrary to the terms of this Agreement or in derogation of Licensor's proprietary rights in the Software.
- (b) Publisher fails or neglects to perform or observe any of its existing or future obligations under this Agreement, including, without limitation, the timely payment of any sums due Licensor within _____[specify period] after notice that the payment is delinquent.
- (c) Publisher makes any assignment of its business for the benefit of creditors.
- (d) A petition in bankruptcy is filed by or against Publisher.
- (e) A receiver, trustee in bankruptcy, or similar officer is appointed to take charge of all or part of Publisher's property.
- (f) Publisher is adjudicated a bankrupt.

5.03. Effect of Termination. (a) Publisher agrees that immediately upon the operation of Section 5.01, whether or not it receives written notice of termination, it shall immediately _____[return all copies of the Software to Licensor or destroy all copies of the Software and certify that fact to Licensor]. Publisher further agrees that in the event of termination through its default, all fees or charges due for the remaining term of this Agreement shall immediately become due and payable. Upon termination of the license granted under this Agreement, Licensor's obligations hereunder shall cease.

(b) Notwithstanding the provisions of Section 5.03(a) above, the termination of this Agreement shall not affect Publisher's ability to fulfill any obligations made in good faith relating to the Software that arose prior to the date of termination, including any obligation to provide maintenance for Software licensed by it prior to termination.

Article 6. General Terms and Conditions

6.01. Notices. Unless otherwise provided in this Agreement, any notice required or permitted by this Agreement to either party shall be deemed to have been duly given if in writing and delivered personally or mailed by first-class, registered, or certified mail, postage prepaid and addressed (when intended for Publisher) to _____[specify address, including appropriate department] or (when intended for Licensor) to _____[specify address, including appropriate department].

6.02. Assignment of Contract. Publisher shall not assign this Agreement or its rights hereunder without the prior written consent of Licensor. Any attempt to make such an assignment without Licensor's consent shall be void.

6.03. Amendments. Licensor and Publisher agree that this Agreement shall be modified only by a written agreement duly executed by persons authorized to execute agreements on their behalf.

6.04. Nonwaiver. Licensor and Publisher agree that no failure to exercise, and no delay in exercising any right, power, or privilege under this Agreement on the part of either party shall operate as a waiver of any right, power, or privilege hereunder. Licensor and Publisher further agree that no single or partial of any right, power, or privilege under this Agreement shall preclude further exercise thereof.

6.05. Attorneys' Fees. If any legal action is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire Agreement.

6.06. Severability. If any part of this Agreement is found or deemed by a court of competent jurisdiction to be invalid or unenforceable, that part shall be severable from the remainder of this Agreement and shall not cause the invalidity or unenforceability of the remainder of this Agreement.

6.07. Governing Law. This Agreement shall be deemed to have been made in, and shall be construed pursuant to, the laws of the State of California.

6.08. Entire Agreement. Publisher acknowledges and agrees that this Agreement is the complete and exclusive statement of the mutual understanding of the parties and that it supersedes and cancels all previous written and oral agreements and communications relating to the subject matter of this Agreement.

Executed this _____ day of _____, at _____[city], California.

LICENSOR

_____ [name]

[typed name and title]

LICENSEE

_____ [name of corporation]

By _____ [signature]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Conveyances Licenses General Overview Trade Secrets Law Protected Information Computer Software



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART IV. FORMS
B. Software Related Transactions

22-57 California Legal Forms--Transaction Guide § 57.227

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.227 Software Evaluation License

[1] Comment--Use of Form

This form is an agreement by a software company to license its software to a customer for evaluation or beta testing purposes. It is different from a software license in that it limits the term of the license, usually to a time period or until the completion of the evaluation or "beta test," [see P 9] and it is specific to a specified use [see P 3]. Additionally, an evaluation agreement is also limited to the number of copies of the software the customer will be receiving to evaluate [see P 3]. As with standard software licenses, this form confirms that all intellectual property rights are retained by the software owner [see P 6], and that no interest in any form is transferred to the customer [see P 12].

[2] FORM

Software Evaluation License

SOFTWARE EVALUATION AGREEMENT
(Demonstration/Beta Test Agreement)

This Agreement ("Agreement") is made as of _____[date] (the "Effective Date"), by and between _____[name of company] ("Company"), and _____[name of customer] ("Customer"). Customer wishes to evaluate the beta test version of certain software ("Software") and related documentation (the "Documentation"; the Software and Documentation being collectively referred to as the "Products"), and Company is willing to permit Customer to evaluate the Products listed below.

In consideration of the mutual covenants and conditions contained herein, the parties agree as follows:

1. Evaluation of Products. Company and Customer agree that Company will supply the following Products for evaluation by Customer in accordance with the terms and conditions of this Agreement: _____[specify]

products customer will evaluate]

2. Installation Address. The address of the Customer's facility at which the Products will be installed and maintained during the term of this Agreement is: _____ *[customer's facility address]*.

3. Non-Exclusive License. Subject to the terms and conditions of this Agreement, Customer is granted a non-exclusive license for evaluation purposes only during the term of this Agreement, to use a single copy of each of the Products as follows: _____ *[specify specific use of products]*. No more than one copy of each Product delivered may be made, and then only for backup purposes, during the term of this Agreement. Customer acknowledges that the Products (including any images, icons, graphics, animations, video, audio, music, and text incorporated into the Products) are protected by United States and foreign country copyright laws.

4. Confidentiality. Customer acknowledges that the Products and the attributes of the Products, (including but not limited to their design, functionalities, performance characteristics and Customer's evaluation of the Products) and any other verbal or written information that may be supplied by Company to Customer during the term of this Agreement, or obtained through Customer's evaluation of the Products, are collectively Product Information that is the confidential and proprietary property of Company. Customer shall maintain the confidentiality of Products and Product Information during the term of this Agreement and thereafter, in the same manner that it maintains its own confidential information (but with no less than a reasonable degree of care), and specifically shall:

(a) Not disclose Products or Product Information or the existence or terms of this Agreement to any third party without the prior written consent of Company;

(b) Limit internal access to Products or Product Information only to Customer employees with a need to have access to the Products or the Product Information;

(c) Not use Products or Product Information for any purpose other than for evaluating the performance of the Products in Customer's business environment; and

(d) Not copy, modify, adapt, merge, reverse engineer, reverse compile, disassemble, sell, rent or lease, loan or sublicense the Products or Product Information in whole or in part.

5. Product Testing. In consideration for Company making the Products available to Customer for evaluation, Customer agrees to use the Products in Customer's business environment, and to provide Company with reports during the term of this Agreement no less than _____ *[e.g., weekly]*, as well as promptly upon the identification of any bugs, defects or other operability problems. Among other things, each report shall include, as applicable, evaluation of the performance of the Products during the reporting period, information concerning any defects or deficiencies identified therein since the last report, any workarounds or "fixes" identified for any previously identified defects, deficiencies or bugs, and any suggested changes or modifications for the purpose of improving or enhancing the ease of use or performance of the Products. Reports shall be sent by e-mail to the following address (or such other address as Company may provide to Customer from time to time): _____ *[address]*.

6. Ownership of Products. Products and Product Information are and shall remain the property of Company and shall be returned to Company no later than _____ *[return date]*. Customer will bear all risk of loss or damage to the Products while the Products are within Customer's possession or control. In the event Company makes any or all of the Products available for license to Customer, that license shall be made at then-prevailing prices under Company's standard license terms and conditions. The license agreement for any such Products shall supersede the corresponding provisions of this Agreement.

7. Cost of Installation and Return. Customer shall bear all expenses of installation of the Products at Customer's

location, and of returning of the Products to Company upon the expiration or termination of this Agreement.

8. Taxes. Customer will pay any and all taxes pertaining to the Products or the use of the Products during the term of this agreement, including but not limited to property and/or use taxes, and shall reimburse Company upon Company's request if Company is required to pay any such tax.

9. Term of Agreement. The term of this Agreement will commence on the Effective Date and will end upon the earlier of (1) termination under the provisions of Paragraph 11 of this Agreement; (2) the date of Customer's return of the Products as specified in Paragraph 6, above; or (3) the effective date of a superseding license agreement by which the Products are licensed to Customer.

