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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

April 6, 2000

Mr. Joseph Tarantino, Jr., Chairperson
State Real Estate Commission
116 Pine Street
Harrisburg, PA 17105

Re: IRRC Regulation #16A-568 (#2084)
State Real Estate Commission
Agency

Dear Chairperson Tarantino:

Enclosed are our Comments on the subject regulation. They are also available on our website at <http://www.irrc.state.pa.us>.

Our Comments list objections and suggestions for consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you would like to discuss these Comments, please contact Mary Lou Harris at 772-1284.

Sincerely,

Robert E. Nyce
Executive Director

REN:wbg

Enclosure

cc: Judith Pachter Schulder
Joyce McKeever
Dorothy Childress
Honorable Kim Pizzingrilli
Office of General Counsel
Office of Attorney General
Lee Ann Labecki

Comments of the Independent Regulatory Review Commission

on

State Real Estate Commission Regulation No. 16A-568

Agency

April 6, 2000

We submit for your consideration the following objections and recommendations regarding this regulation. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) list the criteria the Commission must use to determine if the regulation is in the public interest. The State Real Estate Commission (Commission) must respond to these Comments when it submits the final regulation. If the final regulation is not delivered by March 6, 2002, the regulation will be deemed withdrawn.

1. Section 35.201. Definitions. - Consistency with the statute.

This section proposes to amend an existing definition and add ten new definitions of terms, which are also defined in The Real Estate Licensing Act (Act) (63 P.S. § 455.201). Only the definition of "consumer" is identical to the definition in the Act; the remainder are not.

We object to the definitions in the regulation which differ from the definitions in the Act. The Commission should reference the statutory definitions in Section 455.201 of the Act. If the Commission does not reference the statutory definitions of these terms in the final regulation, it should justify the changes to the following definitions.

Agency relationship

This definition refers to a "broker of record or licensees employed by a broker of record." The *Act* refers to the "broker or licensees in the employ of the broker." The term in the proposed regulation also refers to a "consumer who becomes a principal." The *Act* refers to a "consumer of real estate services."

Buyer agent

This definition refers to a "licensee who enters into an agency relationship with a buyer/tenant." The *Act* refers to a "consumer buyer of real estate" instead of a "buyer/tenant."

Designated agent

This term refers to one or more licensees designated by the "broker of record," while the *Act* refers to an "employing broker." The term in the proposed regulation also refers to licensees

“employed by the broker of record,” while the *Act* refers to licensees “within the broker’s employ.”

Dual agent

This term is defined as “a licensee who acts as an agent for the buyer/tenant and seller/landlord in the same transaction.” The *Act* defines the term as “a licensee who acts as an agent for the buyer and seller, or lessee and landlord, in the same transaction.”

Listing broker

This term is defined as “a broker of record who has entered into a written agreement with a seller/landlord to market property as a seller’s agent, dual agent or transaction licensee.” The *Act* defines the term as “a broker engaged as a seller’s agent, dual agent or transaction licensee to market the property of a seller/landlord for sale or lease pursuant to a written agreement with the seller/landlord.”

Principal

This term is defined as “a consumer who has entered into an agency relationship with a broker of record or another licensee employed by the broker of record.” The *Act* defines the term as “a consumer of real estate services who has entered into an agency relationship with a broker.”

Salesperson

Subsection (vii) states that a salesperson may “assist a broker in managing [or appraising] property.” The existing definition is being amended by the deletion of the phrase “or appraising.” However, the remainder of Subsection (vii) is inconsistent with the definition of “salesperson” as defined in the *Act*, because the definition does not include the phrase “managing of property.”

Seller’s agent

This term is defined as “a licensee who enters into an agency relationship with a seller/landlord.” The *Act* defines the term “seller agent” as “any licensee who has entered into an agency relationship with a seller of real estate.”

Subagent

This term is defined as “a licensee, not in the employ of the listing broker, who acts or cooperates with the listing broker in selling property as a seller’s/landlord’s agent.” The *Act* defines the term as “a broker, not in the employ of the listing broker, who is engaged to act for, or cooperate with, the listing broker in selling property as an agent of the seller. A subagent is deemed to have an agency relationship with the seller.”

Transaction licensee

The term is defined as “a licensee who, without entering into an agency relationship with the consumer, provides communications or document preparation services or performs other acts listed in the definition of ‘broker’ or ‘salesperson’.” The *Act* defines the term as “a licensed broker or salesperson who provides communication or document preparation services or performs acts described under the definition of “broker” or “salesperson” for which a license is required, without being an agent or advocate of the consumer.”

