# Chapter 3:
# Commission Position Statements

An * in the left margin indicates a change in the statute, rule or text since the last publication of the manual.


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## CP-1 Commission Policy on Homebuilder's Exemption from Licensing

Corporations which build structures on land it owns may sell the land and building together without licensing, provided that the sales are made by corporate officers or regularly salaried employees. The land and building must be sold as a unit and the building must not have been previously occupied. This exemption is usually referred to as the homebuilder's exemption. Since employees who sell must be regularly salaried employees, the question often arises as to what a regular salary is. This is the position of the Commission: 12-61-101(4)(j) C.R.S., among other requirements, requires that a corporation use "regular salaried employees" to sell or negotiate the sale of real property.

It is the position of the Commission that the phrase, "regular salaried employees" means that:

1. The salary must be an actual and stated amount and must not be a draw or advance against future commissions.
2. The salary must be regularly paid (i.e., weekly, monthly, etc.).
3. Although the amount of salary may vary, an employee must be paid at least the prevailing federal minimum wage.
4. The corporation should deduct amounts for state and federal withholding taxes, FICA taxes, and other commonly deductible expenses which the corporation would employ with respect to other employees.

Payment of a commission, in addition to a regular salary, will not invalidate the exemption if the above guidelines are met.

## CP-2 Commission Position On Referral Fees And Advertising Services

Section 12-61-113(i)(j) of the license law forbids a broker from paying a commission or valuable consideration, for performing brokerage functions, to any person who is not licensed as a real estate broker.

Pursuant to Colorado case law "negotiating" means "the act of bringing two parties together for the purpose of consummating a real estate transaction" Brakhage vs. Georgetown Associates, Inc., 523 P 2d 145 (1974). Therefore, any unlicensed person who directly or indirectly brings a buyer and seller together, is negotiating and would need a broker's license in order to be compensated. This includes, but is not limited to, such activities as referring potential time-share purchasers to a developer or referring potential purchasers to a homebuilder.

Payment for providing a name to a licensed broker is not specifically addressed in the license law. However, it would be illegal to pay such a fee to anyone performing acts that require a license (i.e., negotiating, listing, contracting). Care should be taken. At best, the referrer can have no active involvement in the transaction beyond merely giving to a licensee the name of a prospective buyer, seller or tenant.

If the payment is simply for the referral of a name to a licensee, with no further activity on the part of the referrer, the Commission will not consider it to be a violation of the license law. Complaints and inquiries are dealt with on a case-by-case basis.

The Commission has received a number of inquiries from licensees regarding its position on finder's fees as related to the RESPA position prohibiting certain types of payments. Specifically, people are asking whether they can continue paying finders fees until further clarification from HUD. Because of the dilemma created by conflicting positions and the fact that licensees could jeopardize their standing with HUD, the Commission hereby adopts the following position:

> "All licensees should comply with the RESPA statute and regulations regarding payment of referral fees. To the extent the commission position on such payments differs from that of RESPA and HUD, licensees should comply with RESPA and HUD to avoid jeopardizing their standing with respect to federally related loan programs and are advised to contact HUD for further clarification."

Payment for general promotion of a real estate business is not prohibited. Contracting with newspapers, catalog companies of general circulation or with institutional advertisers such as radio, television or any other media, is not prohibited provided the activity does not otherwise constitute offering, negotiating, listing,

selling, or leasing real estate as defined in 12-61-101(2). Payment based on the successful sale or lease of real estate does not in itself constitute brokering as so defined. However, in the past, the Commission has determined that many so-called advertising services actually involved brokering activities. The method of payment is often an important factor in determining whether the activity requires a license.

### CP-3 Position Statement Concerning Commission Rule E-13

Commission Rule E-13, commonly referred to as the "sign-crossing" rule, states as follows:

"A real estate licensee shall not negotiate a sale, exchange, lease or listing contract of real property directly with an owner for compensation from such owner if such licensee knows that such owner has a written unexpired contract in connection with such property which grants to another licensee an exclusive right to sell or lease or which grants an exclusive agency right to sell or lease. However, when a licensee is contacted by an owner regarding the sale, exchange, lease or listing of property that is exclusively listed with another broker, and the licensee has not initiated the discussion, the licensee may negotiate the terms upon which the licensee might take a future listing or, alternatively, may take a listing to become effective upon expiration of any existing exclusive listing."

The Commission's intent in promulgating Rule E-13 was (1) to prevent brokers from interfering with existing listing contracts to the detriment of the owner and (2) to protect the owner from possible claims that two commissions are owed.

Many owners are extremely dependent on the expertise of the licensee. They may sincerely believe an existing listing contract is not in effect when, in fact, it is. The burden of inquiry is on the licensee.

Earlier versions of E-13 had been criticized for being too restrictive. The current rule still provides that licensees shall not negotiate directly with an owner if they know that the owner has a written unexpired Exclusive Right to Sell or Lease. However, the licensee is now allowed to negotiate the terms for a future listing or take a listing effective upon expiration of a current listing so long as the licensee is first contacted by the owner.

This recognizes the fact that an owner with property currently listed may initiate the negotiations concerning a future listing. In addition, the current rule recognizes that in some instances owners become dissatisfied with the services of the broker with whom they have a listing and wish to cancel the listing. If a knowledgeable and informed seller wishes to cancel a listing and list with another company, this cannot be prevented. Of course, the seller runs the risk that improper cancellation of a listing contract can result in legal consequences. Brokers should never independently advise a seller in this area. Instead, an inquiring seller should be advised to seek legal counsel to explain the consequences of canceling an unexpired listing.

If the rule is followed closely it will provide greater opportunities for licensees to negotiate listings where a seller does not wish to re-list with the same broker while maintaining the integrity of the principal/agent brokerage relationship.

### CP-4 Commission Position On Interest Bearing Trust Accounts

**(Revised Position 8-04)**

Section 12-61-113 (l)(g.5) C.R.S. permits brokers to place entrusted money in an interest bearing account.

The Commission has taken the position that in the absence of a contract signed by the proper parties to the contrary, any interest accumulating on a trust account does not belong to the broker who is acting as escrow agent. (This position is based upon 12-61-113(l)(q) and upon the well-established tenet of agency that the agent may not profit personally from the agency relationship except for agreed upon compensation.)

Contracts calling for large earnest money deposits or other payments should contain a provision specifying which party is entitled to interest earned and under what conditions. In the absence of such a provision, accrued interest normally belongs to the seller if the contract is consummated or if the seller is successful in declaring a forfeiture. The entrusted money normally belongs to the purchaser if the contract fails.

In a property management trust account, the accrued interest on that portion of rental money received that belongs to the lessor beneficiary (landlord), would belong to the lessor beneficiary. The accrued interest on security deposits would belong to the respective tenants unless the lessor can establish a right to the security deposit (in the absence of a contract to the contrary).

However, in the case of the property management of mobile homes, by Colorado statute, the interest earned on security deposits may be retained by the landlord of a mobile home park as compensation for administering the trust account. (38-12-209(2)(b) C.R.S.)

* *Nothing in this position statement precludes a real estate broker from voluntarily transferring interest earned on a trust account to a fund established for the purpose of providing affordable housing to Colorado residents if such a fund is established.*

## CP-5 Commission Position On Advance Rentals And Security Deposits

Pursuant to C.R.S. 12-61-113 (l)(g.5) and Commission Rule E-l and E-16, all money belonging to others which is received by a broker must be placed in an escrow or trust account. This applies to tenant security deposits and advance rental deposits, including credit card receipts, held by a broker.

A broker may not deliver a security deposit to an owner unless notice is given to the tenant in the lease, rental agreement, or in a separate written notice that the security deposit will be held by the owner. Such notice must be given in a manner so that the tenant will know who is holding the security deposit, and shall include either the true' name and current mailing address of the owner or the true name and current mailing address of a person authorized to receive legal notices on behalf of such owner, along with specific requirements for how the tenant is to request return of the deposit.