10. Termination. Notwithstanding any other provision of this Agreement, Company, upon written notice to Customer, may terminate this Agreement for its convenience, in whole or in part, without cost or liability whatsoever. This Agreement shall automatically terminate upon a material breach by Customer. Upon termination, Customer agrees to return promptly any and all Products and Product Information and any whole or partial copies thereof to Company.

11. Evaluation and Testing Use Only. Company makes no representation regarding if or when Company may announce the availability of the Products for license. Customer also understands that testing of the Products may not be complete and that the Products provided under this Agreement may not meet applicable qualifications or standards, or conform to Company's product specifications. Accordingly, Customer shall use the Products furnished under this Agreement only for purposes of evaluation testing and not for any business use.

12. No License. Nothing in this Agreement shall be construed as granting a license or conferring any right, expressly, implicitly or otherwise, in any of the Products, Product Information, or intellectual property rights related thereto, other than as expressly provided in this Agreement.

13. No Export. The Products and certain Product Information may be subject to export restrictions under United States export laws and regulations. Therefore, notwithstanding any other provision of this Agreement, Customer agrees not to export, directly or indirectly, any U.S. source technical data acquired from Company, or any products utilizing such data, to any foreign country. Nothing in this Paragraph releases Customer from its obligations of confidentiality stated elsewhere in this Agreement.

14. Disclaimer of Warranties.

COMPANY MAKES NO REPRESENTATIONS OR WARRANTIES REGARDING THE PRODUCTS OR THE PRODUCT INFORMATION. THE PRODUCTS AND PRODUCT INFORMATION FURNISHED HEREUNDER ARE FURNISHED "AS IS." COMPANY SPECIFICALLY DISCLAIMS ALL WARRANTIES WITH RESPECT TO PRODUCTS FURNISHED HEREUNDER INCLUDING, WITHOUT LIMITATION, ALL IMPLIED WARRANTIES OF MERCHANTABILITY, AND FITNESS FOR A PARTICULAR PURPOSE, TITLE, NON-INFRINGEMENT, QUIET ENJOYMENT AND IMPLIED WARRANTIES ARISING FROM A COURSE OF DEALING OR COURSE OF PERFORMANCE.

15. Limitation of Liability.

NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT TO THE CONTRARY, IN NO EVENT WILL COMPANY OR ITS SUPPLIERS BE LIABLE TO CUSTOMER OR ANY THIRD PARTY FOR ANY LOSS OR DAMAGES WHATSOEVER, INCLUDING, WITHOUT LIMITATION, SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES AND DAMAGES RESULTING FROM LOSS OF TIME, DATA, PROFITS, REVENUE, USE OR ANY OTHER LOSS, EVEN IF COMPANY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, ARISING OUT OF OR IN CONNECTION WITH THIS

AGREEMENT OR THE USE OF PERFORMANCE OF COMPANY'S PRODUCTS, WHETHER BASED IN CONTRACT, TORT (INCLUDING NEGLIGENCE), PRODUCT LIABILITY, OR UNDER ANY OTHER THEORY OF LIABILITY, EVEN IF A REMEDY SET FORTH HEREIN IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE.

16. Indemnification.

CUSTOMER AGREES TO DEFEND, INDEMNIFY AND HOLD COMPANY HARMLESS FROM AND AGAINST ANY CLAIMS, LOSS OR DAMAGES, INCLUDING COURT COSTS AND LEGAL EXPENSES, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT.

17. Rights and Remedies. All rights and remedies conferred by this Agreement or by law are cumulative and may be exercised singularly or concurrently. Customer acknowledges that any unauthorized use, copying, disclosure, distribution of the Products or any related methods, algorithms, techniques, processes or other information, will cause Company irreparable harm for which there is no adequate remedy at law, entitling Company to prompt injunctive relief in addition to any other legal or equitable remedies.

18. Severability. If any provision of this Agreement is held invalid by any law or regulation, that invalidity shall not effect the enforceability of any other provisions hereof.

19. Governing Law. This Agreement is governed by and shall be construed in accordance with the laws of the State of California, without giving effect to its conflicts of law or choice of law rules or principles.

20. Effect of Agreement. Customer acknowledges that, in providing Customer with the Products and Product Information, Company has relied upon Customer's agreement to be bound by the terms of this Agreement. Customer further acknowledges that no contract, purchase order, invoice, or other document originating from Customer and relating to this Agreement shall amend or supplement the terms of this Agreement, even if that document has been signed by Company. Customer's acceptance of any Product or Product Information shall be conclusive evidence of Customer's agreement to be bound by all of the terms and conditions of this Agreement, including the provisions of this Section.

21. Provisions Surviving Termination of Agreement. Unless otherwise agreed by Company in writing, the provisions of Sections 4, 6, 10, 11, 12, 13, 14, 15, 16, 17, 19, and 22 shall survive any expiration or earlier termination of this Agreement.

22. Entire Agreement. This Agreement constitutes the entire Agreement between the parties and supersedes all prior negotiations and communications, oral or written, between the parties with respect to the subject matter hereof, and no deviation from these terms and conditions shall be binding unless in writing and signed by the party against whom the same is sought to be enforced.

Executed on _____ [date], at _____ [city], California.

COMPANY

_____ [name]

By _____ [signature]

[typed name and title]

CUSTOMER

_____ [name]

By _____ [signature]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawConveyancesLicensesGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART IV. FORMS
B. Software Related Transactions

22-57 California Legal Forms--Transaction Guide § 57.228

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.228 Mutual Non-Disclosure Agreement

[1] Comment--Use of Form

This form is a separate mutual agreement for nondisclosure of proprietary and confidential information. Nondisclosure issues may be covered in the contract for services, or in a separate agreement. It is common for nondisclosure and confidentiality to be covered in hardware procurement, software license or other service contract. Many companies routinely require a stand-alone nondisclosure agreement from potential customers at the beginning of a business relationship. The main reasons to have a stand alone agreement in the early stages of a business arrangement are to protect each party and allow for the disclosure of proprietary and confidential information so that both parties can adequately make informed business decisions. The form describes the confidential information to be disclosed and a promise on the part of the receiving party not to disclose the information. The form also specifies the party's obligations in regard to the protection of proprietary and confidential information, the allowable uses of such information, and the conditions of disclosure.

The use of an agreement against disclosure, misappropriation, or misuse is recommended because, even though injunctive and other relief may be available against a person who uses confidential and proprietary information to the owner's prejudice, an agreement such as this one provides a firm written basis for traditional contract remedies and clearly informs the receiving party of his or her obligation not to divulge the confidential information.

For a separate nondisclosure agreement for general consultant services, see *Ch. 86, Agreements for Professional Services*, § 86.204.

[2] FORM

Mutual Non-Disclosure Agreement

MUTUAL NONDISCLOSURE AGREEMENT

The undersigned Customer and Company, on behalf of themselves and their subsidiaries and affiliates, acknowledge that, by reason of their business relationship, they may have access to information and materials concerning the other's business, plans, products and technical data concerning the purpose of this Agreement which is confidential and of substantial value that would be impaired if the information were disclosed to third parties. Accordingly, for the protection of such confidential information, the parties agree as follows:

1. Confidential Information. For the purposes of this Agreement, "Confidential Information" means any technical, business, financial, contractual terms and conditions or other information or data furnished by one party to the other relating to the Purpose: (a) in written or other tangible form marked with a proprietary legend, or (b) in oral or visual form, identified as being confidential at the time of disclosure and thereafter summarized in a writing which identifies the confidential information and is transmitted to the recipient party within 30 days after such oral or visual disclosure. The disclosing party hereby warrants that it has the right to disclose such information to the receiving party.

2. Purpose of Agreement. The purpose of this Agreement is the mutual analysis and evaluation of a prospective business relationship between the parties.

3. Period of Protection. The period of protection during which Confidential Information received pursuant to this Agreement shall be subject to an obligation of confidentiality and protection is _____[number] years from the date of first receipt of the information.

4. Standard of Care. The standard of care which each party shall be required to employ in protecting and handling Confidential Information received pursuant to this Agreement is the same degree of care which the recipient party employs to protect and safeguard its own Confidential Information of the kind, but not less than a reasonable degree of care.

5. Restrictions on Use. Confidential Information shall be used solely for internal evaluation and use pertaining to the Purpose of this Agreement and shall not otherwise be used for the benefit of the recipient or others. Confidential Information shall be disclosed only to the employees of the recipient who have a "need to know" and who have executed an internal non-disclosure agreement.

