

Section I (Substituted Disclosures) of the TDS

When and why was Section I added to the TDS?

Section I was part of the TDS when it first came into effect in 1987. It is thought that, at the time, the hope was a regular home inspection might be used as a substitute for the seller's statutory disclosure obligations. That scenario did not happen as a matter of practice and the result was that Section I has been widely ignored since its inception. One reason may be that regardless of the TDS statute, California case law imposes a separate duty of the seller to disclose to the buyer known material facts affecting the value and desirability of the property. Using the TDS allows the seller to satisfy both the common law and statutory duty. Section 1102.1 of the Civil Code now includes the following language: "The Legislature did not intend to affect the existing obligations of the parties to a real estate contract ... to disclose any fact materially affecting the value and desirability of the property, including, but not limited to, the physical conditions of the property ..." Another reason may be that home inspectors understandably did not want their reports used as a replacement for the seller's disclosure duties.

When and why was "[] No substituted disclosures for this transfer" added to Section I of the TDS?

Legislation approved in 2019 (AB 892) inserted the language into the TDS. The 2019 legislation was thought necessary because other legislation a year earlier (AB 1289) amended Civil Code 1102.3 to specify that the buyer's statutory right to terminate an offer began once sections I, II and III of the TDS were completed and delivered as required. Following that 2018 legislation, arguments were made that the TDS was not complete if Section I was left blank even if there were no substituted disclosures in the transaction. To accommodate the most common scenario where no substituted disclosures are made, a new option (the "No substituted disclosure ..." language) was added to Section I.

What is a substituted disclosure?

A substituted disclosure is a disclosure that is "intended to satisfy the disclosure obligations on [the TDS form], where the subject matter is the same."

Section I specifically mentions a Natural Hazard Disclosure (NHD) Report. Is the NHD a substituted disclosure? If the "No substituted disclosure ..." box is checked should an NHD Report be provided?

The NHD report should not be considered a substituted disclosure for two reasons: First, a NHD report is not intended to satisfy the disclosure obligations on the TDS form itself but rather statutory obligations found elsewhere in the law (such as Government Code (flooding and fire zones), Public Resources Code (earthquake and fire zones), and other sections of the Civil Code (Mello Roos, Industrial Use zones, gas pipelines) and; Second, because the subject matter is not the same. For example, the TDS form does not ask about fire, flood or earthquake zones. A NHD report should be provided in addition to the TDS, not in place of it.

Should prior inspection reports and disclosures be specified in Section I of the TDS?

No. Those reports should be used to supplement, not substitute for, the seller's TDS disclosure duty. The better place to refer to and attach those documents would be in the explanation portion of Section II A, B or C of the TDS or in response to a specific question on the SPQ or more generic questions on the SPQ such as 5J or 17A or 17C.

Bottom line. Should a seller check the "No substituted disclosure ..." box in Section I?

In most cases, yes. In those rare cases where there will be a substituted disclosure, as distinguished from the NHD and supplemental disclosures and reports, then one of the first two boxes may need to be checked. Those situations are unlikely.