If, after receipt by the broker, the security deposit is to be transferred to the owner or used for the owner's benefit, the broker, in addition to properly notifying the tenant, must secure the consent of the owner to assume full financial responsibility for the return of any deposit which may be refundable to the tenant. The broker shall not withhold the identity of the owner from the tenant if demand for the return of the deposit is properly made according to the lease, rental agreement, or separate notice, and the owner has refused to return the security deposit. The lease, rental agreement, or separate notice may also give notice that the security deposit will be transferred upon the happening of certain events, e.g., sale of the property or the naming of a new property manager.

Delivery of the security deposit to the owner or to anyone (including a succeeding broker/manager of the property) without proper notice to the tenant, in addition to subjecting the broker to possible civil liability, will constitute a violation of the license law escrow statute cited above. The licensee must retain copies of such notices for inspection by the Commission.

Under a property management contract, the broker must transfer all escrowed money belonging to the owner of the property at reasonable and agreed upon intervals and with proper accounting pursuant to statutory requirements and Commission Rules E-l and E-2. If advance rental money is held by a broker but is subject to recall by the tenant or occupant, it must be escrowed until such time as it is earned and rightfully transferred or credited to the owner. A broker has no claim on or right to use advance deposits which are subject to recall by a tenant or prospective occupant. Deposits which are not subject to recall are the property of the owner and may not be transferred to the broker's account or used for the broker's benefit unless specifically authorized and agreed to by the owner in the management agreement.

If litigation concerning escrow money commences, the money may be placed with the court. The jurisdiction of the court will, of course, supersede the statutory requirement for escrowing money belonging to others.

## CP-6 Commission Position On Release of Earnest Money Deposits

**(Revised Position 4-1-2003)**

Rule E-15 states in part that: "When for any reason the owner fails, refuses, neglects or is unable to consummate the transaction as provided for in the contract, and through no fault or neglect of the purchaser the real estate transaction cannot be completed, ...the deposit should be returned to the purchaser at once…"

The Commission will not pursue disciplinary action against a broker for refusal to disburse disputed funds when the broker is acting in accordance with the language of the appropriate Commission-approved contract to buy and sell. It is clear in the contracts to buy and sell real estate that the broker holds the earnest money on behalf of both buyer and seller. If there is no dispute, the broker should disburse to the appropriate party immediately.

Some brokers unnecessarily require a signed release by both parties even when there is no disagreement. Audits have disclosed many instances where brokers have held deposits for extended periods just because one or both parties will not sign a release. While good judgment is always urged, releases are not a requirement of the Real Estate Commission. In addition, where one party has given written authorization for the release of a deposit to another, a written release by the other party is not required.

Exculpatory provisions holding the broker harmless do not belong in an agreement for the release of earnest money and should not be used to relieve the broker from liability unrelated to earnest money.

In the case of a dispute between the parties, the broker is authorized by the contract to buy and sell to obtain mutual written instructions (such as a release) before turning a deposit over to a party. The Commission has approved an optional use "Earnest Money Release" form when such a written release might help facilitate expeditious disbursement.

A broker may also hold the money pending court action. If a lawsuit has commenced, the broker may surrender (interplead) the money to the court. The interpleader may claim a portion of the forfeiture pursuant to the broker's contract with the seller if the seller is successful in the suit, or the broker may disclaim any portion of the money and request that the court remove the broker as a defendant if the broker has been so named.

If no lawsuit has begun, the broker may surrender the money to the court by way of a "notice of appearance" (a form of interpleader) disclaiming any part of the money, but requesting that the defendants (both buyer and seller) be restrained from instituting any action against the broker.

If the broker is unable to locate the party due the refund, the broker may be required to transfer the deposit to the Colorado State Treasurer under the provisions of the Colorado "Unclaimed Property Act" C.R.S. 38-13-101. Notice of funds held is published in local newspapers under the "Great Colorado Payback Program" each year. Further information and reporting forms may be obtained from that office.

## CP-7 Commission Position On Closing Costs

In the past, the Commission's position had been that real estate licensees were responsible for all costs of closing. This position has been modified after a re-examination of the Colorado Supreme Court case of Conway-Bogue vs. The Denver Bar Association and after the adoption of Rule E-37.

Commission Rule E-37 states:

> "There is no obligation for a licensee to prepare any legal documents as part of a real estate transaction. However, if a licensee or the licensee's agent prepares any legal document, the licensee or the licensee's agent may not charge a separate fee for preparation of such documents. A licensee shall not be responsible for fees charged for the preparation of legal documents where they are prepared by an attorney representing the purchaser or seller. Costs of closing not related to preparation of legal documents may be paid by the licensee or by any other person. A broker who closes transactions and charges separately for costs of closing not related to the preparation of legal documents must specify the costs and obtain the written consent of the parties to be charged."

Based on the new rule the position is as follows:

1. Licensees are still responsible for paying the costs of legal document preparation when they are preparing such documents for their clients. If the broker delegates this function to an agent (title company or closing service) the broker is still responsible for bearing the cost.
2. Other costs associated with closings can be paid for by the licensee or any other party. The Commission will no longer require that licensees bear these costs. Licensees are urged to use the Closing Instructions and Earnest Money Receipt form developed by the Commission.
3. It is now permissible for brokers to close their own transactions and make additional charges for providing closing services so long as the charges are not tied to legal document preparation. If a licensee does this it must be with the consent of the parties and all charges must be specified. This consent may be obtained through the Listing Contract, the Contract to Buy and Sell, the Closing Instructions and Earnest Money Receipt form, or otherwise.
4. Licensees are not responsible for bearing the cost of legal document preparation where the documents are prepared by an attorney representing the parties to the transaction. However, the broker should not designate the broker's own attorney to prepare legal documents for the parties and then charge as if the attorney had prepared the documents on behalf of a client.
5. The broker must still provide accurate closing statements.

Particular note should be paid to the first sentence of the rule. While there is no legal obligation for a broker to prepare the legal documents in a transaction the Commission strongly advises that licensees make this clear in the Listing Contract. Many persons, purchasers and sellers alike, normally look to the broker for the preparation of these documents. If the broker has not made it clear that the broker's company will not undertake the preparation of legal documents, the parties might well assume that the broker will do so at the broker's cost.

### CP-8 Commission Position On Assignment Of Contracts And Escrowed Funds

Assignments of contracts and escrowed funds usually occur when one real estate company is purchased or taken over by another real estate company.

The following reflects the general position of the Commission concerning the assignment of contracts and escrowed funds as it concerns the brokers.

1. All parties to a contract must be informed of assignments and all beneficiaries of escrowed funds must be informed of any transfer of escrowed funds.
2. Listing contracts may not be assigned by the listing broker to another broker (without the consent of the owner), because the listing contract is a personal contract of a type which would not be entered into except when the owner relies on the personal skills and expertise of the broker.
3. The broker concerned with an executory contract is not a party principal to the contract itself and, therefore, has no voice in its assignment. The broker signs the sales contract only as the receipting agent.
4. The right of entitlement of a broker to a commission, pursuant to a contract between the broker and a seller, is assignable. In the Commission approved form of executory contract, the agreement of the seller in regard to a commission is placed outside the body of the contract between the purchaser and seller.
5. The contract between the seller and the broker concerning commissions does not affect the contract between the principal parties in the sale.
6. Earnest money taken pursuant to an executory contract is money belonging to others and falls within the purview of 12-61-113(l)(g) and (g.5), C.R.S. Earnest money being held by the broker is not transferable to any party except to a closing agent as immediately prior to closing as is practicable.
7. The maintenance of earnest money held in escrow must be pursuant to the rules of the Commission. The broker may, for convenience, authorize other persons to withdraw money from this escrow

account (see Commission Rule E-l(a)), but the withdrawal must be pursuant to law and Commission rules.

