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House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

February 5, 2002

COMMITTEES

PROFESSIONAL LICENSURE,
MAJORITY CHAIRMAN
LIQUOR CONTROL
FIREFIGHTERS' CAUCUS,
COCHAIRMAN EMERITUS

John R. McGinley, Jr., Chairman
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

Dear Chairman McGinley:

I am writing to inform you that the House Professional Licensure Committee held a meeting on February 5, 2002, and voted to approve Regulation 16A-568, State Real Estate Commission.

Please feel free to contact my office if any questions should arise.

Sincerely,

A handwritten signature in cursive script that reads "Mario J. Civera".

Mario J. Civera, Chairman
House Professional Licensure Committee

MJC/sms
Enclosure

cc: George E. Meagher, III, Chairman
State Real Estate Commission
Honorable Kim H. Pizzigrilli, Secretary of the Commonwealth
Department of State

Regulation 16A-568

State Real Estate Commission

PROPOSAL: Regulation 16A-568 amends 49 PA Code, Chapter 35, regulations of the State Real Estate Commission. These amendments and additions to the regulations would implement the provisions of Act 112 of 1998 and Act 47 of 2000.

Regulation 16A-568 is Final Rulemaking which was delivered to the Professional Licensure Committee on January 22, 2002. The Professional Licensure Committee has until February 11, 2002, to approve or disapprove the regulation.

ANALYSIS: The regulatory package is rather comprehensive due to the many changes effected by Act 112 of 1998. The final package also incorporates provisions related to Act 47 of 2000, which became effective after the Committee reviewed and offered comments the proposed rulemaking package.

Section 35.201 of the regulations, relating to definitions, would be amended to add definitions for agency relationship, buyer agent, comparative market analysis, consumer, designated agent, dual agent, listing broker, open listing agreement, non-exclusive buyer agency agreement, principal, seller's agent, subagent, and transaction licensee.

Section 35.281(a) would be amended to reflect the requirement of Sec. 606.1(b) of the Act that all contracts for services between a licensee and a consumer wherein the consumer is to pay a fee to the licensee be in writing and contain the information set forth in Sec. 608.1 of the Act. Proposed Sec. 35.281(b) sets forth the exceptions to this requirement as set forth in Sections 606.1(b)(2), (3) and (4).

Section 35.283(d) would be amended by adding services which a licensee may engage in so long as he or she does not require a consumer to use the services. These services include financial services, title transfer and preparation, insurance, construction, repair or inspection services. Subsection (e) would be added to provide that if a consumer chooses to use any of the services listed in subsection (d), the licensee must disclose any financial interest that the licensee has in the service. Subsection (f) would be added to provide that a licensee has a continuing obligation to disclose to a principal any conflict of interest within a reasonable period of time that the licensee learned or should have learned about the conflict.

Section 35.284 would be amended by deleting the description of what a licensee must disclose to all consumers at the initial interview. Instead, Sec. 35.284(a) would require a licensee to provide the disclosure summary set forth in Sec. 35.336 to consumers seeking to purchase or sell real estate at the initial interview if the interview occurs in person. If the initial interview does not occur in person, the licensee must provide the oral disclosure set forth in Sec. 35.339. Sec. 35.284(b) sets forth the disclosure requirement to consumers seeking to lease real estate, and Sec. 35.284(c) sets forth the disclosure requirement to consumers involved in time-share sales. Sec. 35.284(d) would require a licensee to provide a copy of the signed disclosure summary to a consumer, have the consumer acknowledge receipt of the disclosure, and retain a copy. If a consumer refuses to sign the acknowledgment, the licensee shall note the refusal on the acknowledgment and retain it in his or her records.

Section 35.286, pertaining to retention and production of records, would be amended to delineate which records must be retained for 3 years and which records must be retained for 6 months. Section 35.287 would be amended to delete all references to salespersons being authorized to assist brokers in the preparation of real estate appraisals. Appraisals are no longer included in a real estate licensee's scope of practice.

Section 35.292(a) would be added to delineate the duties a licensee generally owes all consumers of real estate services, which are set forth in Sec. 606.1(a) of the Act. Subsections (b), (c) and (d) would be added to mirror the provision of Sections 606.1(h) and (i) of the Act. This clarifies that licensees have no duty to conduct an independent inspection of a property, that a licensee is not required to independently verify the accuracy of any representation made by a consumer to a transaction which the licensee reasonably believes to be accurate, and that a licensee is not liable for the acts of a consumer unless the consumer is acting at the express direction of the licensee or as a result of a representation by a licensee.

Section 35.311(a) would be added to delineate the business relationships permitted between a consumer and a licensee. As authorized by the Act, a licensee may be a seller's agent, a buyer's agent, a dual agent or a transaction licensee. Subsection (b) would be added to clarify that a broker of record may not extend or delegate his or her agency relationship without the written consent of the principal. Subsection (c) would be added to clarify that compensation paid by a broker of record to an assisting broker does not create an agency relationship between the consumer and the other broker. Subsection (d) would be added to prohibit a licensee from revealing confidential information of his or her principal except under five circumstances.

Section 35.312 would be added to delineate the duties of a seller's agent as provided in Sec. 606.2 of the Act. Subsection (e) of this new regulation would reflect language of Sec. 606 of the Act that employees of a broker will act as the seller's agent unless named or thereafter named by the broker as a designated agent. Similarly, Sec. 35.313 would be added to delineate the duties of a buyer's agent as provided in Sec. 606.3 of the Act, also incorporating the language of Sec. 606 regarding employees of the broker.

Section 35.314 would be added to delineate the duties of a dual agent pursuant to Sec. 606.4 of the Act. Sec. 35.315 would be added to cover designated agency situations as provided in Sec.