6. Information Not Subject to Confidentiality. The Confidential Information of a party shall not include and the foregoing obligations shall not apply to information or data which:

- (a) Was generally available to the public at the time of receipt from the disclosing party, or thereafter to have become generally available to the public; or
- (b) Is known to the recipient party on a non confidential basis prior to its receipt from the disclosing party; or
- (c) Was disclosed with the prior written consent of the disclosing party; or
- (d) Becomes known to the recipient party from a source other than the disclosing party without breach of this Agreement by the recipient party; or
- (e) Was required to be disclosed pursuant to law; or
- (f) Was developed independently by personnel of the recipient party who had no substantive knowledge of the disclosing party's Confidential Information at the time of its independent development.

7. No License. The disclosure of Confidential Information shall not be construed as granting either a license under any

patent, patent application or any right of ownership in said Confidential Information.

8. Equitable Relief. The receiving party acknowledges and agrees that in the event of a breach or threatened breach of any provision of this Agreement, the disclosing party shall have no adequate remedy at law and shall therefore be entitled to enforce any such provision by temporary or permanent injunctive or mandatory relief obtained in any court without the necessity of proving damages, posting any bond or other security, and without prejudice or diminution of any other rights or remedies which may be available at law or in equity. This Agreement shall be construed in accordance with the laws of the state of California excluding its conflict of law provisions.

9. Export Regulations. The receiving party will not transfer any confidential information received hereunder or any product made using such confidential information to any country prohibited from obtaining such data or product by the United States Department of Commerce Export Administration Regulations without first obtaining a validated export license.

10. Termination. This Agreement may be terminated by either party upon a 30-day written termination notice to the other party. Upon expiration or termination of this Agreement, each party shall cease all use of the other party's Confidential Information and return to the other party all tangible copies of the other party's Confidential Information.

Executed on _____[date], at _____[city], California.

CUSTOMER

_____ [name]

By _____ [signature]

[typed name and title]

COMPANY

_____ [name]

By _____ [signature]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Trade Secrets LawProtection of SecrecyReasonable MeasuresConfidentiality Agreements



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART IV. FORMS
B. Software Related Transactions

22-57 California Legal Forms--Transaction Guide § 57.229

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.229 Software Warranty Provisions for Separate Levels of Support

[1] Comment--Use of Form

This form contains software warranty provisions providing different levels of warranty protection for separate classes of software. It is intended for use in a commercial software license agreement such as the one in § 57.220[1] when the agreement licenses more than one program and the programs differ in their reliability or degree of perfection (that is, whether they are proven and bug-free or not). For discussion of commercial warranties and warranty disclaimers see § 57.220 [1].

[2] FORM

Software Warranty Provisions for Separate Levels of Support

PROGRAM WARRANTY PROVISIONS FOR SEPARATE LEVELS OF SUPPORT

1. Programming Services Category. Licensor shall provide programming services after delivery of the Software. The services to be provided for each item of Software shall be determined based on the programming service category designated for that item of Software. The programming service category of each item of Software shall be specified by Licensor in the Software Order attached to this Agreement and incorporated by reference. The programming services available for each category are as follows:

(a) Programming Service Category I. For Software in Programming Service Category I, Licensor shall verify program errors detected by Licensee, provided that the error can be recreated. Error verification shall be conducted at Licensee's location and on its hardware. If an error is verified, it will be reported to Licensor's programming service center for correction. Corrected programs ("updates") shall be issued. Any other programming services or assistance will be provided at the rate of \$_____ [specify hourly or other rate].

(b) Programming Service Category II. For Software in Programming Service Category II, Licensor shall correct program errors detected by Licensee and forwarded to Licensor's programming service center for correction. Corrected programs ("updates") may be issued. Any other programming services or assistance will be provided at the rate of \$_____ [*specify hourly or other rate*].

(c) Programming Service Category III. Program correction service shall not be provided for Software in Programming Service Category III. Corrected programs ("updates") shall not be issued. Programming services or assistance will be provided at the rate of \$_____ [*specify hourly or other rate*].

2. Right to Change Categories. The programming service category of any Software may be changed by Licensor upon six months notice to Licensee. Licensee acknowledges and agrees that such a change may result in discontinuance of services with respect to that Software.

3. Service to Modified Software. Licensor shall make service charges in addition to its regular programming services rate for any additional effort required to provide programming services resulting from Licensee's modification of the licensed Software or use of software other than the latest available version of the Software.

4. Product Warranties. (a) Each item of Software in Programming Service Categories I and II is warranted to conform to its published specifications when shipped to Licensee. Sample data will be shipped with each such product to assure receipt of a valid copy.

(b) EACH ITEM OF SOFTWARE IN PROGRAMMING SERVICE CATEGORY III IS DISTRIBUTED ON AN "AS IS" BASIS WITHOUT WARRANTY.

5. Limitation of Warranty.

THE FOREGOING WARRANTIES ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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22-57 California Legal Forms--Transaction Guide §§ 57.230-57.239

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

[Reserved]

§§ 57.230[Reserved]



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DIVISION III: COMMERCIAL TRANSACTIONS
CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
PART IV. FORMS
C. Internet Related Transactions

22-57 California Legal Forms--Transaction Guide § 57.240

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.240 Website Development Agreement

[1] Comment

[a] Use of Form

This form is a website development agreement between a website development company and a customer for the development of a website. It is designed for either a new website or enhancement of an existing website. This form can be adapted to provide for the performance of differing website services by use of an Exhibit A, which should describe the specifications, milestones, and timelines for the website development.

This form provides for a flat rate fee for basic website development services, with additional charges for extra services and changes or modifications to the basic specifications. Paragraph 2 of the form can be modified to provide for a flat hourly rate or other method of compensation, if desired.

This form does not include provisions for website hosting or computer server services. A website hosting agreement is *set forth in § 57.244*.

For a co-marketing agreement to be used by an operator of a retail website to buy promotional links and advertising on another party's portal website, see *Ch. 50, Advertising and Promotion, § 50.280[2]*.

[b] Ownership Rights

In drafting a website development agreement it is important to clarify who will own the work being performed. This agreement provides that the work and services to be performed are to be "works for hire" and all rights, title and interest will be vested in the Customer. For a further discussion of ownership and works for hire, see § 57.225[1][d].

For an authorization (license) to use a copyrighted work to be used in gaining permission to use a copyrighted work, see

Ch. 103A, Copyrights, § 103A.223[2]. For an agreement assigning all of a copyright owner's rights under a copyright, see Ch. 103A, Copyrights, § 103A.224[2].

[2] FORM

Website Development Agreement

WEBSITE DEVELOPMENT AGREEMENT

This agreement ("Agreement") is made as of _____[*date*] ("Effective Date"), by and between _____[*name of customer*] ("Customer") and _____[*name of website developer*] ("Website Developer"). The parties agree as follows:

1. Website Development. Website Developer has been hired by Customer for the specific project of _____[*developing or improving*] the Customer's _____[*existing or soon to be existing*] website located at _____[*website address*].

2. Services and Fees. (a) Website Developer shall provide to Customer the services described on the attached Exhibit A. Exhibit A includes the specifications, milestones, and timelines for the website development services that Website Developer shall provide under this agreement.

(b) As compensation for Website Developer's services as specified in Exhibit A, Customer agrees to pay Website Developer the sum of \$_____, payable as specified in (d), below.

(c) Additional costs incurred by Website Developer shall be in addition to the amount specified in (b), above. "Additional costs" shall consist of any additional time spent on new elements or requirements introduced by the Customer in addition to those specified in Schedule A, or resulting from requests for changes or modifications to the specifications in Schedule A. Additional time shall be billed at \$_____ per hour, in half hour increments.

(d) The following are the invoice dates and amounts due for this project:

(1) An initial payment of \$

_____ is due and payable upon execution of this Agreement.

(2) A second payment of \$

_____ is due and payable upon completion of the design phase, which is schedule for completion on

_____ [*due date*].

(3) A third payment of \$

_____ is due and payable upon completion of the development of the website when the testing period begins, which is scheduled for

_____ [*due date*].

(4) The remainder of the estimate plus any additional costs incurred shall be due and payable upon delivery of the fully developed website one the site has been tested and is error-free. This delivery date is scheduled for

_____ [completion date] and is dependent upon Website Developer receiving the information and materials needed to start developing this website by

_____ [start date].

(e) All payments are due and payable _____ [insert payment terms, e.g., net 30 days from the date of invoice].