8. Unless contracted to the contrary, the mechanical act of closing the transaction may be performed by any qualified person or persons with the agreement of the principal parties to the contract.
9. The absence of the closing broker or the Broker's agent will not relieve such broker from the broker's responsibilities of approving the Statement of Settlement. (See Commission Rule E-5). However, the absence of the broker cannot impede the closing of the transaction pursuant to the executory contract.
10. If a licensed broker receipts for earnest money pursuant to an executory contract and then transfers such earnest money to an unauthorized person, who is also a licensed broker, the licensed transferee, (as well as the transferor), is also subject to the law and rules of the Commission in regard to money belonging to others. Such licensed transferee is obligated to retain such money in a trust account until the transaction is consummated, defeated, or settlement has occurred, or unless directed otherwise by a court of law. If litigation concerning escrowed money commences, the money may be placed with the court. The jurisdiction of the court will supersede the statutory requirements and the Commission Rules.
11. If the seller and the buyer, who are the sole beneficiaries of the escrowed money, both agree that such escrowed money be transferred, then settlement has occurred and the broker must transfer the money according to the wishes of the beneficiaries. This does not defeat the broker's right to a commission whether by original contract with the seller or by assignment of such contract right.

## CP-9 Commission Position On Record Keeping By Brokers

The Commission is often asked what documents must be kept in the broker's files which concern a particular transaction.

A duplicate means photocopy, carbon copy, or facsimile, or electronic copies which contain a digital or electronic signature as defined in 24-71-101(1) C.R.S. Pursuant to Rule E-4 and E-5, a broker shall maintain a duplicate of the original of any document (except deeds, notes and trust deeds or mortgages prepared for the benefit of third party lenders) which was prepared by or on behalf of the licensee and pertains to the consummation of the leasing, purchase, sale or exchange of real property in which the broker participates as a broker. The payoff statement and new loan statement monetarily affect the settlement statements and should be retained by the respective broker concerned. Cooperating brokers, including brokers acting as agents for buyers in a specific real estate transaction, shall have the same requirements for retention of duplicate records as is stated above, except that a cooperating broker who is not a party to the listing contract need not retain a copy of the listing contract or the seller's settlement statement. A broker is not required to obtain and retain copies of existing public records, title commitments, loan applications, lender required disclosures or related affirmations from independent third party closing entities after the settlement date. The broker shall retain documents bearing a duplicate signature for the disclosures required by Commission Rule F-7. The broker engaged by a party shall insure that the final sales agreement, settlement statement, or amendment of the settlement, delivered at closing for that party's tax reporting or future use, shall bear duplicate signatures as authorized by the parties concerned.

A complete listing of the documents normally required by the Commission for sales transactions and management activities can be found in the current edition of the Colorado Real Estate Manual, Chapter 18, and at the website address: http://www.dora.state.co.us/real-estate.

## CP-10 Commission Position On Compensation Agreements Between Employing and Employed Brokers

In regard to an employed broker's claim for compensation from an employing broker, the Real Estate Commission has no legal authority to render a monetary judgment in a money dispute nor will it arbitrate such a matter. A broker's failure to pay an employee does not warrant disciplinary action.

The Commission's position is:

1. An employed broker is an employee of the employing broker. (12-61-101 (3) C.R.S.)
2. That an employed broker may not accept a commission or valuable consideration for the sale of real property except from his or her employing broker. (12-61-117 C.R.S.)
3. That a commission or compensation paid to the employing or independent broker for real estate services is money belonging to such broker and is not money belonging to others as defined in 12-61-113(l)(g) and (g.5) C.R.S.
4. That a claim by an employed licensee for money allegedly owed by an employing broker must be decided by the civil courts on the basis of contract or "quantum merit."
5. That an employing broker pays their licensed or unlicensed employees pursuant to an oral or written employment contract.

Therefore, the contractual relationship between employing and employed brokers, as well as the office policy manual, should adequately cover the compensation of employed brokers.

### CP-11 Commission Position On Assignments Of Broker's Rights To A Commission

The Real Estate Commission recognizes and will enforce the statutory obligation of employed licensees as described in (12-61-113(1), C.R.S.), and more particularly:

> "12-61-113(l)(f) C.R.S. In the case of a broker registered as in the employ of another broker, failing to place, as soon after as is practicably possible, in the custody of that licensed broker-employer any deposit money or other money or fund entrusted to the employee by any person dealing with the employee as the representative of that licensed broker-employer."

The Commission recognizes and will enforce the prohibition described in 12-61-117 C.R.S.:

> "12-61-117 C.R.S. It is unlawful for any real estate any broker registered in the commission office as in the employ of another broker to accept a commission or valuable consideration for the performance of any of the acts specified in this part 1 from any person except the broker's employer, who must be a licensed real estate broker."

However: If a broker is entitled to a commission pursuant to 12-61, Part 2, C.R.S., or, a broker is entitled to a commission in a transaction and title has passed from a seller to a buyer, the broker may assign any or all legal rights to such commission to any person including employed licensees and no disciplinary action will be invoked against such broker for having made such an assignment.

### CP-12 Commission Position On The Broker's Payment Or Rebating A Portion Of An Earned Commission

The License Law forbids a broker from paying a commission or valuable consideration for performing brokerage functions to any person who is not licensed as a real estate broker. Thus, "referral fees" or "finder's fees" paid as the result of performing brokerage activities are prohibited.

The question of whether or not a broker may make payments from their earned commission to a buyer or a seller in a particular transaction will arise because usually neither the buyer nor the seller are licensed.

However, the License Law also permits any person to sell or acquire real property on such person's own account.

In a listing contract, the broker is principal party to the contract and the consideration offered is the brokerage services. The broker may add to this consideration the payment of money to the property owner in order to secure the listing. This is not a violation of the License Law.

Also, in a particular real estate transaction, the broker may pay a portion of commission to the unlicensed seller. This is merely a reduction in the amount of the earned commission and does not violate the License Law.

Payment to the unlicensed purchaser is often referred to as "rebating" and the intention to pay money to the purchaser is sometimes advertised and promoted as a sales inducement. The payment to the purchaser in itself is not a violation of the License Law because the broker is licensed to negotiate and the purchaser may negotiate on their own account. However, a broker representing the seller in a transaction should take care to insure that such payments do not conflict with fiduciary duties. For example, the "rebate" of a portion of a commission to a purchaser to be used by the purchaser as a down payment could distort the purchaser's financial qualifications and ultimately harm the seller. Additionally, a purchaser who does not receive a promised rebate of a partial commission may try to hold the seller liable for the wrongdoing of the broker on the theory of respondent superior. The Commission recommends that brokers disclose such payments to the seller and obtain the seller's consent prior to acceptance of any offer to purchase.

Gratuitous gifts to a purchaser subsequent to closing and not promised or offered as an inducement to buy would also be allowed (i.e., a door knocker or dinner). Such gifts would not require disclosure and consent inasmuch as fiduciary duties would not be involved.

### CP-13 Commission Policy On Single-Party Listings

Brokers often secure single-party listings because they have what they believe to be a good prospect for purchase. These listings are usually only for a few days, but occasionally the broker wishes to be protected for a longer period while the broker is negotiating with a particular prospective purchaser.

A single-party listing, when placed on a Commission approved form for an Exclusive Right to Sell or Exclusive Agency, results in greater protection to the broker than the broker needs to have and the owner is placed in a position which is unfair. The owner may not realize that if the owner signs a listing contract with another broker, the owner may become liable for the payment of two commissions even though the owner has excepted a sale to the person mentioned in a single-party listing contract.

In any and all contracting, the intent of the parties is paramount in its importance, in a listing contract, a broker is dealing with those less informed than the broker, and the broker has a duty to disclose the true meaning of the listing contract.

The Commission does not wish to limit any owner of the freedom to contract. However,-the broker should fully disclose to the owner the effect of the exclusive right to sell listing contract or the exclusive agency contract.

Usually, when an owner signs an exclusive right to sell or exclusive agency agreement concerning a single party, the owner wishes to limit the rights of the broker under the listing contract. Therefore, in the space provided for additional provisions, one, two, or all of the following limitations should be inserted in this space:

1. The provisions of this listing contract shall apply only in the event a sale is made to ___________________________________.
2. The termination date shall not be extended by the "Holdover Period" of this listing contract.
3. In the event a sale is made by the owner or their broker to any other party than the above names, this listing contract is void.

If an owner is misled to their disadvantage, the broker may be found guilty of endangering the public.

