

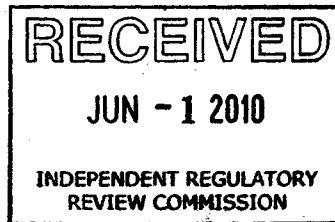


Pennsylvania
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May 28, 2010

Judith Pachter-Schulder, Counsel
State Real Estate Commission
PO Box 2649
Harrisburg, PA 17105-2649

Dear Ms. Schulder:

As an organization that represents more than 30,000 of the Commonwealth's real estate licensees, the Pennsylvania Association of REALTORS® (PAR) welcomes the opportunity to provide input on the proposed regulation titled "Seller Property Disclosure Statement" (16A-5618).

Our comments are as follows:

Section 35.284a(a)(1) requires a seller's agent to advise sellers of their duties and to provide a property disclosure statement ("statement"). As we outlined in comments when this proposal was in draft form, this section overlooks the fact that a seller may be working with a transaction licensee and not with a seller's agent, or that the seller may be selling her property without licensed assistance. In the latter event, the duty to inform the seller of the duty to disclose material defects, etc. should be borne by the licensee working with the buyer. We suggest that the regulation state something to the effect that "a licensee who has entered into a business relationship with a seller shall advise the seller . . . In the event the seller has not entered into a business relationship with any licensee, these duties shall be imposed upon the licensee(s) who has entered into a business relationship with the buyer in the transaction." The same revision would apply to the duty referenced in subsection (a)(2) dealing with the licensee's duty to provide a form statement on which the disclosures are to be made. In addition, subsection (a)(1) and (a)(2) insinuate that a form must be provided in every transaction and does not address the 10 exceptions in the Real Estate Seller Disclosure Law ("Law") where sellers do not need to fill out a form.

Section 35.284a(a)(3) imposes the duty of delivering the completed statement upon the seller's agent. The Law does not impose this duty on any licensee; rather, it is the duty of the seller to provide the statement. In most cases, licensees involved in the transaction assume this responsibility, but the Law does not mandate it.

This section also includes a provision that a seller may elect to not provide disclosure information and simply mark the statement as "refused." We are concerned that establishing a process by which



sellers may refuse to provide this information will ultimately lead to more refusals. Such refusals would subvert the intent of the law, which is to protect buyers by requiring sellers to provide these disclosure statements.

If these refusals do increase, it could dramatically increase the liability on brokers and salespersons on both sides of the transaction. Section 7314 of the Law states that a buyer “shall not have a cause of action under this chapter against the seller or the agent for either or both of the seller or the buyer for ... material defects to the property disclosed to the buyer prior to the signing of an agreement of transfer...” Section 7310 of the Law states that “an agent of a seller or buyer shall not be liable for any violation of this chapter unless the agent had actual knowledge of a material defect that was not disclosed to the buyer or of a misrepresentation relating to a material defect.” In short, if the seller refuses to provide a disclosure statement, but either the listing broker or buyer broker become aware of a condition that should have been disclosed, either or both brokers could be held liable for that condition unless they disclose it to the buyer themselves.

Another consideration with respect to subsection (a)(3) is that in many markets, the statement is transmitted to the multiple listing service that makes it available online. Where this is possible, it should suffice as delivery upon the selling agent provided she has access to the MLS. We believe adding that “publishing the Seller’s Property Disclosure Statement at a location where selling agents have access” would satisfy the obligation of the Law.

Section 35.284a(b)(1) imposes the duty to advise buyers of their right to have a completed statement on the buyer’s agent. If the buyer is working with a subagent rather than a buyer’s agent, we believe the subagent should be duty-bound to advise the buyer as to her right to a completed statement. In the case of a buyer who is purchasing the property directly through the services of a seller’s agent, we believe as well that a licensee should be responsible for informing the buyer of her right to a statement. The agent with whom the buyer has a business relationship should have that duty; in the event the buyer has not entered into a business relationship then the licensee who has entered into a business relationship with the seller and who is involved in the transaction should bear that responsibility.

Section 35.284a(b)(2) requires the buyer’s agent to deliver the completed statement to the buyer before the buyer executes an agreement of sale. If the licensee working with the seller has already made the delivery to the buyer (see 35.284(a)(3)), then this is redundant. We are concerned that seller’s agents could be prosecuted because they failed to deliver a completed statement to a buyer who already received a completed statement from the listing agent. Clearly this should be limited to those situations where there is a licensee who has entered into a business relationship with the buyer and where the statement has not already been delivered by another source.

Section 35.284a(c) and (d) are flawed because they make reference only to sellers’ and buyers’ agents when it is clear the Commission intends the provision to cover any licensee involved in the transaction.

Section 35.335a provides for the content of the statement. A review of the proposed statement indicates that the only question that appears different from the original Commission statement is #12. The original form asks sellers to fill in information about certain equipment and appliances



that are “included in sale” (listing things like refrigerators, garage door openers, smoke detectors, intercoms, etc.), but does not ask about their condition in any way. The proposed revision replaces that list with “The following items included in the sale are in need of repair or replacement: ____.” While we believe there may be confusion if something is listed here that is not ultimately included in the Agreement of Sale, asking for information only about items that are likely to need repair or replacement is more along the lines of the original intent of the statement, and will probably result in fewer misunderstandings than does the current language.

Thank you for the opportunity to comment on this regulatory proposal. Please feel free to contact me should you have any questions.

Sincerely,

Derenda Updegrave

Director, Government Affairs