2. Section 35.281. Putting contracts, commitments and agreements in writing. - Clarity.

Subsection (a) Valuable Consideration

This subsection states, “and a principal or consumer who is required to pay a fee, commission or other valuable consideration...” What qualifies as “valuable consideration,” other than monetary consideration? For clarity, the Commission should define the term “valuable consideration,” or list examples in Subsection (a).

Subsection (b)(1) Open Listing

This subsection contains the term “open listing.” For clarity, the Commission should consider defining the term in either this section or Section 35.201 (relating to *Definitions*).

Subsection (b)(3) Disclosure Statement

Subsection (b)(3) applies to licensees who provide services to the buyer/tenant, but are paid by the seller/landlord. These licensees are required to provide, and have signed, “a written disclosure statement describing the nature of the services and the fees to be paid.” Section 35.331 (relating to *Written agreements generally*) contains much more detailed language. These additions provide a more accurate description of the required materials. For greater clarity, the Commission should add a cross-reference to Section 35.331 of the proposed regulation in Subsection (b)(3).

3. Section 35.283. Conflict of interest. - Consistency with the statute; Clarity.

Subsection (f) Conflict of Interest

Subsection (f) requires a licensee to disclose to a principal any conflict of interest in a “reasonably practicable period of time.” Although the Act (63 P.S. Section 455.608.1(7)) requires a licensee to “timely disclose” any conflicts of interest to a consumer, the Commission should clarify what it considers timely disclosure. It is in the consumer’s best interest to be notified immediately of any conflict of interest. Therefore, we recommend that the Commission provide a definitive standard in the final regulation for what would be considered timely.

4. Section 35.284. Preagreement disclosures to consumers. - Clarity.

Subsection (a) Licensee Duties

This subsection requires licensees to provide a disclosure summary to “all consumers.” Subsection (b) requires a licensee to provide the entire disclosure to “the consumer.” Does disclosure need to go to all consumers, or just those interested in conducting business with the licensee? For clarity, the Commission should use either “all consumers” or “the consumer” consistently in this section.

Additionally, there appears to be a typographical error in Subsection (a)(4). The cross reference to “Section 33.336 (relating to disclosure summary)” is incorrect. The section in the proposed regulation that relates to disclosure summary is Section 35.336. This should be corrected in the final regulation.

5. Section 35.311. Generally. - Consistency with the statute; Clarity.

Subsection (d) Confidential Information

This subsection provides that “ a licensee in an agency relationship may not knowingly, during or following, reveal or use confidential information” For improved clarity and consistency with Section 606.1(g) of the Act (63 P.S. § 455.606a(g)), the Commission should add the phrase “the termination of an agency relationship” after “during or following.”

6. Section 35.314. Dual agency. - Consistency with the statute; Clarity.

Subsection (b)(2) Licensee Duties

This subsection requires the licensee to make a good faith effort to find a buyer for the property and a property for the buyer, “*unless otherwise agreed.*” (Emphasis added.) However, the language in Section 606.4(b)(2) of the Act (63 P.S. § 455.606d(b)(2)) is more specific. The *Act* requires the agreement to be in writing. Additionally, the *Act* states, “... except that a dual agent is not obligated to seek additional offers to purchase the property while it is subject to an existing contract for sale.” For improved clarity and consistency with the Act, the Commission should add the language contained in Section 606.4(b)(2) of the Act.

7. Section 35.315. Designated agency. - Consistency with the statute; Statutory authority.

Subsection (b) Designation

This subsection states, “Designation *should* take place at the time that the parties enter into a written agreement.” (Emphasis added.) Subsections (b)(1) and (b)(2) list circumstances where it is permissible to designate an agent after the initial designation or after the written agreement is signed.

“Should” is nonregulatory language which implies that a provision is optional. Optional provisions should be placed in policy statements or guidance documents. Regulations contain

mandates which have the full force and effect of law. The Commission should replace “should” with “shall,” or delete this provision.

Additionally, a commentator and the House Professional Licensure Committee expressed concerns that this subsection could be interpreted as a general consent to a designated agency relationship. For clarity, the Commission should specify that the consumer must consent to the designation of an agent as well as the specific agent designated.

Subsection (b)(2) Renunciation of Prior Agency Relationship

This subsection requires the principal to renounce any previous agency relationship with other licensees employed by the broker of record “to the exclusion of other designated agents.” The meaning of this phrase is unclear. We request that the Commission explain the intent of this phrase.