### CP-14 Commission Position On Sale Of Modular Homes By Licensees

The Commission is aware that many services rendered by licensees may or may not, in themselves, require licensing. Such services as collection of rents on real property, subdivision development services other than sales, or the general management of real property not involving renting or leasing may all be performed independently by an unlicensed person. When performed by a licensee, these services are all so integrated with real estate brokerage that all money received in connection therewith must be held or disbursed according to the law and rules of the Real Estate Commission.

Therefore, it is the position of the Commission that a licensee who sells land and a modular home to be affixed to the land, to the purchaser in concurrent or an arranged or pre-arranged or packaged transaction, is

subject to the laws and rules of the Commission. Consequently, all money received concerning the integrated transaction, including the modular home, should be processed through the broker or the employing broker pursuant to 12-61-117, C.R.S. and 12-61-113(l)(f), C.R.S. and Commission Rules E-l and E-5.

It is also the position of the Commission that if a licensee sells to an owner of land, a modular home to be affixed to the land and there has been no brokerage relationship between the owners of the land and the licensee, such licensee in such a sale will not be required to comply with the requirements of 12-61-117, C.R.S. or 12-61-113(l)(f), C.R.S. or Commission Rules E-l and E-5.

## CP-15 Commission Position On Sale Of Items Other Than Real Estate

Inquiries have been made to the Commission as to the proper handling of sales, made by licensees, of items or services other than real estate. The following is the position of the Commission:

If the item, appliance, repair, remodeling or installation is performed in conjunction with a management contract or lease for a particular party or pursuant to an oral or written contingency in a specific executed contract of sale of the property, the employed licensee must process any fees or commissions received from the vendor or contractor through the employing broker. Also, disclosure must be made by the licensee to both the buyer and the seller of the property that the licensee is compensated by the vendor or contractor.

It is also the position of the Commission that if the sale of the item, appliance, repair, remodeling or installation is performed pursuant to a separate contract, and without reference to a specific contract of sale of the property, then the employed licensee may receive compensation directly from the vendor, or contractor and payment need not be made through the employing broker. However, if the sale of items or services is made to a buyer of real property during the term of the brokerage agreement with the seller of such property, then disclosure must be made by the licensee to both the buyer and the seller of the property that the licensee is compensated by the vendor or contractor.

The Commission takes no position when the licensee engages in selling items or services unconnected with real estate sales.

In any of the above situations the employed licensee may be subject to any requirements or prohibitions imposed by the employment agreement with the employing broker.

## CP-16 Commission Position On Access To Properties Offered For Sale

**(Revised November 1, 2005)**

The Commission approved listing agreements (LC series) include a section titled OTHER BROKERAGE FIRMS ASSISTANCE – MULTIPLE LISTING SERVICE – MARKETING.

Provisions of this section allow the seller and listing broker to agree on whether or not to submit the property to a multiple listing service, information exchange, and whether there are limitations on the methods of marketing the property.

The provisions of the section also allow for discussion and the establishment of “Other Instructions” regarding access to the property by other brokerage firms such as through a lock box, for example.

It is the position of the Commission that the access information, and adherence to the Other Instructions, whether through lock box code or other means, is the responsibility of the listing broker. Listing brokers should take every effort to safeguard the access information on behalf of the seller. The listing agreements also include a section titled MAINTENANCE OF THE PROPERTY, which addresses the broker’s liability for damage of any kind occurring to the property caused by the broker’s negligence. Brokers are advised that failure to safeguard the access information and adhere to the instructions of the Seller related to access by other brokerage firms, could result in a claim of negligence brought against the listing broker.

Selling brokers who obtain access information should safeguard that information at all times. At no time should a selling broker share the access information with a third party (inspector, appraiser, buyer, etc.) without the listing broker’s authorization. Selling brokers are reminded that pursuant to the Contract to Buy and Sell, the Buyers indemnify the Seller against damage to the property in connection with the property inspection provision.

## CP-18 Commission Position On Payments To A Wholly Owned Employee's Corporation

The Commission has received several inquiries concerning the payment of commissions or fees by an employing broker to a corporation which is wholly owned by an employed licensee. Reprinted below is the Colorado Real Estate Commission position statement relating to this situation.

**POSITION STATEMENT**

12-61-103(9) which prohibits the licensing of an employed broker as a corporation, partnership or limited liability company and the limitations on the payment or receipt of real estate fees, as described in 12-61-113(l)(j) and 12-61-117, are recognized by the Commission; however, it is the position of the Commission that:

An employing broker's payment of earned real estate fees to a corporation which is solely owned by an employed licensee of such employing broker shall not be considered by the Commission as a violation of 12-61-113(l)(j) or "12-61-117; however, a contract between the employing broker and such corporation or employed licensee shall not relieve the broker of any obligation to supervise such employed licensee or any other requirement of the licensing statute and Commission rules. It is not the intent of this position statement that the employed licensee be relieved from personal civil responsibility for any licensed activities by interposing the corporate form.

It must be stressed that the above position statement does not allow such corporations to be licensed under a broker and specifically refers only to corporations which are owned solely by the employed licensee.

## CP-19 Commission Position On Short Term Occupancy Agreements

The Commission has been asked for its position concerning the need for a real estate broker to escrow funds coming into their possession involving short-term occupancies.

A short-term occupancy can be distinguished from a lease in that it is in the nature of a hotel reservation and a license to use. Short-term occupancy agreements, if properly treated, are not considered lease agreements. Activities relating to these agreements are exempt from the definition of real estate brokerage. Concerns arise when a licensed real estate broker wants to engage in short term occupancy activities either exclusively or as part of their separate brokerage practice. In some instances brokers have objected to holding money belonging to others in their trust accounts or accounting for these funds if the activity itself is exempt.

C.R.S. 12-61-113(l)(g) subjects a licensee to disciplinary action for "Failing to account for or to remit, within a reasonable time, any moneys coming into their possession which belong to others, whether acting as real estate brokers, or otherwise and failing to keep records relative to said moneys...." In addition, the case of Seibel vs. Colorado Real Estate Commission, 533 P.2nd 1290, gives the Commission jurisdiction over the acts of a licensed broker even where those acts would otherwise exempt the person from original licensure.

Based on the above, it is the position of the Commission that a licensed real estate broker engaging in short term occupancy agreements must escrow and account for funds coming into their possession which belong to others. To hold otherwise, would be to invite further confusion and mistrust on the part of the public in an already confusing real estate related practice. It has been the Commission's experience that most brokerage companies engaging in short term occupancy activities combine those activities with those requiring a license (i.e., long term rental and lease agreements, sales). In addition, brokers continually hold themselves out to the public as being both licensed and professional. The public does not distinguish between an activity technically exempt from licensure and the overall business practices of a licensed real estate broker.

## CP-20 Commission Position Statement On Personal Assistants

**(Adopted August 2, 2001)**

The use of personal assistants has grown considerably in recent years. Personal assistants are generally thought of as unlicensed persons performing various functions as employees (including clerical support) or independent contractors of a real estate broker within the framework of a real estate transaction. The

Commission recognizes the growth in the utilization of such assistants. Inquiries generally fit into two categories: (1) whether the activity performed is one which requires a license, and (2) what are the supervisory responsibilities of an employing broker.

The license law prohibits unlicensed persons from negotiating, listing or selling real property. Therefore, foremost to the use of personal assistants is careful restriction of their activities so as to avoid illegal brokerage practice. Personal assistants may complete forms prepared and as directed by licensees but should never independently draft legal documents such as listing and sales contracts, nor should they offer opinions, advice or interpretations, in addition, they should not distribute information on listed properties other than that prepared by a broker.

On the other hand, they may:

1. perform clerical duties for a broker which may include the gathering of information for a listing;
2. provide access to a property and hand out preprinted, objective information, so long as no negotiating, offering, selling or contracting is involved:
3. distribute preprinted, objective information at an open house, so long as no negotiating, offering, selling or contracting is involved;
4. distribute information on listed properties when such information is prepared by a broker;
5. deliver paperwork to other brokers;
6. deliver paperwork to sellers or purchasers, if such paperwork has already been reviewed by a broker;
7. deliver paperwork requiring signatures in regard to financing documents that are prepared by lending institutions; and
8. prepare market analyses for sellers or buyers on behalf of a broker, but disclosure of the name of the preparer must be given, and it must be submitted by the broker.

