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Legal Update: Commercial Real Estate Brokers Now Subject to the Same Dual Agency and Disclosure Laws as Residential Brokers

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As of January 1, 2015, commercial real estate brokers and salespersons will be required to comply with a stringent set of agency disclosure requirements formerly applicable only to residential brokers, expressly setting forth their agency role (i.e. as the agent of a buyer, seller, tenant, landlord, or a dual agent).

In August 2014, the California State Legislature passed SB 1171, redefining the term “real property” as used in Civil Code sections 2079.13 through 2079.24 to include “commercial property.” This seemingly innocuous change will have significant implications for commercial real estate brokers by requiring them to meet the same strict agency disclosure and written consent requirements as residential real estate agents, when representing a party in the sale (or lease exceeding one year) of commercial property. Prior to the enactment of this law, commercial real estate brokers were not required to obtain consent in writing for dual representation. The rationale was that parties to commercial transactions were more sophisticated than parties to residential transactions, so there was arguably no need for stringent disclosure requirements. The supporters of SB 1171 felt otherwise.

New Statutory Disclosures

Commercial real estate brokers likely will need to modify their form of listing agreements and disclosures to provide the statutory disclosure set forth in Civil Code section 2079.16 (as shown in detail below) to the buyer, seller, tenant, or landlord (as applicable) and should provide the disclosures before or concurrently with submitting a letter of intent. Specifically, the law requires that the statutory disclosures be provided by commercial real estate brokers within the following time frames:

(1) The listing agent, if any, must provide the disclosure form to the seller/landlord prior to entering into the listing agreement.

(2) The selling agent must provide the disclosure form to the seller/landlord as soon as practicable prior to presenting the seller/landlord with an offer to purchase (or lease).

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

Commercial real estate brokers’ written disclosures must now include the text from Civil Code sections 2079.13 through 2079.24 (excluding Civil Code section 2079.16) on the back of the disclosure form. Additionally, brokers must obtain the written acknowledgement of receipt of such disclosures from both the seller and buyer (or landlord and tenant, as applicable). For the required content of the front of the disclosure form and for the form of written acknowledgement, please see the end of this legal update.

Effects on Dual Agency

In addition to the foregoing changes to disclosure requirements, commercial real estate brokers are now bound by Civil Code section 2079.21. Accordingly, when acting as a dual agent, a commercial real estate broker is not allowed to disclose to the buyer that the seller is willing to sell the property at a price less than the listing price, without the express written consent of the seller and similarly, is not permitted to disclose to the seller that the buyer is willing to pay a price greater than the offering price, without the express written consent of the buyer. The same rules would apply when acting as a dual agent for a landlord and tenant. This begs the question as to how a commercial real estate broker acting as a dual agent can meet its fiduciary obligation to both buyer and seller if the broker cannot be completely candid with each party as to the purchase price each party is willing to pay without buyer and seller expressly consenting to such communication in writing.

Even more troubling is whether large brokerage firms will be able to continue representing both buyers and sellers (or landlords and tenants) in commercial real estate transactions. When one salesperson obtains the listing and represents the seller, and another salesperson employed by the same broker represents the buyer, they both act as employees of the same broker. That broker thereby becomes a dual agent representing both parties. (2 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 3:12, p. 68, fns. omitted.) In *Horiike v. Coldwell Banker Residential Brokerage Co.* (2014) 169 Cal. Rptr. 3d 891, a recent case involving residential real estate brokers, the appellate court held that when a broker is the dual agent of both the buyer and the seller in a real property transaction, the salespersons acting under the broker have the same fiduciary duty to the buyer and the seller as the broker. The *Horiike* case is under review by the California Supreme Court, but the court's analysis was conducted under the Civil Code statutory scheme discussed above, which will apply to commercial real estate brokers and salespersons as of January 1, 2015.

The actual ramifications of the *Horiike* case and implementation of SB 1171 are yet to be seen. However, it remains unclear as to how a broker can represent both a buyer and seller (or landlord and tenant) in a deal without violating the required disclosures, even when utilizing separate agents.

New Form of Statutory Disclosure

On the front of the commercial real estate broker's disclosure form, all of the following must appear:

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

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

SELLER'S AGENT

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

To the Seller:

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

To the Buyer and the Seller:

(a) Diligent exercise of reasonable skill and care in performance of the agent's duties.

(b) A duty of honest and fair dealing and good faith.

(c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties.

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

BUYER'S AGENT

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

To the Buyer:

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

To the Buyer and the Seller:

(a) Diligent exercise of reasonable skill and care in performance of the agent's duties.

(b) A duty of honest and fair dealing and good faith.

(c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties.

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

AGENT REPRESENTING BOTH SELLER AND BUYER

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

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

(a) A fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the Seller or the Buyer.

(b) Other duties to the Seller and the Buyer as stated above in their respective sections.

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

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

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

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

_____ _____

Agent (date) Buyer/Seller (date)

(Signature) (Signature)

_____ _____

Associate Licensee (date) Buyer/Seller (date)

(Signature) (Signature)

Written Acknowledgement of Agency Disclosure

Commercial real estate brokers will need to obtain a written acknowledgement of receipt of the applicable disclosures by the seller and buyer (or landlord and tenant, as applicable) in the following form:

_____ (Name of Listing Agent) is the agent of (check one):

( ) the seller exclusively; or

( ) both the buyer and seller.

_____ (Name of Selling Agent if not the same as the Listing Agent) is the agent of (check one):

( ) the buyer exclusively; or

( ) the seller exclusively; or

( ) both the buyer and seller.

For more information regarding this legal update, please contact Katie Jones at katie.jones@msrlegal.com or 925-935-9400.

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