606.5 of the Act. Designated agency allows the broker of record to assign a licensed employee to act exclusively as the seller's agent and another licensed employee to act exclusively as the buyer's agent in the same transaction. All other licensed employees of the broker would have no agency relationship with either party. Designation may take place at any time, but if designation takes place after an initial designation or after an agreement has been entered into, the broker must obtain the principal's written consent, or obtain the principal's agreement to renounce any previous agency relationship with other licensees employed by the broker. The broker and designated agents would be required to use reasonable care to ensure that confidential information is not disclosed or used.

Section 35.316 would be added to delineate the duties of a transaction licensee as provided in Sec. 606.6 of the Act. A transaction licensee is not an agent for either party to a transaction and therefore has no duty not to disclose confidential information. The transaction licensee would be required to advise consumers of that fact and that confidential information should not be provided to the transaction licensee. A transaction licensee would have a limited duty of confidentiality, prohibiting the licensee from disclosing that a seller/landlord will accept a price less than the asking/listing price, that a buyer/tenant will pay a price greater than the price submitted in a written offer, or that the seller/landlord or buyer/tenant will agree to financing terms other than those offered.

Section 35.331 would be amended to incorporate the mandatory provisions of Sec. 608.1 of the Act as to what must be included in any written agreement between a broker and a principal or a broker and a consumer. New subsection (b) would allow the Consumer Notice required by Sec. 608 of the Act to be incorporated by reference in the written agreement. The Commission states that since some of the required information will be explained to consumers in detail at the initial interview, repetition would not be necessary.

Current Sec. 35.332(d), which provides a sample form of an exclusive right-to-sell listing agreement would be deleted. The Commission states that since regulations do not provide sample agreements for all real estate transactions, the listing agreement sample is unnecessary. Sec. 35.333, relating to agreements of sales, would be amended to incorporate the mandatory provisions of Sec. 608.2 of the Act. The amendment would also clarify the applicability of these provisions to sales of cemetery lots, mausoleums or cremation spaces or openings.

Section 35.336 sets forth the disclosure summary that must be provided to consumers involved in the purchase or sale of residential or commercial real estate or for the lease of residential or commercial real estate where the licensee is working on behalf of the tenant. Current Sections 35.336(b) and (c), relating to the Disclosure Summary, would be deleted, as those provisions would be moved to Sec. 35.284. Sec. 35.337 would be set forth the disclosure summary for the lease of residential or commercial real estate where the licensee is working on behalf of the owner, and Sec. 35.338 would set forth the disclosure summary for time-share estates. Sec. 35.339 sets forth the oral disclosure that must be provided during an initial interview that does not take place in person. Sec. 35.340 would be added to incorporate the provisions of Sec. 608.3 of the Act, relating to comparative market analysis.

The Committee questioned why the definition of “agency relationship” as set forth in Sec. 35.201 is different from the definition of “agency relationship” set forth in the act. The Commission states that in formulating the regulation, the Commission has shortened the definitions in the act without changing their meaning.

The Committee questioned the inconsistency between proposed Section 35.292(a) (7) requires licensees to “timely disclose” to consumers any conflicts of interest, while proposed Sec. 35.283, which also addresses the duty to disclose conflicts of interest, provides that disclosure be made “in a reasonably practicable period of time.” The Commission now consistently uses the phrase “in a reasonably practicable period of time.”

The Commission corrected a typographical error in Sec. 35.284(a)(4) which erroneously referred to the disclosure summary in Sec. 33.336 rather than Sec. 35.336.

The Committee recommended that proposed Sec. 35.315(b) be amended to require a specific consent to the broker’s designation of the agent, the identity of the agent, and the date on which the designation occurs. The Commission believes that further modification is not necessary. The Commission states that where designation takes place at the time the parties enter into the original contract, the designated licensee is named. The designation date is the date of the contract signed by the licensee and the principal. Where designation occurs after the contract has been executed, subsection (b)(1) requires the consent be given to the newly designated licensee. As such, the principal is informed of, and must give written consent to, the designation and the licensee being designated.

In proposed form, Sec. 35.315(b)(2) required the principal to renounce any previous agency relationship with the other licensees employed by the broker “to the exclusion of the other designated agents.” At the suggestion of the Committee, the Commission has deleted the phrase as unnecessary.

The Committee noted that proposed Sec. 35.315(d), which provides that all licensees employed by the broker of record who are not designated have no agency relationship with either party in the transaction, would appear to be in conflict with Sec. 606 of the act, which provides that licensees employed by the broker shall bear the same relationship to the consumer as the broker. Although Sec. 606 authorizes a broker to designate agents to act exclusively for either a buyer or seller, it does not expressly negate any duties on the part of other employees of the broker to consumers who have entered into an agency relationship with the employing broker. The Commission states that the proposed language is consistent with the express language in the definition of “designated agent” in Sec. 201 of the act, which provides that designated agent acts exclusively as an agent on behalf of the principal “to the exclusion of all other licensees within the broker’s employ.”

The Committee noted that proposed Sec. 35.315(e) would authorize employees of a broker to designate themselves and/or affiliated licensees who are employed by the broker as designated agents, provided there is a written company policy. Sections 606 and 606.5 of the act expressly provide that a broker may designate licensees employed by the broker to act as designated agents.

Regardless of whether or not there is a written company policy, the act would not appear to authorize employees of a broker to designate themselves or others as designated agents. Accordingly, the Commission has deleted this subsection.

The Committee noted that on page 6 of the proposed rulemaking package, the Commission stated that Sec. 35.332(d), relating to exclusive listing agreements, would be deleted. However, the deletion was not shown in the proposed draft. The Commission has corrected that error.

RECOMMENDATIONS: It is recommended that the Professional Licensure Committee approve the regulation.

House of Representatives
Professional Licensure Committee
January 31, 2002