Employing brokers need to be especially aware of their supervisory duties under the license law. Supervisory duties apply whether the assistant is an employee or independent contractor.

An employing broker should have a written office policy explaining the duties, responsibilities and limitations on the use of personal assistants. This policy should be reviewed by and explained to all employees.

Licensees should not share commissions with unlicensed assistants. Although this may not technically be a violation of the licensing act if the activity is not one which requires a license, the temptation to “cross over” into the area of negotiating and other prohibited practices is greatly increased where compensation is based on the success of the transaction.

If brokers develop adequate policies for the use of assistants and routine procedures for monitoring their activities, the assistant can serve as a valuable tool in the success of the transaction. As with any other activity involving the delegation of an act to another, the freedom and convenience afforded the broker in allowing the use of assistants carries with it certain responsibilities for that person’s actions.

## CP-21 Commission Position On Office Policy Manuals

**(Revised and Adopted 4-1-2003)**

12-61-Part 8 C.R.S. and Commission Rules E-29, E-30, E-31 and E-32 set out a broker’s supervising responsibilities. (See Rules E-29, E-30, E-31 and Rule E-32 in chapter 2 of this manual.) In order to help brokers comply with the rules it is suggested that a policy manual contain procedures for at least the following

1) typical real estate transactions
   a) review of contracts
   b) handling of earnest money deposits, including the release thereof
   c) back-up contracts
   d) closings
2) non-qualifying assumptions and owner financing

3) guaranteed buyouts
4) investor purchases
5) indentifying brokerages relationships offered to public (required by 12-61-808 C.R.S.)
6) procedures for designation of brokers who are to work with a seller, landlord, buyer or tenant, individually or in teams (required by Rule E-38) (Does not apply to brokerage firms that consist of only one licensed natural person.)
7) identify and provide adequate means and procedures for the maintenance and protection of confidential information (required by Rule E-39)
8) licensee's purchase and sale of property
9) monitoring of license renewals and transfers
10) delegation of authority
11) property management
12) property listing procedures, including release of listings
13) training
    a) dissemination of information
    b) staff meetings
14) use of personal assistants
15) fair housing/affirmative action marketing

Brokers are encouraged to add other policies as appropriate to their practice.

In the event that one or several of these suggested topics (e.g.. guaranteed buyouts) are not applicable in a particular office, they should be addressed by stating that the office does not participate in that activity.

The Commission does not become involved in matters relating to independent contractor agreements, and disputes over earned commissions. Office policies in these areas do not fall within the purview of Commission rules.

*(See additional discussion of office policy manuals in Chapter 18)*

## CP-22 Commission Position Statement on Handling of Confidential Information in Real Estate Brokerage

**(Adopted October 1, 2003)**

Prior to designated brokerage, it was common for brokers to share the motivations of a buyer or seller during office sales meetings, for example. Under designated brokerage, the law specifically prohibits sharing of such information. Confidential information, and the broker responsibility thereto, are defined in C.R.S. 12-61-804 (2), 12-61-805 (2), 12-61-807 (3), and Rules E-32 and E-39. Confidential information can include, but is not limited to, motivation of the parties.

Brokers are required to have a written office policy that identifies and provides adequate means and procedures for the maintenance and protection of confidential information. Situations where inadvertent disclosure of confidential information may occur, include, but are not limited to:

- sales meetings or marketing sessions,
- shared fax or copy machines,
- shared computer networks, printers and file directories,
- in-office mail boxes,
- hand written telephone messages,
- phone conversations or meetings with clients,
- relocation, divorce, pending foreclosure and other sensitive documents,
- conversations with affiliated business providers,

- production boards,
- social functions

Brokers must develop office policies and procedures to address the handling of confidential information. For example, some offices may have "locked" transaction files that include confidential information and other offices may elect not to include confidential information in transaction files.

A designated broker is permitted to share confidential information with a supervising broker without changing or extending the brokerage relationship beyond the designated broker. Brokers may want to consult legal counsel regarding the necessity of securing the authorization of the party to whom the information is confidential before the designated broker shares that confidential information with the supervising broker. Such advice could include modifications to the listing agreement or buyer agreement that create such authorization.

### CP-23 Commission Position On Use Of "Licensee Buyout Addendum"

**(Revised January 17, 2006 )**

Rule F-7 requires real estate licensees to use the Commission approved "Licensee Buyout Addendum to Contract to Buy and Sell Real Estate", when purchasing certain listed properties.

It is the Commission's position that Rule F-7 requires use of the Buyout Addendum under the following circumstances:

1. When a licensee enters into a contract to purchase a property concurrent with the listing of such property.
2. When a licensee enters into a contract to purchase a property as an inducement or to facilitate the property owner's purchase of another property, the purchase or sale of which will generate a commission or fee to the licensee.
3. When a licensee enters into a contract to purchase a property from an owner but continues to market that property on behalf of the owner under an existing listing contract.

Unless one of the above situations exists, licensees are not required to use the Buyout Addendum.

The term "licensee", as used above, refers to the individual licensee who has personally taken a listing or to the listing broker or brokerage entity if the buyout is to be accomplished by that broker or brokerage entity. If the listing licensee or broker desires to acquire a listed property solely for personal use or future resale and not as an inducement to the owner, the licensee or broker is advised to (1) clearly sever their agency or listing relationship in writing; (2) renounce the right to any commission, fee or compensation in conjunction with acquisition of the listed property; and, (3) advise the owner to seek other assistance, representation or legal advice.

Future resale of a purchased property, as referred to above, means resale to a third party purchaser with whom the licensee has not negotiated during the listing period. Resale to a person with whom a licensee has conducted previous negotiations concerning the subject property during the listing period (often referred to as a "pocket buyer"), would constitute a violation of 12-61-113(l)(n) in the absence of full written disclosure and acknowledgment by the owner.

### CP-24 Commission Position On Preparation Of Market Analyses And Real Estate Evaluations Used For Loan Purposes

The Colorado Real Estate Appraiser Licensing Act contains special provisions which allow licensed real estate brokers to perform certain real estate valuation related activities without being registered, licensed or certified as real estate appraisers. These provisions are found in Sections 12-61-702 (2) and 12-61-718, C.R.S.

The first of these allows a broker to prepare an "estimate of value" which is not represented as an appraisal and is not used to obtain financing. The position of the Commission is that this provision allows a broker to prepare a market analysis for use in the real estate brokerage process and to offer their estimate as to the value or market price of real estate for court testimony or tax purposes.

The second provision allows a broker to prepare what are termed "evaluations" in federal banking regulations. These evaluations may be used for lending purposes. This provision is very narrow in scope--a broker may prepare such an evaluation only for a federally regulated bank, savings and loan or credit union with whom they have a contract. The loan amount must be below the threshold which invokes the requirement for a true appraisal.

As the authority to prepare such estimates of value and evaluations is tied to the holding of a Colorado real estate broker license, the Colorado Real Estate Commission has jurisdiction over the activities of brokers engaged in such activities. The Commission will consider the conduct of licensees who prepare estimates of value and evaluations in light of Sections 12-61-113 (l)(n) and (t), which speak to unworthiness, incompetency and dishonest dealing.

It is the position of the Commission that the mere holding of a broker license does not in itself assure the competency necessary to prepare more complex estimates of value or evaluations. Licensees preparing estimates of value and evaluations have a responsibility to possess training and experience commensurate with the complexity of the assignment undertaken.