(f) All dates specified above [and on Exhibit A] are dependent on the timeliness of delivery of materials and information by the Customer. In the event materials are not timely delivered, the specified delivery dates are automatically extended by the number of dates in which the Customer's materials are late. In the event that Website Developer becomes unable to deliver the website on the completion date because of events outside of Website Developer's control, or if the Customer, after execution of this Agreement, orders options or creates the necessity for overages, then Website Developer shall give reasonable assurance of the new completion date. All payments are non-refundable except in the case of a breach of this Agreement by Website Developer.

3. Ownership. (a) The services provided by Website Developer under this Agreement and all materials, products, and modifications developed by or prepared for Customer by Website Developer under this Agreement are the property of Customer and all right, title and interest therein shall vest in Customer and shall be deemed a "work made for hire." To the extent that title to any such works may not vest in Customer by operation of law, or that any such works may not be considered "work made for hire," all right, title, and interest therein are hereby irrevocably assigned to Customer exclusively throughout the world. All such material shall belong exclusively to Customer and Customer shall have the right to obtain and hold in Customer's name any copyright, patent, trademark, or any other form of protection appropriate to the subject matter, except for the trademark, logo, or identification of Website Developer or any archival photos, artwork, audio, or video which are in the public domain or any licensed software within the website. Website Developer agrees to give Customer reasonable assistance to perfect the rights defined in this section.

(b) Nothing in this section shall expand the limitations of Website Developer's warranties as provided in this agreement.

(c) Subject to this section, to the extent Website Developer incorporates any of its intellectual property owned by it prior to the development of the website, it hereby grants Customer a perpetual, irrevocable, fully paid-up and royalty free, worldwide, sub-licensable, non-exclusive and unrestricted license and right to use, reproduce, modify, transfer, and maintain such intellectual property and all of its derivatives on the website, except for any licensed software.

4. Website Developer's Warranties. (a) Website Developer warrants that the website as installed pursuant to the specifications shall be free from defects in workmanship for a period of _____ [insert warranty period, e.g., six months from the date of final invoice] ("Warranty Period"). If any failure to conform becomes apparent during the Warranty Period, Website Developer shall, upon notice from Customer, repair the website to make it conform to the terms of this Agreement. **THIS WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NONINFRINGEMENT.**

(b) If content developed or used in connection with the development of this the website by Website Developer because the subject of a claim of infringement or misappropriation of a patent, copyright, trademark, or proprietary right of a third party, Website Developer, in addition to its obligations set forth in (a), above, shall use its best efforts to:

- (1) Promptly replace such content with compatible non-infringing content; or
- (2) Promptly modify the content to make it non-infringing without materially impairing the ability to use the content as intended; or
- (3) Promptly protect Customer's right to continue using the content; or
- (4) If none of the above alternatives is reasonably available to Website Developer, promptly pay to Customer all of the monies paid and costs incurred by Customer to Website Developer.

This section (b) shall only apply to materials provided by Website Developer and not to materials provided by Customer.

5. Limitation of Liability.

IN NO EVENT SHALL WEBSITE DEVELOPER'S LIABILITY RELATED TO ANY OF THE SERVICES PERFORMED UNDER THIS AGREEMENT, EXCEED THE TOTAL FEES PAID BY CUSTOMER FOR THE SUCH SERVICES. WEBSITE DEVELOPER SHALL NOT IN ANY EVENT BE LIABLE FOR ANY DIRECT, INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, AND DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, OR OTHER PECUNIARY LOSS, EVEN IF WEBSITE DEVELOPER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, WHETHER SUCH LIABILITY IS BASED ON CONTRACT, TORT, WARRANTY, OR ANY OTHER LEGAL OR EQUITABLE GROUNDS.

6. Customer's Representations. Customer represents as follows:

- (a) That all artwork, design, logos or photos as supplied by Customer are supplied with proper permission.
- (b) That any work supplied by Customer does not infringe on any copyright or trademark.
- (c) That Customer will indemnify and hold Website Developer harmless from any and all claims arising out of Website Developer's use of materials supplied by Customer in connection with work performed by Website Developer on Customer's website.
- (d) That Customer gives permission to Website Developer to refuse at any time to print or place on the website any artwork or any kind that Website Developer, in Website Developer's sole discretion, believes is an invasion of privacy, degrading, libelous, unlawful, obscene, pornographic, in bad taste, or which in the sole judgment of Website Developer is an infringement on a trademark or copyright belonging to others; provided that Website Developer shall have no affirmative obligation to review the website for any such infringement.

7. Confidentiality. This Agreement creates a confidential relationship between Customer and Website Developer. Information concerning Website Developer's and Customer's business affairs, vendors, finances, properties, methods of operation, computer programs, employees, documentation, any other such information whether written, oral or otherwise, is confidential. Customer and Website Developer will not disclose any confidential information to third parties without the prior written consent of the other party, except as may be required by law.

8. Breach or Cancellation. (a) In the event of any uncured default in payment within 10 business days after notice by the Website Developer, the Customer shall be deemed to be in default under this contract. Upon such contract default, or if the Customer gives notice of cancellation of the contract without any default on the part of Website Developer, the Website Developer is immediately entitled to all payments previously made and to invoice for all work including

overage, to the date of cancellation or breach. There shall be no right to a refund to any payments already made. Website Developer shall be entitled to reasonable legal fees in the event the services of an attorney are necessary for collection.

(b) In the event of any uncured default by the Website Developer within five business days after notice by Customer concerning the delivery schedule, the Website Developer shall be deemed in default under the contract and the Customer shall be entitled to a refund of payments made at which time the contract is canceled, the work is deemed that of Website Developer, without any warranties by the Website Developer. The Customer shall be entitled to reasonable legal fees in the event the services of an attorney are necessary for collection.

9. Completion of Project. The completion of the project by sending the final invoice indicates that all work has been completed under this Agreement. Upon completion, Customer agrees that every aspect of the websites appearance and function has been approved by the Customer and that all work has been completed.

10. Notices. Unless otherwise provided in this Agreement, any notice required or permitted by this Agreement to be given to either party shall be deemed to have been duly given if in writing and delivered personally or mailed by first-class, registered, or certified mail, postage prepaid and addressed (when intended for Customer) to _____ [specify address, including appropriate department] or (when intended for Website Developer) to _____ [specify address, including appropriate department].

11. Governing Law. This Agreement shall be deemed to have been made in, and shall be construed pursuant to, the laws of the State of California.

12. Attorneys' Fees. If any legal action is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire Agreement.

13. Severability. If any part of this Agreement is adjudged by any court of competent jurisdiction to be invalid, that judgment shall not affect or nullify the remainder of this Agreement, and the effect shall be confined to the part immediately involved in the controversy adjudged.

14. Entire Agreement. Customer acknowledges and agrees that this Agreement is the complete and exclusive statement of the mutual understanding of the parties and that it supersedes and cancels all previous written and oral agreements and communications relating to the subject matter of this Agreement.

Executed on _____ [date], at _____ [city], California.

CUSTOMER

_____ [name]
By _____ [signature]
[typed name and title]

WEBSITE DEVELOPER

_____ [name]
By _____ [signature]
[typed name and title]

EXHIBIT A

Specifications, Milestones, and Dates

_____ *[insert description of all specifications, milestones and deadlines in relating to the project]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet LawInternet BusinessGeneral OverviewComputer & Internet LawInternet
BusinessContractsGeneral OverviewCopyright LawOwner RightsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
 CHAPTER 57 COMPUTER-RELATED AND INTERNET TRANSACTIONS
 PART IV. FORMS
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22-57 California Legal Forms--Transaction Guide § 57.241

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.241 Terms of Use

[1] Comment--Use of Form

This form is a set of "terms of use" by which the owner of a website specifies the restrictions on use of the site, and gives any legal notices, disclaimers, and limitations of liability to the users and viewers of the website. The terms of use are typically posted in a conspicuous place on the website and many websites require that the user affirmatively indicate that he or she has read these terms and agrees to abide by them. Typically this is done by requiring the user to click on an "I accept" or "I agree" button on the first page of the site.

