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House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

COMMITTEES

PROFESSIONAL LICENSURE,
MAJORITY CHAIRMAN
LIQUOR CONTROL
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COCHAIRMAN EMERITUS

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

March 21, 2000

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2000 MAR 22 PM 2:02
INDEPENDENT REGULATORY
REVIEW COMMISSION

Dear Chairman McGinley:

I am writing to inform you that the House Professional Licensure Committee held a meeting on March 21, 2000. The Committee submits the comments listed below pertaining to the regulations that were considered.

Regulation 16A-568, State Real Estate Commission. The Committee voted to take no formal action until final-form regulations are promulgated. However, the Committee offers the following comments:

- (1) The Committee questions 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.
- (2) Proposed Section 35.292(a) (7) reflects the language of Section 606(a)(7) of the act which requires licensees to "timely disclose" to consumers any conflicts of interest. However, 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 Committee questions the inconsistency between these two proposed sections.
- (3) The proposed amendment to Sec. 35.284(a)(4) refers to the disclosure summary in Sec. 33.336. The disclosure summary is actually provided in Sec. 35.336.
- (4) Proposed Sec. 35.315(b) is somewhat vague as to what a consumer is consenting to in authorizing a broker to designate agents. As drafted, it would appear that a consumer would be granting a "blanket" consent to a designated agency relationship without being advised of the identity of the designated agent

and the date on which the designated agency becomes effective. The Committee recommends that in the best interests of the consumer, this section be clarified that the consumer must consent to the broker's designation of an agent, the identity of the agent, and the date on which the designation will occur. (5) Proposed Sec. 35.315(b) provides that a licensee may be "designated" after an initial designation or after a written agreement has been entered into, provided the broker (1) obtains the principal's consent, in writing, to the newly designated licensee, and (2) obtains, where applicable, the principal's agreement to renounce any previous agency relationship with the other licensees employed by the broker of record to the exclusion of other designated agents. The Committee requests an explanation of the phrase "to the exclusion of other designated agents."

(6) 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.

(7) Proposed Sec. 35.315(e), which 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. Additionally, the Committee requests a clarification as to what is meant by "affiliated licensees" who are employed by the broker.

(8) On page 6 of the proposed rulemaking package, the Commission states the Sec. 35.332(d), relating to exclusive listing agreements, would be deleted. However, the deletion is not shown in the proposed draft.

Regulation 16A-555, State Board of Accountancy. The Committee voted to take no formal action until final-form regulations are promulgated. However, the Committee offers the following comment:

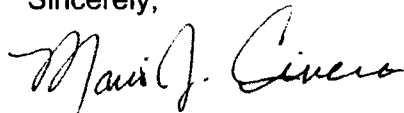
The Committee questions whether a deadline of December 31, 2000, affords sufficient time for approved program sponsors to seek re-approval. Currently, this deadline is less than one year away, and it is uncertain how much time will

John R. McGinley, Jr., Chairman
Independent Regulatory Review Commission
March 21, 2000
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be left before final-form regulations have been approved. Additionally, the Board estimates that one half of the approximately 2,000 currently approved sponsors will apply for re-approval. The Committee questions whether the Board will be able to timely process that number of applications prior to the deadline. Finally, there may be situations where a licensee, prior to December 31, 2000, signs up for a continuing education program to be given after that date. If the program sponsor has not been re-approved by the time the program is administered, how will credits earned by the licensee be affected?

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

Sincerely,



Mario J. Civera, Chairman
House Professional Licensure Committee

MJC/sms

Enclosures

cc: Joseph Tarantino, Jr., Chairman
State Real Estate Commission
Thomas J. Baumgartner, CPA, Chairman
State Board of Accountancy
Honorable Kim H. Pizzingrilli, Secretary of the Commonwealth
Department of State

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REGULATORY REVIEW COMMISSION

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, which went into effect of November 25, 1999.

The proposed Rulemaking was published in the Pennsylvania Bulletin on February 5, 2000. The Professional Licensure Committee has until March 27, 2000, to submit comments on the regulation.

ANALYSIS: The regulatory package, which is rather comprehensive due to the many changes effected by Act 112, can be summarized as follow:

Section 35.210 of the regulations, relating to definitions, would be amended to add definitions for agency relationship, buyer agent, consumer, designated agent, dual agent, listing broker of record, 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 title transfers, deed or document 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. Sec. 35.284(b) would require a licensee to

provide a copy of the entire disclosure summary to a consumer, have the consumer acknowledge receipt of the disclosure, and retain a copy. Subsection (c) would be added to provide that 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. It is the Commission's intent to provide the procedural requirements for disclosure in Sec. 35.284, and the substantive requirements in Sec. 35.336.

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 of record are also 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 of record.

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. The regulation would require designation to take place at the time the parties enter into a written agreement. Designation may occur after an agreement has been entered into only if the broker obtains the principal's written consent, or obtains the principal's agreement to renounce any previous agency relationship with other licensees

employed by the broker. The broker of record and designated agents would be required to use reasonable care to ensure that confidential information is not disclosed or used. Provided there is a written company policy, a broker of record may authorize employee licensees to execute listing and agency contract indicating themselves and/or affiliated licensees as the designated agent(s) of the consumer.

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 licensee and a principal or a licensee 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.

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. New Sec. 35.337 would be added to incorporate the provisions of Sec. 608.3 of the Act, relating to comparative market analysis.

RECOMMENDATIONS: It is recommended that the Professional Licensure Committee take no formal action until final form regulations are promulgated. However, the committee offers the following comments:

- (1) The Committee questions 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.
- (2) Proposed Section 35.292(a) (7) reflects the language of Section 606(a)(7) of the act which requires licensees to "timely disclose" to consumers any conflicts of interest. However, 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 Committee questions the inconsistency between these two proposed sections.

- (3) The proposed amendment to Sec. 35.284(a)(4) refers to the disclosure summary in Sec. 33.336. The disclosure summary is actually provided in Sec. 35.336.
- (4) Proposed Sec. 35.315(b) is somewhat vague as to what a consumer is consenting to in authorizing a broker to designate agents. As drafted, it would appear that a consumer would be granting a “blanket” consent to a designated agency relationship without being advised of the identity of the designated agent and the date on which the designated agency becomes effective. The Committee recommends that in the best interests of the consumer, this section be clarified that the consumer must consent to the broker’s designation of an agent, the identity of the agent, and the date on which the designation will occur.
- (5) Proposed Sec. 35.315(b) provides that a licensee may be “designated” after an initial designation or after a written agreement has been entered into, provided the broker (1) obtains the principal’s consent, in writing, to the newly designated licensee, and (2) obtains, where applicable, the principal’s agreement to renounce any previous agency relationship with the other licensees employed by the broker of record to the exclusion of other designated agents. The Committee requests an explanation of the phrase “to the exclusion of other designated agents.”
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- (7) Proposed Sec. 35.315(e), which 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. Additionally, the Committee requests a clarification as to what is meant by “affiliated licensees” who are employed by the broker.
- (8) On page 6 of the proposed rulemaking package, the Commission states the Sec. 35.332(d), relating to exclusive listing agreements, would be deleted. However, the deletion is not shown in the proposed draft.

House of Representatives
Professional Licensure Committee
March 17, 2000