



WHAT IS A BULK SALE ESCROW?

A type of escrow agreement placed on the sale of a business, which may include inventory and assets. The escrow serves to protect the interests of unsecured creditors; it eliminates the risk that the seller of the business will use the proceeds from the sale for purposes other than paying debts and/or taxes that may be owed.



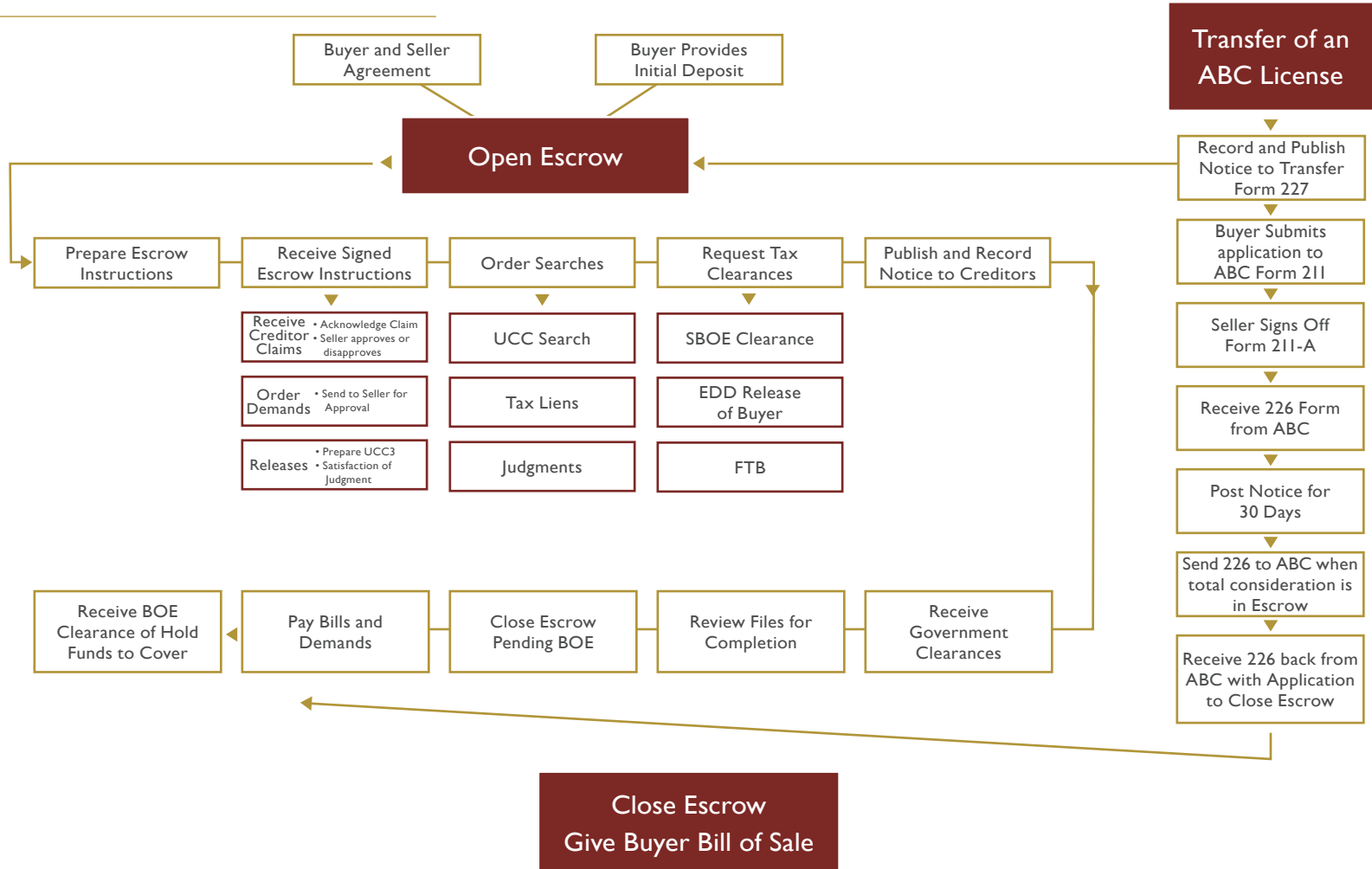
A Bulk Sale escrow is opened when a business is being sold. The escrow agent (a neutral third party) holds all funds in escrow until the transfer of assets at the completion of the transaction when funds are forwarded to the appropriate parties. The buyer and seller typically share the escrow fees associated with the transaction, however, different payment arrangements may be outlined in the escrow agreement and all parties must agree to them.