This form is not intended to act as a "click-wrap" agreement for the downloading of software. For a consumer software agreement, see § 57.220.

[2] FORM

Terms of Use

TERMS AND CONDITIONS OF USE

Welcome to our website. This site is maintained as a service to our customers. By using this site, you agree to comply with and be bound by the following terms and conditions of use. Please review these terms and conditions carefully. If you do not agree to these terms and conditions, you should not use this site.

1. Agreement. This Agreement ("the "Agreement") specifies the Terms and Conditions for access to and use of _____[*name of website*] (the "Site") and describe the terms and conditions applicable to your access of and use of the Site]. This Agreement may be modified at any time by _____[*name of website operator*] upon posting of the modified agreement. Any such modifications shall be effective immediately. You can view the most recent version of these terms at any time at _____[*website address*]. Each use by you

shall constitute and be deemed your unconditional acceptance of this Agreement.

2. Privacy. Your visit to our site is also governed by our Privacy Policy. Please review our Privacy Policy at _____[*website address*].

3. Ownership. All content included on this site is and shall continue to be the property of _____[*name of website operator*] or its content suppliers and is protected under applicable copyright, patent, trademark, and other proprietary rights. Any copying, redistribution, use or publication by you of any such content or any part of the Site is prohibited, except as expressly permitted in this Agreement. Under no circumstances will you acquire any ownership rights or other interest in any content by or through your use of this site.

4. Intended Audience. This website is intended for adults only. This website is not intended for any children under the age of 13.

5. Trademarks. _____[*Trademark*], _____[*trademark*], _____[*trademark*], and others are either trademarks or registered trademarks of _____[*name of website operator*]. Other product and company names mentioned on this Site may be trademarks of their respective owners.

6. Site Use. _____[*Name of website operator*] grants you a limited, revocable, nonexclusive license to use this site solely for your own personal use and not for republication, distribution, assignment, sublicense, sale, preparation of derivative works, or other use. You agree not to copy materials on the site, reverse engineer or break into the site, or use materials, products or services in violation of any law. The use of this website is at the discretion of _____[*name of website operator*] and _____[*name of website operator*] may terminate your use of this website at any time.

7. Compliance with Laws. You agree to comply with all applicable laws regarding your use of the website. You further agreed that information provided by you is truthful and accurate to the best of your knowledge.

8. Indemnification. You agree to indemnify, defend and hold _____[*name of website operator*] and our partners, employees, and affiliates, harmless from any liability, loss, claim and expense, including reasonable attorney's fees, related to your violation of this Agreement or use of the Site.

9. Disclaimer.

THE INFORMATION ON THIS SITE IS PROVIDED ON AN "AS IS," "AS AVAILABLE" BASIS. YOU AGREE THAT USE OF THIS SITE IS AT YOUR SOLE RISK. _____[*Name of website operator*] DISCLAIMS ALL WARRANTIES OF ANY KIND, INCLUDING BUT NOT LIMITED TO ANY EXPRESS WARRANTIES, STATUTORY WARRANTIES, AND ANY IMPLIED WARRANTIES OF: MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. TO THE EXTENT YOUR JURISDICTION DOES NOT ALLOW LIMITATIONS ON WARRANTIES, THIS LIMITATION MAY NOT APPLY TO YOU. YOUR SOLE AND EXCLUSIVE REMEDY RELATING TO YOUR USE OF THE SITE SHALL BE TO DISCONTINUE USING THE SITE.

10. Limitation of Liability.

UNDER NO CIRCUMSTANCES WILL _____[*name of website operator*] BE LIABLE OR RESPONSIBLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, CONSEQUENTIAL (INCLUDING DAMAGES FROM LOSS OF BUSINESS, LOST PROFITS, LITIGATION, OR THE LIKE), SPECIAL, EXEMPLARY, PUNITIVE, OR OTHER DAMAGES, UNDER ANY LEGAL THEORY, ARISING OUT OF OR IN ANY WAY

RELATING TO THE SITE, YOUR SITE USE, OR THE CONTENT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. YOUR SOLE REMEDY FOR DISSATISFACTION WITH THE SITE AND/OR CONTENT IS TO CEASE ALL OF YOUR SITE USE.

You may have additional rights under certain laws (including consumer laws) which do not allow the exclusion of implied warranties, or the exclusion or limitation of certain damages. If these laws apply to you, the exclusions or limitations in this Agreement that directly conflict with such laws may not apply to you.

11. Use of Information. _____ [Name of website operator] reserves the right, and you authorize us, to use and assign all information regarding site uses by you and all information provided by you in any manner consistent with our Privacy Policy.

12. Copyrights and Copyright Agent. If you believe your work has been copied in a way that constitutes copyright infringement, please provide a notice containing all of the following information to our Copyright Agent:

- (a) An electronic or physical signature of the person authorized to act on behalf of the owner of the copyright interest;
- (b) A description of the copyrighted work that you claim has been infringed;
- (c) A description of where the material that you claim is infringing is located on the Site;
- (d) Your address, telephone number, and e-mail address;
- (e) A statement by you that you have a good faith belief that the disputed use is not authorized by the copyright owner, its agent, or the law; and
- (f) A statement by you, made under penalty of perjury, that the above information in your notice is accurate and that you are the copyright owner or authorized to act on the copyright owner's behalf.

Our Copyright Agent for Notice of claims of copyright infringement on the Site is _____, who can be reached as follows:

By Mail: _____
 By Phone: _____
 By e-mail: _____

13. Applicable Law. You agree that the laws of the state of _____, without regard to conflicts of laws provisions will govern these Terms and Condition of Use and any dispute that may arise between you and _____ [name of website operator] or its affiliates.

14. Severability. If any provision of this Agreement shall be adjudged by any court of competent jurisdiction to be unenforceable or invalid, that provision shall be limited or eliminated to the minimum extent necessary so that this Agreement will otherwise remain in full force and effect.

15. Termination. _____ [Name of website operator] may terminate this Agreement at any time, with or without notice, for any reason.

16. Contact Information.

HOW TO CONTACT US:

_____ *[name of website operator]*

_____ *[address]*

_____ *[phone number]*

_____ *[e-mail address]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet LawInternet BusinessGeneral OverviewComputer & Internet LawInternet

BusinessContractsGeneral Overview



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DIVISION III: COMMERCIAL TRANSACTIONS
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22-57 California Legal Forms--Transaction Guide § 57.242

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.242 Privacy Policy

[1] Comment

[a] Use of Form

This form is a sample privacy policy to be used by operators of websites or on-line services. It is designed to comply with the privacy policies of California's Online Privacy Protection Policy Act (OPPA) [*see Bus. & Prof. Code § 22575 et seq.*]. This policy is designed for a simple website that does not market to children [*see [d], below*] and does not engage in activities (such as issuing credit cards in its own name to consumers [*see 16 C.F.R. § 313.3(k)(2)*]) that would classify it as a "financial institution" for federal privacy notice purposes [*see [e], below*].

To be compliant with California's Online Privacy Protection Policy Act [*see Bus. & Prof. Code § 22575 et seq.*], the privacy policy must do all of the following:

- Be conspicuously posted on the website [*Bus. & Prof. Code §§ 22575(a), 22577(b); see [b], below*].
- Identify the categories of personally identifiable information collected [*Bus. & Prof. Code §§ 22575(b)(1), 22577(a); see P 2 of form*].
- Identify categories of third-party persons or entities with whom the operator may share personally identifiable information collected from the user [*Bus. & Prof. Code § 22575(b)(1); see P 4 of form*].
- If the operator maintains a process for users to review and request changes to their personally identifiable information that is collected through the website, describe that process [*Bus. & Prof. Code § 22575(b)(2); see P 8 of form*].
- Describe the process by which the operator notifies users of material changes to the operator's

privacy policy [*Bus. & Prof. Code* § 22575(b)(3); see P 9 of the form].

- State the effective date of the policy [*Bus. & Prof. Code* § 22575(b)(4); see § 57.242[2], P 10].

Various other provisions not expressly required by OPPA typically are included by website operators. One particularly important provision is a consent statement in which the user agrees that use of the website constitutes the user's consent to the collection and use of information in accordance with the privacy policy [see P 9 of Form]. For a detailed guide to drafting OPPA privacy policies, see § 57.142[5]. For a discussion of OPPA and its requirements, see § 57.35[1].