Investigations undertaken by the Commission relating to unworthiness, incompetency and dishonest dealing will take into account the following:

- Brokers preparing estimates of value and evaluations must act independently at all times. The estimate or evaluation must be unbiased.
- The broker preparing an estimate or evaluation must not represent themselves as an appraiser, nor represent the work product as being an appraisal.
- The broker preparing an estimate or evaluation must at all times comply with the statutory requirement in Sections 12-61-702 and 12-61-718, Colorado Revised Statutes, for a written notice that they are not an appraiser. The wording and use of the written notice are specified in Chapter 15 of the Rules of the Board of Real Estate Appraisers. The required wording is:

  "NOTICE: The preparer of this appraisal is not registered, licensed or certified as a real estate appraiser by the State of Colorado".
- The broker must not prepare an estimate of value or evaluation of real property which requires a level of competency beyond the level of training and experience possessed by the licensee.

### CP-25 Commission Position On Recording Contracts

Over the years the Commission has received many inquiries and complaints concerning the recording of listing contracts to protect claims for commissions. In addition, some licensees have attempted more "creative" ways of holding up a closing, such as filing mechanics liens or notices of lis pendens, as well as recording demand letters or purchase contracts. The end result is usually a cloud on the title and sometimes a slander of title action.

Some states have passed statutes authorizing the filing of such liens. Colorado has not. Filings and recordings such as these are inappropriate and will result in Commission action.

Here is a typical scenario: Broker lists a property at $125,000 for 120 days and actively markets it. No offers come in during the first 30 days. Broker advises her seller to lower the price by $5,000 to encourage some activity. The seller is adamant that the property is worth the list price and refuses. After another 15 days with no offers, the seller reluctantly lowers the price. He also tells the broker that he doesn't feel she is trying hard enough to sell the property and he's going to take it off the market if nothing happens.

A week later an offer for $100,000 comes in from another company, which is presented and rejected. The seller is quite upset at the low offer and demands to be released from the listing. There is no further communication between the parties, but the listing is never formally terminated. Three weeks later the broker learns that the seller has entered into a contract with the same buyer for $110,000 and closing is set. The broker is very upset and wants to protect her commission. What can she do?

1. File a mechanics lien?

   ANS: No. Real estate licensees are not a protected class of lien claimant under the statute.
2. File a lis pendens (notice of pending lawsuit)?

   ANS: No. A lis pendens relates to a title or ownership dispute involving the land itself. The broker has no legal interest in the real estate.
3. Record the listing contract?

   ANS: No. This will usually have the effect of clouding title to the property, which in turn affects the closing between buyer and seller. The broker should not interfere in the process of transferring title to property.
4. Escrow the disputed commission?

   ANS: Maybe. This is a touchy area. If the broker makes demand on the seller for the commission prior to closing and states her possible rights (mediation; arbitration; civil action) the parties may agree to an escrow pending settlement of the dispute. However, there is no legal requirement that the closing entity escrow funds absent an agreement.
5. Commence mediation, arbitration or civil action (as appropriate).

   ANS: Yes. Nothing prevents a licensee from asserting any legal claim against a principal.

A commission dispute is an emotional issue. Sometimes a licensee has put in considerable time on a listing only to be faced with a seller who refuses to pay, attempts to renegotiate or is outright deceitful. On the other side, the Commission has witnessed instances in which the licensee had no legitimate right to a commission and was using superior knowledge and scare tactics to force payment. Clearly this is a time to consult a good real estate attorney and avoid the risk of a complaint based on a hasty decision.

## CP-26 Commission Position On Auctioning

**(Adopted 5-1-97)**

Real estate experts predict that the next decade will see a significant increase in the sale of real estate through auctions. For many years auctioning was associated with rural or distressed properties. However, forecasts are for a proliferation of sales activity in both residential and commercial real estate. Sales by auction are already occurring in the residential market in Colorado and other parts of the country.

The brokers act requires that real estate auctions be conducted by a licensed broker and defines the activity as "…offering, attempting or agreeing to auction real estate, or interest therein, or improvements affixed thereon…" (CRS 12-61-101(2)(f)).

A long-standing Attorney General's opinion allows an unlicensed auctioneer to "cry" the bid at a real estate auction in the presence of a broker or seller. However, the control of the sale, including listing, advertising, showing the property and writing contracts must remain with the broker or the auctioneer will be violating the law.

Based on the statute and Attorney General's opinion, the following guidelines are established for unlicensed persons involved in the auction process:

1. Auctioneers should never hold themselves out as providing real estate brokerage services to the public (e.g., listing, advertising, negotiating, contracting, legal document preparation);
2. Inquiries from sellers should be referred to a licensed broker or attorney;
3. Inquiries from buyers should be referred to the seller, listing broker or sellers attorney;
4. Only auctioning services should be advertised to buyers and sellers;
5. A potential buyer may be chauffeured to a property, so long as the property is shown by the seller or a licensed broker;
6. Information on listed properties may be distributed when such information has been prepared by a broker;

7. Auctioneers may "cry" the sale, but may not engage in subsequent negotiations, document drafting and the handling of earnest money;
8. Payment should be based on auctioning services performed regardless of the success of a sale.

## CP-27 Commission Position On The Performance Of Residential Property Management Functions

**(Adopted August -1998)**

Pursuant to C.R.S. 12-61-101(2)(a)&(b), the leasing and subsequent management of real estate for a fee or compensation, is included among the activities for which a license is required. Employing brokers involved in these activities should include provisions for the efficient, orderly conduct of this phase of business in their office policy manual. These activities must be done in the name of the employing broker only. All monies received from these activities shall be turned into the employing broker to be accounted for pursuant to Commission Rule E-l.

The **management contract** should be in writing and outline the duties and responsibilities of both parties. The contract should, at the very minimum, address the:

- Duration of the contract;
- Identities of the parties;
- Address of the property to be managed;
- Fees for the manager's services, including disclosure of any mark-ups (Commission Rule E-1 (p)(8));
- Disclosure of broker's ownership interest in any company which will be providing maintenance or related services;
- Identity of the entity responsible for the holding of the security deposit, and if interest is earned on security deposit escrow accounts, who benefits from such interest;
- Process to be followed in any subsequent transfer of owner's monies, security deposits, keys and documents (Commission Rule E-l6); and,
- Requirement that the owner receive regular monthly accounting of all funds received and disbursed.

Employing brokers supervising property managers should have an awareness of and comply with the proper procedures involved in C.R.S. 38-12-101, Security Deposits-Wrongful Withholding. (See also the Commission Position on Advance Rentals and Security Deposits (CP-5), Chapter 3)

When ownership of a property changes or if ownership remains the same but transfer of management services occurs, it is recommended that the:

- Outgoing broker should maintain written verification of such change or transfer;
- Outgoing broker shall transfer pertinent documents to incoming broker as soon as practically possible, but in any case, not to exceed ten (10) days as it relates to items "a through e" below and not to exceed sixty (60) days as it relates to item "f' below.
- Pertinent documents shall include, but are not limited to:

  (a) Copy of existing lease
  (b) Copy of check-in condition report
  (c) Keys
  (d) Outstanding tenant balances
  (e) Tenant(s) security deposit(s)
  (f) Owner's funds (subject to outstanding obligations)

In those situations wherein there may be the potential for conflict of interest (e.g. managing property for a family member), the broker should disclose that information to all parties, pursuant to Commission Rule E-25.

Employing brokers as well as property managers should be familiar with Chapters 18, 19, and 23 of the Colorado Real Estate Manual.

## CP-28 Commission Position On Showing Properties

**(Adopted March 4th 1999)**

The Real Estate Commission reminds licensees that the Brokerage Relationships Act imposes duties on agents to promote the interests of their buyers or sellers with the utmost good faith as well as to counsel their principals on material benefits or risks of a transaction. A transaction-broker must exercise reasonable skill and care, advise the parties and keep the parties fully informed regarding the transaction. Whether working as an agent or a transaction-broker, these duties include disclosing the accessibility of and actual access to a property or properties.

**Working With a Seller:** Pursuant to the section in the various listing contracts entitled, "OTHER BROKERS, ASSISTANCE", the licensee should advise the seller of the advantages and disadvantages of using multiple listing services and other methods of making the property accessible by other brokers (e.g., using lock boxes, by appointment only showings, etc.). If applicable, it should be explained that some methods may limit the ability of a selling broker to access and show a particular property. The chosen methods of cooperating with other brokers should be included in the listing agreement.