The process of handling a Bulk Sale escrow is slightly different from that of a real property and requires the expertise of an Escrow Officer proficient in handling Bulk Sale transactions.

Requirements to “open” a Bulk Sale escrow:

- A copy of the Purchase Contract, all Counter Offers and Addendums signed by all parties.
- Name, address, phone number and e-mail address of the Buyer.
- Name, address, phone number and e-mail address of the Seller unless Seller is represented by a real estate agent in which case the agent’s information is required.
- Legal name being used for the purchase.
- Final acceptance date.
- A list of contingencies (i.e. approval for a new loan, selling another business).

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TRANSACTION TIPS

- It is best for the buyer to contact the Landlord before he opens escrow. The buyer should negotiate the lease to his satisfaction first, before escrow starts spending money on publications, etc.
- Buyer should make sure that his down payment is in the accounts that he has stated on his loan application form for easy verification by the Loan Officer.
- Before buyer enters into a contract, he should know his loan interest rate so that he will be prepared for the minimum down payment that he will need and understand what the conditions are that he will need to watch for with regards to his financial situation.
- Buyer should be sure that the funds for the down payment and closing costs are readily accessible and can be wired to the Escrow Holder upon request.
- In a transaction that involves a liquor license transfer, the Department of Alcohol and Beverage Control is very strict on who the applicants will be. If the buyer is married, then his spouse needs to join in the purchase. If the buyer is using a corporate entity, all the officers and partners need to submit their individual applications to the Department of Alcohol and Beverage Control. If any changes are made after the license has been submitted, then the buyer will have to re-do the process.
- The buyer should let his Escrow Officer know if he is adding any additional buyers or if the sale price has changed so that the Escrow Officer can put together a new set of documents.
- When there is a liquor license involved and there is a new Lender funding a new loan, the Lender needs to know in advance that Escrow Holder will need an “unconditional letter of funding” before escrow turns in the “Authorization to Close” (form 226) to the Department of Alcohol and Beverage Control to request transfer of license.
- Buyer should schedule the final walk through at least a week before the closing date of escrow to avoid any surprises.
- Buyer will need to file his own Fictitious Business Name early so that he can start conducting business under the business name.

WHAT BOTH SIDES OF A TRANSACTION NEED TO KNOW



- The Department of Alcohol and Beverage Control does not allow Escrow Holder to pre-release any funds to seller before the authorization to close has been issued. Liquor licenses depend on the approval of the Department of Alcohol and Beverage Control.
- If the sales price is not sufficient to pay all creditors, it is important to alert all creditors to inform them that they have to take only a prorated percentage of what they are owed. In this event, the transaction goes “Prorata,” any existing tax liens are paid and a formula is implemented to determine payment to the creditors.
- The corporation must prepare a Notice to Creditors of Bulk Transfer at least 12 business days prior to the date of transfer of the property. The notice is printed in a general circulation paper that covers the judicial district in which the property is being transferred.
- The notice must also be published in the judicial district where the principal executive office of the prior business is located.
- Copies must be filed in each judicial district or county where the property is located and where the prior business had its principal executive office, with the county tax collector and the county recorder, at least 12 business days prior to the transfer.

COMPLIANCE WITH BULK SALES LAWS

The Bulk Sales Laws are designed to prevent sellers from defrauding creditors by either (1) selling the business for less than the market price and paying creditors less than the amount owed or (2) simply selling the business to a good faith purchaser and disappearing with the proceeds.