[b] Posting Privacy Notice on Website

The privacy policy must be "conspicuously posted" on the website by one of following methods [*Bus. & Prof. Code* §§ 22575(a), 22577(b)]:

- Posting the actual privacy policy on the homepage or first significant page after entering the website.
- Using an icon that hyperlinks to a web page on which the actual privacy policy is posted, if the icon (1) is located on the homepage or first significant page after entering the website; (2) contains the word "privacy"; and (3) uses color that contrasts with the background color of the web page or is otherwise distinguishable.
- A text link that hyperlinks to a web page on which the actual privacy policy is posted, if the text link is located on the homepage or first significant page after entering website, and either (1) includes the word "privacy"; (2) is written in capital letters equal to or greater in size than surrounding text; or (3) is written in larger type than surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.
- Any other functional hyperlink that is so displayed that a reasonable person would notice it.

Although OPPA does not specify exact color, size, and font requirements for the privacy policy itself (as opposed to text links and hyperlinks, as noted above), in order to assure that the policy meets the requirement that it be "conspicuously posted," it is advisable to post the policy so that it stands out, clearly labeled, and is in a different color, different font, or larger type size than the surrounding text [*compare 16 C.F.R. § 313.3(b)(2)(ii), (iii)* (federal privacy notice requirements applicable to financial institutions)].

[c] Collection of Customer Personal Information

Effective January 1, 2005, businesses that collect customer personal information may also be subject to statutory requirements covering disclosure of customers' personal information [see *Civ. Code* § 1798.83]. For additional discussion of this legislation, see § 57.38; see also *Ch. 46, Credit Cards and Other Open-End Credit Transactions*, § 46.96. This form is not specifically designed to comply with statutory requirements governing disclosure of personal information.

[d] Children

In drafting a privacy policy for an operator of a website that is directed to children under the age of 13, or of a general audience website that has a children's area and collects personal information from children, the privacy policy must also comply with the federal Children's Online Privacy Protection Act (COPPA) [15 U.S.C. § 6501 *et seq.*] and its implementing FTC regulations [16 C.F.R. § 312 *et seq.*]. For a discussion of COPPA and its requirements, see §

57.35[2].

The privacy policy in this form is directed to websites operated primarily or exclusively for adults, and therefore does not include the additional information necessary for COPPA compliance [see P 7 of form]. For a guide to drafting COPPA-compliant privacy policies, see § 57.142[6].

[e] Federal Requirements for Financial Institutions

In addition to the California privacy policy requirements, website operators that fall within the federal definition of "financial institutions" [see 16 C.F.R. § 313.1(b); see also § 57.35[3]] are subject to detailed federal privacy policy requirements governing the dissemination of consumers' nonpublic personal information [see 16 C.F.R. § 313.1 et seq.; see also 15 U.S.C. § 6801 et seq. (Gramm-Leach-Bliley Act)]. This form is not specifically designed to comply with these federal requirements. For more detailed discussion of the Gramm-Leach-Bliley Act and a federal privacy notice, see *Ch. 1A, Role of Counsel in Starting A New Business*, § 1A.206[1].

[2] FORM

Privacy Policy

PRIVACY POLICY

1. Our Commitment to Privacy. This notice describes our Privacy Policy. Our privacy policy is designed to advise you about how we collect, use, and protect the personal information you provide. By visiting this site, you are accepting the practices described in this Privacy Policy.

2. What Information is Collected.

(a) Information You Provide to Us: We collect any information you enter on our site, or that you give us in any other way. You can choose not to provide certain information, but you may not be able to take advantage of our services and features.

(b) Automatic Information: When you visit a website, you disclose certain information, such as your Internet Protocol (IP) address and the time of your visit. This site, like many other sites, records this basic information about visits to our site.

(c) "Cookies": Cookies are pieces of information that are transferred to your computer from a web server. Most browsers are set up to accept cookies, but you can change your settings to have your browser notify you when you receive a new cookie or to refuse to accept cookies.

3. How and When the Information is Used. The information we collect is used for administering our business activities. Occasionally we may use the information to notify you about changes to our website, new services, or special offers.

4. How We Protect Your Information. The privacy and protection of your information is important to us. We do not make any personal information available to third parties without your permission.

Your access to some services and content is password protected. We advise that you do not disclose your password to anyone. In addition, we recommend you sign out of password-protected services at the end of your session.

5. Who Has Access to the Information. Information about our users is important to us. We will not disclose any individually identifiable information to any third party without first receiving that user's permission.

6. Methods We Use to Protect Your Information. We use security software to protect the confidentiality of your personal information. In addition, our business practices are reviewed periodically for compliance with policies and procedures governing the security and confidentiality of our information. Our business practices limit employee access to confidential information, and limit the use and disclosure of such information to authorized persons.

7. Children. This website does not provide services or sell products to children under the age of 18. [If you are under 18, you may use this website only with the involvement of a parent or guardian.]

8. How You Can Access Your Information. You can request access to all your personally identifiable information by sending an e-mail to _____[*e-mail address*].

9. Consent. By using our website, you consent to the collection and use of your personal information as described in this Privacy Policy.

10. Changes to Privacy Policy. If our Privacy Policy or procedures change, we will immediately post those changes to our website. Any such changes will be effective immediately upon being posted, unless otherwise stated in the change.

11. Effective Date. This Privacy Policy is effective as of _____[*date*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionRight to Financial PrivacyGeneral OverviewComputer & Internet LawPrivacy & SecurityGeneral OverviewComputer & Internet LawPrivacy & SecurityChildren's Online Privacy Protection ActComputer & Internet LawPrivacy & SecurityState Regulation



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22-57 California Legal Forms--Transaction Guide § 57.243

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.243 Domain Name Purchase Agreement

[1] Comment--Use of Form

This form is an agreement for the purchase and sale of a domain name; that is, the transfer of the name from the current a domain name registrant to a buyer. This form assumes that the domain name has already been registered in the name of the seller, as opposed to the first instance of registering a domain name that did not previously exist. Registration of a new domain name with one of the many domain name registries may be a less expensive alternative if a suitable unregistered name can be found.

When transferring or purchasing a domain name it is important to consider the rules of the relevant domain name registry and to ensure that the purchaser is eligible to be the registrant of the domain name.

[2] FORM

Domain Name Purchase Agreement

DOMAIN NAME PURCHASE AGREEMENT

The following agreement ("Agreement") is made as of _____[*date*] ("Effective Date"), by and between _____[*name of seller*] ("Seller") and _____[*name of buyer*] ("Buyer"), collectively referred to as the "parties." The parties agree as follows:

1. Domain Name. Seller hereby agrees to sell to Buyer, and Buyer hereby agrees to buy from Seller, the internet domain name _____[*insert domain name*] ("Domain Name"), on the terms and conditions set forth in this Agreement.

2. Price and Payment Terms. The parties agree that the total purchase price for the Domain Name is

\$_____. Payment for the Domain Name will be made _____[insert method of payment, e.g., in a lump sum by certified check immediately upon execution of this agreement or specify other payment terms]. [Optional if parties contemplate using an escrow agent to complete the transaction: Any financial transaction may be handled through the services of an escrow agent mutually agreed upon by the parties. If an escrow agent is used, any escrow costs will be split equally between both parties involved in the transaction.]

3. Transfer of Ownership. Upon receipt of Buyer's payment for the Domain Name [or specify another point at which seller's duty to perform the specified obligations will arise, such as payment of an initial portion of the purchase price], Seller will do all of the following:

(a) Sell, assign and transfer to Buyer all Seller's rights, title and interest in and to the Domain Name, including any trademarks, service marks, copyrights and other intellectual property rights, whether or not registered, which the Seller has in the Domain Name; and

(b) Promptly prepare and deliver to the appropriate parties, including _____[name of appropriate domain name registry], all forms and other documents necessary or advisable to transfer the Domain Name.

4. Representations and Warranties. Seller represents and warrants that:

(a) Seller has obtained all necessary authorization for it to execute and deliver this Agreement and fulfill all of Seller's obligations.

(b) Seller is the registrant and sole legal and beneficial owner of the Domain Name and the Domain Name is free and clear from all liens, charges, claims, and encumbrances.

(c) Seller does not owe any amount to any domain name registration authority on account of the registration of the Domain Name

(d) Seller is not aware of any pending or threatened actions, suits, claims, litigation, or proceedings related to the Domain Name.