**Working With a Buyer:** A licensee working with a buyer has an obligation to explain the possible methods used by a listing broker and seller to show a particular property. These methods may include limitations on the buyer and selling broker being able to access a property due to the type of lock box placed on the property, the seller's choice to have the property shown by appointment only, etc. The selling broker should include such showing limitations in the Exclusive Right To Buy Contract (agency or transaction-broker).

There should be no instances of a listing broker refusing to allow a property to be shown, unless the seller has given prior explicit, written authorization to do so.

## CP-29 Commission Position On "Megan's Law"

**(Adopted July 1, 1999)**

The Commission has been asked for its position as to the disclosure requirements for real estate licensees with regard to "Megan's Law." In 1994, and primarily as a response to the murders of two young girls, a federal law was passed creating a registration and notification procedure to alert the public as to the presence of certain types of convicted sex offenders living in a neighborhood. This is commonly referred to as "Megan's Law." Identified sex offenders are required to register with local law enforcement officials. The federal law also required states to establish registries of convicted sex offenders. It contains no disclosure requirements for real estate licensees when working with the public.

In compliance with federal law, Colorado enacted legislation that sets procedures and timeframes for local registration. The office of chief of police is the designated place of registration for those offenders residing within any city, town or city and county. The office of the county sheriff is the designated place of registration for those living outside any city, town or city and county, in addition, the law enforcement agency is required to release information regarding registered persons. However, the duty to release information may differ depending on whether the inquiring party does or does not live within that jurisdiction.

While legislation in a few states has specifically imposed disclosure requirements on real estate licensees working with buyers and sellers, Colorado's legislation imposes no such requirements. Colorado's legislation clearly places the duty to release information on the local law enforcement agency, after considering a request.

It is the position of the Real Estate Commission that all real estate licensees should inform a potential buyer to contact local law enforcement officials for further information if the presence of a registered sex offender is a matter of concern to the buyer.

*Editor's Note:*

*C.R.S. 18-3-412.5 requires the Colorado Bureau of Investigation to post on the Internet identifying information, including a picture, of each sex offender:*

- *Sentenced as a sexually violent predator; or*
- *Convicted of a sexual offense involving children*

## CP-30 State of Colorado Real Estate Commission and Board of Real Estate Appraisers Joint Position Statement on Seller Assisted Down Payments

**(Adopted July 11, 2003)**

The Colorado Real Estate Commission and the Colorado Board of Real Estate Appraisers have issued this Joint Position Statement to address mutual concerns pertaining to practices of real estate brokers and real estate appraisers with regard to residential sales transactions involving seller assisted down payments.

Seller assisted down payments should not be confused with seller concessions.

For example, in HUD Handbook 4155.1 REV-4 CHG-1, HUD permits sellers (or other interested third parties such as real estate brokers, builders, etc.) to contribute up to 6% of the property's sales price toward the buyer's actual closing costs, prepaid expenses, discount points, and other financing concessions. HUD defines other expenses (beyond those described above) paid on behalf of the borrower as inducements to purchase. Further, HUD considers a dollar-for-dollar reduction to the sales price for inducements to purchase before applying the appropriate loan to value ratio. Similar consideration might be appropriate on loans not involving HUD.

There are varied sources of seller assisted down payments. In some cases, the seller and buyer choose to participate in a down payment program through a charitable organization*. The seller pays a fee to the charitable organization and the charity "gift funds" the down payment for the buyer. The fee paid by the seller and the amount of the down payment is not necessarily equal.

In other cases, the seller may fund the buyer's down payment through proceeds of the sale. A buyer may offer a purchase price higher than the listing price with the provision that the seller contributes the amount of the offer over the listing price as a seller assisted down payment for the buyer.

A residential real estate transaction has a life well beyond closing and possession of the property. Accurate sales data is crucial for appraisals and comparative market analysis (CMA) work products. Both appraisers and real estate brokers can effectively work together to maintain the safeguards that accurate sold data affords.

A **real estate broker** can facilitate these safeguards by adherence to the following:

- Note the presence and amount of any seller paid costs (including a seller assisted down payment or fee paid to a charitable organization on behalf of the buyer) in the proper transaction documents, including the Buy/Sell Contract, Closing Statements, and Real Property Transfer Declaration.
- Utilize all available fields in the multiple listing service to record all transaction terms, including seller contributions and inducements to purchase. Sold information should be entered promptly and be specific and detailed particularly when the sold price includes a seller assisted down payment.
- Advise buyers and sellers to consult legal and tax counsel for advice on tax consequences of seller contributions and inducements to purchase.
- Cooperate with appraisers as they perform their due diligence in asking questions about sales.

An **appraiser** can facilitate these safeguards by adherence to the following:

- Research and confirm subject property and comparable sales, including obtaining details of the contract and financing terms.
- Research and confirm all relevant information about a transaction, including determination of seller paid costs.

- Utilize all available data search tools, including the listing history and seller contributions features of multiple listing services.
- Make appropriate adjustments to comparables with seller contributions and inducements to purchase when developing work products.
- Comply with the applicable provisions of the Ethics Rule and Standards 1 & 2 of the Uniform Standards of Professional Appraisal Practice.
- Comply with any supplemental standards required by agencies such as the Federal Housing Administration.

* *Editor Note: At the time of this publication, recent Internal Revenue Service guidance (Revenue Ruling 2006-27), indicates that organizations which provide seller-funded down payment assistance to home buyers do not qualify as tax-exempt charities. Brokers should consult tax and legal counsel concerning this matter. It is anticipated that the Commission and Board will revise this Position Statement.*

### CP-31 Commission Position on Acting As A Transaction Broker Or Agent in Particular Types of Transactions.

**(Adopted 9-8-04)**

The public may enter into either a Transaction-Broker relationship or an Agency relationship with a Broker. Fundamental among the differences between Agency and Transaction-Brokerage is that an Agent is an advocate with fiduciary duties, while a Transaction-Broker should remain neutral, not advocate. However, in some situations the relationship of the Broker with a particular party or property may make a particular relationship inappropriate or problematic.

Before acting as a Transaction-Broker in transactions where neutrality is difficult, the Broker should consider whether the Transaction-Brokerage arrangement is suitable, consult with the Broker's supervising Broker and then make the necessary disclosures. Some examples of these situations include:

1. Selling or purchasing for one's own account (whether the property is solely or partially owned or to be acquired by the Broker), (See Rule E-25 regarding proper disclosures);
2. Selling or purchasing for the account of a spouse or family member of the Broker;
3. Selling or purchasing for the account of a close personal friend, business associate, or other person where it would be difficult for the Broker to remain neutral; or
4. Selling or purchasing for the account of a repeat or regular client/party where it would be difficult for the Broker to remain neutral (i.e., undertaking as a Transaction-Broker the listing of multiple units, lots or properties such as listing a real estate development or condominium complex for a single developer, listing multiple residential or commercial properties for the same seller that will be sold to different buyers, or listing for lease a multiple unit residential or commercial property that will be leased to different tenants).

An agency relationship between a Broker and a seller or landlord, buyer or tenant, requires a written agency agreement. The duties of an agent go beyond facilitation of the transaction as a neutral party and require representing the interests of the Broker's principal over the interests of the other party. In certain circumstances, fulfilling the duties of an Agent including acting as an advocate may be difficult. A Broker who enters into an agency relationship must fulfill the duties of advocacy, fidelity, loyalty and other fiduciary duties associated with a single agency relationship. In circumstances where the Broker may not be able to fulfill the duties imposed on an agent the Broker should consider whether the agency arrangement is appropriate, consult with the Broker's supervising Broker and act accordingly.

***This Position Statement applies to relationships where Brokers are working with landlords or tenants, as well as sellers and buyers. It applies equally to residential and commercial transactions.***

## CP-32 Commission Position on Buyer and Tenant Agency Agreements

**(Adopted 9-8-04)**

**(Revised November 1, 2005)**

The Commission believes that a broker who intends to act as a buyer's or tenant's agent in a transaction should attempt to secure a written agency agreement as early in the brokerage relationship as possible. However, the Commission also recognizes that in some instances, the buyer or tenant will not immediately execute such a written agency agreement.