- **Filing and Publication of Notice** - to protect creditors, California law requires a buyer to record and publish advance notice of the sale. Further, in a small cash sale of not more than \$2,000,000, the buyer or escrow agent is authorized to impound and control the distribution of the proceeds, and must apply the sale proceeds to the seller's debts before paying the seller.
- **Sales Subject to Bulk Sales Law** - a "bulk sale" is any sale outside the ordinary course of the seller's business of more than one half of seller's inventory and equipment, as measured by the fair market value on the date of the bulk sale agreement
- **Sales Exempt from Bulk Sales Law** - although there are a number of exemptions, the one most applicable relates to a sale of assets having either (a) a value, net of liens and security interests, of less than \$ 10,000 or (b) a value of more than \$ 5 million on the date of the bulk sale agreement.
- **Determining if Business Is Subject to Bulk Sales Law** - the Bulk Sales Law applies to a bulk sale if both of the following conditions exist: (a) the seller's principal business is the sale of inventory from stock, including those who manufacture what they sell, or is that of a restaurant owner; and (b) the seller is located in California.
- **Failure to Comply With Bulk Sales Law** - in general, if a buyer fails to comply with the bulk sale notice requirements, with respect to one or more claimants, the buyer is liable for damages in the amount of any claims against the seller, less any amount that the claimant would not have realized if the buyer had complied with the notice requirements. The claimant has the burden of establishing the validity and amount of the claim, and the buyer has the burden of establishing the amount that the claimant would not have realized if the buyer had complied. An exception to liability applies where the buyer made a good faith effort to comply with the requirements of the Bulk Sales Law.
- **Limitations on Buyer's Liability** - no action may be brought by or on behalf of a claimant whose claim is unliquidated or contingent.
- **Time for Commencement of Action** - an action under the Bulk Sales Laws against a buyer, auctioneer, or liquidator must ordinarily be commenced within one year after the date of the bulk sale.
- **Complying with Notice Requirements:**
 - a. Notice of Sale - In any bulk sale subject to the Bulk Sales Law, the buyer must do all of the following: (i) obtain from the seller a list of all business names and addresses used by the seller within three years before the date that the list is sent or delivered to the buyer; (ii) give notice of the bulk sale; and (iii) comply with the distribution requirements applicable to small cash bulk sales.
 - b. Notice Contents - The notice referred to above must state all of the following: (i) that a bulk sale is about to be made; (ii) the names and business addresses of the buyer and seller (note: the buyer must include all other business names and addresses used by the

seller within the past three years, to the extent known); (iii) the location and general description of the property to be transferred; (iv) the place and the anticipated date of the bulk sale; (v) whether or not the bulk sale is a small cash sale (i.e., \$2 million or less) and if so, the notice must also state the name and address of the person with whom claims may be filed and the last date (which must be the business day before the noticed sale date) for filing claims.

- **Recording, Publishing and Delivering Notice** - prior to the date of the bulk sale, the buyer must take three actions with respect to the notice of bulk sale:
 - a. first, the buyer must record the notice in the office of the county recorder of the county or counties in California in which the tangible assets are located and, if different, in the county in which the seller is located before the date of the bulk sale;
 - b. second, the buyer must publish the bulk sale notice before the date of the bulk sale in a newspaper of general circulation published in the judicial district in which the tangible assets are located and, if different, in the judicial district in which the seller is located;
 - c. third, the buyer must deliver the notice or send the notice by registered or certified mail to the county tax collector in the California county or counties in which the tangible assets are located before the date of the bulk sale.
- **Paying Creditor Claims**
 - a. Transactions Subject to Payment Requirements - the Bulk Sales Law imposes additional requirements on the payment of creditor claims when the consideration for the bulk sale is \$2 million or less and is either substantially all cash, an obligation of the buyer to pay cash in the future to the seller, or a combination of the two.
 - b. Obligations of Buyer - in a small cash sale, the buyer (or an escrow agent if the transaction is handled through an escrow) has a duty to apply the consideration in accordance with statutory distribution requirements. This duty extends so far as is necessary to pay those debts of the seller for which claims are both (1) due and payable on or before the date of the bulk sale and (2) filed in writing on or before the date specified as the last date to file claims with the person designated in the notice to receive claims.
 - c. Submission of Claims to Seller and Disputes Claims - the buyer or escrow agent should submit all creditor claims to the seller for approval or rejection. If the seller disputes whether a claim is due and payable on the noticed sale date, or disputes the amount of any claim, the buyer or escrow agent must withhold from distribution an amount specified by statute.
 - d. Payment of Undisputed Claims - with respect to timely claims that the seller does not dispute, the buyer or escrow agent, following the passing of legal title, must either:
 - 1. pay the claims to the extent of the cash consideration, or
 - 2. institute an interpleader action. Note that when the total creditor claims exceed the amount of the cash deposit, there are additional notice and payment requirements to fulfill.