5. Nonperformance. In the event Seller is unable to perform all the terms of this Agreement, Seller's liability shall be limited to the total amount of money paid to Seller by Buyer under this Agreement. Seller makes no claims or warranties of any kind, expressed, implied, or statutory concerning the stability, availability, or usability of the Internet and the Internet Domain Name system. In the event that ICANN or some other official body or organization issues a ruling that hinders Seller from transferring the Domain Name to Buyer, this Agreement shall be canceled. In the event of cancellation, Buyer agrees not to bring any lawsuit against Seller and will accept the return of all monies paid under this Agreement as total damages.

6. Limitation of Liability. Buyer agrees that Seller shall not be liable under any circumstances for any special, consequential, incidental, punitive, or exemplary damages arising out of or in any way connected with this Agreement, including, but not limited to, damages for lost profits, loss of use, lost data, loss of privacy, and damages to third parties. In no event shall Seller's liability for any and all claims against Seller under this Agreement, in contract, tort, or otherwise, exceed the total amount of the fees paid by Buyer to Seller under this Agreement.

7. Force Majeure. Seller is not responsible for nonperformance or delay resulting from war, riots, embargoes, strikes, sabotage, computer viruses, computer failures, or other events beyond Seller's control.

8. Modifications. This Agreement can be modified only by a separate written document executed by both parties. Any attempts to modify these terms and conditions other than by written agreement are void, and will not be valid or

enforceable.

9. Notices. All notices, offers, acceptance and any other acts under this Agreement, except payment, shall be in writing, and shall be sufficiently given if delivered to the addressees in person, by facsimile delivery, or by mail, postage prepaid, return receipt requested, as follows:

To Seller:

_____ [seller's name]
_____ [seller's address]

To Buyer:

_____ [buyer's name]
_____ [buyer's address]

10. Governing Law. This Agreement will be interpreted and applied in accordance with the laws of the state of California.

Executed on _____ [date], at _____ [city], California.

BUYER

_____ [name]
By _____ [signature]
[typed name and title]

SELLER

_____ [name]
By _____ [signature]
[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Trademark Protection Protection of Rights Internet Domain Names



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22-57 California Legal Forms--Transaction Guide § 57.244

AUTHOR: Fiona C. Newell Kaufman, J.D. Revision Author

§ 57.244 Website Hosting Agreement

[1] Comment--Use of Form

This form is a website hosting agreement for use by website hosting providers to individual or company users. Providers of website hosting services may use this type of agreement to define the specific services they are providing, define the usage that a user may engage in, restrict the usage that a user may engage in, and limit liability.

Most website hosting services have a variety of standard plans geared to the particular user, ranging from low-end plans for individuals with limited internet and e-mail needs to high-end plans designed for use by businesses. The services included in these plans vary as to the amount of storage space, number of dial up and e-mail accounts, amount of file transfers during a given period, and so on. This form is designed for web service providers who may offer a variety of accounts, by incorporating appendices containing the terms and conditions of the user's particular plan, as well as the general policies and terms of the web service provider.

[2] FORM

Website Hosting Agreement

WEBSITE HOSTING AGREEMENT

This Website Hosting Agreement ("Agreement") is entered into between _____ [name of service provider] ("Company") and _____ [name of user] ("User"). The parties agree as follows:

1. Acceptance. By accepting this Agreement and using Company's Website Hosting Services ("Services"), User agrees to be bound by all the terms and conditions of this Agreement.

2. Provision of Services. Company agrees to provide User with website hosting services consisting of website server

space, e-mail capability, internet access, [domain name registration,] and such additional services as may be provided by Company from time to time. A more detailed description of the services included in User's service plan is attached to this agreement as Appendix A. Company reserves the right to change or modify the features of User's service plan from time to time on _____ [e.g., 30 days] written or e-mailed notice to User. User's continued use of Company's services after receipt of such a notice of modification shall constitute User's acceptance of and agreement to be bound by the Company's modification of the terms and conditions of this agreement and Appendix A.

3. Agreement Term. The initial term of this agreement shall commence on the date of execution of this agreement and shall continue through the remainder of the calendar month in which this agreement was executed (the "Initial Term"). After the initial term, this agreement shall be automatically renewed for successive monthly periods until terminated by one of the parties as provided in this agreement. [Optional: If User chooses to pay Company quarterly, the renewal term shall continue for each quarter (three months) that he or she pays for Company's services.]

4. Termination Without Cause. (a) User may terminate this agreement at any time, for any reason, by contacting Company, either by phone or e-mail, and requesting that User's account be canceled. In the event of a cancellation, Company will not refund amounts already billed for the current monthly [or other term] service period in which User terminates the agreement. [Any amounts paid in advance by User for future service terms following the current monthly (or other term) service term will be promptly refunded by Company.]

(b) Company may terminate this agreement at any time, for any reason, by providing written or e-mail notice of termination to User's primary website e-mail contact address no less than 30 days prior to the service termination.

(c) If either Party terminates this Agreement under this Paragraph, Company will back up all user's current Website content, databases, and e-mail messages as an archive file, and send them to User either as an attachment to an e-mail or via other file transfer process, or mail them to User in the form of a CD-ROM.

5. Termination for Cause. User agrees to abide by the terms of this Agreement and by Company's general use policies as set forth in this agreement and on Appendix B attached, as those policies may exist from time to time. Company may change its use policies on 30-day written notice to Customer by e-mail message, mail, or facsimile transmission. Any violation by User of the terms of this Agreement or of Company's general use policies shall be grounds for immediate termination of User's account for cause. If Company terminates User's account for a violation of this Agreement under this Paragraph, Company shall not be required to refund any amounts billed for the billing period in which Company terminates User's services.

6. Payment Terms. (a) User agrees to pay Company the amount specified on Appendix A for the Company's services. Company reserves the right to change or modify its charges for User's plan from time to time on _____ [e.g., 30 days] notice written or e-mailed to User. User's continued use of Company's services after receipt of such a notice shall constitute User's acceptance of and agreement to be bound by the Company's modified charges for its services. Additional charges for add-on services not included in User's plan will be made as specified on Appendix A.

(b) Service charges are payable in advance _____ [on a _____ (monthly or quarterly) basis or in one, 3, 6 or 12 month installments, at User's option]. Company will invoice User at the beginning of each payment period. Company will submit all invoices to User by e-mail. Payment is due immediately upon receipt of invoice. Payments can be made online or by check. Interest in the amount of _____ [amount of interest] per month will be added to any outstanding invoices remaining unpaid for more than 30 days. [User may elect to have payments charged to a credit or debit card or other account automatically on the first day of any payment period.]

(c) User agrees to be billed for all recurring and one-time charges, including late charges, for any Services ordered by

User and any fees owed to Company.

(d) Any charges for upgrading User's current hosting package, or performing add-on requests, will not be billed until the next invoice.

7. Taxes. Company shall not be liable for any taxes and other governmental fees related to purchases made by User or from Company's server. User agrees that he or she will be fully responsible for all taxes and fees of any nature associated with products or services sold through the use of or with the aid of services provided to User by Company.

8. Materials and Products. Any material and data User provides to company in connection with Services shall be in a form requiring no additional manipulation on the part of Company. Company shall make no effort to validate this material or data for content, correctness, or usability. Material or data that is not in this condition shall be a breach of this Agreement. Company, in its sole discretion, may reject material or data that User has placed on Company's servers or that User has requested that Company put on Company's servers. Company agrees to notify User immediately of its refusal of any material or data and provide User with an opportunity to amend or modify the material or data to meet the Company's requirements. User's failure to amend or modify the data or material as directed by Company within a reasonable time shall be a breach of this Agreement.

9. Electronic Mail Abuse. Harassment by e-mail, whether through language, frequency, or size of messages, is prohibited. User may not send e-mail to any person who does not wish to receive it. If a recipient asks to stop receiving e-mail, User must not send that person any further e-mail. Users are explicitly prohibited from sending unsolicited bulk e-mail messages ("junk mail" or "spam"). This includes, but is not limited to, bulk mailing of commercial advertising, informational announcements, and political tracts. Such material may only be sent to those who have explicitly requested it. Users may not forward or otherwise propagate chain letters, whether or not the recipient wishes to receive such mailings. Malicious e-mail, including but not limited to "mail bombing" (flooding a user or site with very large or numerous pieces of e-mail) and "trolling" (posting outrageous messages to generate numerous responses) is prohibited. Forging of header or any other information is not permitted. Subscribing someone else to an e-mail list or removing someone else from a mail list without that person's permission is prohibited. Company's accounts or services may not be used to collect replies to messages sent from another Internet Service Provider if those messages violate this Agreement or any usage policy of that other provider. Violations of this Agreement will result in immediate account termination and provider reserves the right to charge an administrative clean-up fee of up to \$_____ and a deactivation fee of \$_____.