Subsection (d) Agency Relationships

This subsection states, “The licensees employed by the broker of record who are not designated may not have an agency relationship with either party in the transaction.” This provision appears to be inconsistent with Section 606 of the Act (63 P.S. § 455.606). The Act provides that licensees employed by a broker have the same relationship to the consumer as the broker, except when the broker is a dual agent and designates a licensee to act exclusively on behalf of one party. We request that the Commission explain how Subsection (d) is consistent with the Act.

Subsection (e) Company Policy on Designation

This subsection refers to designated agents of the “consumer.” Since a consumer who enters into an agency relationship is a “principal,” should the term “consumer” be replaced with “principal?”

In addition, the Commission should clarify the meaning of “affiliated licensees” in this subsection.

8. Section 35.331. Written agreements generally. - Consistency with the statute; Clarity.

Subsection (a) Written Agreements

This subsection states that a written agreement “...*may* contain the following information printed conspicuously.” (Emphasis added.) “May” is nonregulatory language that implies that a provision is optional. Further, the use of the word “may” appears to be inconsistent with Section 608.1 of the Act (63 P.S. § 455.608a), which uses the word “shall.” Therefore, the Commission should replace “may” with “shall” in Subsection (a).

Subsection (a)(6) Description

This subsection requires the written agreement to provide “a description of the licensee’s conflicts of interest and a method whereby the licensee will disclose future conflicts.” This requirement is not clear. What is intended when the Commission requires a licensee to describe

“a method whereby the licensee will disclose future conflicts”? Section 608.1(7) of the Act (63 P.S. § 455.608a(7)) requires a licensee to include a statement which notifies consumers of the “licensee’s continuing duty to timely disclose any conflicts of interest.” The Commission should revise this subsection so that it is consistent with the Act.

9. Section 35.332. Exclusive listing agreements. - Clarity.

The Preamble states that Subsection (d) is being deleted. However, the regulation does not show this deletion. The Commission should reconcile this inconsistency in the final regulation.

10. Section 35.333. Agreements of sale. - Clarity.

Subsection (a) Conspicuously

Subsection (a) requires each agreement of sale to contain “conspicuously...” a specific statement. The use of the term “conspicuously” is vague. If the Commission intends by the use of the term “conspicuously” that the statement should appear in bold, large type and on the front page of each agreement of sale then the Commission should specifically describe its requirement in the final regulation.

Subsection (a) Agreement of Terms

Subsection (a) refers to “an agreement of sale, other than for a cemetery lot, mausoleum or cremation space or opening...” However, Subsection (d) refers to “an agreement of sale for a cemetery lot or plot or a mausoleum space or opening.” Does the Commission intend Subsections (a) and (d) to apply to the same subjects? If so, the Commission should revise both subsections to ensure that the language is consistent in the final regulation.

11. Section 35.337. Comparative market analysis. - Reasonableness.

Subsection (b) exempts a licensee who is also licensed as an appraiser under the Real Estate Appraisers Certification Act (63 P.S. §§ 457.1 – 457.19) from placing a disclosure on the comparative market analysis. The intent of the disclosure is to alert a consumer that a comparative market analysis is not an appraisal. Regardless of who prepares a comparative market analysis, a consumer should be informed that the analysis is not the same as an appraisal. Consequently, the disclosure requirement should apply to all market analyses, and Subsection (b) should be deleted.

12. Miscellaneous Clarity Issues.

Section 25.283. Conflict of interest

There appears to be a typographical error in Subsection (d). The last word in this subsection, “service,” should be “services.”

Section 35.313. Buyer's agency

The title of this section is inconsistent with the format used in Section 35.312, and in the Act. For consistency the title should be changed to "Buyer's agent."

Section 35.314. Dual agency

The title of this section should be changed to "Dual agent."

Subsection (b)(2) contains a typographical error. The first word should be changed from "Maing" to "Making."

Section 35.315. Designated agency

The title of this section should be changed to "Designated agent."

Subsections (f)(1), (f)(2), (f)(4) and (f)(5) are numbered incorrectly. These subsections should be renumbered (f)(1), (f)(2), (f)(3) and (f)(4).

Section 35.331. Written agreements generally

Subsections (a)(5), (a)(6), (a)(7) and (a)(8) are numbered incorrectly. They should be renumbered Subsections (a)(4), (a)(5), (a)(6) and (a)(7) respectively.

Subsection (b) incorrectly refers to Subsection (b) instead of Subsection (a). This should be corrected in the final regulation.