In these situations, the broker should initially function as a transaction-broker by either entering into:

BC 60: Exclusive Right-to-Buy Contract (All Types of Properties); or
LC 57: Exclusive Right-to-Lease Listing Contract (All Types of Properties; or
ETC 59: Exclusive Tenant Contract (All Types of Properties)

With any of the three forms the broker should check the box "Transaction-Brokerage" whereby only the brokerage services and duties contained in Section 4 of the agreement would apply.

The broker may then engage as a transaction-broker and may perform any of the activities enumerated in section 12-61-101 (2), C.R.S., which are the acts of real estate brokerage.

However, **before** the broker begins to work as the buyer's or tenant's **agent** and advocate to secure the best possible price or lease rate and terms for the buyer or tenant, the parties must execute one of the above listed agreements with the "Agency" box checked. In an agency relationship the broker has the duties and responsibilities contained in Section 4 of the agreement, and the additional duties of an agent contained in Section 5 of the agreement.

## CP-33 Joint Position Statement from the Division of Real Estate and Division of Insurance

**Concerning Application of the Good Funds Laws**

**Issued: July 10, 2002**

I. Background and Purpose

The purpose for this bulletin is to clarify the Division of Insurance and the Division of Real Estate's position with respect to application of Colorado's good funds laws to real estate transactions involving regulated entities. In particular, there is confusion in the industry regarding reconciliation of § 38-35-125, C.R.S., Colorado's good funds laws, with Division of Insurance regulation 3-5-1(6)(F) and the current practice of disbursing cashier's checks drawn on a title entity's account, pursuant to instructions of the parties and in connection with closing a real estate transaction.

Bulletins are the agencies' interpretations of existing laws or general statements of policy. Bulletins themselves establish neither binding norms nor finally determine issues or rights.

II. Applicability and Scope

This bulletin concerns all title insurance entities and real estate licensees involved in real estate closings.

III. Position Statement

The good funds statute provides, in relevant part:

> *No person or entity that provides closing and settlement services for a real estate transaction shall disburse funds as a part of such services until those funds have been* ***received*** *and are either:* ***available for immediate withdrawal as a matter of right*** *from the financial institution in which the funds have been deposited; or available for immediate withdrawal as a consequence of an agreement of a financial institution in which the funds are to be deposited or a financial institution upon which the funds are to be drawn.*

38-35-125(2), C.R.S. The same statute defines funds "available for immediate withdrawal as a matter of right" to include any wire transfer or any certified check, cashier's check or teller's check. Thus, a

cashier's check or wired funds (most typically used) that have been received by the entity providing closing and settlement services are considered "good funds".

Division of Insurance regulation 3-5-1(6)(F) parallels § 38-35-125, C.R.S. and provides that "All title insurance entities shall comply with the 'good funds law'." In addition, Division of Insurance regulation 3-5-1(5)(A)(3) specifies that failure to comply with the good funds laws constitutes an unlawful inducement for the referral of title insurance business proscribed by § 10-11-108, C.R.S.

The federal courts interpreted Colorado's good funds laws in Guardian Title v. Matrix, 141 F.Supp.2d 1277 (D.Colo. 2001). The court held that good funds laws govern title entities that engage in closing and settlement services. See id. at 1279. Failure to comply with the good funds statute is a deceptive trade practice and violates insurance regulation 3-5-1. See id. at 1280-81. The court stated: "The Good Funds law was developed as a solution to 'the need to insure that the title company or other party responsible for real estate closings has 'good funds' **in hand** before closing the transactions'". Id. at 1281.

Based on the above, it is the position of the Division of Real Estate and Division of Insurance that Colorado's good funds law and insurance regulation 3-5-1 6(F) require that a title entity must have good funds **"in hand"** (e.g., wired funds, certified check, cashier's check, tellers check) **before it disburses funds** as part of its settlement services.

Further, it is the position of the Division of Real Estate and Division of Insurance that a title company which withdraws funds from its account in the form of a cashier's check, but (1) maintains complete control and possession of the check; and (2) does not disburse (pay out) until **delivery** and receipt of "good funds" relating to the specific transaction, complies with the good funds laws.

By way of example, it is common in a real estate transaction for funds to come to the closing from at least two sources, the buyer and the lender. It is also common for a seller to ask for closing proceeds in the form of a cashier's check, drawn on the title entity's account. Applying the 'good funds' law and insurance regulation 3-5-1, the title company could cause a cashier's check to be issued from its account and have the check available for the seller at closing. The title entity could not disburse to the seller until "good funds" were received or "in hand" from the buyer and lender. "In hand" means that a cashier's check has been received by the title entity or, in the case of a wire transfer, has been wired into the title entity's account.

Once the transaction closes and the cashier's check is paid to the seller, the title entity is responsible for immediately depositing the buyer's "good funds" into its account. If the transaction does not close, the title entity is responsible for immediately redepositing its cashier's check into its account. In that manner, no other customer of the title entity is harmed.

IV. For more information:

Division of Insurance
1560 Broadway, Suite 850
Denver CO 80202
Phone: 303-894-7499
Internet:
www.dora.state.co.us/insurance

Division of Real Estate
1560 Broadway, Suite 925
Denver CO 80202
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http://www.dora.state.co.us/real-estate

## * CP-34 Concerning Renewals and Background Checks

**Implementation Date: January 5, 2007**

I. Background and Purpose

The purpose for this position statement is to clarify the Colorado Real Estate Commission's position with respect to application of § 12-61-110.8, C.R.S. and Rule A-15 concerning fingerprint background checks and renewals. Position statements are the agencies' interpretations of existing laws or general statements of policy. Position statements themselves establish neither binding norms nor finally determine issues or rights.

II. Applicability and Scope

This position statement concerns all renewal applicants subject to § 12-61-110.8, C.R.S. Neither this position statement nor Rule A-15 applies to new applicants for licensure.

III. Position Statement

Section 12-61-110.8, C.R.S. requires a salesperson or broker applying for renewal of a license to submit a set of fingerprints to the Colorado Bureau of Investigation ("CBI") for the purpose of conducting a state and national fingerprint-based criminal history record check utilizing records of the CBI and the federal bureau of investigation. Rule A-15, prior to its repeal by emergency rulemaking on January 5, 2007, stated that applicants seeking renewal would be placed automatically on inactive status until the Division of Real Estate received their completed background checks.

It has come to the Commission's attention that many renewal applicants are unable through no fault of their own to provide readable fingerprints to the CBI and accordingly, are unable to renew their licenses. Through meetings with the CBI, the Commission has learned that where a licensee's fingerprints are not readable or unable to classify ("UTC"), they must provide another set to CBI attaching the first unreadable set. If the CBI once again determines the fingerprints are UTC, a national criminal background check is conducted using the applicant's name. The results of that search are forwarded to the Division of Real Estate.

To avoid placing renewal applicants whose fingerprints are UTC on inactive status automatically even though they made a good faith effort to comply with the law thereby potentially damaging their livelihood, it is the Commission's position that where a renewal applicant can demonstrate that he or she in good faith submitted fingerprints that appear to be unreadable, the Commission will not automatically place the applicant's license on inactive status.

The following are factors, among other things, the Commission will consider in determining not to place a renewal applicant's license on inactive status automatically:

1) the renewal applicant can demonstrate and attest that he or she submitted fingerprints to the CBI in accordance with CBI's policies and procedures on or before October 1, 2006; 2) the renewal applicant can demonstrate that he or she has been informed by CBI that his or her fingerprints are UTC and he or she is in the process of complying with CBI's policies and procedures for conducting a criminal background check based upon a name search; or 3) the Division of Real Estate has received notification directly from CBI that CBI has conducted a criminal background check of the renewal applicant using other means such as a name search and has forwarded that information to the Division of Real Estate.

IV. For more information, contact the Division of Real Estate licensing section at 303.894.2166, 1560 Broadway, Suite 925, Denver CO 80202, or visit the Division of real estate's website at www.dora.state.co.us/real-estate