10. Violations of Network Security. User is prohibited from violating or attempting to violate the security of the network. Violations of system or network security may result in civil or criminal liability in addition to immediate termination of User's agreement. Company will investigate occurrences, which may involve such violations and may involve, and cooperate with, law enforcement authorities in prosecuting Users who are involved in such violations. These violations include, without limitation:

- (a) Accessing data not intended for the User or logging into a server or account that the User is not authorized to access.
- (b) Attempting to probe, scan, or test the vulnerability of a system or network, or to breach security or authentication measures without proper authorization.
- (c) Attempting to interfere with service to any user, host or network, including, without limitation, via means of overloading, "flooding," "mail bombing," or "crashing".
- (d) Forging any TCP/IP packet header or any part of the header information in any e-mail or news group posting.
- (e) Taking any action in order to obtain services to which the User is not entitled.

11. Warranty Against Unlawful Use. User warrants and represents that User shall use Services only for lawful purposes and in accordance with all valid federal, state, and local laws and regulations governing use of e-mail and the Internet, whether or not specifically prohibited elsewhere in this Agreement. Failure to abide by the terms of this paragraph shall be grounds for immediate termination of User's account for cause.

12. Liability; No Warranty; Limitation of Damages. (a) User expressly agrees that use of Services provided by Company is at User's sole risk.

(b) Company guarantees _____ percent uptime for its Web servers. If uptime for User's Web server falls below _____ percent during any given month [*or specify other payment period*], Company will credit User as follows: _____ [*specify amount or formula for computation of credit*]. Any such credit shall be applied to future invoices. This credit shall be User's sole and exclusive compensation for any downtime or other unavailability of Company's services under this Agreement. **COMPANY SHALL HAVE NO LIABILITY OF ANY KIND FOR ANY DAMAGES OR LOSS ARISING AS A CONSEQUENCE OF SUCH DOWNTIME OR UNAVAILABILITY.**

(c) **COMPANY, ITS AGENTS, AFFILIATES, LICENSORS OR THE LIKE, DO NOT REPRESENT OR WARRANT, EXPRESSLY OR IMPLIEDLY, THAT THEIR SERVICES WILL NOT BE INTERRUPTED OR ERROR FREE; NOR DO THEY MAKE ANY WARRANTY AS TO THE RESULTS THAT MAY BE OBTAINED FROM THE USE OF THEIR SERVICES OR AS TO THE ACCURACY, RELIABILITY, OR CONTENT OF ANY INFORMATION SERVICE OR MERCHANDISE CONTAINED IN OR PROVIDED THROUGH THEIR SERVICES, UNLESS OTHERWISE EXPRESSLY STATED IN THIS AGREEMENT.**

(d) **COMPANY, ITS OFFICERS, AGENTS, OR ANYONE ELSE INVOLVED IN PROVIDING SERVICES SHALL NOT BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES THAT RESULT FROM THE USE OR INABILITY TO USE SERVICES; OR FOR ANY DAMAGES THAT RESULT FROM MISTAKES, OMISSIONS, INTERRUPTIONS, DELETION OF FILES, ERRORS, DEFECTS, DELAYS IN OPERATION, OR TRANSMISSION, OR ANY FAILURE OF PERFORMANCE, WHETHER OR NOT LIMITED TO ACTS OF GOD, COMMUNICATION FAILURE, THEFT, DESTRUCTION, OR UNAUTHORIZED ACCESS TO COMPANY'S RECORDS, PROGRAMS, OR SERVICES.**

(e) Company will exercise no control over the content of the information passing through Company's network except those controls expressly provided herein.

(f) **COMPANY MAKES NO WARRANTIES OR REPRESENTATIONS OF ANY KIND, EXPRESS OR IMPLIED, FOR THE SERVICES IT IS PROVIDING. COMPANY ALSO DISCLAIMS ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND WILL NOT BE RESPONSIBLE FOR ANY DAMAGES THAT MAY BE SUFFERED BY USER, INCLUDING LOSS OF DATA RESULTING FROM DELAYS OR NON-DELIVERIES.**

13. Patents, Copyrights, Trademarks, and Other Intellectual and Proprietary Rights. [(a)] Except for rights expressly granted herein, this Agreement does not transfer any intellectual or other property or proprietary right to User. User agrees that all right, title, and interest in any product or service provided to User belongs to Company. These products and services are only for User's use in connection with Services provided to User as outlined in this Agreement.

[(b) User expressly warrants to Company that User has the right to use any patented, copyrighted, or trademarked material which User uses, posts, or otherwise transfers to Company servers.]

14. Hardware, Equipment, and Software. User is responsible for and must provide all phones, phone services, computers, software, hardware, and other services necessary to access Company servers. Company makes no representations, warranties, or assurances that User's equipment will be compatible with Company Services.

15. Age. User expressly represents and warrants that User and any person to whom User grants access to User's Company account are at least 18 years of age.

16. Indemnification. User agrees to defend, indemnify, and hold Company harmless from any and all demands, liabilities, losses, costs, and claims, including reasonable attorneys' fees, asserted against Company, its agents, servants, officers, and employees, that may arise or result from any Service provided or performed or agreed to be performed or any product sold by User, User's agents, employees, or assigns. User further agrees to defend, indemnify, and hold harmless Company against liabilities arising out of:

(a) Any liability to Company arising by virtue of any use of Company's services by User for any unlawful purpose, or in violation of any valid federal, state, or local law or regulation governing use of e-mail or the Internet;

(b) Any injury to person or property caused by any products sold or otherwise distributed in connection with Services provided to User;

(c) Any material supplied by User infringing or allegedly infringing on the property or proprietary rights of a third party;

(d) Copyright or trademark infringement by User, or violation by User of intellectual property rights of any other party; and

(e) Any defective product which User sold or distributed by means of Services.

User agrees that the liability limit of Company shall in no event be greater than the aggregate dollar amount which User paid during the terms of this agreement, including any reasonable attorneys' fees and court costs.

17. Attorneys' Fees. If any legal action is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire Agreement.

18. Notice. User agrees to keep Company informed of all current contact information for User's account. Changes in User's account information may be reported to Company by e-mail at _____[*e-mail address*] or on Company's website located at _____[*website address*]. Failure to maintain or keep current all contact information shall be a ground for Company to terminate User's account for cause.

19. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the state of _____. [User agrees, in the event any suit is brought in connection with Company's provision of Services to User, to submit to the jurisdiction of the state of _____.]

20. Severability. In case any one or more of the provisions of this Agreement be held for any reason to be invalid, illegal, or unenforceable in any respect, that invalidity, illegality, or unenforceability shall not affect any other provisions of this Agreement, and this Agreement shall be construed as if the invalid provision(s) had never been contained in this Agreement, provided that those provision(s) shall be curtailed, limited, or eliminated only to the extent necessary to remove the invalidity, illegality, or unenforceability.

21. Waiver. No waiver by Company of any breach by User of any provision of this Agreement shall be deemed a waiver of any preceding or succeeding breach of this Agreement. No waiver shall be effective unless it is in writing, and then only to the extent expressly set forth in such a writing.

22. Entire Agreement. This Agreement shall constitute the entire agreement between User and Company.

Executed this _____ day of _____, at _____[city], California.

USER

_____ [name]

[typed name and title]

COMPANY

_____ [name of corporation]

By _____ [signature]

[typed name and title]

APPENDIX A

Description and Charges for User's Service Plan and Optional Add-On Services

APPENDIX B

Company Terms, Conditions, and Policies

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet LawInternet BusinessGeneral OverviewComputer & Internet LawInternet BusinessInternet & Online ServicesGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION III: COMMERCIAL TRANSACTIONS

Chapters 58-59 [Reserved]

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[Reserved]

Chapters 58[Reserved]